

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of)	
Chapters 4901-1, Rules of Practice and)	
Procedure; 4901-3, Commission Meetings;)	Case No. 11-776-AU-ORD
4901-9, Complaint Proceedings; and 4901:1-1,)	
Utility Tariffs and Underground Protection, of)	
the Ohio Administrative Code)	

COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO POWER COMPANY'S INITIAL COMMENTS

INTRODUCTION

By Entry dated March 2, 2011 the Commission invited comments regarding the proposed rule amendments to Ohio Administrative Code Rules 4901-1, 4901-3, 4901-9 and 4901:1-1. The Commission set April 1, 2011 and April 30, 2011 as the filing dates for initial and reply comments respectively. In accordance with this schedule, Columbus Southern Power Company and Ohio Power Company (collectively AEP Ohio) file the following initial comments. AEP Ohio reserves the right to submit reply comments on any matter raised by another commenter.

AEP Ohio commends the Commission for undertaking the considerable effort and resource commitment required to implement a modern and effective electronic filing system. AEP Ohio believes that the Commission's work in this regard will aid in reducing paper waste and other costs, and promote greater efficiency in the filing process as a whole. AEP Ohio looks forward to working with the Commission and all stakeholders involved to achieve these goals. AEP Ohio thanks the Commission for this opportunity to comment.

4901-1-02(D)(5), Filing of Pleadings and other Documents

While it is clear that the e-mail notice under this rule satisfies a filer's burden of service upon those parties who are electronically subscribed to a case, it is unclear how a filer determines whether a party is electronically subscribed to a case. To clarify this uncertainty, AEP Ohio proposes that a party be considered electronically subscribed to a case if he or she indicates a willingness to accept service of filed documents by fax or e-mail pursuant to rule 4901-1-03(A). AEP Ohio's recommended language is set forth below.

- **Recommended Rule Changes for Rule 4901-1-02(D)(5):**

(5) If an e-filing is accepted, notice of the filing will be sent via electronic mail (email) to all persons who have electronically subscribed to the case, including the filer. This e-mail notice will constitute service of the e-filed document upon those persons electronically subscribed to the case. Upon receiving the e-mail notice that the e-filed document has been accepted by the commission's docketing division, the filer shall serve copies of the document in accordance with rule 4901-1-05 of this chapter upon parties to the case who are not electronically subscribed to the case. **AN ATTORNEY OR PARTY WHO IS WILLING TO ACCEPT SERVICE OF FILED DOCUMENTS BY FAX OR E-MAIL AS SET FORTH IN RULE 4901-1-03(A) SHALL BE CONSIDERED ELECTRONICALLY SUBSCRIBED TO A CASE.**

4901-1-03(A), Form of Pleadings and other Papers

With an effective electronic filing system in place, it is reasonable to assume service by e-mail will become the preferred method among parties for serving and receiving documents as e-mail correspondence is quick, essentially free and already ubiquitous in workplaces. Accordingly, with increased service by e-mail likely, a party willing to receive documents by e-mail should be responsible for ensuring his or her e-

mail account is appropriately set to receive documents from the various parties involved in a proceeding, including the Commission. Specifically, a party should be responsible for ensuring that his or her e-mail account is listed correctly, currently active and not set to treat outside messages as SPAM. A party performing service by e-mail should not be responsible for a failed service simply because the intended recipient's e-mail settings are set to block messages from a foreign sender. AEP Ohio proposes the following clarification to accomplish this goal:

- **Recommended Rule Changes for Rule 4901-1-03(A):**

(A) All pleadings or other papers to be filed with the commission shall contain a caption or cover sheet setting forth the name of the commission, the title of the proceeding, and the nature of the pleading or paper. All pleadings or papers filed subsequently to the original filing or commission entry initiating the proceeding shall contain the case name and docket number of the proceeding. Such pleadings or other papers shall also contain the name, address, and telephone number of the person filing the paper, or the name, address, ~~and telephone number, and attorney registration number~~ of his or her attorney, if such person is represented by counsel. The party making a filing should include a ~~facsimile transmission~~ fax number and/or an ~~electronic message~~ (e-mail)-address if the party is willing to accept service of pleadings by fax - ~~facsimile transmission~~ or e-mail. An attorney or party who is willing to accept service of filed documents by fax shall include the following phrase next to or below its fax number: (willing to accept service by fax). An attorney or party who is willing to accept service of filed documents by e-mail shall include the following phrase next to or below its e-mail address: (willing to accept service by e-mail). **AN ATTORNEY OR PARTY WILLING TO ACCEPT SERVICE OF DOCUMENTS BY E-MAIL SHALL BE RESPONSIBLE FOR ENSURING HIS OR HER E-MAIL ACCOUNT IS ACTIVE AND APPROPRIATELY SET TO ACCEPT MESSAGES FROM FOREIGN SENDERS, INCLUDING THE COMMISSION.**

4901-1-16(B), General Provisions and Scope of Discovery

In its current form, this rule permits any party to a proceeding to immediately seek an unlimited amount of discovery even before a proceeding has been set for hearing. The rule permits extensive discovery and essentially facilitates fishing expeditions even in cases where only a notice-and-comment process is used to decide the case. AEP Ohio proposes that the Commission limit discovery to those proceedings in which a hearing has been scheduled, or, in the alternative, require that a party obtain approval from the Commission, the legal director, the deputy legal director or an attorney examiner to conduct discovery in those proceeding in which there is no hearing.

The value of written discovery is inherently tied to a hearing. Responses to discovery requests are not useful if they are never employed because a proceeding does not involve a hearing. A party should be prohibited from imposing upon another party the costs and burdens of discovery in proceedings without a hearing, or should at least be required to demonstrate a need for obtaining discovery under those circumstances so as to limit duplicative requests or other abusive uses of the discovery process. Requiring that a party demonstrate his or her need for obtaining discovery in these situations would impose no greater burden on a party seeking to propound legitimate discovery requests, reduce Commission involvement in discovery disputes and at the same time adequately facilitate preparation for participation in the fundamental aspect of an administrative proceeding—the hearing. AEP Ohio recommends including the following language to help achieve this goal.

- **Recommended Rule Changes for Rule 4901-1-16(B):**

(B) Except as otherwise provided in paragraphs (G) and (I) of this rule, any party to a commission proceeding **THAT HAS**

BEEN SCHEDULED FOR A HEARING may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. **FOR PROCEEDINGS IN WHICH NO HEARING WILL BE HELD, A PARTY MAY OBTAIN DISCOVERY ONLY AFTER DEMONSTRATING A NEED FOR THE DISCOVERY AND OBTAINING THE APPROVAL OF THE COMMISSION, THE LEGAL DIRECTOR, THE DEPUTY LEGAL DIRECTOR, OR AN ATTORNEY EXAMINER.** It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions, and requests for admission. The frequency of using these discovery methods is not limited unless the commission orders otherwise under rule 4901-1-24 of the Administrative Code

4901-1-17(A), Time Periods for Discovery

As with rule 4901-1-16(B), AEP Ohio suggests that this rule be modified to prohibit discovery in those proceedings in which no hearing will be held, unless the party seeking discovery demonstrates a need for the discovery and obtains the approval of the Commission, the legal director, the deputy legal director or an attorney examiner

- **Recommended Rule Changes for Rule 4901-1-17(A):**

(A) Except as provided in paragraph (E) of this rule, discovery may begin immediately after a proceeding **HAS BEEN SCHEDULED FOR HEARING, OR FOR PROCEEDINGS IN WHICH NO HEARING WILL BE HELD AFTER THE PARTY HAS DEMONSTRATED A NEED FOR THE DISCOVERY AND OBTAINED THE APPROVAL OF THE COMMISSION, THE LEGAL DIRECTOR, THE DEPUTY LEGAL DIRECTOR OR AN ATTORNEY EXAMINER,** ~~is commenced~~ and should be completed as expeditiously as possible. Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of the hearing.

4901-1-18, Filing and Service of Discovery Requests and Responses

In order to further advance the Commission's efforts to promote the transition to filing documents by fax and e-mail, AEP Ohio suggests permitting the service of discovery requests and responses by fax and e-mail as well. AEP Ohio proposes adding the following language to this rule to highlight this objective

- **Recommended Rule Changes for Rule 4901-1-18:**

Except as otherwise provided in rules 4901-1-23 and 4901-1-24 of the Administrative Code, and unless otherwise ordered for good cause shown, discovery requests and responses shall be served upon all parties but shall not be filed with the commission. Discovery requests and responses shall be served upon staff counsel if staff is participating in the proceeding. For purposes of this rule, the term "response" includes written responses or objections to interrogatories served under rule 4901-1-19 of the Administrative Code, written responses or objections to requests for the production of documents or tangible things or requests for permission to enter upon land or other property served under rule 4901-1-20 of the Administrative Code, and written responses or objections to requests for admission served under rule 4901-1-22 of the Administrative Code. It does not include any documents or tangible things produced for inspection or copying under rule 4901-1-20 of the Administrative Code. **AN ATTORNEY OR PARTY WHO IS WILLING TO ACCEPT SERVICE OF FILED DOCUMENTS BY FAX OR E-MAIL AS SET FORTH IN RULE 4901-1-03(A) SHALL BE SIMILARLY CONSIDERED WILLING TO ACCEPT DISCOVERY REQUESTS AND RESPONSES BY THE SAME MEANS.**

4901-1-21(B), Depositions

The phrase "absent unusual circumstances" is vague and will likely generate unnecessary debate among parties. AEP Ohio suggests that the rule be modified to afford the legal director, deputy legal director or an attorney examiner the discretion to allow a deposition to be conducted after the commencement of the hearing for good cause shown.

- **Recommended Rule Changes for Rule 4901-1-21(B):**

(B) Any party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to the deponent, to all parties, and to the commission. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known^ or if the name is not known, a general description sufficient for identification. If a subpoena duces tecum is to be served upon the person to be examined, a designation of the materials to be produced thereunder shall be attached to or included in the notice. Notice to the commission is made by filing a copy of the notice of deposition provided to the person to be deposed or a copy of the subpoena in the case file. ~~Absent unusual circumstances,~~ **UNLESS OTHERWISE ORDERED FOR GOOD CAUSE SHOWN,** depositions should be completed prior to the commencement of the hearing.

4901-1-21(N), Depositions

AEP Ohio proposes adding language to clarify that a deposition transcript can be used to refresh the recollection of a witness even if the transcript was not prefiled.

- **Recommended Rule Changes for Rule 4901-1-21(N):**

(N) Depositions may be used in commission hearings to the same extent permitted in civil actions in courts of record. Unless otherwise ordered for good cause shown, any depositions to be used as evidence must be filed with the commission at least three days prior to the commencement of the hearing. A deposition need not be prefiled if used to **REFRESH A WITNESS'S RECOLLECTION OR TO** impeach the testimony of a witness at hearing.

4901-1-25, Subpoenas

AEP Ohio proposes that the Commission clarify this rule to limit the use of subpoenas to compelling factual testimony only. Unlike policy or opinion testimony,

individuals may possess personal knowledge of facts that are integral to the resolution of a proceeding and may need to be compelled to testify if not offered voluntarily. A party should bear its own burden of producing a witness for non-essential testimony such as opinion or policy testimony and should not be permitted to compel such testimony through the use of a subpoena. Accordingly, the rule should limit the use of subpoenas to compelling those witness who offer testimony based on personal knowledge of the facts at issue in the case. AEP Ohio proposes the following clarifications to this rule to reflect this objective.

- **Recommended Rule Changes for Rule 4901-1-25:**

(A) The commission, any commissioner, the legal director, the deputy legal director, or an attorney examiner may issue subpoenas, upon their own motion or upon motion of any party. A subpoena shall command the person to whom it is directed to attend and give **FACTUAL** testimony at the time and place specified therein. A subpoena may also command such person to produce the books, papers, documents, or other tangible things described therein. A party may request a subpoena by either of the following methods: ~~A copy of the motion for a subpoena and the subpoena itself should first be submitted to the attorney examiner assigned to the case, or to the legal director or deputy legal director, for signature of the subpoena. After the subpoena is signed, a copy of the motion for a subpoena and a copy of the signed subpoena shall then be docketed and served upon the parties to the case. The person seeking the subpoena shall retain the original signed subpoena and make arrangements for its service.~~

(D) A subpoena may require a person, other than a member of the commission staff, to attend and give **FACTUAL** testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code. Such a subpoena is subject to the provisions of rule 4901-1-24 of the Administrative Code as well as paragraph (C) of this rule.

CONCLUSION

For the foregoing reasons, AEP Ohio recommends the above comments and changes be considered and adopted by the Commission in finalizing its rule review. AEP Ohio once again thanks the Commission for this opportunity to comment

Respectfully submitted,

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/1/2011 1:42:12 PM

in

Case No(s). 11-0776-AU-ORD

Summary: Comments AEP Ohio Initial Comments electronically filed by Mr. Steven T Nourse
on behalf of American Electric Power Service Corporation