

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**INITIAL COMMENTS OF COLUMBIA GAS OF OHIO, INC.,  
THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO, AND  
VECTREN ENERGY DELIVERY OF OHIO, INC.**

Pursuant to the Commission’s March 2, 2011 Entry, Columbia Gas of Ohio, Inc. (“Columbia”), The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO”) and Vectren Energy Delivery of Ohio, Inc. (“VEDO”) (collectively, the “Large Gas LDCs”) file their comments in response to the Commission Staff’s proposed changes to Chapters 4901-1, 4901-3, 4901-9, and 4901:1-1.

**I. INTRODUCTION**

The rules in Chapter 4901-1, Ohio Administrative Code (“O.A.C.”), are vitally important. These rules govern how every aspect of every Commission proceeding is processed. Any decision to modify or rescind existing rules, or implement new rules, should be guided by the twin goals of fairness and administrative efficiency. For the most part, Commission Staff’s proposed changes to Chapter 4901-1 meet these goals.

In two respects, however, Staff’s proposed changes do not go far enough. First, although “encouraging” parties to electronically file and serve documents is a step in the right direction, there is no reason the procedural rules should not make electronic filing and service mandatory. Exceptions can be made for *pro se* parties and perhaps other unique circumstances, but mail service should be the exception and not the rule. Given that utilities and other stakeholders who

routinely participate in Commission proceedings already have the capability to file and serve documents electronically, mandating electronic filing and service will not prejudice anyone.

Second, although Commission Staff is a key stakeholder in many important Commission proceedings, Staff is generally exempt from the substantive and procedural requirements of Chapter 4901-1. At best this is highly unfair; at worst it is unconstitutional and unlawful. Chapter 4901-1 should be modified so that Staff is subject to the same requirements as every other participant in Commission proceedings. Under both the current and proposed rules, Staff may serve discovery requests without being subject to *any* discovery itself. Staff may testify at hearings without pre-filing testimony. Staff may produce and file reports in the Commission's docket without being subject to cross-examination at hearing. In short, Staff can pretty much do whatever it wants. The Large Gas LDCs appreciate the fact that Staff has been exempt from the procedural rules for many years, but this does not make it right. Regulatory inertia is not a substitute for substantive and procedural due process.

The Large Gas LDCs have proposed several other practical and logical rule changes based on their experiences in Commission proceedings. The Large Gas LDCs respectfully request the Commission adopt changes to Chapters 4901-1 and 4901-9 consistent with these Initial Comments.

## II. INITIAL COMMENTS

### A. Comments to Chapter 4901-1

#### **Rule 4901-1-01**

The Large Gas LDCs have no comments or proposed changes regarding the definitions in Ohio Adm. Code 4901-1-01.

#### **Rule 4901-1-02**

##### **4901-1-02(A)(5)**

Staff proposes to allow the Commission to redact any material from a filed document prior to its posting on the Docketing Information System (“DIS”). The Commission may redact confidential personal information, trade secrets, or other information that is inappropriate for posting to its website.

The Large Gas LDCs support allowing the Commission to redact documents prior to posting them on DIS. But the Commission should provide the filer and other parties notice of any redactions prior to or contemporaneously with its DIS posting. Otherwise, the filer will not receive timely notice that a redaction occurred. Therefore, the Large Gas LDCs propose the following change to Ohio Adm. Code 4901-1-02(A)(5):

(5) The commission reserves the right to redact any material from a filed document prior to posting the document on the docketing information system if the commission finds the material to be confidential personal information, a trade secret, or inappropriate for posting to its website. IF THE COMMISSION REDACTS ANY INFORMATION CONTAINED IN THE FILING, IT WILL NOTIFY THE PARTIES SUBSCRIBED TO THE PROCEEDING EITHER PRIOR TO OR CONTEMPORANEOUSLY WITH ITS POSTING THE REDACTED DOCUMENT ON THE COMMISSION’S WEBSITE.

**4901-1-02(D)**

Staff proposes to include a new section detailing the procedures for electronic filing. The Large Gas LDCs initially note that with the inclusion of the e-filing requirements in Chapter 4901-1, the Commission should consider closing the Case No. 07-535-AU-ORD proceeding.

Generally, the Large Gas LDCs support the Commission's efforts to increase the use of e-filing. However, if the Commission is serious about e-filing, it should require all parties represented by counsel, including Staff, to file electronically. Under the proposed rules, a party may choose to file documents by paper, facsimile, or e-filing. By allowing parties to choose the method of filing, some parties will file documents late on Friday afternoon by paper, knowing the document will not post to DIS until Monday morning and the service copy by mail will not be received until later Monday afternoon. With the Commission proposing to eliminate the three-day extension for parties served by mail, continuing to permit paper filing unfairly shortens response times.

Requiring parties represented by counsel to file documents electronically would not be burdensome. Internet and e-mail are widely available. E-filing also streamlines the flow of pleadings, motions, and comments between parties and allows parties to send and receive information while absent from the office. The Large Gas LDCs' proposed rule change also recognizes that certain consumer complainants, appearing in propria persona, may not have the technology to file electronically and would continue to be permitted to file by paper, facsimile or electronically. Therefore, the Large Gas LDCs propose the following change to Ohio Adm. Code 4901-1-02(D):

(D) A person may e-file documents with the commission PURSUANT TO THIS RULE. ~~under the following conditions:~~ ALL PARTIES REPRESENTED BY COUNSEL SHALL ONLY E-FILE DOCUMENTS, EXCEPT AS PROVIDED PURSUANT TO 4901-1-02(D)(2), UNDER THE FOLLOWING CONDITIONS:

Similarly, all parties represented by counsel should be required to subscribe to the case to receive the electronic notifications sent by the Commission's docketing system once a document is e-filed. Most parties already sign up for DIS case notifications for proceedings in which they participate. Mandatory subscription to Commission proceedings would also alleviate the redundancy of serving documents to parties who already utilize the Commission's DIS website. Most importantly, by requiring all parties to subscribe to cases, a filer will not have the hassle of differentiating between the parties who are and are not subscribed to a particular proceeding to provide additional service, as is currently required under Staff's proposed rules. Therefore, the Large Gas LDCs propose the following change to Ohio Adm. Code 4901-1-02(D)(5):

(5) If an e-filing is accepted, notice of the filing will be sent via electronic mail (e-mail) to all persons who have electronically subscribed to the case, including the filer. IN ORDER TO RECEIVE SERVICE OF FUTURE CASE FILINGS, ALL PARTIES REPRESENTED BY COUNSEL SHALL ELECTRONICALLY SUBSCRIBE TO THE CASE UPON THEIR INITIAL APPEARANCE IN THE PROCEEDING. ~~This~~THE 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 electrically subscribed to the case.

The Large Gas LDCs are also concerned that under the current proposed rules, e-filed documents will not be accepted the same day they are electronically submitted to the Commission. According to proposed Ohio Adm. Code 4901-1-02(D)(4), "[A]ny e-filed document received after five-thirty p.m. shall be considered filed at seven-thirty a.m. the next business day." However, in proposed Ohio Adm. Code 4901-1-02(D)(6), the Commission notes that "[t]o allow time for same-day review and *acceptance* of e-filings, persons making e-filings are encouraged to make their filings by no later than four p.m." Proposed Ohio Adm. Code 4901-1-02(D)(6) (emphasis added). Parties will *not* be encouraged to e-file if the Commission does not guarantee

same-day acceptance of their properly filed documents. It is unreasonable to deny same-day acceptance to a party who e-files an acceptable document at 4:15 p.m. if that same person could walk into the Commission's office with the paper filing at 5:15 p.m., and avoid electronic service to the other parties.

To alleviate the concern with the proposed rule, the Large Gas LDCs propose that the Commission ensure same-day review and acceptance for all e-filings submitted on or before 5:30 pm. The Commission would also need to amend its Docketing Information System Electronic Filing Technical Requirements & Manual. Currently, the Manual does not ensure same-day review and acceptance for filings. It states that “[a]cceptance [of an e-filed document] will be deemed to occur on the confirmation date if the filing time occurred during Docketing’s business hours, or on the next business day if the confirmation occurred after business hours.” Docketing Information System Electronic Filing Technical Requirements & Manual, Section 6.16 (Revised November 16, 2010) at 26. The Commission should not set the filing date by a document’s confirmation time, assigned *after* the Docketing Division has reviewed and accepted the filing. For e-filing to be a success, the Commission needs to ensure same-day acceptance of e-filed documents submitted within the Docketing Division hours. Therefore, the Large Gas LDCs propose the following change to Ohio Adm. Code 4901-1-02(D)(6):

(6) The commission’s docketing division closes at five-thirty p.m. ~~To allow time for same-day review and acceptance of e-filings, persons making e-filings are encouraged to make their filings by no later than four p.m.~~ ALL DOCUMENTS E-FILED BEFORE OR AT FIVE-THIRTY, WHICH MEET THE COMMISSION’S ELECTRONIC FILING TECHNICAL REQUIREMENTS AND MANUAL, WILL BE CONSIDERED FILED AND POSTED TO THE COMMISSION’S WEBSITE THAT DAY.

### **Rule 4901-1-03**

#### **4901-1-03(A)**

Staff proposes to amend this paragraph to require attorneys filing documents to include their attorney registration number and a parenthetical notation to indicate whether the attorney or party is willing to accept filings by facsimile or e-mail. The Large Gas LDCs support the Commission aligning its signature block requirements with Ohio courts and encouraging parties to serve documents more efficiently. However, the Large Gas LDCs do not believe Staff's proposed rules go far enough. Similar to the proposed change to Ohio Adm. Code 4901-1-02(D), the Large Gas LDCs propose that the Commission require all parties represented by counsel to be served by e-mail via the Commission's DIS notification system. E-mail is the method of communication most often used by these individuals to communicate with clients, business personnel, and the Commission. With the elimination of the three-day extension for service by mail and one-day extension for service by e-mail after 5:30 p.m. in Ohio Adm. Code 4901-1-07, e-mail is the most expeditious and reliable method of service. Therefore, the Large Gas LDCs propose the following change to Ohio Adm. Code 4901-1-03(A):

(A) ... The party making a filing should include a fax number and/or e-mail address if the party is willing to accept service of pleadings by fax 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).~~ ALL PARTIES REPRESENTED BY COUNSEL, BY ELECTRONICALLY SUBSCRIBING TO THE CASE, SHALL RECEIVE SERVICE BY E-MAIL NOTIFICATION FROM THE COMMISSION'S E-FILING SYSTEM.

### **Rule 4901-1-04**

The Large Gas LDCs have no comments or proposed changes regarding the signing of pleadings in Ohio Adm. Code 4901-1-04.

**Rule 4901-1-05**

**4901-1-05(B)**

This rule details the requirements for service after a document is e-filed. The proposed rule allows for the Commission's DIS notifications to serve as the service copy to parties subscribed to the case, but requires additional service to parties who are not subscribed to the case. Similar to the comments in Ohio Adm. Code 4901-1-02, the Large Gas LDCs propose for the Commission to require all represented parties to subscribe to the case to receive e-mail service from the Commission. Most parties currently use DIS to receive case notifications. It is not burdensome to require sophisticated intervenors and other parties represented by counsel, who already electronically file in other courts, to subscribe to Commission cases. Moreover, almost every party before the Commission proceeding utilizes a business e-mail address. By implementing the Large Gas LDCs' proposed change to this rule, the Commission would be taking a proactive step towards transitioning parties to e-filing and electronic service.

Finally, the Large Gas LDCs note that if the Commission is planning to use the DIS system notice in lieu of actual service parties, whether or not the Large Gas LDCs' proposed rule modifications are accepted by the Commission, then it *must* ensure that this notice is sent the same day the filing is accepted by the Commission. The Commission's Docketing Information System Electronic Filing Technical Requirements & Manual explains that "[i]f your filing is accepted, the filing is immediately posted on the DIS web site and an email message similar to that shown below is sent to the filer and all subscribers to the case(s)." Docketing Information System Electronic Filing Technical Requirements & Manual, Section 6.16 (Revised November 16, 2010) at 26. However, solely using a manual to determine when an e-filed document is served, is not sufficient. At its core, the service requirement is to ensure parties receive notice of docu-

ments filed in a proceeding in which they participate. Notice is an essential due process requirement, which must be effectuated timely with a filing. To address this concern, the Large Gas LDCs also have added language to this paragraph to ensure the e-filing notice is sent the same day a document is filed.

Therefore, the Large Gas LDCs propose the following changes to Ohio Adm. Code 4901-1-05(B):

(B) ALL PARTIES REPRESENTED BY COUNSEL MUST SUBSCRIBE TO THE CASE UPON THEIR INITIAL APPEARANCE IN THE PROCEEDING. ONCE ~~If~~ an e-filing is accepted by the docketing division, an e-mail notice of the filing will be sent by the commission's e-filing system THAT DAY to all persons who have electronically subscribed to the case. The e-mail notice will constitute service of the document upon the recipient. Upon receiving notice that an e-filing has been accepted by the docketing division, the filer shall serve copies of the document in accordance with this rule upon all other parties to the case who are not served via the e-mail notice. A person making an e-filing shall list in the certificate of service included with the e-filing the parties who will be served by e-mail notice by the commission's e-filing system and the parties who will be served by traditional methods by the person making the filing. The certificate of service for an e-filed document shall include the following notice: The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties: (list the names of the parties referenced on the service list of the docket card who have electronically subscribed to the case).

**4901-1-05(D)**

To conform with the proposed changes to Paragraph (B), the Large Gas LDCs also propose to edit Paragraph (D) to require parties represented by counsel to subscribe to receive service by e-mail via the Commission's DIS notification system. The Large Gas LDCs' change also recognizes that pro se complainants in Commission proceedings may continue to be served by the traditional methods of personal, mail, fax, and e-mail. The Large Gas LDCs also propose that any represented party e-mail a same-day courtesy copy to all parties in the proceeding. Requiring a courtesy copy should not be a drastic change. It is good practice to e-mail courtesy copies of pleadings to other parties, and should encourage communication between the parties. Further, a

courtesy copy will provide parties with a timely opportunity to review filings in the event the DIS website is down and unable to serve parties. Therefore, the Large Gas LDCs propose the following changes to Ohio Adm. Code 4901-1-05(D):

(D) Service upon an attorney or party, OTHER THAN A PARTY APPEARING IN PROPRIA PERSONA, SHALL BE BY THE COMMISSION'S E-FILING SYSTEM. A PARTY REPRESENTED BY COUNSEL SHALL E-MAIL ALL OTHER PARTIES IN THE PROCEEDING A SAME-DAY COURTESY COPY OF ITS FILING. SERVICE UPON A PARTY APPEARING IN PROPRIA PERSONA may be personal or, by mail, fax, or e-mail under the following conditions:

- (1) Personal service is complete by delivery of the copy to the ~~to the attorney or to a responsible person at the office of the attorney. Personal service to a party not represented by an attorney is complete by delivery to the party or to a responsible person at the address provided by the party in its pleadings.~~
- (2) Service by mail to ~~an attorney or~~ A party is complete by mailing a copy to his or her last known address. If the ~~attorney or~~ party to be served has previously filed and served one or more pleadings or documents in the proceeding, the term "last known address" means the address set forth in the most recent such pleading or document.
- (3) Service of a document to ~~an attorney or~~ A party by fax may be made only if the person to be served has consented to receive service of the document by fax. Service by fax is complete upon the sender receiving a confirmation generated by the sender's fax equipment that the fax has been sent. The sender shall retain the confirmation as proof of service until the final disposition of the case.
- (4) Service of a document by e-mail to ~~an attorney or~~ A party may be made only if the person to be served has consented to receive service of the document by e-mail. Service by e-mail is complete upon the sender receiving a confirmation generated by the sender's computer that the e-mail has been sent. The sender shall retain the confirmation as proof of service until the final disposition of the case.

#### **Rule 4901-1-06**

The Large Gas LDCs have no comments or proposed changes regarding the Commission's ability to amend any application, complaint, long-term forecast report, or other pleading in Ohio Adm. Code 4901-1-06.

**Rule 4901-1-07**

**4901-1-07(B)**

Staff proposes to eliminate the three-day response period extension given to parties who received service by mail. By eliminating this provision, however, the Commission encourages parties to strategically serve documents by mail instead of utilizing the Commission's e-filing system. Specifically, under the proposed rules, a party could file a document at the Commission office at 5:15 pm on Friday and mail the document later that evening, with the served party not seeing the filing until Monday morning when docketing posts it to the DIS website or Monday afternoon when the service copy arrives. Without the three-day extension, the served party has lost almost three days to respond to the late filing on Friday.

Further, even if the Commission adopts the Large Gas LDCs' proposed changes to require e-mail service for all represented parties, the Commission ignores instances when pro se complainants send documents by mail. Without this rule, the Commission gives those complainants an advantage with decreasing the response time for the public utilities. Therefore, the Large Gas LDCs propose that 4901-7-07(B) not be deleted:

(B) WHENEVER A PARTY IS PERMITTED OR REQUIRED TO TAKE SOME ACTION WITHIN A PRESCRIBED PERIOD OF TIME AFTER A PLEADING OR DOCUMENT IS SERVED UPON HIM OR HER AND SERVICE IS BY MAIL, THREE DAYS SHALL BE ADDED TO THE PRESCRIBED PERIOD OF TIME.

**Rule 4901-1-08**

The Large Gas LDCs support the changes made by Staff to conform the out-of-state attorney practice before the Commission to the rules governing the Ohio Bar. The Large Gas LDCs note that the Commission's Docketing Division will be initially enforcing this Rule, by

ensuring each pleading signed by an attorney contains his or her attorney registration number, as is currently proposed under Ohio Adm. Code 4901-1-03.

**Rule 4901-1-09**

The Large Gas LDCs have no comments or proposed changes to the ex parte discussion rules in Ohio Adm. Code 4901-1-09.

**Rule 4901-1-10**

**4901-1-10(C)**

Staff should be considered a party for all Commission proceedings. Paragraph (C) of Ohio Adm. Code 4901-1-10 lists the only provisions in which the Staff is considered a “party.” Staff must follow the filing, pleading and service rules contained in Ohio Adm. Code 4901-1-02 through 4901-1-07. Staff must file motions in conformance with Ohio Adm. Code 4901-1-12, and may file motions to continue proceedings pursuant to Ohio Adm. Code 4901-1-13. Staff is also not required to file its discovery requests pursuant to Ohio Adm. Code 4901-1-18, and its counsel shall receive all requests and responses if staff is participating in the proceeding. Staff must abide by the brief and memorandum requirements of 4901-1-31. Staff also may participate in prehearing conferences, pursuant to 4901-1-26; enter into stipulations, pursuant to 4901-1-30; move for oral arguments, pursuant to 4901-1-32; file exceptions to an attorney examiner’s report, pursuant to 4901-1-33; and move to reopen proceedings, pursuant to 4901-1-34.

Even with all of these allowances, the current rule exempts the Staff from the remainder of the procedural rules in Chapter 4901-1. Staff is not considered a party for purposes of any of the discovery rules contained in Rules 4901-1-16 through 4901-1-24. In essence, Staff may individually serve discovery requests upon the parties and intervenors and impose arbitrary response deadlines, but parties cannot serve any requests for production, interrogatories, or requests for

admission, or depose any of the Staff witnesses. This one-sided discovery process limits parties from examining the analysis and research methods used by Staff to produce its reports and testimony. Such limitations hinder public utilities from fully commenting on Staff reports.

The only opportunity parties have to cross-examine Staff is in the event Staff *chooses* to testify at hearing. Though cross-examination at hearing provides an opportunity to question Staff, parties are at a significant disadvantage since they were unable to discover the basis of Staff testimony through requests for production, interrogatories, and depositions. Cross-examination becomes, at best, a deposition, or, at worse, a fishing expedition. Further, even if Staff chooses to pre-file its testimony, which it has sometimes done *minutes* before the witness takes the stand, Staff does not have to follow the timelines set forth in Ohio Adm. Code 4901-1-29(A). This status quo fundamentally violates parties' right to a "fair and open hearing." *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1937), 301 U.S. 292, 304 (holding that the Commission failed to follow due process by taking judicial notice of statistics not entered into evidence).

By exempting Staff from discovery, the Commission violates the Ohio Revised Code. R.C. 4903.082 requires that "[a]ll parties and intervenors shall be granted ample rights of discovery." The statute explains that the Commission's procedural rules should be reviewed "to aid [in] *full* and reasonable discovery by all parties." *Id.* (emphasis added). Importantly, no statute exempts Commission Staff from the definition of a "party." Parties do *not* have ample discovery rights and cannot engage in full discovery of the facts and research underlying a case when one of the key participants is exempt from discovery. By continuing to shield Staff from discovery, the Commission is ignoring the legislature's mandate of discovery in all Commission proceedings. Without allowing discovery from Staff, parties will be forced to submit public records requests, pursuant to R.C. 149.43(B).

The Large Gas LDCs recognize that the Commission has dismissed prior requests to subject Staff to the procedural rules. In Case No. 00-2192-AU-ORD, Columbus Southern Power and Ohio Power Company both proposed amending Ohio Adm. Code 4901-1-16(I), to remove the paragraph exempting Staff from discovery. The Commission denied this proposal by explaining, “The existing rule has been in effect for almost 20 years. Granting the request would certainly hinder the performance of the staff and result in delay of the Commission’s work.” *In the Matter of Chapter 4901-1 of the Ohio Administrative Code*, Case No. 00-2192-AU-ORD, Finding and Order (January 30, 2001) at Finding 39. There is no basis for the conclusion that subjecting Staff to the same discovery rules that apply to all other parties would “hinder” or “delay” the Commission’s work. If anything, allowing discovery from Staff would enable the Commission to base its decisions on data, information and testimony that has been subject to thorough cross examination. Further, Staff’s work would not be delayed, since administration of any discovery request would be processed through Staff’s counsel, the Ohio Attorney General, per Ohio Adm. Code 4901-1-18. Finally, the fact that the Commission has allowed an unfair practice to exist for almost three decades does not justify perpetuating the practice. The Commission should level the playing field and make Staff subject to discovery. Ohio Adm. Code 4901-1-10(C) should be deleted in its entirety:

~~(C) Except for purposes of rules 4901-1-02, 4901-1-03, 4901-1-04, 4901-1-05, 4901-1-06, 4901-1-07, 4901-1-12, 4901-1-13, 4901-1-15, 4901-1-18, 4901-1-26, 4901-1-30, 4901-1-31, 4901-1-32, 4901-1-33, and 4901-1-34 of the Administrative Code, the commission staff shall not be considered a party to any proceeding.~~

#### **Rules 4901-1-11 through 4901-1-15**

The Large Gas LDCs have no comments or proposed changes to Ohio Adm. Code 4901-1-11 through 4901-1-14. The Large Gas LDCs have one minor grammatical change for the pro-

posed addition to Paragraph (D). The word “email” is missing a hyphen in the second sentence. Therefore, the Large Gas LDCs propose the following change to Ohio Adm. Code 4901-1-15(D):

(D) Any party intending to file an interlocutory appeal on the day before a day on which commission offices are closed shall notify all other parties of the intent to file an interlocutory appeal by three p.m. on the day of filing. Notice may be personal or by phone or e-mail...

**Rule 4901-1-16**

**4901-1-16(B)**

The Large Gas LDCs are often subject to numerous and sporadic discovery requests. By proceeding with discovery in an ad hoc, unorganized fashion, parties are often frustrated by limitless and repetitive discovery requests. The Large Gas LDCs believe that discovery should be limited by the parties on a case-by-case basis. To foster a realistic approach to discovery, the Large Gas LDCs believe that, upon a party’s motion, the parties should be required to meet at one prehearing conference to discuss procedural matters, including limits on discovery. If the parties agree to limit discovery, then it should be included in a Commission procedural order.

Therefore, the Large Gas LDCs propose either of the following changes to Ohio Adm. Code 4901-1-16(B):

(B) . . . Discovery may be obtained through interrogatories, requests for 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.~~ IN THE PREHEARING CONFERENCE(S) PURSUANT TO RULE 4901-1-26, THE PARTIES MAY AGREE UPON DISCOVERY LIMITS.

**4901-1-16(H)**

The Commission’s rules currently contain a loophole that has been exploited by certain intervenors in Commission proceedings. Paragraph (H) currently allows a *potential* intervenor,

whose intervention is being opposed, to serve discovery to other parties before intervention is granted, denied or not granted at all. Recently, OCC provided an illustrative example of potential intervenors abusing this rule. In the Commission's review of the Natural Gas Company's uncollectible expense rider, OCC served numerous discovery requests to the Large Gas LDCs *prior* to moving to intervene in that proceeding.<sup>1</sup> Included in these discovery requests were detailed questions asking about various sections of the audit report, asking irrelevant questions not related to the audit report, and requesting copies of all data requests and correspondence between each Large Gas LDC and the Commission appointed auditor, NorthStar.<sup>2</sup> The Large Gas LDCs opposed OCC's attempted discovery by filing a Motion to Stay Discovery. Even after OCC moved to intervene in the proceedings, the Large Gas LDCs argued that discovery was not necessary since the Commission had not determined any further process was necessary to the resolution of the docket.<sup>3</sup>

Though this is just one example, there are other examples of intervenors serving the Large Gas LDCs with numerous and unnecessary discovery requests when the Commission had not authorized its intervention.<sup>4</sup> As in the case above, it is a waste of the Large Gas LDCs' resources to respond to discovery requests when the request to intervene could be denied. The Large Gas LDCs also recognize the Commission's interest in an efficient discovery process. Therefore, the Large Gas LDCs propose the following change to Ohio Adm. Code 4901-1-16(H):

(H) For purposes of rules 4901-1-16 to 4901-1-24 of the Administrative Code, the term "party" includes any person who has filed a motion to intervene which is

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<sup>1</sup> *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Rider*, Case No. 08-1229-GA-COI, Memorandum in Support of Motion to Stay Discovery (July 14, 2010) at 2.

<sup>2</sup> *Id.*

<sup>3</sup> *In the Matter of the Five-Year Review of Natural Gas Company Uncollectible Rider*, Case No. 08-1229-GA-COI, Memorandum Contra Office of Ohio Consumers' Counsel's Motion to Intervene and Reply Memorandum in Support of Motion to Stay Discovery (August 9, 2010) at 7.

<sup>4</sup> See Case Nos. 10-2633-GA-AEC, 10-2634-GA-ATA

pending at the time a discovery request or motion is to be served or filed; PROVIDED, HOWEVER, THAT IF A PERSON'S MOTION TO INTERVENE IS OPPOSED, ANY DISCOVERY SERVED BY SUCH PERSON SHALL BE STAYED PENDING RESOLUTION OF THE MOTION TO INTERVENE.

**4901-1-16(I) and (B)**

Paragraph (I) exempts the Staff from the discovery provisions in Rules 4901-1-16 through 4901-1-24. As explained above under Rule 4901-1-10(C), allowing Staff to continue to engage in one-sided discovery violates other parties' due process rights, and permits the Commission to make significant and substantial determinations without the parties being able to fully discover the basis of Staff's data or conclusions.

Even if the Commission chooses not to make Staff subject to discovery, the Commission should at least provide Staff guidelines if it *engages* in discovery. Staff frequently sends data requests to parties from many different Staff members. The requested deadlines are often arbitrary and sometimes unreasonable. Managing numerous requests from different Staff members under different deadlines can quickly become a tedious and burdensome juggling act. It would not be unreasonable to require Staff to serve written discovery through the Attorney General, its statutory counsel pursuant to R.C. 4901.17. Therefore, the Large Gas LDCs proposed the following change to Ohio Adm. Code 4901-1-16(B) and (I):

(B) Except as otherwise provided in paragraphs (G) ~~and (I)~~ of this rule, . . .  
. . . .

~~(I) Rules 4901-1-16 to 4901-1-24 of the Administrative Code do not apply to the commission staff.~~ ANY DISCOVERY REQUEST FROM THE STAFF TO A PARTY MUST BE SERVED BY THE ATTORNEY GENERAL. ANY RESPONSE TO A STAFF DISCOVERY REQUEST MUST BE SIMILARLY SERVED TO THE ATTORNEY GENERAL.

### **Rule 4901-1-17 and 4901-1-18**

The Large Gas LDCs have no proposed changes regarding the time periods of discovery and the serving of discovery requests and responses pursuant to Ohio Adm. Code 4901-1-17 and 4901-1-18. Consistent with the earlier comments herein, Staff should be considered a party for purposes of these rules, and subject to the time period requirements under Ohio Adm. Code 4901-1-17 and service of discovery requests under Ohio Adm. Code 4901-1-18.

### **Rule 4901-1-19**

#### **General Comments**

Consistent with the earlier comments herein, Staff should be considered a party for purposes of this rule.

#### **4901-1-19(A)**

The Commission should change this rule to make clear that interrogatories served to a corporation must be verified by someone on behalf of the corporation, and not in an individual capacity. Rule 4901-1-19 states that “[i]f the party served is a corporation, partnership, association, government agency, or municipal corporation, it shall designate one or more of its officers, agents or employees to answer the interrogatories, who shall furnish such information as is available to the party.” This rule simply requires that the corporation designate an employee to certify that, to the best of the affiant’s knowledge, the answers given are accurate and those of the corporation. The designated representative does not need to actually have personal knowledge of that particular question.

Rule 4901-1-19 is essentially identical to Rule 33 of both the Ohio and Federal Rules of Civil Procedure. The state and federal Civil Rules do not require the identification of witnesses in interrogatories. As one court explained, “[T]he Federal Rules of Civil Procedure do not con-

template that the corporate officer or employee responding to the interrogatories have first-hand personal knowledge of all the facts reflected in the answers.”<sup>5</sup> Therefore, the Large Gas LDCs propose the following change to Ohio Adm. Code 4901-1-19(A):

(A) Any party may serve any other party written interrogatories, to be answered by the party serviced ... Each interrogatory shall be answered separately and fully, in writing and under oath, unless it is objected to, in which case the reason for the objection shall be stated in lieu of an answer. The answers shall be signed by the person making them, OR IN THE CASE OF A CORPORATION OR OTHER ENTITY THAT IS NOT A NATURAL PERSON, ON BEHALF OF THE PARTY MAKING THEM ~~and the objections shall be signed by the attorney and other person making them.~~ The party upon whom the interrogatories have been served shall serve a copy of the answers or objections upon the party submitting the interrogatories...

#### **Rule 4901-1-20**

Consistent with the earlier comments herein, Staff should be considered a party for purposes of this rule.

#### **Rule 4901-1-21**

Consistent with the earlier comments herein, Staff should be considered a party for purposes of this rule.

#### **4901-1-21(E)**

The Large Gas LDCs are concerned by a trend of parties circumventing the twenty-day response time provided pursuant to Rule 4901-1-20(C) by requesting production of documents in conjunction with depositions. Specifically, parties have been utilizing this rule to impose a unilateral, arbitrary, and shortened deadline for a party's response to the request for production. For example, a party may file a notice of deposition 10 days prior to the deposition. The current Rule 4901-1-21(E) requires a party to respond to the request “at the taking of the deposition.” Thus, under this scenario, a party would have to respond to the request for production in *half* the time

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<sup>5</sup> *In Re Folding Card Antitrust Litigation*, 76 F.R.D. 417, 419 (N.D. Ill. 1977).

allotted by Rule 4901-1-20. Therefore, the Large Gas LDCs propose the following change to Ohio Adm. Code 4901-1-21(E):

(E) The notice to a party deponent may be accompanied by a request, made in compliance with rule 4901-1-20 of the Administrative Code, for the production of documents or tangible things at the taking of the deposition, IF THE REQUEST FOR PRODUCTION OF DOCUMENTS OR TANGIBLE THINGS ACCOMPANYING THE DEPOSITION NOTICE IS SERVED AT LEAST TWENTY DAYS BEFORE THE TAKING OF THE DEPOSITION.

#### **Rule 4901-1-22**

Consistent with the earlier comments herein, Staff should be considered a party for purposes of this rule.

#### **Rule 4901-1-23 and 4901-1-24**

The Large Gas LDCs have no proposed changes regarding the Commission's rules providing for motions to compel discovery or motions for protective order pursuant to Ohio Adm. Code 4901-1-23 and 4901-1-24. The Large Gas LDCs support Staff extending the protective order effectiveness to twenty-four months, since this change conforms all protective order time periods under the rule.

#### **Rule 4901-1-25**

##### **4901-1-25(A)**

Similar to the requested change under Rule 4901-1-21(E), parties have been abusing the subpoena procedures to shorten the length of time for parties to produce documents and other tangible things. Pursuant to 4901-1-25(A), a person may be required "to produce books, papers, documents, and other tangible things," when he or she gives testimony. For example, assume an attorney examiner signs a subpoena duces tecum requiring a person to attend a deposition within 10 days with certain documents. At this point, the party has *half* of the time allotted under 4901-

1-21(E) to produce documents. Therefore, the Large Gas LDCs request that the following changes be made to Rule 4901-1-25(A):

(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 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 SUBPOENA COMMANDING THE PRODUCTION OF BOOKS, PAPERS, DOCUMENTS, OR OTHER TANGIBLE THINGS MUST BE SERVED TO THE PERSON AT LEAST TWENTY DAYS BEFORE THE PERSON IS COMMANDED TO ATTEND AND GIVE TESTIMONY. A party may request a subpoena by either of the following methods:

**4901-1-25(C) and (E)**

The Commission's current rules do not provide adequate time to move to quash a subpoena. Under Rule 4901-1-12(B), a party may file a memorandum contra to a motion to quash a subpoena, within 15 days of service, and the moving party may file a reply memorandum within 7 days thereafter. If the motion requests an expedited ruling, any party opposing the motion is allowed 7 days to file a memorandum contra pursuant to Ohio Adm. Code 4901-1-12(C).

All motions for a subpoena requiring a person to attend a hearing must be filed "no later than ten days prior to the commencement of the hearing or, if expedited treatment is requested, no later than five days prior to the commencement of the hearing." Ohio Adm. Code 4901-1-25(E). Based on the Commission's rules, a party could file an expedited motion for a subpoena 6 days before a hearing, the Commission could sign the subpoena 5 days before the hearing, leaving a party without sufficient time to file a motion to quash the subpoena *prior to* the hearing.

Recently, the Commission addressed this very situation in a DEO complaint case. In Case No. 10-650-GA-CSS, the Complainant filed a motion for subpoena on November 30, 2010 to

compel two witnesses to attend the hearing on December 9, 2010.<sup>6</sup> The subpoenas were signed by the attorney examiner on November 30, 2010, 8 days before the hearing date.<sup>7</sup> DEO filed its Motion to Quash and Request for Expedited Treatment on December 2, 2010, 6 days before hearing date.<sup>8</sup> Without time for the Complainant to file a written objection, the Hearing Examiner granted DEO's Motions to Quash at the December 9 hearing.<sup>9</sup> Though this particular decision was correctly decided, there remains a possibility that a subpoenaed person could incur substantial expenses to travel to a hearing and then have his or her subpoena quashed. Therefore, the Large Gas LDCs propose the following changes to Ohio Adm. Code 4901-1-25(C) and (E):

(C) The commission, the legal director, the deputy legal director, or an attorney examiner, upon their own motion or upon motion of any party, may quash a subpoena if it is unreasonable or oppressive, or condition that denial of such motion upon the advancement by the party on whose behalf the subpoena was issued of the reasonable costs of producing the books, papers, documents, or other tangible things described therein. A PARTY MAY FILE A MOTION TO QUASH A SUBPOENA ISSUED TEN (10) DAYS OR LESS PRIOR TO THE HEARING AT LEAST FIVE DAYS BEFORE HEARING. ANY PARTY MAY FILE A MEMORANDUM CONTRA AT LEAST THREE DAYS BEFORE THE HEARING.

(E) Unless otherwise ordered for good cause shown, all motions for subpoenas requiring the attendance of witnesses at a hearing must be filed with the commission no later than ten days prior to the commencement of the hearing or, if expedited treatment is requested, no later than ~~five~~ SEVEN days prior to the commencement of the hearing. IF A SUBPOENA TO COMPEL THE ATTENDANCE OF A WITNESS AT A HEARING IS ISSUED TEN (10) DAYS OR LESS PRIOR TO THE HEARING, ANY PARTY MAY MOVE TO QUASH THE SUBPOENA IN ACCORDANCE WITH RULES 4901-1-25(C).

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<sup>6</sup> *In the Matter of the Complaint of Sarunas Abraitis v. The East Ohio Gas Company d/b/a Dominion East Ohio*, Case No. 10-650-GA-CSS, Motion for Subpoenas (November 30, 2010).

<sup>7</sup> *Id.*

<sup>8</sup> *In the Matter of the Complaint of Sarunas Abraitis v. The East Ohio Gas Company d/b/a Dominion East Ohio*, Case No. 10-650-GA-CSS, Motion to Quash Subpoenas and Request for Expedited Treatment (December 2, 2010).

<sup>9</sup> *In the Matter of the Complaint of Sarunas Abraitis v. The East Ohio Gas Company d/b/a Dominion East Ohio*, Case No. 10-650-GA-CSS, Transcript (December 27, 2010) at 14-15.

**4901-1-25(D)**

As stated above, the Commission should permit Staff to be subpoenaed in Commission proceedings. It is a subversion of due process to allow Staff members to contribute substantially to the Commission's findings without permitting them to be subject to party subpoenas pursuant to this rule. For the reasons previously discussed herein, the Large Gas LDCs request the following change to Rule 4901-1-25(D):

(D) A subpoena may require a person, ~~other than a member of the commission staff,~~ to attend and give testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery...

**Rule 4901-1-26**

**4901-1-26(A)**

Prehearing conferences conducted, similar to the Rule 26(f) prehearing conference required under the Federal Rules of Civil Procedure would aid greatly in the efficient administration of cases. Currently, prehearing conferences are discretionary under Rule 4901-1-26. Under the Large Gas LDCs' proposed rule change, the Commission shall grant a parties' motion to hold a prehearing conference to establish or amend the procedural schedule and discuss other procedural matters, including limits on discovery. A mandatory prehearing conference would also help alleviate the scheduling problems and other case administrative issues and allow parties to preliminarily resolve outstanding issues. The proposed rule also allows parties flexibility to not move for a prehearing conference if no party believes one is needed. Therefore, the Large Gas LDCs propose the following changes to Ohio Adm. Code 4901-1-26(A):

(A) ~~In any proceeding,~~ UPON MOTION OF ANY PARTY the commission, the legal director, the deputy legal director, or an attorney examiner ~~may, upon motion of any party or upon their own motion,~~ SHALL hold A ~~one or more~~ prehearing conferences for the purpose of ESTABLISHING OR AMEND THE PRO-

CEDURAL SCHEDULE AND RESOLVING OTHER PROCEDURAL AND  
DISCOVERY MATTERS.

(B) THE COMMISSION, LEGAL DIRECTOR, DEPUTY LEGAL DIRECTOR,  
OR ATTORNEY EXAMINER, UPON MOTION OF ANY PARTY OR UPON  
THEIR OWN MOTION, MAY HOLD ONE OR MORE ADDITIONAL PRE-  
HEARING CONFERENCES.

(1) Resolving outstanding discovery matters, including:

(a) Ruling on pending motions to compel discovery or motions for  
protective orders.

(b) Establishing a schedule for the completion of discovery.

(c) AGREEING TO LIMITS ON DISCOVERY.

(C)(B) Reasonable notice of any prehearing conference shall be provided to all parties...

(D)(C) Prior to a prehearing conference, the commission, the legal director . . .

(E)(D) Following the conclusion of a prehearing conference . . .

(F)(E) Evidence of (1) furnishing or offering or promise to furnish . . .

(G)(F) If a conference is scheduled to discuss settlement...

**Rule 4901-1-27**

**4901-1-27(C)**

The Large Gas LDCs are confused by Staff's proposal to only allow sworn testimony at public hearings. By requiring individuals to be sworn before they can speak at a public hearing, public hearings will be converted from informal public feedback sessions to an extension of the evidentiary hearing. If it is the Commission's intent to consider sworn public hearing testimony as part of the evidentiary record, utilities will have a greatly increased incentive, if not duty, to cross-examine people who talk at public hearings. Rather than adopt Staff's proposed change, the Commission should instead amend the rule to recognize that the purpose of public hearings is to gather comments, and not take sworn testimony that will be considered evidence. Members of

the public who wish to provide sworn testimony at evidentiary hearings will remain free to do so.

The Large Gas LDCs request the following change to Ohio Adm. Code 4901-1-27(C):

(C) The presiding hearing officer shall permit members of the public to offer ~~sworn or unsworn~~ COMMENTS at the portion or session of the hearing designated for the taking of public COMMENT ~~testimony~~.

#### **Rule 4901-1-28**

The Large Gas LDCs have no comments or proposed changes regarding reports of investigations in Ohio Adm. Code 4901-1-28.

#### **Rule 4901-1-29**

##### **4901-1-29(A)**

Staff should not be exempt from pre-filing testimony prior to a hearing. It is not burdensome to require Staff witnesses to file direct testimony under the same requirements and the same schedule that apply to all other parties. The Large Gas LDCs request the following change to Ohio Adm. Code 4901-1-29(A):

(A) Except as otherwise provided in this rule, all expert testimony to be offered in commission proceedings, ~~except testimony to be offered by the commission staff~~, shall be reduced to writing, filed with the commission, and served upon all parties prior to the time such testimony is to be offered...

#### **Rules 4901-1-30 through 4901-1-35**

The Large Gas LDCs have no comments or proposed changes regarding Ohio Adm. Code 4901-1-30 and 4901-1-38.

#### **Rule 4901-1-35**

##### **4901-1-35(A)**

Staff proposes to require all applications for rehearing to be set forth “in numbered or letter paragraphs....” This proposal needs to be clarified. Utilities frequently seek rehearing by filing a brief application, accompanied by a separate (and much longer) memorandum in support.

Staff seems to be suggesting applications for rehearing should be presented in one document, similar to a complaint, with numbered paragraphs. If that is the intent, it is not clear why this change is necessary. At a minimum, the proposed rule should be clarified.

**Rule 4901-1-36 and 4901-1-37**

The Large Gas LDCs have no comments or proposed changes regarding Ohio Adm. Code 4901-1-36 and 4901-1-37.

**Rule 4901-1-38**

Staff proposes to eliminate the Commission's ability to waive its rules sua sponte. The Large Gas LDCs applaud the Commission for its judicial restraint and further supports this change to its rules.

**B. Chapter 4901-3**

The Large Gas LDCs have no comments or proposed changes regarding Chapter 4901-3.

**C. Chapter 4901-9**

**Rule 4901-9-01**

Staff proposes a minor change to Rule 4901-9-01(A), which is inapplicable to the Large Gas LDCs, and thus they have no comment upon this change. The Large Gas LDCs, however, request that the Commission add language to this rule to address a growing trend among the consumer complaint cases filed pursuant to R.C. 4905.26. In quite a few of these cases, prehearing settlement conferences or hearings are scheduled at the Commission's offices and the Complainant fails to attend without giving the Commission or the public utility notice. The attorney examiner typically issues a warning to the Complainant and reschedules the conference or hearing to again be disregarded by the Complainant. In some complaint cases, this process is repeated for continuing absences of the Complainant. Such measures waste the Commission and the public

utilities' time and resources to continually accommodate a party that would otherwise had his or her case dismissed in a court of law. The Commission's rules should require that a complaint cases is dismissed for failure to prosecute if a complainant fails to appear at a prehearing conference or hearing, without prior notice to the attorney examiner.

Therefore, the Large Gas LDCs propose the following change to Ohio Adm. Code 4901-9-01:

(I) IF THE PERSON FILING A COMPLAINANT AGAINST A PUBLIC UTILITY FAILS TO APPEAR AT A PREHEARING CONFERENCE OR AT A HEARING WITHOUT PROVIDING THE ATTORNEY EXAMINER PRIOR NOTICE, THE COMMISSION WILL DISMISS THE CASE WITHOUT PREJUDICE FOR FAILURE TO PROSECUTE.

**D. Chapter 4901:1-1**

The Large Gas LDCs have no comments regarding Chapter 4901:1-1.

**III. CONCLUSION**

For the reasons discussed above, the Commission should revise the rule language as commented or proposed as reflected in these Initial Comments.

Dated: April 1, 2011

Respectfully submitted,

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