

**FSTATE 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))))))	ORDER DISMISSING PETITION IN PART, GRANTING PETITION TO INTERVENE, JOINING NECESSARY PARTIES, AND REQUESTING COMMENTS
--	----------------------------	---

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.

In summary, Petitioners contended that essentially all funds expended by public utilities for all purposes are funds received from captive retail ratepayers, and, therefore, that captive retail ratepayers are being required to fund the utilities' lobbying, advertising, political, and other activities (discretionary spending). Petitioners submitted that the Commission should adopt rules that prohibit public utilities from recovering discretionary spending from ratepayers, that require public utilities to file an annual report of their discretionary spending, and that 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. The petition included an attachment setting forth proposed rules, and an affidavit in support of Petitioners' proposed rules.

Petitioners acknowledged that the Commission has previously determined that certain discretionary spending by public utilities will not be recovered from ratepayers. Further, Petitioners included statistics about the discretionary spending of the electric investor-owned utilities (IOUs), and Duke Energy Corporation, from 2014 through 2017. Petitioners contended that it is 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.

On February 8, 2019, Petitioners filed Exhibit B to their petition, which Petitioners stated was inadvertently omitted from the petition.

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

On April 18, 2019, the Center for Biological Diversity 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, Petitioners' Response discusses several United States Supreme Court decisions and other court rulings on First Amendment rights of public utilities, ratepayers, union members and nonmembers. Petitioners conclude from the courts' 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.

Moreover, simply preventing the Electric IOUs [footnote omitted] addressed in the Petition from expressly including their political activities in the revenue requirement, while allowing the companies to shift their profits to the parent corporation for those purposes, also would not safeguard the objecting rate-payers' First Amendment rights. Thus, Janus dictates that this Commission promulgate a rule that prohibits electric utilities from spending any ratepayer money on these activities, including recovery of its own operating expenses, and transfer of funds to its parent corporation as a means of circumventing the constitutional rights of ratepayers.

Petitioners' Response, at 10.

Discussion

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 Public Utilities Act (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.

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

Above the Line vs. Below the Line

In typical utility parlance, and as used herein, the term “above the line” means a public utility's costs that are recoverable from ratepayers, if determined to be reasonable and prudent, and “below the line” means a public utility's costs that are not recoverable from ratepayers, even if the costs are reasonable and prudent.

Pursuant to N.C.G.S. § 62-133, public utilities are entitled to the opportunity to earn an authorized return on their assets used and useful, i.e. the utility's rate base, in providing services to ratepayers. In addition, as the Commission discussed in its order deciding the 2013 Duke Energy Progress, LLC (DEP) general rate case in Docket No. E-2, Sub 1023 (DEP Rate Order), there are constitutional constraints upon the Commission's decisions regarding a public utility's rate of return on equity established by the United States Supreme Court in Bluefield Waterworks & Improvement Co., v. Pub. Serv. Comm'n of W. Va., 262 U.S. 679 (1923) (Bluefield), and Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944) (Hope):

To fix rates that do not allow a utility to recover its costs, including the cost of equity capital, would be an unconstitutional taking. In assessing the impact of changing economic conditions on customers in setting an ROE, the Commission must still provide the public utility with the opportunity, by sound management, to (1) produce a fair profit for its shareholders, in view of current economic conditions, (2) maintain its facilities and service, and (3) compete in the marketplace for capital. State ex rel. Utilities Commission v. General Telephone Co. of the Southeast, 281 N.C. 318, 370, 189 S.E.2d 705, 757 (1972). As the Supreme Court held in that case, these factors constitute “the test of a fair rate of return declared” in Bluefield and Hope. Id.

2013 DEP Rate Order, at 29.

In addition, the rate of return on equity is, in fact, a cost of service, i.e. an above-the-line cost. The return that equity investors require represents the cost to the utility of equity capital. In his dissenting opinion in Missouri ex rel. Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n, 262 U.S. 276 (1923), Justice Brandeis remarked upon the lack of any functional distinction between the rate of return on equity (which he referred to as a “capital charge”) and other items ordinarily viewed as business costs, including operating expenses, depreciation, and taxes:

Each is a part of the current cost of supplying the service; and each should be met from current income. When the capital charges are for interest on the floating debt paid at the current rate, this is readily seen. But it is no less true of a legal obligation to pay interest on long-term bonds ... and it is also true of the economic obligation to pay dividends on stock, preferred or common.

Id. at 306 (Brandeis, J. dissenting) (emphasis added). Similarly, the United States Supreme Court observed in Hope, “From the investor or company point of view it is

important that there be enough revenue not only for operating expenses but also for the capital costs of the business ... [which] include service on the debt and dividends on the stock.” Hope, 320 U.S. 591, 603.

Thus, a utility's cost of capital is an above-the-line cost of service. Once determined to be reasonable, placed in the utility's rates, and recovered from ratepayers, this revenue is the property of the utility and its shareholders. Petitioners have cited no authority under the United States Constitution, the North Carolina Constitution, or any statute, and the Commission knows of no such authority, that would allow the Commission to take this revenue from the utility, or to dictate how it is used.

Petitioners contend that the Supreme Court's decision in Janus v. American Federation of State, County, and Municipal Employees, Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924, 585 U.S. __ (2018) (Janus), provides a basis for the Commission to prohibit a public utility from using all revenues received from ratepayers for the utility's and its parent company's discretionary spending. In Janus, the Court addressed a provision in the Illinois Public Labor Relations Act (IPLRA) that allowed public employees, by a majority vote, to designate a union as the exclusive representative of all the employees. In addition, the IPLRA provided that employees who did not join the union were nonetheless required to pay an “agency fee,” which amounted to a percentage of the union dues. The agency fee was intended to cover the collective bargaining services provided by the union, but not other union activities, such as lobbying and support of political candidates. Plaintiffs asserted that requiring nonmembers to pay any union fees was a violation of their First Amendment rights. The defendant union countered that its collective bargaining services inured to the benefit of nonmembers and were important to the goal of labor/employer harmony. Further, the union contended that nonmembers would be “free riders” if they were not required to pay the agency fee. The Court weighed the union's arguments against the First Amendment's freedom of speech and freedom of association guarantees, and determined that the balance should be struck in favor of the First Amendment rights of nonmembers, and against the union's collection of agency fees.

This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed [citations omitted].

Id., 201 L. Ed. 2d at 964.

By their reliance on Janus, Petitioners make a long leap from the mandatory union agency fees required by the IPLRA of nonmembers to the regulated cost of service revenues approved by the Commission for public utilities. The facts in Janus are substantially different from the public utility setting, given that there are no “nonmembers” being compelled to pay rates to public utilities. Every person who pays a rate to a public

utility receives a service that the person has requested, and that has been proven by substantial evidence to be cost-based. Thus, ratepayers receive full value for their money, and public utilities receive only the revenues determined necessary to cover their above-the-line costs. Nevertheless, Petitioners would have the Commission rule that rates paid to the utility that become the legal property of the utility continue to be controlled by ratepayers, who can dictate how the utility and its parent company spends its earnings. The Commission finds no basis for applying the Court's Janus decision in that manner.

The Commission acknowledges that in Janus the union was the exclusive representative of all of the employees, even those employees that did not vote for or join the union. For purposes of discussion, the Commission agrees that this is somewhat analogous to the situation in which regulated monopolies are the exclusive retail electricity and gas suppliers in their North Carolina service territories. The Commission notes, however, that the Supreme Court did not hold that dues paying union members had a First Amendment right to control the union's discretionary spending. Likewise, the Commission finds no First Amendment basis to require that retail ratepayers be allowed to control an IOU's discretionary spending. As a general rule, a consumer's control over his dollars ends when the consumer pays those dollars and receives goods or services in return. In the utility services context, the consumer is free to use the electricity and gas he buys from the utility as he chooses, and the utility is free to use its profits as it chooses.

Petitioners also rely on Cahill v. New York Public Service Commission, 76 N.Y. 2d 102, 556 N.E. 2d 133 (1990) (Cahill). In Cahill, plaintiff ratepayers challenged the New York Public Service Commission's (PSC's) practice of allowing utilities to recover from ratepayers a part of the utilities' contributions to charitable organizations. The plaintiffs asserted that they were being forced to support the lobbying and political activities of these charitable organizations in violation of their First Amendment rights. In response, the utilities argued that ratepayers were benefited by the goodwill achieved through these contributions, and that it was unlikely that the general public would attribute a charitable organization's views and political activities to individual ratepayers merely because the utility made a contribution to the organization. The court disagreed with the utilities and struck down the New York PSC's practice.

In sum, the utilities have not fulfilled their burden of justification for imposing on their ratepayers, rather than on their shareholders, the bill for their selected philanthropy. Indeed, the beneficial corporate public relations generated by the largesse made in the name of public utilities essentially advances predominately the private interests of the utility corporations and their shareholders - especially their financial interests - and are too peripheral to the service interests of the ratepayers. As we have stated previously in another context, "nothing in the Constitution requires that the shareholders get a free ride on the backs of the ratepayers." Matter of Consolidated Edison Co. v. Public Serv. Comm'n., 66 N.Y.2d 369, 372.

Id. at 138. [emphasis in original]

As Petitioners acknowledged in their Response, the Commission has long held that charitable contributions by public utilities are not a cost of service that can be recovered from ratepayers. In other words, charitable contributions are utility expenditures that must be recorded below the line and paid from shareholders' earnings. Although the Commission's restriction on the recovery of charitable contributions is not based on First Amendment grounds, it is consistent with the Cahill decision. Also consistent with Cahill is the Commission's practice of not interfering with the freedom of choice by the utilities and their shareholders to make charitable contributions that are recorded below the line. The Commission determines that it will continue with that practice.

With regard to restricting the expenditures of utilities' parent companies, Petitioners stated:

Finally, it is essential to differentiate the Commission's regulation over public utilities versus their parent corporations. We recognize that given the First Amendment right of corporations, and the fact that, as a general rule, the Commission does not have jurisdiction over non-utility entities like Duke Energy Corporation (Duke Energy), which is the parent of Duke Energy Carolinas, LLC (DEC) and Duke Energy Progress, LLC (DEP), the Commission in most circumstances may not directly regulate Duke Energy's expenditures. However, the Commission—because it, among other things, approves rate-making petitions — certainly may regulate the manner in which funds that ratepayers pay to public utilities, which are in turn provided to Duke Energy, are expended. Accordingly, there is no First Amendment concern with the Commission prohibiting the Electric IOUs it regulates from providing funds to its parent corporations expressly to be used for these purposes. However, while the parent company Duke Energy will remain free to spend other money on these activities, it should be prohibited from using ratepayer funds to do so. [emphasis in original]

Petitioners' Response, at 11.

Petitioners cite no authority in support of these propositions, and the Commission is aware of none. In particular, the Commission finds no support for the notion that the Commission's authority to approve utility rates somehow extends to the authority to regulate the manner in which utilities or their parent companies spend their earnings. The Commission's general ratemaking authority is largely defined by N.C. Gen. Stats. §§ 62-130-133. Section 62-133 specifies the costs to be included in rates, including, as discussed above, the utility's authorized rate of return. Nowhere in these statutes, or the Act, is there even a hint of the Commission having authority to direct how the utility or its parent company spends the utility's earnings.

As acknowledged by Petitioners, the Commission generally does not have jurisdiction over a public utility's parent company and cannot regulate the parent company's expenditures. The narrow exception to the Commission's jurisdiction, pursuant

to N.C.G.S. § 62-3(23)2.c., is when the parent's "affiliation has an effect on the rates or service of such public utility." In the Duke Energy example used by Petitioners, Duke Energy (Duke) owns all of the stock of DEC and DEP. Thus, the Duke board of directors, elected by and representing Duke's shareholders, controls all of the earnings of DEC and DEP, and decides how to spend those earnings. As noted previously, DEC's and DEP's earnings are set according to N.C.G.S. § 62-133, based on each utility's cost of capital and the utility's rate base. Nevertheless, the setting of DEC's and DEP's rates, and the manner in which they provide service to their ratepayers, have nothing to do with how Duke decides to use DEC's and DEP's earnings. Thus, the Commission has no jurisdiction or statutory authority that empowers the Commission to regulate the manner in which Duke spends its money.

In addition, Petitioners' proposal that the Commission restrict a parent company's use of its public utility's earnings would be virtually impossible for the Commission to implement, for several reasons. Using Duke Energy as an example, Duke is the parent company of dozens of subsidiary corporations, most of which are not regulated utilities like DEC and DEP. Further, Duke is fully entitled to decide what to do with the earnings of its subsidiary corporations, and the timing of how it uses such earnings. Duke can leave the earnings, or some portion of them, in the subsidiary to be used for operating expenses or capital. It can transfer the subsidiary's earnings to another subsidiary to be used for that subsidiary's operating expenses or capital. It can use the subsidiary's earnings to pay dividends on the subsidiary's stock, all of which is held by Duke or another Duke subsidiary. Suffice it to say that the permutations and combinations of when and how Duke uses its subsidiaries' earnings are complex. As a practical matter, it would require endless time and money to determine from Duke's records the sources and timing of funds received by Duke, and, assuming it is physically possible, to track the funds to determine how Duke used them. Indeed, Petitioners concede that funds derived from a new issuance of stock can be used for unrestricted discretionary spending. Again, it would be virtually impossible for the Commission to audit the books of Duke Energy and its many subsidiaries to determine what amount of funds from a subsidiary's issuance of stock were used for what purposes. Multiply that auditing task by the several parent companies owning regulated utilities in North Carolina, and it becomes obvious that pursuing such audits would be a fool's errand.

Based on the lack of legal authority, the lack of any rational basis, and the lack of any practical manner of doing so, the Commission finds and concludes that it cannot adopt or enforce a rule that prohibits shareholders or a public utility's parent company from using a public utility's earnings for discretionary spending. As a result, there is no reasonable grounds for that portion of Petitioners' petition requesting that the Commission adopt such a rule, and that portion of the petition should be dismissed for failure to state a claim.

Discretionary Spending as an Above-the-Line Cost

Commission Rule R12-12(a), (b), and (c) define "advertising," "political advertising," and "promotional advertising," respectively.

(a) "Advertising" means the commercial use, by a public utility, of any media, including newspaper, printed matter, bill insert, radio, and television, 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 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.

(d) The terms "political advertising" and "promotional advertising" as defined hereinabove do not include —

- (1) advertising which informs electric and natural gas consumers how they can conserve energy or can reduce peak demand for energy,
- (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
- (6) any explanation or justification of existing or proposed rate schedules or billing practices or notifications of hearings thereon.

Commission Rule R12-13(a) provides, in pertinent part:

In ascertaining reasonable operating expenses pursuant to G.S. 62-133, no electric or natural gas utility shall be permitted to recover from its ratepayers any direct or indirect expenditure made by such utility for political or promotional advertising as defined in Rule R12-12 or for other nonutility advertising.

Petitioners' proposed rules would add political donations, charitable contributions and lobbying expenses as utility expenditures that cannot be recovered from ratepayers as a cost of service.

Political Contributions

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. To

the Commission's knowledge, it has never approved such contributions for recovery from a utility's ratepayers. Nonetheless, Petitioners' point about codification of this principle leading to clarity and certainty is well taken. Therefore, the Commission finds good cause to propose the following additional definition to Rule R12-12:

"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.

Further, the Commission finds good cause to propose the addition of "political contributions" to the costs in Rule R12-13(a) that cannot be recovered from ratepayers.

In addition, although Petitioners' proposed rules would apply only to electric and natural gas utilities, the Commission concludes that the rules with regard to discretionary spending by water and sewer utilities should be consistent with those for electric and natural gas utilities. As a result, the Commission proposes to apply the rule changes ultimately adopted in this proceeding to all regulated electric, natural gas, water and sewer utilities.

An underlined/strike through version of these proposed rule changes, as well as others discussed below, is attached to this Order as Appendix A, and a clean version showing the proposed rule changes is attached hereto as Appendix B.

Charitable Contributions

Petitioners cited several previous Commission decisions holding that ratepayers should not bear the expense of a utility's charitable contributions, including In re Southern Bell Telephone and Telegraph Co., 42 P.U.R.4th 18 (1981) (Southern Bell). In Southern Bell, a general rate case, the telephone company sought to recover \$27,000 in charitable contributions in its cost of service. The Public Staff testified that this cost should be excluded from the company's revenue requirement because

[r]atepayers should not be forced to pay contributions through telephone rates to organizations to which they may not desire to contribute. Additionally, the commission has consistently excluded contributions from the cost of service.

Southern Bell, at 36-37. The Commission concurred with the Public Staff's position and disallowed the \$27,000 in charitable contributions.

In In re Virginia Electric and Power Company, 48 P.U.R.4th 327 (1982) (VEPCO), a general rate case, the Public Staff recommended the disallowance of \$10,000 of charitable contributions. The Commission agreed with the Public Staff.

[T]he public staff maintains that the payment of charitable contributions and the recovery of the associated cost through the cost of service makes the ratepayers forced contributors. Consistent with previous commission orders in utility general rate cases in this jurisdiction, the commission concludes that it is inappropriate to include charitable contributions in the company's cost of service.

VEPCO, at 356; see also In re Virginia Electric and Power Company, 11 P.U.R.4th 115, 124 (1975) (Commission rejected inclusion of \$7,000 in charitable and educational donations in VEPCO's cost of service, stating "The ratepayers should not be made involuntary donors to charitable and educational institutions through the payment of electric rates.")

The Commission also addressed the issue of charitable contributions in In re North Carolina Natural Gas Corporation, 128 P.U.R.4th 321 (1990) (NCNG), in which the Public Staff recommended disallowance of \$114,736 in charitable contributions included in NCNG's cost of service. The Public Staff contended that charitable contributions are not a necessary cost of providing utility service, and that ratepayers should not be required to pay for contributions to organizations selected by the utility. In response, NCNG testified that communities depended on NCNG to take a leadership role in fundraising campaigns, and that customers should not have control over management and business decisions, especially when those decisions must pass regulatory scrutiny. The Commission disallowed the charitable contributions.

The Commission concludes that charitable contributions should not be included in the cost of service for the reasons stated by the Public Staff. It has been a long-standing policy of this Commission to exclude contributions from operating expenses.

NCNG, at 361.

Further, in those situations where a utility has agreed to make charitable contributions as part of a settlement, the Commission has made it clear that such contributions must come from shareholder funds. See Order Accepting Stipulation, Deciding Contested Issues and Granting Partial Rate Increase, Docket No. E-2, Sub 1142, Ordering Paragraph No. 20, at 229 (Feb. 23, 2018).

Many other states have adopted a similar prohibition on the recovery of charitable contributions as a cost of utility service. In In re N.J. American Water Co., 169 N.J. 181, 777 A.2d 46 (2000) (American Water), a general rate case, the New Jersey Board of Public Utilities (BPU) approved \$49,592 of charitable contributions to be included in a water utility's rates. The BPU had a policy of allowing 50% of charitable contributions to be recovered from ratepayers, concluding that such contributions benefited ratepayers to a sufficient degree to allow one half of the contributions as a cost of service. The New Jersey Supreme Court disagreed and reversed the BPU's order, on the basis that the BPU's policy was arbitrary and was not supported by sufficient evidence.

[A]ccordingly, no portion of American Water's charitable contributions may be subsidized by consumers. Although we commend American Water for making charitable contributions, we are convinced that the cost of those contributions should be borne solely by its shareholders.

American Water, at 191.

[W]e are also persuaded by the fact that forty states, either by statute, regulation, or case law, do not permit a utility's charitable contributions to be treated as an operating expense.

Id., at 192. The Court discussed several of the decisions from other states disallowing charitable contributions.

Petitioners state that their proposed rules would codify this Commission's prior decisions disallowing charitable contributions. According to Petitioners, a hard and fast rule prohibiting charitable contributions from being included in a utility's cost of service would avoid the need for continued oversight by ratepayers during rate cases. The Commission agrees with the long-standing practice of not allowing charitable contributions by public utilities to be recovered from ratepayers. Further, the Commission concludes that there is value in having clarity about this principle. Therefore, the Commission finds good cause to propose the following additional definition to Rule R12-12:

"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.

Further, the Commission finds good cause to propose the addition of "charitable contributions" to the costs in Rule R12-13(a) that cannot be recovered from ratepayers.

Lobbying Costs

Petitioners cite two previous Commission decisions in support of their proposal that the Commission adopt an ironclad rule prohibiting the recovery of all lobbying and related expenses from ratepayers. The first case is In re Southern Bell Telephone and Telegraph Co., 42 P.U.R.4th 18 (1981) (Southern Bell), a general rate case in which the telephone company included \$41,000 for lobbying expenses in its cost of service. The Commission concurred with the Public Staff's conclusion that the lobbying expenses should be removed from the company's cost of service. Part of the Public Staff's conclusion was based on the fact that the \$41,000 was presented by Southern Bell as a "Public affairs departmental expense," with no explanation of what portion of the \$41,000 went to lobbying and what portion went to other public affairs activities.

[T]he commission is of the opinion that the expense of lobbying activities should not be borne by the ratepayers and while there are indications in the

record of possible customer benefits the commission concludes that the company has not borne the burden of proof that customer benefits exist or the burden of proving public staff witness Sherman's conclusion inaccurate.

Southern Bell, at 37.

Petitioners also cite In re North Carolina Natural Gas Corporation, 128 P.U.R.4th 321 (1990) (NCNG), in support of their proposed rule prohibiting utilities from recovering lobbying costs from ratepayers. The NCNG proceeding was a general rate case. Included in its cost of service, NCNG sought to recover \$27,596 in costs related to legislative activities. NCNG maintained that \$10,450 of the costs was not for lobbying, but was for hiring a former state senator to conduct "legislative liaison work" to keep the company informed of significant legislation affecting the natural gas industry. The Commission agreed with the inclusion of the legislative liaison costs in NCNG's cost of service.

The Commission recognizes that NCNG's officers must prepare for various appearances before legislative committees and must address pending legislation affecting natural gas customers. The Commission finds that it is appropriate to include \$10,450 for Mr. Jernigan in the cost of service, and that the remaining cost for lobbying expenses should be removed as agreed to by NCNG. The Commission concludes that it is appropriate to include this liaison work due to the greatly increased activity that has affected the LDCs before the legislature and the need for the companies to be aware of the activities that are taking place.

NCNG, at 361.

In the 2011 general rate case of Aqua North Carolina, Inc., Docket No. W-218, Sub 319 (Aqua NC), the Commission disallowed that portion of Aqua NC's employee salaries that was attributable to lobbying.

[T]he Company should be responsible for properly accounting for time spent by employees, including ensuring that time spent on acquisitions, capital projects, and lobbying is properly accounted for and is not included in regulated expenses.

Order Granting Partial Rate Increase, at 52 (Nov. 3, 2011).

The Commission's most recent decision on lobbying costs in a contested general rate case was In re Application of Virginia Electric and Power Company d/b/a Dominion North Carolina Power (DNCP), Docket No. E-22, Sub 479 (2012). In its application, DNCP included about \$400,000 in its cost of service for the work of its governmental affairs departments. The Public Staff contended that the job descriptions for the employees of DNCP's governmental affairs departments contained many activities that exhibited characteristics of lobbying. Consequently, the Public Staff recommended that 50% of the

test year expenses for these departments be recorded below the line and charged to shareholders as lobbying expenses.

DNCP did not disagree that direct lobbying costs should be recorded below the line. However, it contended that the work done and the activities undertaken by DNCP's various public policy and governmental affairs departments directly benefited the company's customers. DNCP maintained that the vast majority of the work of the state and local affairs departments at VEPCO was focused on customer safety, education, and service reliability, and that the departments' employees interacted frequently with local and, to some degree, state elected officials about outages, service issues, customer education, and safety. Further, DNCP stated that to the extent legislative or policy issues arose, those were referred to appropriate staff in the services' company, Dominion Resources Services (DRS), and that to the extent that DRS employees engaged in lobbying, their time was recorded as lobbying, and was not included in DNCP's cost of service. Moreover, DNCP submitted that this actual lobbying time/expense was reflected in an adjustment of 8.5% of DRS salaries recorded below the line and excluded by the company in its rate case application. Nevertheless, DNCP conceded that it could be reasonable for the Commission to exclude not only direct lobbying costs but, also, associated costs of such activities from DNCP's cost of service. DNCP stated that an appropriate way to do so was to use the ratio of lobbying salaries of the public affairs department employees divided by the total salaries of those employees during the test year, a calculation that resulted in a 19% ratio of lobbying salaries to the total of public affairs department employees' salaries. In its Order Granting General Rate Increase (DNCP Rate Order), the Commission stated:

The Commission agrees that the cost of lobbying is not a proper cost of providing service that should be recovered from ratepayers, i.e., such costs should not be included in the Company's cost of service.

...

Based upon the greater weight of the evidence, the Commission finds and concludes that it should adopt the Company's alternative proposal and accept that the 19% factor, which is based on an analysis that addresses an expanded definition of lobbying, is an appropriate percentage to apply for the purpose of making an adjustment to charge a portion of the public affairs departments' salaries expense below the line to the Company's shareholders.

DNCP Rate Order, at 70-71.

The Commission agrees with the holdings in NCNG, Agua NC, and DNCP that a utility's lobbying expenses should not be recoverable from ratepayers. In addition, the Commission recognizes 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. The Commission does not intend to restrict the

ability of the utilities in such efforts by denying recovery of the cost of performing this work.

On the other hand, as expressed in the Southern Bell decision, the burden of proof is on the utility to adequately separate the cost of public affairs activities that do not constitute lobbying from the cost of legislative advocacy that does constitute lobbying. Further, the Commission is not entirely satisfied that the approach used in DNCP, an overall disallowance of a percentage of public affairs salaries based on the percentage of lobbying performed by certain employees, is adequate. Rather, the Commission is convinced that public utilities can and should be required to be more precise in their record keeping by clearly separating lobbying costs from non-lobbying costs. In this day of advanced information technology, it is not unreasonable to require a public utility to 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 from the utility's cost of service, and so that this information can be effectively audited by the Public Staff or the Commission.

Further, the Commission is persuaded that this same reasoning supports disallowance of any portion of the dues paid by a utility for membership in an industry trade group, such as Edison Electric Institute (EEI) or Electric Power Research Institute (EPRI), that is attributable to lobbying by the trade group. In In re Delmarva Power & Light Co., 58 F.E.R.C. ¶61,169 (1992) (Delmarva), a rate case, purchasers of wholesale power from Delmarva objected to the utility's inclusion of EEI dues in its cost of service. In its Order Initiating Investigation, FERC stated:

[T]he Commission has allowed utilities to allocate EEI contributions to wholesale customers only to the extent the contributions are for research and development programs to which wholesale customers themselves could not contribute. However, that portion of EEI contributions used for lobbying activities may not, under any circumstances, be included in the utility's cost of service [citing several prior FERC orders]. Thus, the portion of EEI expenditures that a utility may include, if any, in its cost of service depends on the purpose for which the contributions were made. The burden of breaking down EEI expenditures falls upon the utility seeking to include such contributions in its cost of service.

Delmarva, at 61,509.

The utilities' memberships in trade groups such as EEI and EPRI for research, development of best business practices, and other educational purposes can be well worth the dues paid, both for the utilities and their ratepayers. But 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.

Therefore, the Commission finds good cause to request comments on the following proposed additional definition to Rule R12-12, and the underlined additions to Rules R12-12(d) and R12-13(a):

“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.¹

Rule R12-13(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(d), the utility shall include prefiled testimony stating the amount claimed and the basis for the exception.

Finally, the Commission proposes to make conforming amendments, as shown in appendices A and B, to Rule 12-12(d) and Rule R12-13(c) and (d).

Petitioners’ Proposed Public Utility Lobbying Rules

The last section of Petitioners proposed rules would require public utilities to file an annual report with the Commission detailing their lobbying activities and expenditures. Petitioners supported this proposal by first pointing to the Act’s goals “[t]o provide fair regulation of public utilities in the interest of the public,” and “encourage and promote harmony between public utilities, their users and the environment” [N.C.G.S. § 62-2(a)(1) and (5)], and the Commission’s authority to administer and enforce the provisions of the Act. In addition, Petitioners noted that the Commission has adopted the rules discussed above on promotional and political advertising. Further, Petitioners cited the disclosure

¹ This definition generally tracks the definition of “lobbying” in N.C.G.S. § 163A-250(17), except for the addition of (c).

requirements of Commission Rule R12-13(b), R12-14(b), and R12-15(d) that utilities provide the recipients of political and promotional advertisements with a statement that

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

The Commission agrees with Petitioners that it has the authority and discretion to adopt reasonable rules governing the lobbying activities of public utilities, and that it has properly exercised that authority in adopting those portions of Rules R12-12 through R12-15 discussed above. However, the Commission is not persuaded that it should adopt a rule requiring public utilities to file an annual report with the Commission detailing their lobbying activities and expenditures. North Carolina General Statute § 163A-250, et seq., establishes extensive restrictions, registration requirements, and quarterly reporting requirements for persons, including corporations, engaged in lobbying in North Carolina. The existing lobbying statutes are enforced by the North Carolina Secretary of State and the North Carolina Ethics Commission. Petitioners did not identify any lobbying information needed by the Commission that is not readily available to it under the existing lobbying statutes, or any gap in enforcement that the Commission needs to fill. In addition, the Commission is confident that the General Assembly has properly exercised its authority to create extensive guidelines and reporting requirements for persons, including public utilities, engaged in lobbying activities, and that the Secretary of State and Ethics Commission are capable of enforcing the existing statutes. The Commission finds no basis or need for it to duplicate the requirements of N.C.G.S. § 163A-250, et seq., or the efforts of the Secretary of State and Ethics Commission.

Based on the current lobbying restrictions and reporting requirements of N.C.G.S. § 153A-250 et seq., and the record, the Commission finds and concludes that there is no reasonable grounds for the Commission to adopt a rule requiring public utilities to file an annual report with the Commission detailing their lobbying activities and expenditures. As a result, that portion of Petitioners' petition should be dismissed for failure to state a claim.

Conclusions

Based on the foregoing and the record, the Commission finds good cause to dismiss those portions of Petitioners' petition requesting that the Commission adopt rules prohibiting shareholders or a public utility's parent company from using the utility's earnings for discretionary spending, and requiring public utilities to file an annual report with the Commission detailing their lobbying activities and expenditures.

Further, the Commission finds good cause to request that interested parties file comments on the Commission's proposed amendments to Rules R12-12 and R12-13 prohibiting a public utility from recovering from ratepayers as a cost of service political contributions, charitable contributions, and lobbying costs.

In addition, the Commission finds that the investor-owned electric, natural gas, and two largest water and sewer public utilities, Public Staff, and North Carolina Attorney

General are necessary parties to this docket and, therefore, they should be made parties to this docket without the need to file for intervention.

Finally, the Commission finds good cause to allow the requested intervention by the Center for Biological Diversity.

IT IS, THEREFORE, ORDERED as follows:

1. That the portions of Petitioners' petition requesting that the Commission adopt rules prohibiting shareholders or a public utility's parent company from using the utility's earnings for discretionary spending, and requiring public utilities to file an annual report with the Commission detailing their lobbying activities and expenditures, shall be, and are hereby, dismissed with prejudice.

2. That the Commission hereby initiates this rulemaking proceeding to consider the Commission's proposed amendments to Rules R12-12 and R12-13 prohibiting a public utility from recovering from ratepayers as a cost of service political contributions, charitable contributions, and lobbying costs.

3. That Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, Dominion Energy North Carolina, Piedmont Natural Gas Company, Inc., Public Service Company of North Carolina, Inc., Frontier Natural Gas Company, Toccoa Natural Gas, Aqua North Carolina, Inc., Carolina Water Service, Inc. of North Carolina, the Public Staff, and the North Carolina Attorney General are hereby deemed parties to this proceeding.

4. That the Center for Biological Diversity is hereby allowed to intervene in this proceeding.

5. That the Chief Clerk shall send copies of this Order to all the parties specified above in Ordering Paragraph Nos. 3 and 4.

6. That the name and address of the attorney for the Center for Biological Diversity is as follows:

Perrin W. de Jong
Center for Biological Diversity
P.O. Box 6414
Asheville, North Carolina 28816
Telephone: (828) 774-5638
Perrin@biologicaldiversity.org

7. That interested persons may petition to intervene in this proceeding on or before September 30, 2019.

8. That on or before September 30, 2019, parties may file initial comments on the Commission's proposed rules prohibiting utilities from recovering from ratepayers as a cost of service political contributions, charitable contributions, and lobbying costs.

9. That on or before October 14, 2019, parties may file reply comments.

ISSUED BY ORDER OF THE COMMISSION.

This the 29th day of August, 2019.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in cursive script, appearing to read "Janice H. Fulmore".

Janice H. Fulmore, Deputy Clerk

Proposed Revisions to Commission Rules R12-12 and R12-13

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) 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, ~~and~~ 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 and , 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 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, ~~or~~ natural gas, water, or sewer utility for the types of advertising described in Rule R12-12(~~dg~~) 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, ~~or~~ natural gas, water, or sewer utility for advertising of a type or nature other than that described in subsections (b), (c), or (~~dg~~) 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.

Proposed Revisions to Commission Rules R12-12 and R12-13

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) 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.