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Statement of Position Submitted

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Docket

M-100 Sub 150

Message

Regarding M-100 Sub 150 By way of personal background, I was deeply involved with intervenors in numerous utility rate cases in the 1970s and 1980s in North Carolina, South Carolina and Georgia. More recently, I worked extensively on lobbying and campaign finance issues in my job with Democracy North Carolina, and I served as an expert witness for the State of North Carolina in a case about regulating political contributions and independent expenditures. I am also familiar with a line of US Supreme Court decisions that conflate speech with spending and, given the First Amendment, impose a high level of scrutiny on government actions that sanction particular brands of political speech. Several rulings essentially ban a government agency from forcing people to pay for policy advocacy, issue propaganda or political activities that they do not voluntarily support. For example, the 2012 *Knox v. Service Employees* decision concludes by quoting, in modified form, a sentence from the 2001 *United States v. United Foods* ruling: “First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.” The 2018 *Janus v. AFSCME* decision says, “Compelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns.” The Utilities Commission’s Order rightly points out that the *Janus* decision involves nonmembers of a union and very different facts, but there may be legitimate concern if the Commission, as a government agency, purposefully establishes utility prices at a level that forces ratepayers to subsidize the utility’s political speech. The 1990 *Kelly v. State Bar of California* decision prohibited the state bar agency from using mandatory attorney dues for advocacy on issues of public concern, such as gun control. In practice, the NC Utilities Commission honors the compelled speech doctrine by refusing to let its regulated utilities charge ratepayers for a company’s lobbying expenses and political contributions, as well as advertising that does not serve a public-interest purpose consistent with state law. The better justification for excluding these expenses, per to the Commission’s Order, is that they are not necessary costs for a utility to provide adequate, reliable and economical service. Now, in response to petitioners in M-100 Sub 150, the Utilities Commission is making an effort to define with greater

specificity what expenses should not be charged to ratepayers. The danger is that definitions adopted by the Commission may be too narrow or may create loopholes for the regulated industries to exploit. Importantly, the prohibition against a government agency compelling involuntary support of “political speech” or issue propaganda must be understood broadly. “Political” is not simply electoral; for example, as the Supreme Court decisions indicate, it includes promoting positions on controversial topics and issue advocacy broadly defined. Similarly, the Utilities Commission has adopted this broad understanding of “political” in its unamended 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.” By contrast, the new definitions in the Order’s amended rules heavily restrict the meaning of political speech and issue advocacy; they are much too limited and too vulnerable to unintended consequences that will have a negative impact on ratepayers. One alternative would be for the new rules to avoid narrow definitions and focus on key principles. Proposed language might be: “The burden is on the utility to establish that an expense payable by the ratepayer is necessary for the delivery of adequate, reliable and economical service in accordance with North Carolina law. Ratepayers should not be compelled to support a utility’s views or advocacy related to social, economic or political affairs. Therefore, all expenses 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 the transfer of such funds is necessary for the utility to fulfill its legal duty and core operational functions.” If definitions are needed, I offer the following changes to those in the Order (highlighting additions and deletions is not possible in this webpage format). Importantly, these definitions are not for the purpose of banning a company’s speech or spending, nor for requiring disclosure with a penalty for failure to disclose; they are only for describing expenses not recovered from ratepayers and therefore should be appropriately broad in scope. LOBBYING Changes are designed to ** add “solicitation of others” to lobby – borrowed from NCGS 120C-100(36) – and add advocacy communications with the public; ** add clarity to the undefined term “designated individual”; ** add clarity to “obtaining services of another person.” New definition: (d) “Lobbying” means (1) influencing or attempting to influence legislative or executive action, or both, through direct communication or activities with an elected or appointed official or that individual’s agent or immediate family; (2) developing goodwill through communications or activities, including the building of relationships, with an elected or appointed official or that individual’s agent or immediate family with the intention of influencing current or future legislative or executive action, or both; (3) promoting a position on an issue of public importance to members of the public, including current or future legislative, judicial or executive action; (4) soliciting employees, contractors, other entities, or members of the public to communicate with an elected or appointed official or that individual’s agent or immediate family with the intention of influencing current or future legislative or executive action; or (5) obtaining the services of another entity, through membership dues, contract or other means, to engage in any of the activities identified in (1), (2), (3) or (4). “Lobbying” does not include communications or activities as part of a business, civic, religious, fraternal, personal, or commercial relationship which is not connected to public policy advocacy, legislative action, or executive or judicial decisions. CHARITABLE CONTRIBUTIONS Changes are designed to ** delete the qualifier “charitable” in the title of the definition and delete the qualifier “nonprofit” to describe some recipients (the recipient could be a for-profit school, daycare, health center or baseball team); ** add a broad statement about transactions that amount to gifts. New definition: (e) “Contribution” means money, services, or a thing of value donated to any individual, organization, affiliate of a utility, or entity where the contribution or recipient has a major purpose that is religious, charitable, educational, policy formation, entertainment, community or economic development, social service, scientific or literary. A contribution includes a transfer of funds without receiving full and adequate commercial value. POLITICAL CONTRIBUTIONS Changes are designed to ** substitute “contribution” with “spending” in the title because political activities go well beyond contributions for the support or defeat a candidate or party (“express advocacy”); ** expand the scope of the definition; this is the worst of the definitions proposed. It does not recognize the multitude of methods and vehicles used to influence the political process, including opposition research and “issue” communications about candidates, polling and influencing public opinion about hot-button topics, mobilizing voters in targeted areas, and more. New definition: (f) “Political spending” means money, services, or a thing of value 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, a candidate for public office, or a political party. In addition, I note that the Order's changes to Rule R12-13(a) incorporate broader restrictions than indicated by the general title for Rule R12-13: "Advertising by Electric, Natural Gas, Water and Sewer Utilities." Perhaps the title should be changed to "Advertising and Other Expenses by. . . ." Also, shouldn't the changes in Rule R12-13(a) be incorporated in R12-14 (and elsewhere as appropriate) to apply to telephone companies? Finally, I suggest that the definition of "Promotional Advertising" in Rule R12-12(c) should be expanded to include something akin to "any advertising for the purpose of promoting the utility's image, reputation, responsiveness, community service, customer or workforce satisfaction, corporate mission or investment value." Thank you for your consideration of my comments, and thank you for your service to the people of North Carolina. Bob Hall Durham, NC sprc@mindspring.com

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