

**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)	PETITIONERS'
Procedures for Disclosure and Prohibition of)	INITIAL COMMENTS
Public Utility Lobbying, Advertising and Other)	
Expenditures)	

NOW COME NC WARN, Inc. (“NC WARN”) and Friends of the Earth, Inc. (“Friends of the Earth”) (collectively, “Petitioners”), by and through the undersigned attorneys, and hereby provide these initial comments in the above-captioned docket pursuant to the North Carolina Utility Commission’s (“Commission”) Order Dismissing Petition in Part, Granting Petition to Intervene, Joining Necessary Parties, and Requesting Comments entered on August 29, 2019 (the “Order”).

Petitioners believe that the Order is a significant step in the correct direction and generally agree with the rules proposed by the Commission and attached as Appendix A and B to the Order (the “Commission’s Proposed Rules”).¹ Petitioners file these Initial Comments to propose six modifications to the Commission’s Proposed Rules. These proposed revisions to the Commission’s Proposed Rules

¹ Of course, Petitioners do not agree with the portions of the Order which dismissed with prejudice certain aspects of Petitioners’ Petition filed on November 14, 2018. In light of the Order, Petitioners will not make any argument in these Initial Comments concerning portions of the Petition that were dismissed in the Order. Petitioners reserve all rights of appeal with respect to those portions of the Order.

are necessary to effectuate the reasoning employed in the Order and to protect the interests of ratepayers. Namely, Petitioners propose the following six modifications to the Commission's Proposed Rules:

(1) The Commission's Proposed Rules should be revised to explicitly require that public utilities seeking a change in rates file with their application precise records clearly separating lobbying costs from non-lobbying costs as contemplated by the Commission on page 14 of the Order.

(2) The Commission's Proposed Rules should be revised to explicitly state that the burden is on the public utility to establish that public affairs expenses for which the public utility requests recovery are non-lobbying costs. See Order at pp 13-14.

(3) The Commission's Proposed Rules should be revised to require that a public 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 the public utility must also establish that the said educational uses of the funds benefit North Carolina ratepayers. See Order at p 14.

(4) The Commission's Proposed Rules should be revised to 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 or any segment thereof.

(5) The Commission's Proposed Rules should be revised to provide that, if the required certification in proposed Rule R12-13(a) is inaccurate, the Commission has discretion to impose a penalty upon the public utility.

(6) The Commission's Proposed Rules should be revised so that the definition of "charitable contribution" is satisfied whether or not the receiving entity is a non-profit.

Each of the above proposed modifications to the Commission's Proposed Rules is discussed below, including the text of the Petitioners' suggested revisions to the Commission's Proposed Rules.

PROPOSED REVISIONS 1 & 2:
MANDATORY FILING OF RECORDS SEPARATING LOBBYING COSTS
FROM NON-LOBBYING COSTS, AND BURDEN OF PROOF AS TO NON-
LOBBYING COSTS

In the Order, the Commission correctly recognized "that a utility's lobbying expenses should not be recoverable from ratepayers." Order at p 13. However, the Commission's Order also stated 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." *Id.* Therefore, the Order stated that "[t]he Commission does not intend to restrict the ability of the utilities in such efforts by denying recovery of the cost of performing this work." Order at pp 13-14.

The Commission's past cases illustrate that it is frequently difficult to separate which costs are lobbying expenses versus which costs are non-lobbying public affairs costs related to matters such as outages and safety. For example, in *In re Application of Virginia Electric and Power Company d/b/a Dominion North*

Carolina Power (“DNCP”), Docket No. E-22, Sub 479 (2012), substantial litigation occurred over DNCP’s including approximately \$400,000 in its cost of service for the work of its government affairs departments and whether said work was in fact lobbying and therefore not subject to recovery. Similarly, in *In re Southern Bell Telephone and Telegraph Co. (“Southern Bell”)*, 42 P.U.R.4th 18 (1981), significant litigation occurred over whether a \$41,000 sum characterized by the utility as “Public affairs departmental expense” was properly characterized as a lobbying expense. In both of these cases, the Commission reduced (*DNCP*) or denied (*Southern Bell*) the cost recovery to the extent said expenses were for lobbying.

As a means of simplifying the litigation and assisting the Commission in evaluating public affairs cost recovery requests, the Commission’s Order stated the following:

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.

Order at p 14.

Petitioners applaud the Commission’s above-quoted ruling in the Order. In several instances, the Order acknowledged that the “codification of” certain principles “lead[s] to clarity” and is therefore desirable. *E.g.*, Order at p 9.

Therefore, Petitioners request that the Commission's Proposed Rules be revised to include the above-quoted ruling in the Order.

As recognized in the Order, the Commission determined in the *Southern Bell* decision, *supra*, that "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." Order at p 14. In the interests of clarity and consistency, Petitioners recommend that this burden of proof be codified in the Commission's Proposed Rules.

Petitioners therefore propose the following revision to Rule R12-13(a) of the Commission's Proposed Rules (proposed revisions are underlined):

[Proposed] 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. Moreover, in every application for change in rates, the utility shall include prefiled testimony providing 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. In a rate-increase proceeding, burden of proof shall be upon 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.

The above-provided proposed revision to the Commission's Proposed Rules will further the Commission's ruling in the Order that such itemized records can be maintained practically, are appropriate for audit by the Public Staff or Commission, and will assist with efforts to ensure that lobbying expenses are not treated above the line.

PROPOSED REVISION 3:
RECOVERY OF MEMBERSHIP DUES IN TRADE GROUPS

In the Order, the Commission ruled that there should be a "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." Order at p 14. The Commission correctly reasoned that "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." Order at p 14. Petitioners' wholeheartedly agree with the Commission that trade group membership dues attributable to lobbying by the trade group are not in the interests of North Carolina ratepayers and therefore should not be recoverable.

However, the Commission also stated in the Order that "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.” Order at p 14. The Order cited favorably to *In re Delmarva Power & Light Co.*, 58 F.E.R.C. ¶¶ 61,509, in which the Federal Energy Regulatory Commission (“FERC”) determined that “the burden of breaking down EEI expenditures falls upon the utility seeking to include such contributions in its cost of service.” *Id.*

In summary, the Commission’s Order relied upon a distinction between trade membership dues allocated for lobbying—which should be treated below-the-line—and trade membership dues for research, development and educational purposes—which, according to the Order, may be treated as above-the-line. Order at p 14. Moreover, the Commission’s Order favorably quoted a decision by FERC recognizing that the burden of establishing that trade membership dues are within the above-the-line category rests with the utility. Order at p 14.

In the Petition, Petitioners contended—and Petitioners continue to believe—that such membership dues should not be recoverable for any purpose, even for the supposedly research, development and educational purposes to which such dues are purportedly sometimes put. Without waiving Petitioners’ said position, Petitioners hereby propose revisions to the Commission’s Proposed Rules which will ensure that cost recovery is consistent with the Commission’s distinction in the Order between trade group dues for lobbying versus trade group dues for research, development and educational purposes. Order at pp 14-15.

To ensure that the cost recovery of trade organization membership dues is unrelated to lobbying and is in the interests of North Carolina ratepayers, a public utility’s rate-increase application should be accompanied by prefiled testimony

describing with particularity the uses to which said dues were put by the trade organization. To create clarity and consistency, the Commission's Proposed Rules should furthermore be revised to explicitly state that the burden of proof rests with the utility to establish that a reimbursement request for trade organization dues is for research, development and educational purposes and in the interests of North Carolina ratepayers.

Petitioners therefore propose the following revision to Rule R12-13(a) of the Commission's Proposed Rules (proposed revisions are underlined):

[Proposed] 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. Moreover, in every application for change in rates, the utility shall include prefiled testimony providing an itemized allocation of the use to which trade groups put membership dues paid by the utility, and the burden shall be upon the utility to establish that trade group membership dues that are treated as cost of service in the application are in the best interests of North Carolina ratepayers and are not lobbying expenses as defined in Rule R12-12(d).

The above-provided proposed revision to the Commission's Proposed Rules will allow the Commission to perform a meaningful evaluation of trade group membership dues expenses to ensure that the recognized rule against recovery of lobbying expenses is satisfied.

PROPOSED REVISION 4:
DEFINITION OF "LOBBYING"

Petitioners certainly agree with the Commission's ruling in the Order that "the expense of lobbying activities should not be borne by the ratepayers." Order at p 11 (*quoting In re Southern Bell Telephone and Telegraph Co.*, 42 P.U.R.4th 18, 37 (1981)); *see also* Order at p 13 ("The Commission agrees . . . that a utility's lobbying expenses should not be recoverable from ratepayers."). Such lobbying expenses are not part of a utility's cost of service and are not in the interests of North Carolina ratepayers. Hence, the Commission's decision to codify a disallowance of cost recovery for lobbying expenses is laudable.

However, the definition of "lobbying" in the Commission's Proposed Rules omits a crucial type of lobbying which is defined in the Internal Revenue Code as a "lobbying expenditure": namely, expenditures related to attempts to affect the opinions of the general public.

The Commission's Proposed Rules define "lobbying," in part, as "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." Order at Appendix B p 1, Rule R12-12(d)(1). In a similar vein, the Internal Revenue Code defines "lobbying expenditures" as including "expenditures for the purpose of influencing legislation."

26 U.S.C. § 4911(c)(1). The term “influencing legislation” is in turn defined by the Internal Revenue Code as follows:

(A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, and

(B) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.

26 U.S.C. § 4911(d)(1)(A)-(B). The activities described in sub-subsection (B) are similarly within the definition of “lobbying” provided in the Commission’s Proposed Rules. Order at Appendix B p 1, Rule R12-12(d)(1).

However, the lobbying activities described in sub-subsection (A)—*i.e.*, “attempt[s] to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof”—are not within the definition of “lobbying” provided in the Commission’s Proposed Rules. Hence, the Commission’s Proposed Rules are inconsistent with the definition of lobbying provided in the Internal Revenue Code and to which 501(c)(3) organizations appearing before the Commission—such as NC WARN—are subject. See 26 U.S.C. § 501(h)(2)(c) (stating that 501(c)(3) organizations are subject to the definition of “lobbying expenditures” provided in 26 U.S.C. § 4911(d)).

Revising the definition of “lobbying” in the Commission’s Proposed Rules to encompass “attempt[s] to influence any legislation through an attempt to affect the opinions of the general public,” *id.* ¶ 4911(d)(1)(A), will result in consistency

between the Commission's rules and other lobbying rules, and will furthermore protect North Carolina ratepayers from funding a public utility's political goals.

Petitioners therefore propose the following revision to Rule R12-12(d) of the Commission's Proposed Rules (proposed revisions are underlined):

[Proposed] 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) any expenditure as defined in 26 U.S.C. § 4911(d)(1)(A), or (4) obtaining the services of another person, including through membership in a trade or other organization, to engage in any of the activities identified in (1), ~~or (2), or (3).~~

The above-provided proposed revision to the Commission's Proposed Rules will protect the interests of North Carolina ratepayers and establish consistency between the Commission's rules and the Internal Revenue Code.

PROPOSED REVISION 5:
PENALTIES FOR INACCURATE CERTIFICATION

The Commission's Proposed Rules would impose the following new obligation upon applicants for a rate increase: "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." Order at Appendix B p 3, Rule R12-13(a).

Petitioners wholeheartedly agree with the proposal to require a certification of compliance with the Commission's Proposed Rules, and in fact, Petitioners believe it necessary to make explicit that, if the certification proves inaccurate, the Commission retains the authority to impose a penalty upon the utility.

There is a disturbing recurrence of utilities requesting reimbursement for expenses properly classified as lobbying. The Order discussed at least one example. Order at pp 11-12 (discussing *In re Southern Bell Telephone and Telegraph Co.*, 42 P.U.R.4th 18, 37 (1981)). As another example, during Duke Energy Carolinas LLC's ("DEC") 2012 rate-increase proceeding, Docket No. E-7, Sub 1026, NC WARN discovered that DEC inappropriately coded multiple political contributions/donations as cost of service in the test period instead of "below-the-line" and not recoverable from customers. In its Order Granting General Rate Increase, page 65, the Commission noted that it was "quite disturbed and concerned about the Company's accounting errors uncovered in this case, i.e., the miscoding of certain charges as 'above-the-line' cost of service ratepayer charges by the Company."

To ensure compliance with the Commission's Proposed Rules and discourage further requests for recovery of lobbying and other such expenses, Petitioners recommend that the proposed rules explicitly note that, if the required certification of compliance is inaccurate, the Commission may impose a penalty.

Petitioners therefore propose the following revision to Rule R12-13(a) of the Commission's Proposed Rules (proposed revisions are underlined):

**[Proposed] 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. If the said certification is inaccurate, the Commission may exercise the discretion to impose a penalty upon the utility. 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.

The above-provided proposed revision to the Commission's Proposed Rules will help ensure compliance with the rules on lobbying, political or promotional advertising, political contributions, and charitable contributions.

PROPOSED REVISION 6:
REMOVAL OF THE WORD "NONPROFIT" FROM THE DEFINITION OF
"CHARITABLE CONTRIBUTION"

The Commission's Proposed Rules define "charitable contribution" as "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." Use of the word "nonprofit" limits the scope of "charitable contribution" and would arguably permit a public utility to charge ratepayers for a donation to, say, a commercial daycare, a student's scholarship, or a private festival.

The Commission's Proposed Rules contemplate that such donations should not be charged to ratepayers. Therefore, elimination of the word "nonprofit" from the definition of "charitable contribution" would align that said definition with the overall goals of the Commission's Proposed Rules.

Petitioners therefore propose the following revision to Rule R12-12(e) of the Commission's Proposed Rules (proposed revisions are underlined):

[Proposed] Rule R12-12(e) – Definitions

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

The above-provided proposed revision would eliminate a potential loophole in the definition of "charitable contribution" and accomplish the Commission's goal of preventing ratepayers from funding a public utility's charitable contributions.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission adopt, with the above-described revisions, the Commission's Proposed Rules.

This the 2nd day of December, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon all counsel of record by email transmission.

This the 2nd day of December, 2019.

/s/ Matthew D. Quinn
Matthew D. Quinn