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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. M-100, SUB 150

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION:

In the Matter of Petition For Rulemaking Proceeding to Consider Proposed Rule To Establish Procedures For Disclosure and Prohibition of Public Utility Lobbying, Advertising, and Other Expenditures	INITIAL COMMENTS OF INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY

NOW COMES INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY ("the Center"), by and through undersigned counsel, and hereby provides initial comments on the North Carolina Utility Commission's August 29, 2019 Proposed Revisions To Commission Rules R12-12 and R12-13 ("Order").

As discussed below, the Center commends and fully supports the approach taken by the Commission in the "Proposed Revisions To Commission Rules" ("Proposed Revisions"), which will greatly serve the public interest by both curbing inappropriate expenditure of ratepayer funds by regulated utilities, while also providing meaningful transparency and accountability mechanisms to ensure that utilities faithfully apply these requirements. At the same time, the Center urges the Commission to make several important amendments to the Proposed Revisions which are vital to carry out the Commission's goals as set forth in its thoughtful Order.

Most importantly, as discussed below, to protect ratepayers' First Amendment rights, the Commission needs to expand the scope of the regulations to bar *any* and *all* funding to third-party entities – such as the Edison Electric Institute – that engage in lobbying or political activities, regardless of how the specific funds provided by the utility are being used. *See, e.g., Janus v. State,*

County, and Municipal Employees Council 31, 138 S. Ct. 2448 (2018) ("*Janus*"). While the Commission considered whether the First Amendment implicates how utilities spend *shareholder* funds, the Commission did not consider Petitioners' separate argument that utilities may not, consistent with the First Amendment, charge *any* payments to outside groups that engage in lobbying or political activities as part of the Cost of Service paid by ratepayers. *See* Petitioners' Response To Order Requiring Additional Information ("Pet. Resp.") (Apr. 22, 2019) at 9, 11.

The Center sets forth below, in redline and strike-out form, the specific amendments that we urge the Commission to adopt to the Proposed Revisions. To provide the appropriate context for the Center's proposed amendments to the Commission's revised regulations, we begin by discussing the Commission's Order and the additional First Amendment considerations at stake, before turning to the Center's specific proposed amendments and their justification.

The Center's proposed amendments to the Proposed Revisions are as follows:

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Rule 12-12 – Definitions

(d) “Lobbying” means (1) influencing or attempting to influence legislative or executive action, or both, through direct communication or activities with a designated individual or that designated individual’s immediate family, (2) **policy research to support lobbying**, ~~or~~ (3) developing goodwill through communications, **donations** or **other** activities, including the building of relationships, with a designated individual or that designated individual’s immediate family with the intention of influencing current or future legislative or executive action, or both, **or (4)** obtaining the services of another person, including through membership in a trade or other organization, to engage in any of the activities identified in (1), ~~or~~ (2)**, or (3)**.

“Lobbying” does not include communications or activities as part of a business, civic, religious, fraternal, personal, or commercial relationship which is not connected to legislative or executive action, or both, **but does include meetings, correspondence, and other communications with legislative or executive officials (excluding the Commission) influencing or attempting to influence legislative or executive action**.

(e) “Charitable contribution” means money, services, or a thing of value donated to a nonprofit organization, affiliate of a utility, or other **entity** ~~person~~ that is religious, charitable, educational, scientific or literary in purpose.

(f) “Political contribution” means money, services, or a thing of value donated to an elected public official, a candidate for public office, a political party, or an entity that provides money, property, services or other things of value for the purpose of supporting **an elected public official, a candidate for public office, or a political party** ~~the election or re-election of an elected public official or a candidate for public office~~ .

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(i) “indirect expenditure” means funds provided to a trade association or other non-utility organization that engages in political advertising, lobbying, political contributions, or charitable contributions.

Rule R12-13 – Advertising by Electric, Natural Gas, Water and Sewer Utilities

(a) In ascertaining reasonable operating expenses pursuant to G.S. 62-133, no electric, or natural gas, water, or sewer utility shall be permitted to recover from its ratepayers any ~~direct or indirect~~ **(i)** expenditure made by such utility for lobbying, ~~a charitable contribution~~, political or promotional advertising, **(ii) charitable contribution**, (iii) ~~or a~~ political contribution, or **(iv) indirect expenditure**, as defined in Rule R12-12, or for other nonutility advertising. In every application for a change in rates, the utility **shall include precise hourly records of the lobbying activities of each of its employees and its affiliate employees, and** shall certify in its prefiled testimony that its application does not include any expenditure ~~costs~~ for lobbying, political or promotional advertising, a political contribution, ~~or~~ a charitable contribution**, or indirect expenditures**. Further, if the utility seeks to recover costs based on an exception under Rule R12-12(g), the utility shall include prefiled testimony stating the amount claimed and the basis for the exception.

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The Court's August 29, 2019 Order And Proposed Revisions

The Commission's August 29, 2019 Order addresses and proposes restrictions on utilities charging for political donations, charitable contributions, and lobbying expenses as a Cost of Service to ratepayers. The Center supports the Commission's general approach to the Proposed Revisions and their stated goals.

With regard to political donations, the Commission "agrees that a public utility's contributions to a political party, an elected official, or a candidate for public office are not recoverable from ratepayers," Order at 8, and on that basis, proposes to define such prohibited "political contributions" to include both a utility's direct provision of something of value to a candidate, elected official, or political party, as well as a utility's payment to a third party that supports "the election or re-election of an elected public official or a candidate for public office." Order at 9.

As regards charitable giving, the Commission similarly agrees that such contributions may not be treated as a Cost of Service to be recovered from ratepayers, and proposes to define those prohibited "charitable contributions" to include "money, services, or a thing of value donated to a nonprofit organization, affiliate of a utility, or other person that is religious, charitable, educational, scientific or literary in purpose." *Id.* at 11.

Finally, as regards the costs of lobbying, the Commission also agrees that "a utility's lobbying expenses should not be recoverable from ratepayers," *id.* at 13, and in its Order, the Commission reviewed several prior decisions explaining what constitutes lobbying for these purposes. On one side of the line, the Commission explained that costs that relate directly to "customer safety, education, and service reliability" may be recovered, *id.*, while all costs associated with "legislative advocacy" may not. *Id.* at 14. To distinguish between these

expenditures, the Commission proposes to require that each utility "maintain precise hourly records of the lobbying activities of each of its employees and its affiliates' employees so that the salaries paid to those employees for those hours can be excluded . . . ." *Id.* at 14.

In addition, the Commission recognized that a utility should not be permitted to recover as a Cost of Service its funding of third-party groups, such as Edison Electric Institute ("EEI"), to engage in lobbying on the utility's behalf. *Id.* As the Commission noted, "the cost of lobbying activities by such organizations, for legislative advocacy often on a national level that may have little or nothing to do with North Carolina's public interest, is not a cost that should be borne by North Carolina's ratepayers." *Id.*[1]

The Commission's Proposed Revisions seek to carry out these goals.[2]

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[1] As discussed below, trade groups like EEI, and related groups like the Utility Research Groups, often engage in highly controversial political advocacy, including litigation, rule-making comments, and other efforts to undermine clean energy, environmental protection, and other initiatives that might undermine utility profits. *See supra* at 12. Yet, North Carolina utilities regularly include dues to EEI as part of the cost of service. *See, e.g.,* Duke Energy Carolinas LLC, Docket No. E-7, Sub. 1214 (Sept. 30, 2019), NCUC Form E-1 Data request, at Item No. 16b (.pdf pages 601-2), available at https://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=1e1d0884-9b07-41cb-b754-e979023da4f9; Duke Energy Carolinas LLC, Docket No. E-7, Sub. 1146 (Aug. 25, 2017), NCUC Form E-1 Data request, at Item No. 16b (.pdf pages 4-5), available at https://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=27d39a6b-5972-4687-b424-3978f8bfb8c0.

[2] The Commission rejected Petitioners' request for revised regulations limiting how utility *profits* are spent, asserting there is no legal authority for the Commission to establish such rules. Order at 3-7. While not proposing any further amendments at this time to address this issue, the Center notes that it respectfully disagrees with the Commission's legal conclusion as to the limited scope of its authority. For example, the Supreme Court in *Central Hudson Gas & Elec. Corp. v. Pub. Svc. Comm'n* suggested that a utility commission could advance its legitimate interest in furthering energy conservation, consistent with the First Amendment, by limiting a utility from spending *any* funds to encourage consumers to use more electricity. 447 U.S. 557, 569-72 (1980). Moreover, it is far from clear that a "state-created monopoly" is entitled to First Amendment protection. *Id.* at 583-85 (Rehnquist, J., dissenting); *see also Citizens United v. FEC,* 558 U.S. 310, 387-89 (2010) (distinguishing regulated monopoly businesses from the First Amendment rights of other businesses, explaining that "[m]ost of the Founders' resentment towards corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed.").

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The First Amendment Implications Of The Commission's Proposed Revisions

While the Commission's Order rejects Petitioners' First Amendment arguments vis-à-vis expenditures of utility shareholders, Order at 3-7, the Order does not address another critical First Amendment concern raised by the Petition: utility expenditures to third-party organizations, such as the Edison Electric Institute ("EEI"), who engage in lobbying and political activities. As explained below, however, to comply with the First Amendment, the Commission's proposed regulations should be further amended to prevent utilities from including *any* of their expenditures to groups engaged in lobbying or political activities from the Cost of Service.

Specifically, in order to address this gap in the current Proposed Revisions, the Commission should define "indirect expenditures" as follows, and mandate that such indirect expenditures be prohibited as a Cost of Service:

> **(i) "indirect expenditure" means funds provided to a trade organization or other entity that engages in political advertising, promotional advertising, lobbying, charitable contributions or political contributions.**

A. None Of The Expenditures Made By Utilities To Third-Party Organizations That Engage In Lobbying Or Other Political Activities May Be Treated As A Cost of Service.

While the Commission recognizes that utilities may not treat funding for third party political activities as a Cost of Service, Order at 14, the Center urges the Commission to broaden the prohibition to cover all ratepayer funding to such third parties as a Cost of Service, in order to protect ratepayers' First Amendment rights.

As the Supreme Court has emphasized, the First Amendment establishes a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014). Following that principle, as Petitioners have noted, *see* Pet.

Resp. at 3-4, in *Consolidated Edison Co. v. Pub. Svc. Comm'n*, the Supreme Court drew a direct comparison between the First Amendment rights of utility ratepayers who may object to a utility's political advocacy, and those of public employees who may object to the political advocacy of their unions. 447 U.S. 530, 543 and n.13 (1980). In the case the Court relied on in making this comparison, *Abood v. Detroit Bd. of Ed*., the Court had ruled that, in the union context, a state employee's First Amendment rights are appropriately protected so long as employees are only required to pay their union for its *non-political* work (called the "agency fee"), and are not forced to pay their union to engage in political activities that the employees do not support. 431 U.S. 209 (1977).

Applying that rationale to the utility-ratepayer context, the Court in *Consolidated Edison* concluded that because utilities could simply "exclude the cost of [their political activities] from the utility's rate base," the First Amendment did not necessarily proscribe a utility from these expenditures. 447 U.S. at 543; *see also id.* at 550-51 (Blackmun, J., dissenting) (noting how utility commissions, and the Federal Energy Regulatory Commission, all require that "a public utility cannot include in the rate base the costs of political advertising and lobbying," for which the "ratepayers derive no service-related benefits . . . .").

As Petitioners have further explained, *see* Pet. Resp. at 5-6, New York's highest court also relied on this direct analogy between the First Amendment rights of utility ratepayers and public employees in restricting the authority of New York utilities to treat contributions toward the political and ideological activities of third-party organizations as a Cost of Service. *Cahill v. NY Public Svc. Commn*, 556 N.E.2d 133 (N.Y. 1990). As the Court there explained, since "ratepayers are powerless against governmentally regulated monopolies and have no place else to seek indispensable public utilities services," from a First Amendment perspective ratepayers "are more

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seriously burdened and disadvantaged than the contributing nonunion members in *Abood*." *Id*. at 136 (emphasis added).

Accordingly, in *Cahill* the court prohibited utilities from charging customers for contributions made to third-party organizations to engage in these political activities. *Id.* at 138. Similarly as the Supreme Court explained in rejecting a government program that compelled mushroom producers to pay for advertising they did not support, "[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views." *United States v. United Foods*, 533 U.S. 405, 410 (2001).

This approach is consistent with the principles underlying the Commission's Order and Proposed Revisions, which suggest that while a utility may not provide funding to a third-party entity for political activities, it may include as a Cost of Service the funds it provides those same entities for *other* services, such as "research, development of best business practices, and other educational purposes." Order at 14.

However, as the Commission has recognized, *see* Order at 4, in 2018 the Supreme Court, in *Janus v. AFSCME, Council 31*, determined that the standard articulated in *Abood* is, in fact, insufficient to protect First Amendment right. 138 S. Ct. 2448 (2018). Rather, overturning the rule from *Abood*, the *Janus* Court concluded that the First Amendment demands that individuals may not be compelled to pay for even the *non*-political activities of organizations like unions, which both provide non-political services and also engage in political activities. *Id.*

Thus far, the Commission has rejected the application of this precedent to any potential restriction on a utility's use of shareholder funds. *See* Order at 4-6. However, the Commission has not yet considered the implications of *Janus* on whether utilities may, consistent with the First

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Amendment, continue to charge customers, as part of the Cost of Service, for purportedly *non*-political activities of third-party organizations like EEI, when those organizations also engage in political activities.

Utilities may *not*, as the Court's reasoning in *Janus* makes clear. Indeed, it bears stressing that the Supreme Court expressly found the *Abood* distinction between "chargeable and nonchargeable union expenditures" to be unmanageable. *Id.* at 2481-82. Thus, while the *Janus* dissent had explained that over the years courts have successfully made this distinction, *id.* at 2498 (Kagan, J., dissenting), the Court majority concluded that the risks to First Amendment rights were too grave to take the risk that some of these funds might end up supporting political activities, despite best efforts to keep the accounts segregated. *Id.* at 2481-82.[3]

Moreover, the Supreme Court's discussion of this issue in an earlier decision, *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012), further highlights the infeasibility of distinguishing between chargeable and non-chargeable expenses. In particular, the Court noted the problems inherent in assuming that the recipients of these funds are using them in the manner they claim, as well as the inappropriate burden this assumption puts on objecting parties to establish that their compelled payments are not being used in a manner that infringes their First Amendment rights. *Id.* at 318-19 (discussing the "significant burden [on] employees to bear simply to avoid having their money taken to subsidize speech with which they disagree"). Thus, the Court made clear that

[3] The Commission itself made a similar point in the course of rejecting Petitioners' argument that the Commission's regulations should cover how utility parent companies spend ratepayer funds that are part of their shareholder earnings. *See* Order at 7. In particular, the Commission explained that since money is essentially fungible, "it would be virtually impossible" to discern which funds "were used for what purpose." *Id.* ("Suffice it to say that the permutations and combinations of when and how" companies spend their "earnings are complex."). Applying that reasoning here, it would be virtually impossible to determine which funds a utility pays to third parties as a cost of service are being used appropriately, and which are directed to political or other activities that ratepayers should not be forced to subsidize.

all appropriate steps must be taken to insure that objecting parties are not forced to pay for any kind of "political activities" to which they may object. *Id.* at 320 (rejecting the argument that using compelled funds to advocate against a ballot initiative that would harm the unions' interests is a legitimate, non-political expense). Similarly here, the burden of distinguishing the political and non-political activities of third parties like EEI should not be put on the ratepayer.

Further, the Supreme Court has taken a very expansive view of what such political activities encompass, recognizing that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (citation omitted). Thus, for example, as noted, even advertising to promote a generic product like mushrooms falls within the scope of political speech, as are other broad activities not "likely to stir the passions of many." *Knox*, 567 U.S. at 309-10.

Therefore, to protect the First Amendment rights of North Carolina ratepayers, utilities may not rate base *any* of their payments to third-party groups like EEI, which engage in a broad array of political activities. Indeed, as we discuss next, *see infra* at 13, EEI is a particularly stark example of an organization engaged in political activities which, as the Commission noted, "have little or nothing to do with North Carolina's public interest." Order at 14.[4]

The *Janus* Court also rejected the unions' alternative argument that these funds, designated for non-political activities, are necessary for them to carry out their important work. 138 S. Ct. at

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[4] In supporting the outcome in *Janus*, the United States argued that every aspect of a union's collective bargaining work has a political element, since it involves important questions about how public resources are to be expended. *See* Amicus Brief of the United States at 15-17, *Janus v. AFSCME*, No. 16-1466 (U.S. Dec. 6, 2017). Following that same reasoning, everything a group like EEI provides to utilities has political ramifications, given the organization's express mission to provide "public policy leadership" to utilities. *See* EEI Mission, available at https: //www.eei.org/about/mission/Pages/default.aspx.

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2481-83. Similarly, here, given that membership in trade association groups is not at all essential for utilities to function, there is no basis to require ratepayers to fund *any* of these groups' activities as part of the Cost of Service. *See, e.g., Application of Southern California Edison*, No. 16-09-001 (California Pub. Utilities Commission, May 16, 2019) at page 251, available at http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M291/K678/291678149.PDF (disallowing Southern California Edison from providing *any* dues to EEI).[5]

Accordingly, the Center urges the Commission to slightly amend the Proposed Revisions to add a definition of "indirect expenditures" which would encompass *any* funding—for both political and non-political activity—to outside groups that engage in the activities the Commission has determined should not be included as a Cost of Service. In particular, the Center's proposed definition is as follows:

> **(i) "indirect expenditure" means funds provided to a trade organization or other entity that engages in political advertising, promotional advertising, lobbying, charitable contributions or political contributions.**

By defining "indirect expenditures" in this manner, the Commission will appropriately preclude utilities from engaging in the same conduct the Court in *Janus* found to violate the First Amendment: requiring individuals to contribute to organizations that engage in political activities to which they may object. *See also Common Cause v. Lewis, No.* 18-14001, 2019 N.C. Super LEXIS 56, *370 (Super. Ct. N.C. Sept. 3, 2019) ("The government may not restrict a citizen's ability to effectively exercise their free speech rights").

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[5] North Carolina utilities may argue that groups like EEI provide essential non-political services, which the utility should be able to support with rate-payer funds. However the Supreme Court rejected that line of argument in *Janus*, noting that the unions had not established that they could not function without receiving dues from objecting employees. 138 S. Ct. at 2482-83. Similarly here, since it is beyond dispute that regulated monopoly utilities can continue to serve their customers without compelling those customers to support groups like EEI, this argument must fail.

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To effectuate this amendment, the Center further proposes that the Commission slightly amend the prescriptive requirements contained in proposed R12-13, so that the provision would read as follows:

> (a) In ascertaining reasonable operating expenses pursuant to G.S. 62-133, no electric, or natural gas, water, or sewer utility shall be permitted to recover from its ratepayers any ~~direct or indirect~~ **(i)** expenditure made by such utility for lobbying, ~~a charitable contribution~~, political or promotional advertising, **(ii) charitable contribution**, (iii) ~~or a~~ political contribution, or **(iv) indirect expenditure**, as defined in Rule R12-12, or for other nonutility advertising. In every application for a change in rates, the utility **shall include precise hourly records of the lobbying activities of each of its employees and its affiliates employees, and** shall certify in its prefiled testimony that its application does not include any expenditure ~~costs~~ for lobbying, political or promotional advertising, a political contribution, ~~or~~ a charitable contribution**, or indirect expenditures**. Further, if the utility seeks to recover costs based on an exception under Rule R12-12(g), the utility shall include prefiled testimony stating the amount claimed and the basis for the exception.

These proposed amendments fully address the Center's concerns. First, the suggested language clarifies that the scope of unrecoverable costs includes funds spent directly on lobbying or advertising, and also any third-party payments to charitable or political organizations, as well as organizations, like EEI, which engage in lobbying, political or charitable activities. Second, to effectuate this requirement, the proposed language requires that the utility's pre-filed testimony certify that no such expenditures are included.

Third, as the Commission's Order explains, in order to determine precisely how much time utility *employees* spend on lobbying, they must "be more precise in their record keeping by clearly separating lobbying costs from non-lobbying costs." Order at 14. To carry out this mandate, the Center also recommends that the Commission incorporate the language contained in its Order directly into R12-13, by requiring utilities to include the "precise hourly records of the lobbying activities of each of its employees and its affiliates' employees" that the Commission has explained is necessary so "those hours can be excluded from the utilities' Cost of Service, and so that this

information can be effectively audited by the Public Staff or the Commission." Order at 14. Accordingly, the Center also proposes that this specific language from the Order also be added to Rule 12-13, as proposed in the above redline language.

B. The Controversial Political Activities of EEI Exemplify Why the First Amendment Prohibits Third-Party Payments From Being Charged as a Cost of Service.

Although EEI is only one of the many membership and trade organizations both engaged in political activities and supported by North Carolina utilities, further details about EEI's abundance of highly political and controversial activities in particular provide a stark example of the First Amendment concerns at stake here.

EEI, a trade association for investor-owned utilities and other entities, expends large sums annually on highly controversial political advocacy. For example, in recent years EEI itself has emphasized its own efforts toward:

- Achieving a "two year delay" in implementation of the Clean Power Plan, which was designed to protect human health and the environment from air and climate pollution, and "less stringent" requirements for coal plants.[6]
- Advocating for reductions in support for distributed solar technologies.[7]
- Advocating that EPA permit the maximum levels of ozone in the environment, rather than a more environmentally-protective ozone standard.[8]
- Advocating for the repeal of a law designed to end the use of polluting fossil fuels in federal buildings.[9]
- Challenging EPA actions designed to protect human health and the environment, including working with the Utility Regulatory Groups on litigation efforts.[10]

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6 *See* "Edison Electric Institute's 2015 Results in Review," Huffington Post (Attachment 1), also available at http://big.assets.huffingtonpost.com/eeibooklet.pdf.

7 *Id.* at 2.

8 *Id.* at 1.

9 *Id.* at 3.

10 *Id.* at 6.

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- "[A]chiev[ing] the industry's goals of preserving existing regulation of PCBs" in amending the Toxic Substances Control Act.[11]

These are some of the concrete examples of EEI's engagement in controversial political advocacy, but that aspect of EEI's work is evident from other evidence as well. Indeed, when the National Association of Regulatory Utility Commissioners ("NARUC") last audited EEI activities, it found that EEI was spending much of its money on advocacy and lobbying efforts.[12] In addition, utility commissions *themselves* have frequently recognized that EEI spends considerable funds on political advocacy.[13]

Moreover, even in its own filings with the Securities and Exchange Commission, EEI discloses that it spends considerable funds on lobbying activities.[14] EEI also discloses that it

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[11] Edison Electric Institute Results in Review (2016) (Attachment 2).

[12] *See, e.g.*, Testimony of William Marcus to California Public Utility Commission on behalf of The Utility Reform Network,, *Electric Generation and Other Results of Operations Issues for Pacific Gas and Electric Company Operating Issues For Pacific Gas and Electric Company* (May 17, 2013) at 69-70 (showing most of EEI's expenses were for advocacy and research to support advocacy), available at ftp://ftp2.cpuc.ca.gov/PG&E20150130ResponseToA1312012Ruling/2013/05/SB_GT&S_0501605.pdf; *see also, e.g.,* David Anderson, et al., *Paying for Utility Politics: How utility ratepayers are forced to fund the Edison Electric Institute and other political organizations*, Energy and Policy Institute (2017) ("*Anderson et al.*"), at 10, https://www.energyandpolicy.org/wp-content/uploads/2017/05/Paying-for-utility-politics-ratepayers-funding-the-Edison-Electric-Institute.pdf.

[13] *See, e.g.,* Northern Indiana Public Service Company, Edison Electric Institute Dues, (MSFR1-5-8(a)(2)(A)), available at https://www.documentcloud.org/documents/3111262-Northern-Indiana-Public-Service-Company-Invoices.html#document/p204/a318825; Duke Energy Carolinas, Edison Electric Institute Dues, 3-4, available at https://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=27d39a6b-5972-4687-b424-3978f8bfb8c0; Dominion Energy, Edison Electric Institute Dues, 552, available at https://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=84a3f74c-c276-4b61-ba90-63f6cd70f257.

[14] *See, e.g.,* Edison Electric Institute's 2017 IRS Form 990, available at https://www.documentcloud.org/documents/5218920-EEI-2017-Form-990.html.

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provides *direct funding to purely political activities*, such as funding the Republican and Democratic Governors and Attorney Generals' Associations.[15] Moreover, as EEI itself has explained, the organization "partnered with the American Gas Association and the Nuclear Energy Institute . . . to drive the conversation about our nation's energy future" at the 2016 Republican and Democratic National Conventions.[16]

Accordingly, because it is evident that EEI spends considerable funds on activities that North Carolina utilities are prohibited from including in the Cost of Service, under the Supreme Court's standard set forth in *Janus* the Commission cannot allow utilities to rate base *any* of their dues to EEI, or any other third-party organization engaged in the very activities the Commission has agreed that ratepayers should not be forced to subsidize. This should also include, for example, funds ultimately paid to groups like the "Utility Regulatory Groups," which EEI has itself funded[17], and which are heavily engaged in political advocacy work.[18]

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15 *Id.* at 17.

16 Edison Electric Institute, Results in Review (2016) (Attachment 2) at 7.

17 In 2018, EEI charged the Tennessee Valley Authority more than $460,000 for membership in UARG. *See* Edison Electric Institute's Invoice #209269 to Tennessee Valley Authority dated Dec 14, 2017 for "2018 UARG Membership Dues" (Attachment 3).

18 The several "Utility Regulatory Groups" (Utility Air Regulatory Group, Utility Solid Waste Activities Group, and Utility Water Act Group) are well-recognized advocacy groups funded by utilities and other corporate interests, and run by several prominent law firms. *See generally Anderson, et al.*, *supra* note 12, at 15; *see also* Zack Coleman & Alex Guillen, *Documents detail multimillion-dollar ties involving EPA official, secretive industry group*, Politico (Feb. 20, 2019) available at https://www.politico.com/story/2019/02/20/epa-air-pollution-regulations-wehrum-1191258.; https://www.energyandpolicy.org/utility-air-regulatory-group/ (summarizing UARG's work). These groups' highly political and controversial activities include hundreds of initiatives challenging stronger environmental regulations designed to protect human health and the environment. *See* Matt Kasper, *UWAG and USWAG the secretive utility groups that also target EPA safeguards remain after Utility Air Regulatory Group disbands*, Energy and Policy Institute (May 13, 2019), available at https://www.energyandpolicy.org/uwag-and-uswag-the-secretive-utility-groups-that-target-epa-

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<u>Other Requested Amendments To The Commission's Proposed Regulations</u>

A. The Lobbying Definition Should Be Expanded To Include Influence-Related Policy Research And Donations.

The Commission's proposal to define lobbying and expressly prohibit utilities from including lobbying as part of reasonable operating expenses is a critical and important step to protect consumers from bearing the costs of these expenditures, and the Commission's proposed definition captures most of the activities that should be covered. However, the Center proposes two minor additions to clarify the scope of lobbying in a manner consistent with the Commission's ruling:

> "Lobbying" means (1) influencing or attempting to influence legislative or executive action, or both, through direct communication or activities with a designated individual or that designated individual's immediate family, (2) **policy research to support lobbying,** (3) developing goodwill through communications, **donations** or other activities, including the building of relationships, with a designated individual or that designated individual's immediate family with the intention of influencing current or future legislative or executive action, or both, **or (4)** obtaining the services of another person, including through membership in a trade or other organization, to engage in any of the activities identified in (1), or (2)**, or (3).**

The reasons for these proposed amendments are as follows:

First, one of the ways that utilities and their allies engage in lobbying is by conducting policy research and preparing policy papers, comments and other documents to support their

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rules/; *see also* Utility Air Regulatory Group, UARG Policy Workshop Materials (2017) at 16-25 (Attachment 4) (providing a long list of political advocacy projects of UARG); *see also, e.g.,* Utility Water Act Group's Petition for Reconsideration of EPA's "Effluent Limitations" Rule, 80 Fed. Reg. 67,838 (Nov. 3, 2015), available at https://www.epa.gov/sites/production/files/2017-03/documents/letter_to_epa_submitting_petition_for_reconsideration_w_exhibits-c_508.pdf; Utility Solid Waste Activities Group Petition for Rulemaking to Reconsider Provisions of the Coal Combustion Residuals Rule, 80 Fed. Reg. 21,302 (April 17, 2015), available at https://www.epa.gov/sites/production/files/2017-06/documents/final_uswag_petition_for_reconsideration_5.12.2017.pdf.

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preferred policy outcomes. For example, EEI recently commissioned a study purporting to show that renewable energy developers are being overcompensated for electricity generation, as part of a campaign to undermine renewable energy development under the Public Utility Regulatory Policies Act.[19] As another example, the U.S. Chamber of Commerce has issued numerous reports advocating for continued reliance on fossil fuels and against the clean energy transition.[20] By broadening the definition of lobbying to include efforts that lead to these controversial studies, which advocate for controversial policy outcomes with which many ratepayers disagree, the Commission can insure that ratepayers are not forced to pay for such activities as part of the Cost of Service.

Second, one of the common approaches lobbyists rely on to influence decision-makers is to purchase meals, tickets, travel, or other forms of entertainment for them.[21] The Commission's proposed definition of "political contribution" addresses that concern from the standpoint of elected officials and candidates, but those officials are also supported by staff and many other public servants who are also the potential targets of lobbying efforts. The Commission's lobbying

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[19] *See* Concentric Energy Advisors*, An Empirical Analysis of Avoided Cost Rates For Solar And Wind QFs under PURPA* (Nov. 2019), available at https://ceadvisors.com/wp-content/uploads/2019/11/An-Empirical-Analysis-of-Avoided-Cost-Rates-for-Solar-and-Wind-QFs-Under-PURPA.pdf.

[20] *See, e.g.* U.S. Chamber of Commerce, *Infrastructure Lost, Why America Cannot Afford To 'Keep It In the Ground'* available at https://www.globalenergyinstitute.org/sites/default/files/GEI_KIITG_report_WEB.pdf. North Carolina utilities frequently seek to recover the cost of funds paid to the Chamber. *See, e.g.* Duke Energy Carolinas LLC, Docket No. E-7, Sub. 1146 (Aug. 25, 2017), NCUC Form E-1 Data request, at Item No. 16c (.pdf page 6), available at https://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=27d39a6b-5972-4687-b424-3978f8bfb8c0.

[21] *See, e.g.* Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 Cornell J. L. & Pub. Pol'y 1, 23 (2006) (explaining that, [t]wo common types of gifts that lobbyists give to public servants are meals and entertainment.").

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definition covers communications designed to influence legislative or executive action, but as written it does not also clearly cover donations of meals, tickets, or other favors for that purpose, which might be given to legislative staff or others not covered by the political contribution definition. To address that concern, we propose simply adding the word "donations" to the lobbying definition, to make clear that lobbying also includes attempting to influence actions by providing something of value to anyone who may be a target of such efforts.

B. The Lobbying Definition Should Also Clarify That It includes Letters, Meetings And Other Communications Seeking To Influence Legislative Or Executive Action.

Defining lobbying to broadly include efforts to influence legislative or executive action is vital to protect ratepayers from funding such activities as part of the Cost of Service. This lobbying can take several forms, however, and we propose additional language to leave no ambiguity as to what is covered, so that the second paragraph would read:

> "Lobbying" does not include communications or activities as part of a business, civic, religious, fraternal, personal, or commercial relationship which is not connected to legislative or executive action, or both, **but does include meetings, correspondence, and other communications with legislative or executive officials (excluding the Utility Commission) influencing or attempting to influence legislative or executive action.**

The reasons for these proposed amendments are as follows:

While the Commission's proposed definition rightly addresses direct communications intended to influence legislative or executive action, it is not entirely clear whether it also covers written communication or other indirect methods of influencing these decision makers' actions. To clarify the scope of the definition, the Center proposes additional language making it absolutely clear that lobbying includes "meetings, correspondence, and other communications with legislative or executive officials (excluding the Utility Commission) influencing or attempting to influence legislative or executive action." This language would clarify that utilities may not charge as

reasonable operating expenses the time spent writing letters, emails, or otherwise communicating with agencies and legislators to influence executive or legislative action.

To give one concrete, recent example, this fall the N.C. Department of Environmental Quality, pursuant to Governor Cooper's Executive Order ("EO") 80 (Oct. 29, 2018), issued a Draft Clean Energy Plan for public comment. Duke Energy prepared detailed comments advocating the company's views on numerous issues, including nuclear power and fracked gas. In particular, Duke Energy told the DEQ that nuclear power and fracked gas are central to the clean energy transition, provide important jobs and economic benefits, and are "vital" to lowering North Carolina's greenhouse gas emissions.[22]

These views are political in nature, as the Supreme Court itself recognized in *Consolidated Edison*, where the Court characterized discussion of the value of nuclear power as addressing "controversial issues of public policy." 447 U.S. at 537. Moreover, given the climate crisis, which is the basis for Governor Cooper's issuance of EO 80[23], advocating for continued and expanded fracked gas in North Carolina is not only highly controversial, it is contrary to the best available science that shows North Carolina must quickly move *away* from all fossil fuel generation to do its part to avoid the worst impacts of climate change. That is why, for example, Dr. Drew Shindell, a coordinating lead author of the 2013 Fifth Assessment Report of the Intergovernmental Panel on Climate Change ("IPCC"), as well as the 2018 IPCC "Special Report on 1.5°C," recently wrote to

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[22] *See* North Carolina Clean Energy Plan Supporting Document, Part 4, at 286, at 291-93 (Sept. 9, 2019 comments of Duke Energy), available at https://files.nc.gov/ncdeq/climate-change/clean-energy-plan/4.-Stakeholder-Chapter-FINAL-9.26.19.pdf .

[23] *See* EO 80 (explaining that "climate-related environmental disruptions pose significant health risks to North Carolinians, including waterborne disease outbreaks, compromised drinking water, increases in disease-spreading organisms, and exposure to air pollution, among other issues").

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Governor Cooper to explain that Duke's plan to build new gas plants is incompatible with the steps desperately needed for a timely clean energy transition.[24]

When Duke Energy prepares letters and communications like its submission on the Clean Energy Plan, it should not be permitted to charge the expenses associated with that advocacy as reasonable operating expenses. By clarifying the "lobbying" definition to include correspondence such as this letter, the Commission can insure that North Carolina utilities are not able to pass along such expenditures to their customers as a Cost of Service.

C. The Political Contribution Definition Should Be Clarified To Include Parallel Restrictions For Direct And Third-Party Expenditures.

The Commission has correctly defined political contributions to cover providing something of value to elected officials, candidates or parties, and the proposed definition also touches on the issue of providing those contributions through a third party. However, to clarify that the scope of covered contributions directed to candidates through third parties is as broad as direct contributions, the Center recommends the Commission make the language at the end of this provision parallel to the language used at the beginning, so that it would read as follows:

> (f) "Political contribution" means money, services, or a thing of value donated to an elected public official, a candidate for public office, a political party, or an entity that provides money, property, services or other things of value for the purpose of supporting **an elected public official, a candidate for public office, or a political party**~~the election or re-election of an elected public official or a candidate for public office~~.

As currently written, the last phrase of the definition does not appear to prohibit giving money to entities who in turn are supporting political parties. The Center does not think this is the

[24] *See* Letter from Professor Drew Shindell, Duke University Nicholas School of the Environment, to North Carolina Governor Roy Cooper (Oct. 10, 2019), available at https://www.ncwarn.org/wp-content/uploads/ltr_to_Cooper_gas_10_10_19-FINAL.pdf.

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Commission's intention, and thus suggests this minor amendment to clarify the scope of political contributions in a manner consistent with the Commission's Order.

CONCLUSION

As the Center expressed at the outset, we commend the Commission for proposing important regulations that will protect the interests of North Carolina ratepayers. By adopting the amendments offered here, the Commission has an opportunity to further strengthen those protections, and to further advance the vital principles articulated in the Commission's Order: insuring that ratepayers are required only to compensate utilities as a Cost of Service for expenses that are both just and reasonable, and consistent with ratepayers' First Amendment rights.

DATED: November 22, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing INITIAL COMMENTS OF INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY by deposit in the U.S. mail, postage pre-paid, or by email transmission.

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This is the 22d day of November, 2019.

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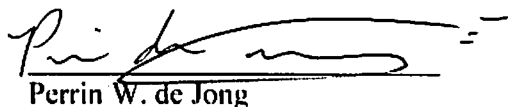
VERIFICATION

Perrin W. de Jong, first being duly sworn, deposes and says that he is the attorney for the Center for Biological Diversity; that he has read the foregoing INITIAL COMMENTS OF INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY and that the same is true of his personal knowledge, except as to any matters and things therein stated on information and belief, and as to those, he believes them to be true; and that he is authorized to sign this verification on behalf of the Center for Biological Diversity.

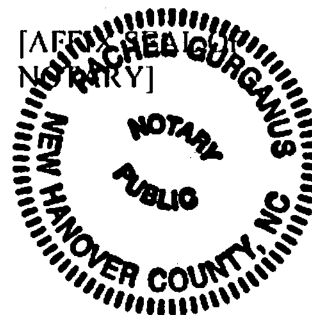
This the 22d day of November, 2019.



Perrin W. de Jong

Sworn to and subscribed before me,

this the 22 day of ~~October~~ November, 2019.



[AFFIX SEAL OF NOTARY]

Notary Public

Rachel Gurganus

Printed Name of Notary Public

My Commission Expires: 01/19/2022.