

**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	)	ORDER ADOPTING AMENDMENTS
Procedures for Disclosure and Prohibition	)	TO COMMISSION RULES R12-12
of Public Utility Lobbying, Advertising and	)	AND R12-13
Other Expenditures	)	

BY THE COMMISSION: On November 14, 2018, NC WARN, Inc., and Friends of the Earth, Inc. (Petitioners), filed a petition in the above-captioned docket requesting that the Commission initiate a rulemaking proceeding to consider adopting rules to govern public utility expenditures on lobbying, advertising, political contributions, and other matters. The petition included an attachment setting forth proposed rules and an affidavit in support of Petitioners' proposed rules, and the Petitioners later filed an exhibit to their petition which had been inadvertently omitted from their filed petition.

In summary, Petitioners contended that all funds spent by public utilities for all purposes are funds received from captive retail ratepayers, and thus, the captive retail ratepayers are being required to fund the utilities' lobbying, advertising, political, and other activities (discretionary spending). Petitioners contended further that it was unjust and unreasonable, as well as a violation of ratepayers' rights to freedom of speech and association, to allow public utilities to engage in discretionary spending. Even though Petitioners acknowledged that the Commission has previously determined that certain discretionary spending cannot be recovered from ratepayers by public utilities, Petitioners requested that the Commission adopt rules that: prohibit public utilities from recovering discretionary spending from ratepayers, require public utilities to file an annual report of their discretionary spending, and prohibit a parent or holding company (parent company) of a public utility from using ratepayer money transferred to it by the public utility for discretionary spending.

On February 19, 2019, the Commission issued an Order Requiring Additional Information directing Petitioners to file responses to several Commission questions within 60 days of issuance of the Order.

On April 18, 2019, the Center for Biological Diversity (CBD) filed a petition with the Commission seeking to intervene in the docket.

On April 22, 2019, Petitioners filed their Response to the Commission's Order Requiring Additional Information. In summary, Petitioner's Response discussed several

United States Supreme Court decisions and other court rulings on First Amendment rights of public utilities, ratepayers, union members, and nonmembers. Petitioners concluded from the decisions that the Commission has the authority to prohibit public utilities and their parent companies from using any revenues received from ratepayers for discretionary spending.

On August 29, 2019, the Commission issued an Order Dismissing Petition in Part, Granting Petition to Intervene, Joining Necessary Parties, and Requesting Comments (Proposed Rules Order). In the Proposed Rules Order the Commission disagreed with Petitioners' position that the Commission should adopt rules prohibiting shareholders or a public utility's parent company from using the utility's earnings for discretionary spending, and rules requiring public utilities to file an annual report with the Commission detailing their lobbying activities and expenditures. As a result, those portions of the petition were dismissed with prejudice. However, the Commission agreed with Petitioners that the Commission has the authority and discretion to adopt reasonable rules prohibiting a public utility from recovering from ratepayers, as a cost of service, lobbying and promotional advertising costs, charitable contributions, and political contributions.

In addition, the Commission proposed amendments to Commission Rules R12-12 and R12-13 (Proposed Rules) prohibiting a public utility from recovering from ratepayers lobbying costs and promotional advertising costs, charitable contributions, and political contributions. Further, the Commission established this proceeding as a rulemaking proceeding. The Commission's proposed changes to Rule R12-12 include new definitions for lobbying, charitable contributions, and political contributions. The changes to Rule R12-13 include a requirement that a public utility certify to the Commission that the utility's application for a change in rates does not include any of these expenditures. Further, even though the Petitioners' petition only applied to electric and natural gas utilities, the Commission determined that the proposed rules concerning discretionary spending should also apply to water and sewer utilities.

In the Proposed Rules Order the Commission added as necessary parties to this rulemaking proceeding Duke Energy Carolinas, LLC, (DEC), Duke Energy Progress, LLC (DEP), Piedmont Natural Gas Company, Inc. (Piedmont), Virginia Electric and Power Company, Inc., d/b/a Dominion Energy North Carolina (DENC), Public Service Company of North Carolina, Inc. (PSNC), Frontier Natural Gas Company (Frontier), Toccoa Natural Gas (Toccoa), Aqua North Carolina, Inc. (Aqua NC), Carolina Water Service, Inc. of North Carolina (CWS NC), the Public Staff – North Carolina Utilities Commission (Public Staff), and the North Carolina Attorney General's Office (AGO). In addition, the Commission granted CBD's petition to intervene. On November 22, 2019, the Commission granted Vote Solar's petition to intervene filed on November 21, 2019.

On December 2, 2019, the following parties and individuals (collectively parties) filed initial comments and proposed rule changes: Petitioners, jointly DEC, DEP and Piedmont (collectively Duke), jointly DENC and PSNC (collectively DENC), Vote Solar, Mr. Bob Hall, Ms. Charlena Dula, and Mr. Robert E. Rutkowski. On December 16, 2019, the following parties filed reply or additional comments: Petitioners, Duke, DENC, CBD,

and Mr. Hall. Frontier, Toccoa, Aqua NC, CWS NC, and the AGO did not file comments in this proceeding.

## **COMMISSION'S PROPOSED RULES**

In the Proposed Rules Order the Commission requested comments on the following new or amended subdivisions of Commission Rules R12-12 and R12-13:

### **Rule R12-12 – 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) developing goodwill through communications or 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 (3) 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).

“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.

(e) “Charitable contribution” means 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.

(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 the election or re-election of an elected public official or a candidate for public office.

(g) The terms “political advertising,” and “promotional advertising” as defined hereinabove do not include —

- (1) advertising which informs electric, or natural gas consumers how they can conserve energy or can reduce peak demand for energy, or water or sewer consumers how they can conserve water,
- (2) advertising required by law or regulation, including advertising required under part 1 of title II of the National Energy Conservation Policy Act,
- (3) advertising regarding service interruptions, safety measures (including utility location services), or emergency conditions,

- (4) advertising concerning employment opportunities with such public utility,
- (5) advertising which promotes the use of energy efficient appliances, equipment or services, or appliances, equipment, or services that conserve water, or
- (6) any explanation or justification of existing or proposed rate schedules or billing practices or notifications of hearings thereon.

(h) "Bill insert"

### **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, natural gas, water, or sewer utility shall be permitted to recover from its ratepayers any direct or indirect expenditure made by such utility for lobbying, a charitable contribution, political or promotional advertising, or a political contribution as defined in Rule R12-12, or for other nonutility advertising. In every application for a change in rates, the utility shall certify in its prefiled testimony that its application does not include costs for lobbying, political or promotional advertising, a political contribution, or a charitable contribution. 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.

(c) Expenditures made by an electric, natural gas, water, or sewer utility for the types of advertising described in Rule R12-12(g) will generally be deemed to be reasonable operating expenses, provided however, that the Commission shall not be precluded from determining, on a case-by-case basis, the extent to which such expenditures may have exceeded a reasonable level or amount.

(d) Expenditures made by an electric, natural gas, water, or sewer utility for advertising of a type or nature other than that described in subsections (b), (c), or (g) of Rule R12-12 or for other nonutility advertising shall be considered by the Commission to represent reasonable operating expenses to the extent that it can be established, on a case-by-case basis, that —

- (1) the advertising is of benefit to the using and consuming public, or
- (2) the advertising enhances the ability of the public utility to provide efficient and reliable service.

## SUMMARY OF COMMENTS AND PROPOSED RULE REVISIONS

### Petitioners

Petitioners stated that they do not agree with the portions of the Commission's Proposed Rules Order that dismissed with prejudice portions of their petition, and they reserved their right of appeal with respect to those portions.

Petitioners raised six issues with the Commission's Proposed Rules and provided suggested revisions to address those issues, as follows:

- (1) Require the utilities to file with their application precise records clearly separating lobbying costs from non-lobbying costs;
- (2) Explicitly state that the burden is on the utility to establish that public affairs expenses for which the public utility requests recovery are non-lobbying costs;
- (3) Require that a utility seeking recovery of membership dues in trade groups provide particularized documentation that the dues paid were used by the trade group for educational purposes only, and establish that the educational uses of the funds benefited North Carolina ratepayers;
- (4) Include a definition of "lobbying" that is consistent with the Internal Revenue Code, specifically 26 U.S.C. § 4911(d)(1)(A), and thereby include within the definition of "lobbying" any attempt to influence any legislation through an attempt to affect the opinions of the general public;
- (5) Include a provision that if the required certification in Rule R12-13(a) is inaccurate the Commission has discretion to impose a penalty on the utility; and
- (6) Revise the definition of "charitable contribution" such that it applies regardless of whether the receiving entity is a nonprofit entity.

Petitioners supported each of the above recommendations with a detailed discussion of their basis for each. For example, Petitioners opined that the Commission's prior orders addressing the utilities' lobbying and non-lobbying costs illustrate that it is frequently difficult to separate lobbying expenses from non-lobbying public affairs costs related to matters such as outages and safety. According to Petitioners, their recommended changes improve the Commission's ability to distinguish between the two. In addition, Petitioners maintained that their proposed penalty provision would help to eliminate situations in which utilities fail to properly code their expenditures, which results in the costs being improperly recorded as a cost of service to be paid by ratepayers.

With regard to the IRS Code, Petitioners contended that the definition of “lobbying” in the Commission’s Proposed Rules omits a crucial type of lobbying which is defined in the IRS Code as a “lobbying expenditure,” that being expenditures related to attempts to affect the opinions of the general public. To remedy this perceived deficiency, they recommended that the Commission’s definition of lobbying be revised to include the phrase “any expenditure as defined in 26 U.S.C. § 4911(d)(1)(A),” which they stated would result in further protecting ratepayers from funding a public utility’s political goals.

Petitioners further contended that use of the word “nonprofit” in the definition of “charitable contribution” limits the scope of the prohibition of such contributions so as to arguably permit a utility to charge ratepayers for a donation to a commercial daycare, a student’s scholarship fund, or a private festival, and that elimination of the word “nonprofit” from the definition of “charitable contribution” would better align the definition with the overall goals of the Commission’s Proposed Rules.

## **CBD**

CBD stated that it fully supports the approach taken by the Commission in the Proposed Rules. It stated that the Proposed Rules will greatly serve the public interest by both curbing inappropriate expenditures of ratepayer funds by regulated utilities, while also providing meaningful transparency and accountability to ensure that utilities faithfully apply these requirements. In addition, CBD recommended that the Commission make several revisions to the Proposed Rules that it believes are vital to carry out the Commission’s goals. The revisions recommended by CBD are as follows:

- (1) Revise the definition of “lobbying” to add the phrase “policy research to support lobbying,” and add the word “donations” to the activities included in developing goodwill;
- (2) Add to the “lobbying” exclusions paragraph the phrase “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”;
- (3) Revise the definition of “charitable contribution” by substituting the word “entity” for the word “person”;
- (4) Revise the definition of “political contribution” by substituting the phrase “an elected public official, a candidate for public office, or a political party” for the phrase “the election or re-election of an elected public official or a candidate for public office”;
- (5) Add to the definition of “political contribution” the following definition: “‘indirect expenditure’ means funds provided to a trade association or other nonutility organization that engages in political advertising, lobbying, political contributions, or charitable contributions”;

- (6) Add “indirect expenditure” to the costs prohibited under Rule R12-13; and
- (7) Add the phrase “shall include precise hourly records of the lobbying activities of each of its employees and its affiliate employees” to the second sentence in Rule R12-13(a).

According to CBD, in order to protect ratepayers’ First Amendment rights the Commission must expand the scope of its rules to bar any ratepayer funds being paid to third-party entities — such as the Edison Electric Institute (EEI) — that engage in lobbying or political activities, regardless of how the specific funds provided by the utility are being used by the third-party. In support of this position CBD cited, as Petitioners had likewise done in their original petition, *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. \_\_\_\_, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018) (*Janus*). CBD contended that although 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. CBD stated that this point is the basis for CBD’s proposal to add “indirect expenditures” as costs to be excluded from a utility’s cost of service.

With regard to its proposed changes to the definition of lobbying, CBD stated two reasons for the proposed changes: (1) policy research and the preparation of policy papers, comments, and other documents is one means by which organizations support their lobbying efforts, and (2) 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. According to CBD, the Commission’s proposed definition of “political contribution” addresses that concern from the standpoint of elected officials and candidates, but does not 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, CBD proposed adding the word “donations” to the lobbying definition, as well as adding to the lobbying definition exclusions paragraph the phrase “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.” CBD stated that this change 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.

Further, to clarify that the scope of prohibited political contributions made through third parties is as broad as direct contributions to candidates, CBD recommended the addition of the phrase “an elected public official, a candidate for public office, or a political party” in substitution for the phrase “the election or re-election of an elected public official or a candidate for public office.” CBD stated that this change would make the language at the end of this provision parallel to the language used at the beginning, which would clarify the Commission’s intent to prohibit contributions to entities who in turn are supporting political parties.

## **Vote Solar**

Vote Solar applauded the Proposed Rules Order for clarifying that dues to trade associations and other groups should provide a clear benefit to North Carolina ratepayers in order to be included in rates. It requested that proposed Rule R12-13 be modified to create a presumption of disallowance of organizational dues paid by utilities to organizations engaged in lobbying, public influence campaigns, and other activities identified by the Commission as activities not to be funded by ratepayer dollars by adding a new subsection (e), as follows:

(e) Expenditures made by an electric, natural gas, water or sewer utility for membership dues to an organization shall be presumed to be prohibited under subsection (a) if any part of the dues paid to the organization is used for lobbying, a charitable contribution, political or promotional advertising, or a political contribution. A utility may overcome a presumption that organizational dues are not recoverable from ratepayers by showing through clear and convincing evidence the portion of membership or organizational dues paid that provide direct benefits to the utility's ratepayers and are not otherwise prohibited.

Vote Solar stated that some legitimate research and advancements toward best practices on cutting edge issues might occur at organizations like the Electric Policy Research Institute (EPRI), and to a lesser extent EEI, but it is important to parse out what portion of a utility's total dues are being used for edifying purposes versus impermissible and unrecoverable purposes. In addition, Vote Solar proposed that to overcome its proposed presumption a utility should be required to produce records of specific expenses undertaken by an organization that provide clear and direct benefits to North Carolina ratepayers, and it maintained that this treatment would be consistent with the traditional burden of proof for cost recovery of a utility's expenses. It cited a recent decision by the California Public Utilities Commission in support of this contention. California P.U.C. Docket No. A.16-09-001, Decision No. D.19-05-020, at 250 (May 24, 2019).

## **Robert Hall**

Mr. Hall stated that he has been involved in numerous utility rate cases and worked on lobbying and campaign finance issues with Democracy North Carolina. He cited several cases, including *Janus*, that he contended essentially ban a government agency from forcing people to pay for policy advocacy, propaganda, or political activities that they do not voluntarily support. However, he also stated that in practice the Commission honors the compelled speech doctrine by refusing to allow utilities to charge ratepayers for the utilities' lobbying expenses, political contributions, or advertising that does not serve the public interest, and that the Commission's Proposed Rules Order is based on the proper conclusion that such expenditures are not costs that are necessary for a utility to provide adequate, reliable, and economical service. Nonetheless, he opined that the definitions in the Commission's Proposed Rules may be too narrow, or may create loopholes for the utilities to exploit. For example, Mr. Hall stated that in his opinion,



“political” activity is not simply electoral, but also includes promoting positions on controversial topics and issue advocacy, which should be broadly defined. He stated that the Commission has adopted a broad understanding of “political” in the current version of Commission Rule R12-12(b), where “political advertising” is defined to include “any advertising for the purpose of influencing public opinion . . . with respect to any controversial issue of public importance,” and, by contrast, the new definitions in the proposed rules that heavily restrict the meaning of political speech and issue advocacy are too limited and vulnerable to unintended consequences that will have a negative impact on ratepayers.

Mr. Hall recommended the following revisions to the Commission’s Proposed Rules:

- (1) Add a presumption that a utility’s expenditures related directly or indirectly to contributions, gifts, lobbying, advertising, political spending, policy advocacy, public relations, community service and membership dues are presumed to be unrecoverable from ratepayers unless the utility demonstrates that they are necessary for the utility to fulfill its legal duty and core operational functions;
- (2) Add to the lobbying definition “solicitation of others” to lobby [from N.C. Gen. Stat. §120C-100(36)], and “advocacy communications with the public”;
- (3) Add clarity to the undefined terms “designated individual” and “obtaining services of another person”;
- (4) Revise the definition of “charitable contribution” by deleting “charitable,” deleting “nonprofit” to describe some recipients, and by adding a broad statement about transactions that are in fact gifts;
- (5) Expand the definition of “promotional advertising” to include “any advertising for the purpose of promoting the utility’s image, reputation, responsiveness, community service, customer or workforce satisfaction, corporate mission or investment value”;
- (6) Add “and Other Expenses” to the title of Rule R12-13; and
- (7) Revise the definition of “political contribution” to be “political spending,” and expand the scope of the definition, as follows:
  - (f) ~~“Political contribution spending” 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 the election or re-election of an elected public official or a candidate for public office.~~ given or expended for the purpose of influencing the

political process or for supporting another entity to influence the political process. The political process includes candidate selection, voter persuasion, elections outcomes, and all aspects of the electoral process; issue advocacy and influencing the public about controversial topics; support or opposition of an elected or appointed public official, a candidate for public office or a political party; and communications to members of the public about the positive or negative attributes or actions of an elected or appointed public official, candidate for public office, or a political party.

Finally, Mr. Hall stated that his proposed revisions are not for the purpose of banning a utility's speech or spending, nor for requiring disclosure with a penalty for failure to disclose; but are for the purpose of defining expenses that should not be recovered from ratepayers, which provisions should be appropriately broad in scope.

### **Robert Rutkowski**

Mr. Rutkowski made some general comments about the proposed lobbying rules, and stated that the Commission should strengthen the Proposed Rules by closing loopholes. Specifically, he recommended that the Commission revise the definition of lobbying to match the federal definition.

### **Public Staff**

The Public Staff agreed with the Commission that it would be helpful to clarify the rules regarding what constitutes lobbying, charitable contributions, and political contributions, and to explicitly exclude from recovery the costs of such activities. The Public Staff stated that most of its recommended changes to the Proposed Rules are for readability and clarity. Moreover, the Public Staff maintained that at a minimum the rule changes should conform to prior Commission decisions regarding the exclusion of these costs. As an example, the Public Staff cited several decisions in which the Commission excluded image and competitive advertising expenses, advertising that was not related to the provision of safe and reliable electric utility service, from recovery as part of the utility's cost of service. The Public Staff recommended the following underlined changes to the definition of "promotional advertising" in Rule R12-12(c) that it stated would conform the definition to the Commission's decisions:

(c) "Promotional advertising" means any of the following: i) advertising for the purpose of encouraging any person to select or use the service or additional service of any utility or the selection or installation of any appliance or equipment designed to use such utility's service, where such appliance, equipment, or service would promote or encourage indiscriminate and wasteful consumption of energy contrary to subsection (d)(5) of this rule; [iii] advertising intended to enhance the utility's image or to achieve other objectives not related to the provision of utility service;

iii) advertising intended to compete with other utility service providers for additional customers or load.<sup>1</sup>

In addition, the Public Staff recommended the following changes to the Commission's Proposed Rules.

- (1) Revise the definition of "advertising" to include all means of communication, which would include electronic media;
- (2) Delete "controversial" from the definition of "political advertising" because an issue of public importance does not need to be controversial to be political;
- (3) In the definition of "lobbying" include definitions of the terms "designated individual" and "public servant" as they are defined in the General Statutes;
- (4) Add a requirement in Rule R12-13(a) for the utility to maintain detailed records to enable the Commission and parties to determine whether the utility has complied with the certification that its costs do not include expenditures for lobbying, political contributions, political or promotional advertising, or charitable contributions; and
- (5) Add to Rule R12-13(c) the phrase "or may otherwise be inappropriate or unreasonable to recover from ratepayers" as a further exception to Rule R12-12(g) allowing cost recovery for certain advertising costs.

## **Duke**

Duke filed a letter with the Commission stating that it had no objection to the Commission's Proposed Rules, but that it reserved the right to file reply comments.

## **DENC**

DENC stated that it supports the Commission's Proposed Rules as they reflect a codification of the Commission's long-standing treatment of lobbying and other utility expenditures, and are consistent with how DENC has accounted for such expenditures in recent rate cases. In addition, DENC recommended that the title of Rule R12-13 be amended to read "Advertising, Lobbying, Charitable Contributions, and Political Contributions by Electric, Natural Gas, Water and Sewer Utilities."

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<sup>1</sup> The Commission's Proposed Rules did not make any changes to Rule R12-12(c).

## **SUMMARY OF REPLY COMMENTS**

### **Petitioners**

Petitioners stated that they support the changes to the Commission's Proposed Rules recommended by the Public Staff; Vote Solar, and CBD. In addition, Petitioners supported the consumer statement of position filed by Mr. Hall, especially his proposed revision to and expansion of the definition of "political contribution." Further, Petitioners stated that they do not object to the proposal by DENC to change the title of Rule R12-13. Moreover, Petitioners stated that there is widespread consensus among the utilities that the Commission's Proposed Rules are not objectionable, and there is widespread consensus among stakeholders that the Commission's Proposed Rules are both helpful and important. Petitioners also included a report entitled "Strings Attached" to highlight the charitable giving of public utilities and to illustrate the need for clear rules governing political, charitable, and other such expenditures. Finally, Petitioners requested that the Commission adopt the Commission's Proposed Rules with the revisions proposed by Petitioners, the Public Staff; Vote Solar, CBD, and Mr. Hall.

### **CBD**

CBD stated that to the extent the further amendments proposed by other parties are consistent with or complement those of CBD, it had no further comment to offer. However, it reiterated its position that all utility payments to trade and research organizations should be excluded from the utilities' cost of service, not merely the portion of such payments attributable to the organization's lobbying efforts and other proscribed activities. In addition, CBD contended that the following three developments further support its position: (1) on December 3, 2019, Duke Energy Corporation submitted comments supporting new regulations proposed by the Federal Energy Regulatory Commission (FERC) that, as the dissenting FERC Commissioner explained, "would effectively gut" the Public Utility Regulatory Policies Act of 1978. Notice of Proposed Rulemaking Under PURPA, 84 Fed. Reg. 53,246, 53,272 (Oct. 4, 2019); (2) a new report entitled "Strings Attached: How utilities use charitable giving to influence politics and increase investor profits" (Dec. 2019), by the Energy and Policy Institute, that details ways that utilities rely on charitable spending, and further supports the Commission's proposed limitations on including charitable contributions as a cost of utility service; and (3) a new report entitled "American Utilities and the Climate Change Countermovement: An Industry In Flux" (Dec. 2019), by the Brown Climate and Development Lab, that details the activities of trade associations like EEI, and discusses the manner in which utilities, including North Carolina utilities, rely on the advocacy of these groups to engage in lobbying and other political activities on their behalf.

### **Robert Hall**

Mr. Hall stated that he agrees with the Public Staff's recommendation that the phrase "designated individuals" in the definition of "lobbying" should be defined, but that the Public Staff's definition of the phrase is too narrow because it would cover state

officials, not local officials. He recommended that at a minimum it should be revised to read, "For purposes of this subsection, 'designated individual' means a legislator, legislative employee, public servant, local elected official or appointee of a local election official. 'Public servant' means those persons as defined in Chapter 138A of the General Statutes." Mr. Hall stated that he supports the other recommendations of the Public Staff, but continues to believe that the definition of "political contribution" is too narrow. He stated that another option for the Commission is to jettison the definitions of lobbying and political contributions and focus on developing a strong policy statement prohibiting ratepayer funding of all activities that do not relate to the provision of safe, adequate, and reliable utility service.

## **Duke**

Duke reiterated that it has no objection to the Commission's Proposed Rules. Further, Duke added that DEC, DEP, and Piedmont participate in public discourse on important policy matters that affect their customers, and that the money used to fund all of these efforts is currently, and will continue to be, provided from shareholder funds, not customers payments, in accordance with the Commission's prior decisions and the companies' existing accounting practices.

Duke stated that it does not object to the Public Staff's proposed changes, except for the proposed addition of the phrase "or may otherwise be inappropriate or unreasonable" at the end of Rule R12-13(c). Duke submitted that this language is vague and overly expansive, and that it could potentially contradict the presumption that permissible advertising costs are reasonable operating expenses, as is provided in Rule R12-13(c). Duke recommended that if the Commission finds some additional language necessary that the Commission add the phrase "or are otherwise inconsistent with the public interest," which Duke asserted is supported by caselaw under the Public Utilities Act (Act).

Duke set forth several specific objections to the Petitioners' recommendations and stated that the revisions proposed by Petitioners are contrary to the Commission's detailed legal holding in the Proposed Rules Order and, therefore, should be rejected.

With regard to CBD's initial comments, Duke submitted that CBD's recommendation that the Commission expand the scope of its regulatory authority to bar all utility funding of third-party entities such as EEI is overreaching and not supported by *Janus*, contrary to CBD's contentions. Duke quoted portions of the Commission's Proposed Rules Order in support of its position.

Duke further maintained that the Commission should reject Petitioners' recommended additions to the definition of "lobbying" in Rule R12-12(d), (f), and (i), as well as associated changes to Rule R12-13. Duke opined that Petitioners are seeking to establish different lobbying definitions and prohibitions beyond those in existing North Carolina law and regulated by the Secretary of State and Ethics Commission. In addition, Duke stated that the Commission previously rejected a similar argument in its Proposed

Rules Order and cited verbatim a quotation from that portion of the order. Duke asserted that the Commission should incorporate only existing state law definitions of lobbying into the Commission's rules. Moreover, Duke made similar points with respect to Vote Solar's proposal that the Commission adopt a new subsection (e) to Rule R12-13 that would establish a rebuttable presumption that any expenditures paid by a public utility to a trade group are presumed impermissible "if any part of the dues paid to the organization is used for lobbying, a charitable contribution, political or promotional advertising, or a political contribution." Further, Duke pointed out that the utilities have the burden of proof in recovering their reasonable and prudent costs to serve customers in general rate cases, rendering Vote Solar's proposed presumption unnecessary.

In response to Petitioners' recommendation that the word "nonprofit" be removed from the definition of "charitable contribution," Duke stated that such a change would be inconsistent with IRS regulations that require that a qualified charitable organization is a nonprofit organization that qualifies for tax exempt status under section 501(c)(3) of the IRS Code. In addition, Duke contended that Petitioners' proposal is another improper attempt to limit a utility's discretionary spending, an attempt that the Commission found not supported by authority, and not to be accepted.

Finally, Duke stated that revising the Commission's rules to authorize a penalty for a violation of the certification required under Rule R12-13(a) is not necessary as the Commission already has authority pursuant to N.C.G.S. § 62-310 to enforce a utility's violations of the provisions of the Act, as well as the Commission's rules and orders.

In conclusion, Duke requested that the Commission not adopt the recommendations proposed by intervenors other than the Public Staff.

## **DENC**

DENC stated that generally it does not object to the Public Staff's initial comments, but finds the Public Staff's proposed modification to Rule R12-13(c) problematic. It opined that the Public Staff's proposed phrase "or may otherwise be inappropriate or unreasonable" is vague and could be interpreted to imply that nonpolitical and nonpromotional advertising costs are not reasonable operating costs and that a utility should not be able to include them in its cost of service. DENC stated that these costs are reasonable operating costs and should be included in a utility's cost of service. Further, DENC contended that if the Commission determines that additional phrasing is needed, the Commission should add the phrase "or are otherwise inconsistent with the public interest," as this language would harmonize the language of the rule with the traditional legal basis in caselaw under the Act.

DENC stated that through their initial comments Petitioners, CBD, and Vote Solar seek to greatly expand the Commission's proposed rule modifications and impose new requirements and burdens of proof. It contended that many of these recommendations would disallow DENC's recovery of costs that benefit North Carolina customers and appear to attack expenses that are paid for by DENC's shareholders. In addition, DENC

stated that it has not attempted to respond to each point raised by Petitioners. DENC provided the following comments on the positions taken by Petitioners, CBD, and Vote Solar that most concern DENC and recommended that the Commission not adopt those positions.

***DENC Already Excludes Lobbying Costs from Membership Dues in Industry Organizations***

According to DENC, recommendations to expand the definition of “lobbying” to disallow recovery of industry organization membership dues, or to establish a presumption that all such dues are disallowed, are overly broad, vague, and unnecessary. Moreover, DENC maintained that these changes would impermissibly encroach on the utilities’ First Amendment rights in that they would completely restrict the utilities’ ability to participate in “meetings, correspondence, and other communications with legislative or executive officials” based solely on the fact that those officials have some “influence [on] legislative or executive action.” CBD Initial Comments at 3. DENC stated that it agrees with the Commission’s statement in the Proposed Rules Order that “the utilities’ public affairs departments serve the vital purpose of maintaining lines of communication with local and state government officials on such matters as outages and safety” and support its conclusion that the utilities should be permitted to both continue this work and recover the cost of performing it. Proposed Rules Order at 13.

DENC further stated that when organizations such as EEI submit a membership dues invoice the invoice segregates the percentage of the dues attributable to lobbying and the percentage of the dues attributable to other services that the organization provides to the benefit of North Carolina customers, and that DENC does not include the percentage of the membership fee attributable to lobbying in their cost of service. DENC provided examples of activities and information provided by trade organizations that DENC contended benefit North Carolina customers.

DENC also opposes Petitioners’ recommendation for Commission authority to impose a penalty for violation of the Rule R12-13 requirement for certification that the utilities’ rate case application does not include prohibited costs. DENC stated that the Commission already has the authority to impose a penalty pursuant to N.C.G.S. § 62-310, which gives the Commission the authority to enforce violations of the Act or a failure to comply with the Commission’s orders or rules.

***No Additional Phrasing Is Needed in the Definitions of Political or Charitable Contributions***

DENC contended that proposals to broaden the definitions of “political contribution” and “charitable contribution” would serve only to muddle what are otherwise clear definitions that do not need to be modified. In addition, DENC stated that it already excludes political and charitable contributions from its cost of service, and that it pays these expenditures with shareholder funds.

### ***Filing Comments in Regulatory Proceedings Is Not Lobbying***

DENC stated that CBD's proposal that a utility's time and expense spent on comments, such as those on the North Carolina Department of Environmental Quality's Clean Energy Plan, should not be included in cost of service should likewise be rejected. DENC contended that CBD appears to have an overly broad definition of what constitutes a "controversial issue of public policy," and that such an overly broad definition could implicate the numerous regulatory filings utilities make in the regular course of business.

### ***The Commission's Proposed Rules Do Not Violate the First Amendment***

DENC stated that CBD erroneously contended that in the Proposed Rules Order the Commission failed to address Petitioners' argument that the First Amendment prohibits utilities from making any payments to outside groups that engage in lobbying or political activities as part of the cost of service paid by ratepayers. DENC cited a portion of the Proposed Rules Order that it maintained addressed this contention and rejected it.

Finally, DENC requested that the Commission consider its reply comments and reject the additional modifications and additions to the Proposed Rules recommended by Petitioners, CBD, and Vote Solar, and either reject the Public Staff's proposed addition to Rule R12-13(c) or accept DENC's alternative language.

## **DISCUSSION AND CONCLUSIONS**

### **Standard of Review**

Pursuant to N.C.G.S. §§ 62-23 and 62-31, the Commission has authority to make and enforce rules for the implementation of the Act. Specifically, N.C.G.S. § 62-23 states, in pertinent part:

The Commission is hereby declared to be an administrative body or agency of the General Assembly created for the principal purpose of carrying out the administration and enforcement of this Chapter, and for the promulgation of rules and regulations and fixing utility rates pursuant to such administration.

Further, the adoption of rules is an administrative agency function within the sound discretion of the Commission. *State ex rel. Utils. Comm'n v. Public Staff – North Carolina Utils. Comm'n*, 123 N.C. App. 623, 627, 473 S.E.2d 661, 663 (1996).

Pursuant to N.C.G.S. § 62-130 the Commission is required to set just and reasonable rates. The basic guidelines for setting a utility's general rates are found in N.C.G.S. § 62-133. As the Supreme Court has held:

[I]n sum, the fixing of "reasonable and just" rates involves a balancing of shareholder and consumer interests. The Commission must therefore set rates which will protect both the right of the public utility to earn a fair rate



of return for its shareholders and ensure its financial integrity, while also protecting the right of the utility's intrastate customers to pay a retail rate which reasonably and fairly reflects the cost of service rendered on their behalf.

*State ex rel. Utils. Comm'n. v. Nantahala Power & Light Co. (Nantahala)*, 313 N.C. 614, 691, 332 S.E.2d 397, 474 (1985); *rev'd on other grounds*, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986); *appeal after remand*, 324 N.C. 478, 380 S.E.2d 112 (1989).

The touchstone of the rate setting balance is determining what costs of the utility are necessary and reasonable for the purpose of providing safe, adequate, and reliable service. Pursuant to N.C.G.S. § 62-133 those costs are recoverable from the utility's ratepayers. Further, as fully discussed in the Proposed Rules Order, a utility's authorized rate of return on its rate base is a part of the utility's cost of service, and once earned a utility's return is the property of the utility to be used for any lawful purpose.

There are some utility costs that are undeniably appropriate for inclusion in the utility's cost of service and some that, although reasonable business expenditures, are undeniably inappropriate for inclusion in the utility's cost of service. The Commission's challenge is to address those that fall into the gray area between these two markers. In the present rulemaking docket the Commission's intent is to adopt amended rules having substantive details that help meet that challenge for advertising, lobbying, charitable, and political expenditures by electric, natural gas, water, and sewer utilities.

The Commission appreciates the time and effort expended by all the parties in this matter. The Commission finds the comments, reply comments, and proposed rule revisions submitted by the parties very helpful, and it has carefully considered all initial and reply comments and proposed revisions to the Commission's Proposed Rules. In this Order, however, the Commission will not address every detail and contention made in every comment, reply comment, and proposed rule revision.

## **Rule R12-12**

The Public Staff is the party charged with the legal responsibility of auditing the utilities' costs and recommending to the Commission which costs should be disallowed. After decades of experience combing through the utilities' cost of service records, the Public Staff certainly has the requisite experience to know what is needed from the utilities in order to thoroughly and efficiently audit the utilities' costs. In addition, all parties accepted the Public Staff's recommended revisions, except for one that was contested by Duke and DENC. As a result, the Commission gives substantial weight to the Public Staff's recommended revisions to the Commission's Proposed Rules.

The Commission concludes that the Public Staff's proposed revisions to Rule R12-12 are appropriate and accepts all of them, with a modification of the Public Staff's proposal to add to the definition of "lobbying" the definitions of "designated individual" and "public servant" from N.C.G.S. § 120C-100. The Public Staff's recommendation is a

good one, and it captures in part the Commission's unexpressed intent to include in the lobbying definition the definitions of all related words and phrases included in the lobbying statute.

Further, the Commission appreciates Mr. Hall's experience in rate cases and related matters, and the Commission has given his points and recommended rules revisions material weight. In particular, the Commission finds persuasive Mr. Hall's recommendation to add the phrase "or that individual's agent" to the definition of "designated individual." Therefore, the Commission will add the following statement as the last sentence in Rule R12-12(d): "For purposes of this subsection, the definitions of words and terms in G.S. 120C-100 shall apply, unless modified by these rules." The modification to the lobbying statute definitions that the Commission finds appropriate is to expand the definition of "designated individual," which is defined in the statute as "a legislator, legislative employee, or public servant." N.C.G.S. § 120C-100(a)(3). The Commission concludes that the definition should be expanded to include state, local, and federal bodies, their employees and agents, as follows:

For purposes of this definition, "designated individual" means a public servant, a state, local, or federal legislative or executive official or the official's employing agency, and any such official's or agency's employee or agent.

The Commission's intent is to prohibit utilities from recovering from ratepayers their costs of lobbying by any means of communication, and whether the lobbying costs were incurred in attempting to influence the views of state, local, or federal legislative or executive officials, including a legislative body as a whole, and the employees or agents of said body.

Moreover, the Commission concludes that it is appropriate to create an exception to the prohibition for recovery of lobbying costs where the costs are incurred for advocacy directed to executive branch agencies and designated individuals employed by executive branch agencies if the advocacy activity is conducted primarily for the benefit of the utility's ratepayers, or to enhance the utility's service to ratepayers. The Commission recognizes that there are situations in which a utility's communications with an executive agency or executive official on such matters as the State Energy Plan and Executive Orders addressing the delivery of utility service can be very helpful to both the agency and the utility's provision of safe and reliable service. The Commission does not want to stymie or curtail such appropriate communications by denying recovery of the costs of same from ratepayers when such recovery is appropriate. As a result, the Commission will add the following subsection (e) to Rule R12-13:

(e) Expenditures made by an electric, natural gas, water, or sewer utility for lobbying activities directed at executive branch agencies or designated individuals at executive branch agencies may be considered by the Commission to represent reasonable operating expenses, in whole or in

part in the Commission's discretion, to the extent, but only to the extent, that it can be established, on a case-by-case basis, that —

- (1) the lobbying activity is conducted primarily for the benefit of the using and consuming public, or
- (2) the lobbying activity is conducted primarily for the purpose of enhancing the ability of the public utility to provide efficient and reliable service to its customers.

At the same time, the Commission finds it appropriate to require that this lobbying exception and the costs to be recovered thereunder be fully supported by the utility. Therefore, the Commission will add the following language to the general certification and proof requirements of Rule R12-13(a):

The utility shall maintain detailed records sufficient, and no less than what would be maintained in the absence of such certification, to allow the Commission and parties to determine whether the utility has complied with this subsection, including the executive branch agencies contacted, the individuals contacted at the executive branch agencies, the subjects of discussion, and the amount of person-hours spent in preparation for and in the discussions.

In addition, the Commission finds persuasive Mr. Hall's recommendation, which was concurred with by Petitioners, to revise the definition of "charitable contribution" by deleting the word "nonprofit" to describe recipients. The Commission's intent is to prohibit the recovery from ratepayers of all money and property transferred to an organization or individual by a utility where the recipient does not provide property or a service used or reasonably needed by the utility for the provision of utility service. The Commission agrees with Mr. Hall and Petitioners that in this context the person receiving the money or property need not be a nonprofit person or organization. However, the Commission reiterates its intent to allow utilities to continue recovering from ratepayers that portion of trade organization membership dues for groups like EEI and EPRI that are attributable to research, best business practices, and other educational purposes, as well as other activities of the organization that benefit ratepayers, while denying recovery of any portion of the membership dues attributable to 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.

Duke objected to removal of the word "nonprofit" from the definition of charitable contribution based on the fact that IRS guidelines require the person receiving the contribution to be a 501(c)(3) entity in order for the contributor to deduct the contribution from the contributor's income taxes. The Commission acknowledges that to be the rule for both federal and North Carolina income tax purposes. However, the Commission's focus is on disallowing all contributions by a utility that are not necessary and reasonable to enable the utility to provide service to its ratepayers. Whether a contribution to be

excluded from the utility's cost of service is tax deductible is more the utility's concern, not that of the Commission.

The Commission is not persuaded that the additional language recommended by Mr. Hall for inclusion in the definition of "charitable contribution" is needed. For example, Mr. Hall recommended adding the following words to the list of types of charitable organizations:

policy formation, entertainment, community or economic development, social service.

The Commission agrees that these words generally describe additional organizations whose purposes are not directly related to a utility's provision of utility service, and that contributions to these organizations typically will not be allowed in a utility's cost of service as costs to be recovered from ratepayers. On the other hand, there are a myriad of other such organizations that could be added to the list, but without any clarifying benefit. Rather than cluttering the definition with an attempt to mention every conceivable organization not directly related to the provision of utility service, the Commission concludes that the current list is reasonably sufficient as an example of the types of charitable organizations that illustrate the intent of the definition.

In addition, Mr. Hall recommended adding a broad statement about additional transactions that he contended are in fact gifts, as follows:

A contribution includes a transfer of funds without receiving full and adequate commercial value.

Similarly, the Commission agrees that these words generally complement the purpose of the definition of "charitable contribution," but provide no additional clarity. In the context of money or property transferred to another person, the words "contribution" and "donated" are universally understood to mean a transfer without consideration, or without adequate consideration. In contrast, if the transferor receives "full and adequate commercial value," the transferor has made a sale or other commercial exchange for consideration, not a contribution or donation.

Moreover, the Commission declines to adopt the remainder of Mr. Hall's recommendations for two reasons. First, the substance of several of the remaining recommendations are covered by the Public Staff's proposed revisions that the Commission is adopting. Second, the remainder of Mr. Hall's recommendations would not add substance or clarity to the Proposed Rules. For example, Mr. Hall recommended adding to the definition of lobbying the phrases "solicitation of others" to lobby (from N.C.G.S. § 120C-100(36)), and "advocacy communications with the public." The Commission has addressed the need for the first recommended phrase in subdivision (d)(3) of Rule R12-12, the definition of lobbying, which the Commission has revised to include "obtaining the services of another person, including through membership in a trade or other organization, to engage in any of the [lobbying] activities identified in (1) or (2)." With respect

to Mr. Hall's second recommended phrase, "advocacy communications with the public," the Commission deems any such communications with the public as being encompassed in the definition of "political advertising," and in the lobbying description phrase "obtaining the services of another person."

Likewise, the Commission declines to adopt the remaining changes to Rule R12-12 recommended by Petitioners, CBD, and Vote Solar, being those changes not encompassed in the Public Staff's or Mr. Hall's revisions and accepted herein. These remaining changes are essentially the same as those of Mr. Hall that the Commission has declined to accept, or are unnecessary changes that simply add surplusage.

In addition, with respect to CBD's and Vote Solar's recommendations for revisions to Rule R12-12, their position that all dues paid by a utility for trade and research organization membership should be disallowed was rejected by the Commission in its Proposed Rules Order, wherein the Commission discussed the ways in which a utility's membership in such groups is beneficial to customers, and can be "well worth the dues paid, both for the utilities and their ratepayers." Proposed Rules Order at 14. Similarly, Vote Solar's proposed addition to Rule R12-13 to create a presumption of disallowance of all membership dues is contrary to the Commission's above rationale, and unnecessary. The utilities have the burden of proving by competent, material, and substantial evidence that their costs were prudently incurred and reasonable. N.C.G.S. §§ 62-65, 62-75, and 62-133. Encompassed within these standards is the requirement that the utility prove that its expenditures were for the purpose of providing safe, adequate, and reliable service. To increase the standard by a presumption of disallowance against the utility is not necessary, and could be an unfair burden of proof on the utility.

In essence, CBD and Vote Solar are requesting reconsideration of the Commission's conclusions in the Proposed Rules Order on the legitimacy of the utilities' memberships in trade and research organizations for purposes that benefit not only the utilities but their ratepayers as well. However, CBD and Vote Solar have merely repeated the same arguments under *Janus* and its progeny that the Commission fully addressed in the Proposed Rules Order. Thus, they have not shown the grounds required under N.C.G.S. § 62-80 for the Commission to amend or rescind its prior order. As a result, their recommendations are not accepted.

Further, the Commission is not persuaded that it should accept Petitioners' recommendation to adopt a portion of the IRS Code's definition of "lobbying" for two reasons. First, the definition of lobbying in the North Carolina General Statutes is fully adequate for application to North Carolina's regulated utilities, with the additional provision added by the Commission as Rule R12-12(d)(3). Second, the Commission has concerns that adoption of a portion of the IRS Code brings with it the interpretations and opinions issued by the IRS and other federal agencies in an effort to define "lobbying" in every state, rather than being specifically focused on North Carolina.

## Rule R12-13

The Commission concludes that the Public Staff's proposed revisions to this rule are helpful and accepts all of them, except the Public Staff's proposal to add to Rule R12-13(c) the phrase "or may otherwise be inappropriate or unreasonable to recover from ratepayers" as a further exception to the Commission allowing recovery of a utility's nonpromotional advertising costs. Duke and DENC objected to this addition on grounds that it was vague, and recommended an alternative phrase stating "or are otherwise inconsistent with the public interest." They opined that their recommended language would harmonize the language of the rule with the traditional legal basis in caselaw under the Act for allowing or disallowing costs. The Commission concludes that there is no need to add further limiting language to its Proposed Rule R12-13(c), which presently states:

Expenditures made by an electric, natural gas, water, or sewer utility for the types of advertising described in Rule R12-12(g) will generally be deemed to be reasonable operating expenses, provided however, that the Commission shall not be precluded from determining, on a case-by-case basis, the extent to which such expenditures may have exceeded a reasonable level or amount.

Subdivisions (1) through (6) of Rule R12-12(g) list several types of utility advertising or information distribution, including information about service interruptions, safety, employment opportunities, and conservation. The introductory phrase to this list states, "The terms 'political advertising,' and 'promotional advertising' as defined hereinabove do not include:" Thus, the combined purposes of Rules R12-12(g) and R12-13(c) are (1) to state several utility advertising activities that the Commission has concluded are in the public interest, the costs of which "generally" are properly included in the utility's cost of service, and (2) to reserve to the Commission the authority to determine that a particular cost, even though it falls within the Rule R12-12(g) categories, is excessive. In addition, as discussed previously, the Commission's overarching goal is to set just and reasonable rates, i.e. rates that serve the public interest. As a result, there is no need to further define or limit the Commission's authority to review under Rule R12-13(c) a utility's costs under Rule R12-12(g) that are "generally" considered to be appropriate for recovery from ratepayers.

However, the Commission is concerned that the present language of Rule R12-13(d) requires clarification in order to better define the scope of that exception to the prohibition on cost recovery. The Commission finds it appropriate to add the phrase "in whole or in part in the Commission's determination" to the opening sentence of the subsection. Further, to reiterate the Commission's intent that such advertising must directly benefit ratepayers the Commission will add the word "primarily" to subdivision (d)(1). With these two changes the full subsection will read:

(d) Expenditures made by an electric, natural gas, water, or sewer utility for advertising of a type or nature other than that described in subsections (b), (c), or (g) of Rule R12-12 or for other nonutility advertising shall be considered by

the Commission to represent reasonable operating expenses, in whole or in part in the Commission's determination, to the extent that it can be established, on a case-by-case basis, that —

- (1) the advertising is primarily of benefit to the using and consuming public, or
- (2) the advertising enhances the ability of the public utility to provide efficient and reliable service.

The Commission has carefully considered the additional revisions to Rule R12-13 proposed by the parties and concludes that those additional revisions are largely wordsmithing or surplusage that would not add substance to the rules. As a result, the Commission is not persuaded that those revisions are appropriate. For example, adding language such as "shall include precise hourly records of the lobbying activities of each of its employees and its affiliate employees" would be superfluous. As previously noted, the utility has the burden of proof and must meet its burden of proof with competent, material, and substantial evidence. N.C.G.S. §§ 62-75 and 62-65. Thus, if the utility does not support a particular cost of service with sufficient substantial evidence, then the Commission can disallow that cost. In addition, in the Proposed Rules Order the Commission rejected Petitioners' request that utilities be required to file detailed lobbying reports with the Commission. CBD's request for hourly lobbying records is akin to the lobbying reports found unnecessary by the Commission. Further, such hourly lobbying reports would burden rate case records with hundreds of pages of unnecessary information. Moreover, to the extent that a party believes that a utility's prefiled testimony fails to satisfy the utility's burden of proof the party can request through discovery more specific evidence to support its position. This option is further bolstered by the Commission's adoption of the Public Staff's revision to Rule R12-13(a) requiring the utilities to maintain sufficient records in support of the certification that their filed cost of service does not include prohibited lobbying or advertising expenditures, or other prohibited expenditures.

Finally, the Commission finds no basis for the Petitioners' recommendation to add a penalty for violation of the rule requiring certification that the utilities' rate case application does not include prohibited costs. Such a provision would be duplicative of the Commission's existing authority under N.C.G.S. § 62-310 to impose a penalty for a violation of the Act or a failure to comply with a Commission rule or order.

## **CONCLUSION**

It bears repeating that the touchstone for interpreting and applying the Act and the Commission's rules is a final determination as to what utility costs are necessary and reasonable for the purpose of providing safe, adequate, and reliable service. Where there is gray area in the Act or the rules, this fundamental principle will be the Commission's guiding light.

Based on the foregoing and the record, the Commission finds good cause to adopt as final those changes to Rules R12-12 and R12-13 set forth in the Commission's Proposed

Rules and the further changes accepted herein. The amended rules are attached hereto as Attachment A, with changes shown in a strike-through and underlined version of the Commission's Proposed Rules, and as Attachment B in a clean version of the final rules. Suggestions or comments not specifically discussed herein have been considered and decided as reflected in the final amended rules attached hereto.


The amended rules shall be applicable prospectively to all filings made on and after September 1, 2021.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 10th day of August, 2021.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink that reads "Lindsey A. Worley". The signature is written in a cursive, flowing style.

Lindsey A. Worley, Acting Deputy Clerk



## FINAL RULES

### Rule R12-12. Definitions

For purposes of the rules set forth in this Chapter, the following definitions shall apply:

(a) “Advertising” means the commercial use, by a public utility, of any media, including newspaper, printed matter, bill insert, radio, ~~and~~ television, social media, or other means of communication, in order to transmit a message to a substantial number of members of the public or to such public utility’s customers.

(b) “Political advertising” means any advertising for the purpose of influencing public opinion with respect to legislative, administrative, or electoral matters, or with respect to any ~~controversial~~ issue of public importance.

(c) “Promotional advertising” means any of the following: (1) advertising for the purpose of encouraging any person to select or use the service or additional service of any utility or the selection or installation of any appliance or equipment designed to use such utility’s service, where such appliance, equipment, or service would promote or encourage indiscriminate and wasteful consumption of energy contrary to subsection (d)(5) of this rule, (2) advertising intended to enhance the utility’s image or to achieve other objectives not related to the provision of utility service and, (3) advertising intended to compete with other utility service providers for additional customers or load.

(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 individual’s immediate family, (2) developing goodwill through communications or activities, including the building of relationships, with a designated individual, or that individual’s immediate family, with the intention of influencing current or future legislative or executive action, ~~or both~~, or (3) 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). For purposes of this subsection, the definitions of words and terms in G.S. 120C-100 shall apply, unless modified by these rules.

“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. In addition, “lobbying” shall not include a utility’s participation in judicial or quasi-judicial proceedings in any federal or state court or judicial or quasi-judicial administrative tribunal or commission, or in any other administrative or regulatory proceedings before this Commission, before the Federal Energy Regulatory Commission, or before any other state regulatory agency or commission whose jurisdiction is comparable to this Commission’s jurisdiction.

For purposes of this definition, “designated individual” means a public servant, a state, local, or federal legislative or executive official or that official’s employing agency, and any such official’s or agency’s employee or agent.

(e) “Charitable contribution” means money, services, or a thing of value donated to an ~~nonprofit~~ organization, affiliate of a utility, or other 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 the election or re-election of an elected public official or a candidate for public office.

(g) The terms “political advertising,” and “promotional advertising” as defined hereinabove do not include —

- (1) advertising which informs electric, or natural gas consumers how they can conserve energy or can reduce peak demand for energy, or water or sewer consumers how they can conserve water,
- (2) advertising required by law or regulation, including advertising required under part 1 of title II of the National Energy Conservation Policy Act,
- (3) advertising regarding service interruptions, safety measures (including utility location services), or emergency conditions,
- (4) advertising concerning employment opportunities with such public utility,
- (5) advertising which promotes the use of energy efficient appliances, equipment or services, or appliances, equipment, or services that conserve water, or
- (6) any explanation or justification of existing or proposed rate schedules or billing practices or notifications of hearings thereon.

(h) “Bill insert”

**Rule R12-13 – Advertising, Lobbying, Charitable Contributions, and Political Contributions by Electric, Natural Gas, Water and Sewer Utilities**

(a) Except as may otherwise be permitted by this Rule, in ascertaining reasonable operating expenses pursuant to G.S. 62-133, no electric, natural gas, water, or sewer utility shall be permitted to recover from its ratepayers any direct or indirect expenditure made by such utility for nonutility advertising, or any of the following as defined in Rule R12-12: lobbying, a charitable contribution, political or advertising, promotional advertising, or a political contribution as defined in Rule R12-12, or for other nonutility advertising. In every application for a change in rates, the utility shall certify in its prefiled testimony that its application does not include costs for lobbying, political or promotional advertising, a political contribution, or a charitable contribution. Further, if the utility seeks to recover costs based on an exception under Rule R12-12(g), or under subsections (d) or (e) of this Rule, the utility shall include prefiled testimony stating the amount claimed and the basis for the exception. The utility shall maintain detailed records sufficient, and no less than what would be maintained in the absence of such certification, to allow the Commission and parties to determine whether the utility has complied with this subsection, including the executive branch agencies contacted, the individuals contacted at the executive branch agencies, the subjects of discussion, and the amount of person-hours spent in preparation for and in the discussions.

(b) Political and promotional advertisements as defined by Rule R12-12 and other nonutility advertisements shall be accompanied by the following statement or a statement substantially to the following effect:

THIS MESSAGE IS NOT PAID FOR BY THE CUSTOMERS OF (the electric or natural gas utility sponsoring the advertisement).

This statement shall be so located and of such size so as to be readily visible or audible to those individuals who may be exposed to the advertisement or communication.

(c) Expenditures made by an electric, natural gas, water, or sewer utility for the types of advertising described in Rule R12-12(g) will generally be deemed to be reasonable operating expenses, provided however, that the Commission shall not be precluded from determining, on a case-by-case basis, the extent to which such expenditures may have exceeded a reasonable level or amount.

(d) Expenditures made by an electric, natural gas, water, or sewer utility for advertising of a type or nature other than that described in subsections (b), (c), or (g) of Rule R12-12 or for other nonutility advertising shall be considered by the Commission to represent reasonable operating expenses, in whole or in part in the Commission's determination, to the extent that it can be established, on a case-by-case basis, that —

- (1) the advertising is primarily of benefit to the using and consuming public, or
- (2) the advertising enhances the ability of the public utility to provide efficient and reliable service.

(e) Expenditures made by an electric, natural gas, water, or sewer utility for lobbying activities directed at executive branch agencies or designated individuals at executive branch agencies may be considered by the Commission to represent reasonable operating expenses, in whole or in part in the Commission's discretion, to the extent, but only to the extent, that it can be established, on a case-by-case basis, that —

- (1) the lobbying activity is conducted primarily for the benefit of the using and consuming public, or
- (2) the lobbying activity is conducted primarily for the purpose of enhancing the ability of the public utility to provide efficient and reliable service to its customers.

## FINAL RULES

### Rule R12-12. Definitions

For purposes of the rules set forth in this Chapter, the following definitions shall apply:

(a) “Advertising” means the commercial use, by a public utility, of any media, including newspaper, printed matter, bill insert, radio, television, social media, or other means of communication, in order to transmit a message to a substantial number of members of the public or to such public utility’s customers.

(b) “Political advertising” means any advertising for the purpose of influencing public opinion with respect to legislative, administrative, or electoral matters, or with respect to any issue of public importance.

(c) “Promotional advertising” means any of the following: (1) advertising for the purpose of encouraging any person to select or use the service or additional service of any utility or the selection or installation of any appliance or equipment designed to use such utility’s service, where such appliance, equipment, or service would promote or encourage indiscriminate and wasteful consumption of energy contrary to subsection (d)(5) of this rule, (2) advertising intended to enhance the utility’s image or to achieve other objectives not related to the provision of utility service and, (3) advertising intended to compete with other utility service providers for additional customers or load.

(d) “Lobbying” means (1) influencing or attempting to influence legislative or executive action through direct communication or activities with a designated individual, or that individual’s immediate family, (2) developing goodwill through communications or activities, including the building of relationships, with a designated individual, or that individual’s immediate family, with the intention of influencing current or future legislative or executive action, or (3) 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). For purposes of this subsection, the definitions of words and terms in G.S. 120C-100 shall apply, unless modified by these rules.

“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. In addition, “lobbying” shall not include a utility’s participation in judicial or quasi-judicial proceedings in any federal or state court or judicial or quasi-judicial administrative tribunal or commission, or in any other administrative or regulatory proceedings before this Commission, before the Federal Energy Regulatory Commission, or before any other state regulatory agency or commission whose jurisdiction is comparable to this Commission’s jurisdiction.

For purposes of this definition, “designated individual” means a public servant, a state, local, or federal legislative or executive official or that official’s employing agency, and any such official’s or agency’s employee or agent.

(e) “Charitable contribution” means money, services, or a thing of value donated to an organization, affiliate of a utility, or other 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 the election or re-election of an elected public official or a candidate for public office.

(g) The terms “political advertising” and “promotional advertising” as defined hereinabove do not include —

- (1) advertising which informs electric, or natural gas consumers how they can conserve energy or can reduce peak demand for energy, or water or sewer consumers how they can conserve water,
- (2) advertising required by law or regulation, including advertising required under part 1 of title II of the National Energy Conservation Policy Act,
- (3) advertising regarding service interruptions, safety measures (including utility location services), or emergency conditions,
- (4) advertising concerning employment opportunities with such public utility,
- (5) advertising which promotes the use of energy efficient appliances, equipment or services, or appliances, equipment, or services that conserve water, or
- (6) any explanation or justification of existing or proposed rate schedules or billing practices or notifications of hearings thereon.

(h) “Bill insert”

**Rule R12-13 – Advertising, Lobbying, Charitable Contributions, and Political Contributions by Electric, Natural Gas, Water and Sewer Utilities**

(a) Except as may otherwise be permitted by this Rule, 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 expenditure made by such utility for nonutility advertising, or any of the following as defined in Rule R12-12: lobbying, a charitable contribution, political advertising, promotional advertising, or a political contribution. In every application for a change in rates, the utility shall certify in its prefiled testimony that its application does not include costs for lobbying, political or promotional advertising, a political contribution, or a charitable contribution. Further, if the utility seeks to recover costs based on an exception under Rule R12-12(g), or under subsections (d) or (e) of this Rule, the utility shall include prefiled testimony stating the amount claimed and the basis for the exception. The utility shall maintain detailed records sufficient, and no less than what would be maintained in the absence of such certification, to allow the Commission and parties to determine whether the utility has complied with this subsection, including the executive branch agencies contacted, the individuals contacted at the executive branch agencies, the subjects of discussion, and the amount of person-hours spent in preparation for and in the discussions.

(b) Political and promotional advertisements as defined by Rule R12-12 and other nonutility advertisements shall be accompanied by the following statement or a statement substantially to the following effect:

THIS MESSAGE IS NOT PAID FOR BY THE CUSTOMERS OF (the electric or natural gas utility sponsoring the advertisement).

This statement shall be so located and of such size so as to be readily visible or audible to those individuals who may be exposed to the advertisement or communication.

(c) Expenditures made by an electric, natural gas, water, or sewer utility for the types of advertising described in Rule R12-12(g) will generally be deemed to be reasonable operating expenses, provided however, that the Commission shall not be precluded from determining, on a case-by-case basis, the extent to which such expenditures may have exceeded a reasonable level or amount.

(d) Expenditures made by an electric, natural gas, water, or sewer utility for advertising of a type or nature other than that described in subsections (b), (c), or (g) of Rule R12-12 or for other nonutility advertising shall be considered by the Commission to represent reasonable operating expenses, in whole or in part in the Commission's determination, to the extent that it can be established, on a case-by-case basis, that —

- (1) the advertising is primarily of benefit to the using and consuming public, or
- (2) the advertising enhances the ability of the public utility to provide efficient and reliable service.

(e) Expenditures made by an electric, natural gas, water, or sewer utility for lobbying activities directed at executive branch agencies or designated individuals at executive branch agencies may be considered by the Commission to represent reasonable operating expenses, in whole or in part in the Commission's discretion, to the extent, but only to the extent, that it can be established, on a case-by-case basis, that —

- (1) the lobbying activity is conducted primarily for the benefit of the using and consuming public, or
- (2) the lobbying activity is conducted primarily for the purpose of enhancing the ability of the public utility to provide efficient and reliable service to its customers.