

AFFIDAVIT OF PETER A. BRADFORD
for NC WARN and Friends of the Earth

November 13, 2018

1. My name is Peter Amory Bradford. I am the CEO of Bradford Brook Associates, a consulting firm specializing in energy, water and telecommunications regulatory policy. My 24 years of experience as a utility regulator includes serving as chair of the New York Public Service Commission (NYPSC) (1987-95), chair and commissioner of the Maine Public Utilities Commission (1971-1977 and 1982-1987) and commissioner of the U.S. Nuclear Regulatory Commission (1977-1982). As far as I know, I am the only person to have served on two state and one federal regulatory commission. I was President of the National Association of Regulatory Utility Commissioners in 1987-88 and served as Maine's Public Advocate in 1982. I was also a director of the National Regulatory Research Institute during 1985-1988. I am currently one of Vermont's two commissioners on the Texas/Vermont Low Level Radioactive Waste Disposal Compact Commission.

2. While in New York, I served also on the New York State Energy Planning Board, the Board of the New York State Energy Research and Development Administration, the New York Environmental Board and as chair of the New York State Energy Facilities Siting Board.

3. I have been an Adjunct Professor at Vermont Law School, where I taught a course entitled Nuclear Power and Public Policy. I also have taught or co-taught courses entitled "The Law of Electric Restructuring" at Vermont Law School and "Energy Policy and Environmental Protection" at the Yale School of Forestry and Environmental Studies. I have also taught at the NARUC Regulatory Studies

Program in East Lansing, Michigan and other regional regulatory studies programs and have conducted seminar programs with the Regulatory Assistance Project. I am a graduate of Yale University and Yale Law School.

4. During my terms on the New York and Maine utility commissions, these commissions decided many cases developing rules and policies regarding the ratemaking treatment and proper reporting of utility expenses pertaining to lobbying, to advertising, to charitable contributions and to membership dues in certain types of organizations. I co-drafted Maine's 1986 rules, which are still in effect.

5. After leaving the NYPS&C in early 1995, I testified in many state regulatory proceedings as well as before legislatures and federal courts. I also participated and advised in developing regulatory laws and institutions in many other countries. I testified twice in North Carolina and met with members of the Legislature considering modifications to the Project Development Statute. I also testified before regulatory commissions and legislatures in South Carolina, Georgia and Florida on these topics.

6. My articles on various aspects of utility regulation have been published in the New York Times, the Wall Street Journal, the Washington Post, the Atlanta Journal Constitution and many other newspapers and magazines.

7. My CV is appended to this Declaration (Attachment A).

8. I am submitting this affidavit on behalf of NC WARN and Friends of the Earth.

9. I understand that rate setting in North Carolina is based on cost-of-service principles. Under these principles, the utility is entitled to recover from its customers the reasonable costs of providing service to them. These costs include, among other things, commission estimates of prudently incurred operating expenses that are directly related to providing electric utility services as well as a Commission-established reasonable return to investors. If actual operating expenses exceed estimated expenses (by management choice or for other reasons), the excess may serve to depress the return on

investment, or the excess amount may be considered part of the return on investment. Estimated operating expenses can be adjusted in the next rate proceeding.

10. In setting utility rates, public utility commissions (PUCs), including the North Carolina Utilities Commission, are exercising a legislative function. That is, the power to set rates was reserved to state legislatures (not the executive branch) by most utility franchise agreements. As the task grew in workload and complexity, all states delegated it to regulatory commissions to act on behalf of the legislature itself pursuant to powers and duties set forth in the relevant constitutions, laws and other agreements.

11. Whether political expenses, advertising expenses, charitable contributions and membership dues in certain organizations are properly characterized as operating expenses to be recovered from customers has been an issue in rate proceedings since the beginning of regulation early in the 20th century. The Maine Public Utilities Commission, on which I became a commissioner in 1971, frequently adjudicated variations on this question throughout the 1970s, but the fundamental issues go much further back. Alfred Kahn's The Economics of Regulation, generally considered to be the leading utility regulatory text of the last 50 years, writes of a report estimating "that the costs of the 'educational' campaign by utilities after World War I 'to sell their industry to the public and to convince the American people of the adequacy of existing regulatory techniques and of the dangers of further government penetration into the utility business' ran 20-30 million a year (in Coolidge and Hoover dollars) 'all charged off as proper advertising expenses...and computed in the rates which the public was required to pay'" (The Economics of Regulation, Volume I, p. 28, 1970). Many books and studies have focused on this topic, including substantial parts of the investigation by the Federal Trade Commission (FTC) from 1928 to 1935 (referenced by Dr. Kahn above) published in 1935 as Summary Report on Economic, Financial, and Corporate Phases of Holding and Operating Companies of Electric and Gas Utilities, Washington: Government Printing Office. Aspects of the FTC study were summarized in 1931 in The Public Pays: A Study of Power Propaganda by Ernest Gruening, updated 25 years later as The Public

Pays, and Still Pays. The techniques of utility propaganda were also explicated in Overcharge: How Electric Utilities Exploit and Mislead the Public (Senator Lee Metcalf and Vic Reinemer, 1967).

12. Regulatory commissions and texts often divide these influence-related expenses into several categories. Lobbying and political expenses, including payments to other organizations to the extent that they lobby or support lobbying or engage in political activities, are rarely permitted to be charged to customers. Institutional advertising, i.e. advertising to promote a utility's image, is sometimes disallowed, sometimes allowed up to a cap and sometimes allowed altogether. Other types of advertising such as informational advertising as to safety or energy conservation or furtherance of economic development or promotion of sales in competitive markets are largely beyond the scope of this affidavit. The amounts are small (the New York Public Service Commission allowed between 1/10 and 1/25 of total operating revenues in its 1977 policy statement) and there is little or no impact in the public policy arena as discussed below. On the other hand, goodwill is an aspect of shareholder value, so expenditures without impact on utility service designed to enhance goodwill can properly also be allocated in substantial part to the return on investment.

13. Charitable contributions are clearly not essential to the provision of service. Nor does a monopoly company need to make such donations to buttress its good name in the marketplace. Furthermore, customers – especially low-income customers and marginal businesses – have urgent uses for every dollar that they possess. Reviewing courts in Maine and New York, as well as many other jurisdictions, have sustained commission decisions protecting customers against paying for utility charitable contributions.

14. All the types of expenditures discussed above have slight direct impact on rates. They are a trivial percentage of the total revenue requirement. However, they have commanded legislative and regulatory attention out of all proportion to their direct rate impacts for several reasons, among them these:

- A. These activities have large impacts in political and public policy contexts. In one recent North Carolina case (Docket No. E-7, Sub 1026, affirmed on appeal January, 2015), Duke Energy Carolinas sought to excuse accounting that would have charged customers for more than a million dollars in concededly improper political expenditures by arguing that the amount was so small in the context of its total revenue stream that a mere \$1 million error was “pretty good” (Docket No. E-7, Sub 1026, at p. 57). But of course \$1 million is far from negligible when it comes to influencing state government and public opinion generally.
- B. Having no need to compete for customers by pleasing them more than do their competitors, utilities in vertical monopoly jurisdictions like North Carolina have long understood their greatest public acceptance challenge to lie in assuring a favorable political climate. North Carolina utilities no doubt focus heavily on assuring that their interests are protected in political forums because, unlike most businesses, dissatisfied customers cannot choose another supplier and must instead seek redress through regulatory or legislative processes. The appointment of regulators and other officials, the enactment of legislation, the selection of judges, the election of legislators, the influencing of opinion pieces and of media editors – these are areas where the expenditure of a few million dollars can and does make a very large difference even though the amounts are hard to detect through their impact on utility rates.
- C. The experience of North Carolina and several other southeastern states with utility influence expenditures in the context of early recovery of nuclear construction costs is now a decade old. The anti-consumer consequences are clear and dramatic, amounting to per-state damage several orders of magnitude greater than the amounts spent buying influence. Beginning around 2005, utilities throughout the southeast

joined with the Nuclear Energy Institute, the Edison Electric Institute and state chambers of commerce in a major lobbying and advertising effort to enact legislation to further what was then called a “nuclear renaissance.” This effort had a major federal component too, but at the state level the focus was on the enactment of laws shifting the economic risks of building new nuclear and other facilities away from investors and onto customers. This was achieved by enactment of laws drastically modifying normal ratemaking practices. The new laws mandated recovery of substantial costs from the beginning of multibillion-dollar construction projects. They also limited the usefulness of reviews of the prudence of the expenditures. The legislation neither contained nor required regulators to impose consumer safeguards such as competitive procurement or caps on recoverable costs. The legislation created a classic economic mismatch known as “moral hazard,” in which utilities isolated by the new laws from immense economic risk that had been moved onto their customers gambled on nuclear construction strategies that stood to benefit their stockholders far more than their customers. In North Carolina, the enabling legislation took the form of the Project Development Statute. Pursuant to this statute, North Carolina regulators certified the now-cancelled Shearon Harris and William Lee nuclear construction projects, exposing customers to wasted investment in the hundreds of millions of dollars.

- D. Those of us who tried in North Carolina and elsewhere to warn legislators, regulators, executive branch officials and editorial boards of the potential losses found ourselves completely outgunned by the money that utilities and organizations of which they were members had spent to argue (often misleadingly) for the new laws. Some of this influence mismatch no doubt resulted from lobbying and political expenditures

that were not charged to customers. Much of it also resulted from the pervasive presence that utilities maintain in their home communities to build support for just this type of endeavor.

E. A major investigative study in The Post and Courier entitled “Power Failure: How Utilities across the U.S. Changed the Rules to Make Big Bets with Your Money” (December 11, 2017) estimates that the early cost recovery statutes enacted in the 2005-2007 time frame as a result of electric utility influence in state capitals “ignited a bonfire of risky spending – \$40 billion so far on new power plants and upgrades.” More than \$15 billion of that amount is irrevocably wasted at sites where the plants have been canceled or partially abandoned. At least another \$15 billion has gone to cover cost overruns. North Carolina customers are relatively fortunate in that Duke’s North Carolina misadventures are likely limited to the hundreds of millions of dollars. In Florida, where The Post and Courier article said that Duke admitted to drafting key provisions of the early cost recovery legislation “as we do in many cases to ensure the final product is the best policy for our state, our customers and our company,” Duke’s cancelled Levy County reactors are costing customers more than \$1 billion. And in South Carolina more than \$9 billion has been spent by a consortium on reactors now cancelled.

F. The climate consequences of this utility influence-driven waste are immense. Not a single molecule of U.S. CO₂ has been eliminated by a new nuclear reactor in the 21st century. Had the tens of billions lost to cancellations and cost overruns instead been devoted to other low carbon solutions such as energy efficiency, load management, renewable energy, grid enhancement and electricity storage, North Carolina customers and their counterparts throughout the southeast would be well on their way to a cleaner, more reliable 21st century electric grid.

15. North Carolina Utility Commission regulations prohibit utilities from charging customers for political or promotional advertising. Errors in utility accounting have resulted in a million dollars or more being allocated to accounts that are “above the line,” that is, chargeable to customers. When these were discovered in a recent rate case, they were corrected. Duke pointed out that the amounts at issue represented some .002% of its total North Carolina revenue requirement and that the influence amounts in dispute would only change the typical residential bill by a penny or two per month (In the Matter of Application of Duke Energy Carolinas for Adjustment of Rates and Charges, Docket No.. E-7, Sub 1026, p. 57).

16. The essence of the regulatory challenge posed by utility influence expenditures is now clear. Through use of political influence accumulated through expenditure of million dollar amounts that are miniscule in ratemaking terms but very large in political or charitable or advertising or other societal contexts, utilities can prioritize the interests of their shareholders in large capital investments whose construction risks are shifted to the utility customers over the interests of their customers.

17. Even if the Commission adopts all the financial control measures recommended by NC WARN and Friends of the Earth, it will not prevent the type of public policy fiasco and customer abuse brought on throughout the region by the deep-pocketed state-by-state drive for early cost recovery or, for that matter, by other utility funded initiatives that elevate shareholder interests over the interests of North Carolina’s customers, citizens and the environment. Nor can routine regulatory proceedings fully avert the damage caused by utility influence in governmental and other public policy forums. Commission decisions pursuant to the early cost recovery laws are replete with rejections of recommendations that history has since vindicated from consumer, industrial and environmental intervenor groups. These recommendations were rejected because the new utility-driven statutes express a clear intent to further nuclear (or clean coal) construction through the rate treatment proposed by the utilities.

18. Utilities have a constitutionally protected right to express themselves. When the New York Public Service Commission sought to prohibit Consolidated Edison Company from expressing views on controversial issues in customer bill inserts, the U.S. Supreme Court in 1980 struck the policy down as an unconstitutional infringement on the utility's First Amendment rights. The same year in a case involving Central Hudson Gas & Electric Company, the Court also struck down a part of the NYPSC policy statement that prohibited all advertising that promoted the use of electricity. The Court held that, while a state had some power to regulate commercial speech, it must impose the minimum amount of regulation necessary to its legitimate goals.

19. Given the harm demonstrably done by utility programs designed to further utility influence over policymaking processes, the Commission should do all that it can within the framework of the First Amendment to assure that customers do not pay for these programs and that full and frequent disclosure is made of the type and purpose of all expenditures in categories intended to further such influence. Because such expenditures do not have a large direct impact on utility rates, rate case litigation of them should be kept to the minimum consistent with assuring these principles. This can be done by expanding existing commission rules to clarify and limit amounts chargeable to customers and to state that the Commission puts the burden of proof on the utility to show beyond reasonable doubt that any expenditures outside of the formula confer a clear benefit on customers and are important to the provision of adequate service at reasonable rates and with minimal environmental impact. To the extent that these programs, as well as charitable contributions and sponsorships, produce corporate goodwill, they enhance shareholder value and are not essential to the provision of utility service.

20. New York set an allowable amount of institutional advertising (i.e. a limit based on a percentage of gross revenues). In addition, many states allowed percentages of Edison Electric Institute (EEI) dues that resulted from the annual EEI audits performed until 2000 by the National Association of Regulatory Utility Commissioners in conjunction with EEI. As to EEI dues paid by North Carolina utilities, such a percentage would be desirable. A formula should also be adopted for recovery of dues

paid to the Nuclear Energy Institute (NEI). Since NEI's activities are heavily political, well over 50% of Duke's NEI dues should come from money otherwise destined for shareholders.

21. The funds used to pay for influence are – when the accounting and ratemaking are done properly – not charged to customers. This means that rates are not higher than they would be if the money used to obtain influence were instead spent in other ways such as dividends or retained earnings. However, monopoly utilities are still uniquely able to collect this money and decide how to spend it without being constrained by concern that customers offended by these expenditures might buy from another seller. The state-granted monopoly franchise greatly strengthens the power of utilities to accumulate money to purchase influence. This state-conferred capability – coupled with the clear and very large harm to the public interest that it has recently done in North Carolina and the surrounding states – also increases the need and the justification for state oversight, within constitutional limits, of the process by which this money is raised and spent.

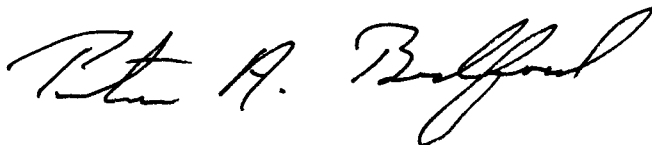
22. The Commission can require detailed reporting of all political and lobbying expenditures by utilities and by utility holding companies and corporate affiliates on topics related to the business of the utilities, including regulatory commission appointments. Such reporting should be on an annual basis and should be immediately available to the public as well as forwarded to the Legislature. No valid basis exists for keeping secret the amount of such expenditures by regulated utilities.

23. The Commission can also require utilities to pay for responsible public interest advocacy to assure that diverse approaches to major public policy issues are brought to the attention of policymakers throughout government. Such utility-supplied funds support interventions in regulatory proceedings and court cases in several states and Canadian provinces. Some of the offices supported by such funds also testify in legislative proceedings. Such funding would require stringent eligibility criteria (such as a prior demonstration of a capability for effective and responsible consumer and/or environmental advocacy). It would also require monitoring as well as upper limits determined on a case-

fund advocacy of positions with which they disagree. No such funds could be used for political contributions. As established above, the total amount would be miniscule in terms of an impact on utility rates, but the savings in avoiding or at least mitigating errors such as the rush to early cost recovery legislation would pay back the costs many times over. Such funding for advocacy by the consumer, citizen and environmental voices that are currently drowned out by immense, monopoly generated funding for utility advocacy would give North Carolina policy makers a clearer and more complete view of the consequences of the policy choices confronting them.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: November 13, 2018


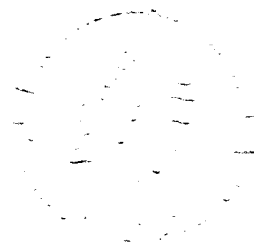


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PROFESSIONAL EXPERIENCE:

March 1998 – 2018 – Adjunct Professor, Vermont Law School

*Teaching courses on “Nuclear Power and Public Policy” and “The Law of Electric Restructuring”;
participating in VLS Energy Law Center programs*

March 2011 – present – Commissioner, Texas-Vermont Low-Level Radioactive Waste Compact
Commission,

One of two Vermont commissioners on this two-state compact

May 2014 – May 2016 – Member Advisory Council, Bipartisan Policy Center Project on Nuclear Waste.

March 1996- present – CEO of Bradford Brook Associates, consulting on energy and utility regulatory
policy

*Advising and teaching utility regulation, restructuring, power supply procurement, nuclear power and
energy policy in the U.S. and abroad. Has been a visiting lecturer in energy policy and environmental
protection at Yale University. Served on State of New York Moreland Commission on Utility Storm
Response and Renewable Energy Procurement (2012-13) and as a member and cochair on Vermont’s
2008-10 Public Oversight Panel on the Comprehensive Reliability Audit of the Vermont Yankee nuclear
power plant; Served on a 2007 Keystone Center fact finding collaboration on nuclear power and a 2006
National Academy of Sciences panel evaluating the alternatives to continued operation of the Indian
Point nuclear power plants in New York. Also affiliated with the Regulatory Assistance Project, which
provides assistance to state and federal energy regulatory commissions regarding economic regulatory
policy and environmental protection.*

*The only person ever to have served on three United States regulatory commissions, Mr. Bradford has
advised on regulatory and restructuring issues and has testified on aspects of energy and
telecommunications regulation in many U.S. states. In recent years (2007-present) has testified in
regulatory and legislative proceedings in California, Delaware, Georgia, Maine, Maryland, Indiana,
Florida, North Carolina, South Carolina and Vermont as well as before the U.S. Nuclear Regulatory
Commission and in U.S. federal district court.*

One prominent regulatory scholar termed him "generally regarded as the nation's brightest and most thoughtful regulator" (Irwin Stelzer, New York Post, 07/14/1994). Another called him a "regulatory legend" (<https://www.scotthemplinglaw.com/essays/the-decisive-regulator>).

International - Taught and/or advised abroad on energy and water issues and electric restructuring in China, Japan, Canada, Armenia, Azerbaijan, Russia, India, Indonesia, Turkey, Kazakhstan, Kyrgyzstan, Czech Republic, Mongolia, St. Lucia, Kosovo, South Africa, Georgia, Trinidad and Tobago, New Zealand, Bangladesh and Samoa. Former Member, Policy Advisory Committee of the Packard Foundation's China Sustainable Energy Project. Served as one of two U.S. representatives on international panel advising European Bank for Reconstruction & Development on least cost energy alternatives in Ukraine to continued operation of the Chernobyl Nuclear Station (1996-97) and on an international expert panel assessing the safety of the Mochovce Nuclear Power Station in Slovakia (1998);

February 1995 - March 1996 Fellow, Regulatory Assistance Project

Project funded by the U.S. Dept. of Energy, the Environmental Protection Agency and foundations to provide assistance to state and federal regulatory commissions on energy and environmental matters.

June 1987- January 1995 Chairman, New York State Public Service Commission, Albany, New York

CEO of state agency charged with overseeing \$29 billion annual revenues of New York utilities. Responsible for developing and implementing consumer and environmental protection policies, transitions from monopoly to competition in energy and telecommunications industries. 700 employees, \$65 million budget.

July 1982- June 1987 Chairman, Maine Public Utilities Commission, Augusta, Maine

CEO of state agency charged with overseeing \$2 billion annual revenues of Maine utilities. Responsible for developing and implementing consumer and environmental protection policies, including competitive bidding for independent power production and energy conservation services as well as adjusting to the break-up of AT&T. 60 employees, \$4 million budget.

March 1982-June 1982 State of Maine Public Advocate

First full-time Maine public advocate; intervened on consumers' behalf in telephone and energy cases; oversaw staff of 6; prepared briefs; cross-examined witnesses.

Aug. 1977-March 1982 Commissioner, United States Nuclear Regulatory Commission, Washington, D.C.

One of five commissioners of the federal agency whose responsibilities include safety of nuclear power plants and other nuclear facilities; preparing licensing criteria for a nuclear waste repository; licensing exports of nuclear fuel and reactors pursuant to Nuclear Nonproliferation Act; assisted in major upgrades

of regulatory and enforcement processes in wake of Three Mile Island accident. 3000 employees, \$250 million budget.

Dec. 1971-Aug. 1977 Commissioner, **Maine Public Utilities Commission, Chairman** (9/74-7/75).

Sept.1968- Dec. 1971 **Federal-State Coordinator**, State of Maine

Responsible for many oil, power, environmental and housing matters. Assisted in preparation of landmark Maine laws relating to oil pollution and industrial site selection. Staff Director, Governor's Task Force on Energy, Heavy Industry and the Coast of Maine.

Aug. 1964-June 1965 **Athens College, Greece, Teaching Fellowship**

PROFESSIONAL AFFILIATIONS:

1999-2015 - Member, Policy Advisory Committee, China Sustainable Energy Project (funded by the David and Lucille Packard Foundation and the Energy Foundation).

1998-2002 - Member, Advisory Council, New England Independent System Operator

Nov. 1986-Nov. 1987 President, National Association of Regulatory Utility Commissioners

1977-1995 NARUC positions, Member, Executive Committee; Member, Electricity Committee (1977-1989); Member, Gas Committee (1989-1993); Member, Communications Committee (1975-1977); Board of Directors, National Regulatory Research Institute (1985-1987).

1975-1977, 1982-1986. Advisory Council, Electric Power Research Institute

1987-1995, Member of New York State Energy Planning Board

1987-1995, Member, Board of Directors, New York State Energy Research and Development Administration

1987-1995, Member, New York State Environmental Board;

1987-1995, Chair, New York State Energy Facilities Siting Board

1992-1994, State co-chair, New York State Task Force on Telecommunications Policy

Vice-chair, Board of Directors, Union of Concerned Scientists

EDUCATION:

1964 B.A. History, Yale University, New Haven, CT

1968 L.L.B., Yale University School of Law, New Haven, CT

PERSONAL:

Married (Susan Symmers Bradford)

Three children (Arthur, Laura, Emily)

PUBLICATIONS of Peter A. Bradford

Books

Fragile Structures: A Story of Oil Refineries, National Security and the Coast of Maine, 1975, Harper's Magazine Press. ("In a number of respects a rare book...The presentation is a balanced one", New York Times, 11/30/1975; "If sanity is ever declared illegal, Peter Bradford ought to be one of the first people arrested...A work of political education that transcends partisanship", Kirkus Reviews, May, 1975).

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Other Published Work

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