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; 4901-9, Complaint Proceedings; and 4901:1-1, Utility Tariffs and Underground Protection, of the Ohio Administrative Code.	)))))))	Case No. 11-776-AU-ORD

JOINT COMMENTS
OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, ADVOCATES FOR BASIC LEGAL EQUALITY, INC., CITIZEN POWER, AND THE OHIO POVERTY LAW CENTER

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I. INTRODUCTION

R.C. 119.032 requires all state agencies, including the Public Utilities Commission of Ohio ("PUCO" or "Commission") to conduct a review, every five years, of their rules. Under this review the Commission must determine whether to continue the rules without change, amend the rules, or rescind the rules. In its review the Commission is required to consider the purpose, scope, and intent of the statute, whether changes should be made to permit more flexibility at the local level, where changes should be made to eliminate unnecessary paperwork, and whether the rule duplicates, overlaps or conflicts with other rules. Additionally, the Commission must consider the continued need for the rule, the nature of any complaints or comments received concerning the rule, and other relevant factors that may have changed in the subject matter area affected by the rule.

On March 2, 2011, the PUCO issued an Entry containing the PUCO Staff's ("Staff") evaluation of the rules contained in Ohio Adm. Code Chapters 4901-1, 4901-3, 4901-9 and 4901:1-1 and proposals for changes in those rules. The Office of the Ohio Consumers' Counsel ("OCC"), Ohio Poverty Law Center, Citizen Power and Advocates for Basic Legal Equality (collectively, "Customer Parties") submit these comments to address, *seriatim*, the recommendations made by the PUCO Staff and to propose additional rule changes resulting from the Customer Parties' evaluation of the rules.[1] The Customer Parties' recommended rule changes are directed, *inter alia*, at bringing the rules into conformance with the Ohio rules of civil procedure and provisions of the Revised Code.[2]

II. COMMENTS

4901-1-01 Definitions

The Customer Parties recommend that the definition of "business day" be clarified so that it is clear that a "business day" does not include a day where the docketing division closes before 5:30 p.m. This additional language would address weather emergencies and other circumstances that result in the docketing division closing earlier than 5:30 p.m. Accordingly, Customer Parties recommend that the definition of "business day" include the following:

> "Business day" means any day that is not a Saturday, Sunday, or legal holiday. "BUSINESS DAY" DOES NOT INCLUDE A DAY WHERE THE DOCKETING DIVISION CLOSED BEFORE 5:30 P.M.

[1] The Customer Parties' reserve the right to file reply comments on rules as to which the Customer Parties have not provided initial comment.

[2] R.C. 4903.22 directs that "[e]xcept when otherwise provided by law … the practice and rules of evidence …. shall be the same, as in civil actions."

4901-1-02 Filing of pleadings and other documents

In Rule 2(A)(5), the PUCO Staff has proposed that the Commission reserve the right to redact any material prior to its posting on the PUCO's Docketing Information System ("DIS"). This raises numerous questions including whether it will be the Commission making this determination (through an order at a public meeting?) or a PUCO Staff member, and whether and how the filer – and those who have an interest in the proceeding – will be notified of this "Commission" decision. Further, the provisions here for the "Commission" to redact trade secrets conflicts with the companion provision in Rule 2(B)(2) that unless a request for protective order is made, the document will be made publicly available. Finally, it is unclear what standard will be used to determine whether a filing is "inappropriate for posting on the Commission's website." These questions and concerns are such that Rule 2(A)(5) should not be adopted.

In the Commission's most recent review of its procedural rules, OCC proposed an amendment to require the "request" for protection under Rule 2(B)(2) to be made by motion.[3] The Commission did not address this proposal.[4] The Customer Parties now reiterate that proposal. Requiring a motion comports with Rule 12, among other things, and establishes the fair process of a pleading cycle that includes an opportunity for the filing of a memorandum contra.

Proposed Rule 2(D)(7) alerts filers to the risk of a failed electronic transmission of such documents. It states: "a person may file a motion requesting that a document be considered timely filed should an equipment failure or electrical outage or other similar

[3] In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code, Case No. OCC 06-685-AU-ORD ("06-685"), OCC Comments (June 26, 2006) ("OCC 06-685 Comments") at 4.

[4] See 06-685, Finding and Order (December 6, 2006) ("06-685 Finding and Order") at 5-6.

event occur." Rule 4901-1-02(C)(6) applies to documents filed by facsimile. However, 4901-1-02(C)(6) does not contain the same protections for a filer should an equipment failure or electrical outage occur. The Customer Parties recommend that the warning for electronic filers in Rule 2(D)(7) be duplicated in Rule (C)(6).

Rule 2(C)(9) as proposed reads:

> Because a document sent to the commission by fax will be date-stamped, and thus filed, the day it is received by the docketing division, the originator of the document shall serve copies of the document upon other parties to the case no later than the date of filing,

The Customer Parties propose the following rewrite, for clarity:

> A document ~~sent to~~ ACCEPTED FOR FILING WITH the commission by fax will be date-stamped, and thus filed, the day it is received by the docketing division. ~~,t~~The originator of the document shall serve copies of the document upon other parties to the case no later than the date ~~of filing~~ THE DOCUMENT IS FAXED TO THE DOCKETING DIVISION.

Rule 2(D)(5) addresses service of electronically-filed documents. There are, however, instances where filers are required to serve specific entities with documents when a case is originated. The proposed rule does not address those circumstances. The Customer Parties suggest additional language for this rule: IF A FILER IS REQUIRED BY STATUTE OR RULE TO SERVE SPECIFIC ENTITIES WHEN A CASE IS ORIGINATED, THE FILER MUST MAKE SUCH SERVICE AS IS REQUIRED BY THE APPROPRIATE STATUTE OR RULE.

Finally,[5] Rule 2(E)(4), to be grammatically correct, should read "for WHOM ~~who~~ it was reserved …."

[5] See also the discussion under Rule 24, which relates to Rule 4901-1-02.

4901-1-05 Service of pleadings

Regarding Rule 5(C), as discussed under Rule 8 below, the consequence of failure to designate a counsel of record for a party with multiple counsel should be that service will be made to the first-listed counsel in the initial pleading.

Rule 5(E) defines "party" as including, for the purposes of this rule, persons who have filed a motion to intervene. For clarity's sake, the rule should state, "the term party includes, IN ADDITION TO THOSE IDENTIFIED IN RULE 4901-1-10, all persons who have filed motions to intervene…."

4901-1-07 Computation of Time

Staff proposes several changes and deletions to this rule. First, Staff proposes in Rule 7(A) to clarify the computation of time when "going backward" (i.e. when expert testimony is to be filed five days before the start of the hearing). The Customer Parties do not oppose this change. Similarly, Staff proposes clarifying language regarding the impact on filings of the closing of Commission offices. The Customer Parties support this change.

The Customer Parties do not, however, support the Staff's proposed deletion of the rule allowing three additional days for filing when the initiating document is served by regular mail. The three-day service rule should be retained, for a number of reasons.

First, it has been the Customer Parties' experience that some parties continue to rely upon mail service as the primary means of service. Second, regular mail is the means of service designated under the current rules of practice.[6] Third, the Staff's proposal would cause difficulties for stakeholders who lack electronic capability or who

[6] The OCC and other parties continue to send and receive pleadings via regular mail service.

do not review the PUCO's docketing on a regular basis. Although filed documents are posted on the PUCO's web site, the posting is not necessarily made on the same day as the filing.[7] Moreover, there are occasions when the PUCO's web site is not accessible.

Maintaining the three-day period associated with mail service will ensure that parties have adequate time to respond. At the very least, the rule allowing for an additional three days of response time when the initiating document was served on the responding party by regular mail should be maintained for a transitional period of adjustment during the implementation and greater perfection of electronic service.

Moreover, the three-day rule is consistent with Ohio Civ. R. 6(E), which provides:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period….

The key is that if and when a party serves a pleading by "snail mail," the recipient continues to need additional time for a response.

Similarly, the Customer Parties do not support the PUCO Staff's proposed deletion of 4901-1-07(C), which grants a party one additional day to take a prescribed action when a pleading is personally served, or served by facsimile, or electronic message served, after five-thirty p.m. There is no explanation for s the deletion of this provision. Permitting a party one additional day to take a prescribed action when a pleading is served after five-thirty p.m. is reasonable. Typical close of business at most offices is five-thirty p.m., and accordingly, a party will not receive a pleading that is served after

[7] This is especially the case for documents filed at or near the end of the day.

five-thirty p.m. until the following business day. Thus, allowing an additional day to take a prescribed action is reasonable, and this provision should be kept in the rule.

4901-1-08 Practice Before the Commission, Representation of Corporations, and Designation of Counsel of Record

The Customer Parties suggest that the Commission specifically address in its rules the instances where a party is represented by more than one attorney and the counsel of record is not identified, contrary to the requirement in this Rule for designating a counsel of record. The Customer Parties recommend that the Commission adopt language similar to the applicable rule contained in the Rules of Practice for the Supreme Court of Ohio.[8] Accordingly, the Customer Parties suggest the following language for Rule 4901-1-08(E):

> (E) THE ATTORNEY REPRESENTING A PARTY SHALL BE DESIGNATED AS COUNSEL OF RECORD FOR THAT PARTY. WHERE TWO OR MORE ATTORNEYS REPRESENT A PARTY, ONLY ONE ATTORNEY SHALL BE DESIGNATED AS COUNSEL OF RECORD TO RECEIVE NOTICES AND SERVICE ON BEHALF OF THAT PARTY. THE DESIGNATION SHALL BE MADE ON THE COVER PAGE OF THE FIRST DOCUMENT FILED BY THE PARTY WITH THE COMMISISON. IF AN ATTORNEY IS NOT DESIGNATED COUNSEL OF RECORD, THE FIRST ATTORNEY LISTED FOR THE PARTY ON THE COVER PAGE OF THE FIRST DOCUMENT FILED IN THE PROCEEDING SHALL BE CONSIDERED THE COUNSEL OF RECORD. TO CHANGE A PARTY'S DESIGNATION OF ITS COUNSEL OF RECORD, THE PARTY SHALL FILE A SEPARATE NOTICE OF CHANGE OF COUNSEL OF RECORD.

4901-1-09 Ex Parte Discussion of Cases

The PUCO Staff has proposed no changes to this rule. However, in comments in 06-685, OCC pointed out that:

[8] See S.Ct.Prac.R. 1.3.

> [a] review of the *ex parte* summary by the Commission interposes unnecessary delay in the disclosure of the communication and also may place the Commission in an awkward position of editing the party's summary. If the Commission is concerned with representations made in the *ex parte* filing, it has the opportunity to file a response to the *ex parte* filing.[9]

In the 06-685 Finding and Order, the Commission stated that it "believes that the [ex parte] document should be correct when filed and would rather have a commissioner or attorney examiner, after consulting with the legal director, correct the draft document before it is filed."[10] Yet the rule as finalized does not refer to such corrections. The rule should be clarified in that respect.

4901-1-11 Intervention

Staff has proposed no changes to the Commission's rule on intervention. The Customer Parties again recommend the changes to this rule proposed by OCC in order to conform this section of the Administrative Code to the underlying intervention statute, R.C. 4903.221. R.C. 4903.221 was enacted in 1983, which was after these procedural rules were first codified. It is well-established that "[a]n administrative rule that conflicts with a valid, existing statute is invalid."[11]

Moreover, the Ohio Supreme Court has held that "administrative rules, in general, may not add to or subtract from … the legislative enactment." *Central Ohio Joint Vocational School Dist. Bd. of Educ. v. Admr., Ohio Bureau of Employment Services* (1986), 21 Ohio St. 3d 5, 10, 487 N.E. 2d 288, 292 (citation omitted). "Under the Supreme Court's standard, then, a regulation that impermissibly adds to or subtracts from

[9] OCC 06-685 Comments at 9-10.

[10] 06-685 Finding and Order at 13.

[11] *State, ex rel. Navistar International Transp. Corp. v. Indus. Comm.* (June 28, 2005), 10th Dist. No.04AP-638 citing *Kelly v. Accounting Board of Ohio* (1993), 88 Ohio App. 3d 453, 458, 624 N.E. 2d 292.

a statute automatically creates a clear conflict, invalidating the rule." *Franklin Iron & Metal Corp. v. The Ohio Petroleum Underground Storage Tank Release Compensation Bd.* (Dec. 31, 1996) 2nd Dist. No. 95-2319.

Accordingly, in order to be valid, Rule 4901-1-11 must mirror the criteria mandated by the Ohio General Assembly in R.C. 4903.221. Specifically, any allowance for a PUCO consideration of whether a person's interest is adequately represented by existing parties, when the PUCO is deciding whether intervention should be granted, should be omitted as follows:

> (A) Upon timely motion, any person shall be permitted to intervene in a proceeding upon a showing that:
>
> (1) A statute of this state or the United States confers a right to intervene; or
>
> (2) The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest~~, unless the person's interest is adequately represented by existing parties~~.
>
> (B) In deciding whether to permit intervention under paragraph (A)(2) of this rule, the commission, the legal director, the deputy legal director, or an attorney examiner shall consider:
>
> (1) The nature and extent of the prospective intervenor's interest.
>
> (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case.
>
> (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings.
>
> (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.
>
> ~~(5) The extent to which the person's interest is represented by existing parties.~~

(C) Any person desiring to intervene in a proceeding shall file a motion to intervene with the commission, and shall serve it upon all parties in accordance with rule 4901-1-05 of the Administrative Code. The motion shall be accompanied by a memorandum in support, setting forth the person's interest in the proceeding. The same procedure shall be followed where a statute of this state or the United States confers a right to intervene.

(D) Unless otherwise provided by law, the commission, the legal director, the deputy legal director, or the attorney examiner may:

(1) Grant limited intervention, which permits a person to participate with respect to one or more specific issues, if the person has no real and substantial interest with respect to the remaining issues ~~or the person's interest with respect to the remaining issues is adequately represented by existing parties~~.

(2) Require parties with substantially similar interests to consolidate their examination of witnesses or presentation of testimony.

4901-1-14 Procedural Rulings

This rule provides that that an attorney examiner "may rule, in writing, upon any procedural motion or other procedural matter." On the other hand, Rule 13(D) – which, in context, would seem to apply only to requests for continuances and extensions of time – provides that "[n]othing in this rule limits the authority of the presiding hearing officer to issue oral rulings during public hearings or transcribed prehearing conferences." Both of these provisions are intended to allow accurate communication of such rulings, along with possible interlocutory appeals. Therefore, the issuance of oral rulings in non-transcribed prehearing conferences is problematic. Any party should be able to request that such a ruling be transcribed.

4901-1-15 Interlocutory Appeals

PUCO Staff proposed the following insertion:

> (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 date of the filing. Notice may be personal or by phone or email. The party filing the interlocutory appeal shall serve, upon request, a copy of the appeal by e-mail or fax. Unless otherwise ordered by the commission, any party may file a memorandum contra within five days after the filing of an interlocutory appeal.

The Customer Parties do not support the Staff's proposed change. Simply put, parties to a proceeding should be aware of the date an interlocutory appeal is to be filed, regardless of whether the appeal is due the day before the Commission's offices are closed. The parties are therefore ***already*** on notice of the date that an interlocutory appeal can be filed. Also, many parties in cases may have no interest in whether an interlocutory appeal is being filed. A requirement to give notice (beyond the notice inherent in the filing) to the many disinterested parties and the potential for the appeal to be jeopardized in the absence of such notice impose unnecessary burdens in cases. In addition, parties that have signed up for electronic docketing will receive an automatic notice of the filing. As such, the PUCO Staff's proposed requirement in subsection (D) is unnecessary and places an undue burden on the party making the filing.

4901-1-16 Scope of Discovery

The Customer Parties propose that the reference in Rule 16(C) to expert witnesses expected to "testify at the hearing" be replaced with expert witnesses expected to "submit testimony." In such instances, discovery rights of parties still exist and should be preserved in the rules.

4901-1-21 Depositions

The PUCO Staff proposes that Rule 21(B) be amended to include the following language: "Absent unusual circumstances, depositions should be completed prior to the commencement of the hearing." The Customer Parties do not support Staff's proposed language. The statement "deposition ***should be*** completed prior to the commencement of the hearing" is not a rule or command, but is merely aspirational language. In addition, there are situations where a party will need to depose a witness on his/her rebuttal testimony, which is filed after a hearing has commenced, or will not be able to schedule the deposition of a later-appearing witness until after the hearing has begun with the testimony of other witnesses. In these instances, the deposition will have to take place in the midst of the hearing, and not prior to the hearing. It is not clear from the language of the rule whether situations similar to the above-mentioned would constitute an "unusual circumstance." The rule, as it currently reads, is ambiguous and unclear and requires clarification at a minimum.

In addition, the Customer Parties propose that changes be made to Rule 21(A) to reflect the fact that there should be a distinction between party and non-party deponents, as recognized in the Rules of Civil Procedure. Consistent with Civil Rule 30, party deponents' attendance at depositions may be compelled by a notice of deposition. But the attendance of non-party deponents' depositions requires the issuance of subpoenas.

The Customer Parties support the PUCO Staff's addition of the language to Rule 21(N) to the effect that there is no need to file a deposition used only for impeachment. Additionally, the Customer Parties propose that, due to the length of deposition transcripts and the number of potential transcript filings, if a paper filing is made, parties need not file more than one complete copy of each deposition with the Commission.

Further, service of the filed deposition transcript need only be made upon the party against whom the deposition is to be used.

4901-1-24 Motions for Protective Orders

The Customer Parties believe that the eighteen months provided in Rule 24(F) for maintaining protected status should remain, and is sufficient. Eighteen months is more appropriate than the twenty-four months now proposed by the PUCO Staff.[12]

In addition, this rule addresses two separate and distinct types of protective order. The first type, set out in paragraphs (A) through (C), is an order regarding discovery, "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The second type is an order to maintain the confidentiality of documents filed with the Commission (paragraphs (D) through (G)). Given these differences, the Customer Parties recommend that the provisions for the second type of protective order be moved wholesale into Rule 2, which addresses filing of papers with the Commission. Thus paragraphs (D) through (G) of Rule 24 would become paragraphs (F) through (I) of Rule 2.

Alternatively, the Customer Parties recommend that for clarity purposes this rule could be split into two sections. The first section should address protective orders related to **discovery matters**, while the second section should address protective orders with respect to **the filing of documents which contain protected material**. To this end, the Customer Parties propose the following changes:

> (A) A PROTECTIVE ORDER MAY BE SOUGHT 1) UPON MOTION OF ANY PARTY OR PERSON FROM WHOM DISCOVERY IS SOUGHT, OR 2)

[12] See 06-685 Finding and Order at 38-40.

UPON MOTION OF ANY PARTY OR PERSON WITH REGARD TO THE FILING OF A DOCUMENT WHICH CONTAINS CONFIDENTIAL INFORMATION.

~~(A)~~ **(B) PROTECTIVE ORDER RELATED TO DISCOVERY**

Upon motion of any party or person from whom discovery is sought, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order that ~~which~~ is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that:

(1) Discovery not be had.

(2) Discovery may be had only on specified terms and conditions.

(3) Discovery may be had only by a method of discovery other than that selected by the party seeking discovery.

(4) Certain matters not be inquired into.

(5) The scope of discovery be limited to certain matters.

(6) Discovery be conducted with no one present except persons designated by the commission, the legal director, the deputy legal director, or the attorney examiner.

(7) A trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way.

(8) Information acquired through discovery be used only for purposes of the pending proceeding, or that such information be disclosed only to designated persons or classes of persons.

~~(B)~~ (C) No motion for a protective order shall be filed under paragraph ~~(A)~~ (B) of this rule until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery. A motion for a protective order filed pursuant to paragraph (A) of this rule shall be accompanied by:

(1) A memorandum in support, setting forth the specific basis of the motion and citations of any authorities relied upon.

(2) Copies of any specific discovery requests that are ~~which~~ the subject of the request for a protective order.

(3) An affidavit of counsel, or of the person seeking a protective order if such person is not represented by counsel, setting forth the efforts that ~~which~~ have been made to resolve any differences with the party seeking discovery.

~~(C)~~ (D) If a motion for a protective order filed pursuant to paragraph ~~(A)~~ (B) of this rule is denied in whole or in part, the commission, the legal director, the deputy legal director, or the attorney examiner may require that the party or person seeking the order provide or permit discovery, on such terms and conditions as are just.

~~(D)~~ (E) PROTECTIVE ORDER RELATED TO CONFIDENTIAL INFORMATION CONTAINED IN A DOCUMENT.

Upon motion of any party or person with regard to the filing of a document with the commission's docketing division relative to a case before the commission, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information, including where the information is deemed by the commission, the legal director, the deputy legal director, or the attorney examiner to constitute a trade secret under Ohio law, and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. Any order issued under this paragraph shall minimize the amount of information protected from public disclosure. The following requirements apply to a motion filed under this paragraph:

(1) All documents submitted pursuant to paragraph ~~(D)~~ (E) of this rule should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information. Such redacted documents should be filed with the otherwise required number of copies for inclusion in the public case file.

(2) Two ~~Three~~ unredacted copies of the allegedly confidential information shall be filed under seal, along with a motion for protection of the information, with the secretary of the commission, the chief of the docketing division, or the chiefs designee. Each page of the allegedly confidential material filed under seal must be marked as "confidential," "proprietary," or "trade secret."

(3) The motion for protection of allegedly confidential information shall be accompanied by a memorandum in support setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure, and citations of any authorities relied upon. The motion and memorandum in support shall be made part of the public record of the proceeding.

~~(1) If a motion for a protective order is filed in a case involving a request for approval of a contract between a telecommunication C carrier and a customer, and the contract has on automatic approval process, unless the commission suspends the automatic approval process or otherwise rules on the motion for a~~

~~protective order, the motion for a protective order will be automatically approved for an eighteen month period beginning on the date that the contract is automatically approved. Nothing prohibits the commission from rescinding the protective order during the eighteen month period. If a motion for a protective order for information included in a gas marketer's renewal certification application case filed pursuant to Section 2928.09, Revised Code, or a competitive retail electric service provider's renewal certification application case filed pursuant to Section 4928.09, Revised Code, is granted, the motion will be automatically approved for a twenty four month period beginning with the date of the renewed certificate. Nothing prohibits the commission from rescinding the protective order during the twenty four month period. Automatic approval of confidentiality under this provision shall not preclude the commission from examining the confidentiality issue do novo if there is on application for rehearing on confidentiality or a public records request for the redacted information.~~

~~(E)~~ (F) Pending a ruling on a motion filed in accordance with paragraph ~~(D)~~ (E) of this rule, the information filed under seal will not be included in the public record of the proceeding or disclosed to the public until otherwise ordered. The commission and its employees will undertake reasonable efforts to maintain the confidentiality of the information pending a ruling on the motion. A document or portion of a document filed with the docketing division that is marked "confidential," "proprietary," or "trade secret," or with any other such marking will not be afforded confidential treatment and protected from disclosure unless it is filed in accordance with paragraph ~~(D)~~ (E) of this rule.

~~(F)~~ (G) Unless otherwise ordered, any order prohibiting public disclosure pursuant to paragraph ~~(D)~~ (E) of this rule shall automatically expire twenty-four eighteen months after the date of its issuance, and such information may then be included in the public record of the proceeding. A party wishing to extend a protective order beyond twenty-four eighteen months shall file an appropriate motion at least forty-five days in advance of the expiration date of the existing order. The motion shall include a detailed discussion of the need for continued protection from disclosure. Nothing precludes the commission from reexamining the need for protection issue de novo during the twenty-four month period.

(~~G~~) (H)The requirements of this rule do not apply to information submitted to the commission Staff. However, information submitted directly to the legal director, the deputy legal director, or the attorney examiner that is not filed in accordance with the requirements of paragraph ~~(D)~~ (E) of this rule may be filed with the docketing division as part of the public record. No document received via fax or e-filing facsimile - transmission will be given confidential treatment by the commission.

4901-1-25 Subpoenas

The PUCO Staff proposes significant changes to this rule. First, the Staff proposes that, unless expedited treatment is granted, the PUCO will use the U.S. Mail to return a signed subpoena to the party requesting the subpoena. Staff also proposes that, unless expedited treatment is requested, all motions for subpoenas requiring the attendance of witnesses at a hearing must be filed with the Commission not later than ten days (instead of the current five days) prior to the commencement of the hearing. These proposed amendments should not be adopted. The proposed amendments will prejudice the rights of the parties seeking a subpoena by impeding the issuance and service of a subpoena prior to a hearing.

Additionally, the Staff's proposed amendments would eliminate the right to serve a copy of the subpoena and require the service of the subpoena with an original signature. The right to serve a copy, that has been present in the current rule for many years, should be retained. In an age when paper documents with original signatures are being replaced by electronic documents with electronic signatures, it is not necessary to impose the burden and inconvenience of limiting service to the paper copy with original signature. The current rule, for example, allows parties serving a subpoena the ability to fax the subpoena or send a PDF of the subpoena to someone serving process out of town, who can then serve a paper copy.

After the PUCO signs the subpoena, it should be sufficient to allow a copy of the signed subpoena to be served on the person being subpoenaed (versus requiring the original to be served). Using a copy of the subpoena to serve the person being subpoenaed is consistent with the provisions of the Rules of Civil Procedure, Rule 45(B).

Therefore, the Customer Parties oppose the Staff's recommendation to omit the words "a copy" from the current version of Rule 25 (B) that presently provides for a copy of a subpoena being served in lieu of the original. The Customer Parties also recommend that Rule 25(A)(2), as proposed by Staff, be modified to say that "The person seeking the subpoena … make arrangements for ~~its~~ service OF THE ORIGINAL OR A COPY OF THE SIGNED SUBPOENA.

4901-1-26 Prehearing Conferences

The PUCO Staff proposes no changes to this rule.

As discussed by OCC in 06-685,[13] the current version of the rule mandates that if a prehearing conference is scheduled to discuss settlement of the issues in a complaint case, all parties attending the conference shall be prepared to discuss settlement of the issues raised and shall have the requisite authority to settle those issues. There are legitimate reasons why persons attending may not have the authority to settle particular issues. It is not at all unusual in such negotiations for positions to be expressed by one party that require further analysis by another party and input from persons other than those in attendance or by persons in attendance who require more time and resources to respond. The Customer Parties propose to add the following language to Rule 26 (F):

> (F) If a conference is scheduled to discuss settlement of the issues in a complaint case, the representatives of the public utility shall investigate prior to the settlement conference the issues raised in the complaint and all parties attending the conference shall be prepared to discuss settlement of the issues raised and shall, TO THE EXTENT PRACTICABLE, have the requisite authority to settle those issues.

[13] 06-685 OCC Comments at 27-28.

4901-1-27 Hearings

The PUCO Staff proposes to delete the provision of Rule 27(C) that allows unsworn testimony by members of the public at public hearings. As with the other proposed rule changes, there is no rationale given for this change.

Regardless of the reason for the proposal, unsworn testimony by members of the public at Commission hearings is a means by which the public can make its views known to the Commission, and has been traditionally a part of public hearings. At those hearings, the public is advised that unsworn testimony will not be evidence in the case, but many members of the public choose to provide unsworn testimony anyway. Does the Commission really want to have to inform those in attendance at such hearings that they may not testify except under oath (and subject to cross-examination)? The proposed rule change should not be adopted, and members of the public should continue to be allowed to provide unsworn testimony at public hearings.

Finally, the Customer Parties recommend addition of a section to this rule that provides that the Commission will give at least thirty days notice of public hearings – especially local hearings at which members of the public are likely to testify – whenever practicable.

4901-1-28 Reports of Investigation and Objections Thereto

The current subsection (E) to this rule mandates in part that, unless otherwise ordered by the Commission, in all cases in which the Commission orders an investigation to be performed by PUCO Staff and the filing of a report, any report conducted by the Staff is deemed to be evidence at the time it is filed. As OCC stated in 06-685,[14] this is

[14] 06-685 OCC Comments at 28-29.

problematic, especially in cases where the PUCO otherwise takes no evidence. What then occurs is that this exclusive evidence could become the basis for the Commission's decision. Sometimes this problem is exacerbated by the fact that in the same proceeding the Commission then denies parties' intervention.[15] Consequently, parties are denied their basic due process rights—the right to participate in proceedings that affect their interests, all in violation of the intervention statutes in the Revised Code.

Additionally, treating some things as evidence and others not, especially when there is no hearing, is unreasonable and unlawful. R.C. 4903.09 requires in all "contested cases" heard by the PUCO that a "complete record of all of the proceeding shall be made including a transcript of all testimony and all exhibits, and the Commission shall file with the records of such cases findings of fact and written opinion." When certain reports are accorded evidentiary weight and others are not, or there is no opportunity to introduce evidence, R.C. 4903.09 is not being followed. The current version of this rule permits the Commission to exercise undue discretion in a way which could violate the fundamental due process rights of parties, as well. In 06-685, the Commission indicated that parties would have the ability to respond to a staff report.[16] That does not adequately address the situation where the staff report is in evidence but parties are allowed only to file comments.[17] If the staff report is evidence, then parties need to be able to cross-examine

[15] See, e.g., *In the Matter of the Application of Cinergy Corp. on behalf of The Cincinnati Gas & Electric Company and Deer Holding Corp. for consent and approval of a change of control of The Cincinnati Gas & Electric Company*, Finding and Order (December 21, 2005). There the Commission ordered the Staff to conduct an investigation of the application. A report was issued. The report became the basis of the Commission's decision in the proceeding. Although there was an opportunity to file comments and reply comments, OCC and others were denied the right to conduct discovery and were denied intervention.

[16] See 06-685 Finding and Order at 48.

[17] See id.

or present evidence of their own. For these reasons, as OCC did in 06-685, the Consumer Parties request that the Commission amend paragraph (E) to this rule.[18]

4901-1-30 Stipulations

The Customer Parties do not object to PUCO Staff's proposed amendments to the rule on stipulations. However, the Customer Parties recommend that the language "No Stipulation shall be considered binding upon the commission" be included in a new paragraph (E) rather than be included its inclusion with amended paragraph (D).

4901-1-33 Attorney Examiner's Reports and Exceptions Thereto

In 06-685, OCC had recommended reinstating the Attorney Examiner's Report as a standard part of Commission proceedings. OCC stated,

> The attorney examiner report, although not much used in recent years, can be a valuable tool in refining the issues prior to consideration by the Commission. The consideration of the report can also further the public discussion at Commission meetings that is expected under Ohio open meetings law. Moreover, the issuance of an attorney examiner's report is consistent with Ohio's Administrative Procedure Act provisions. Although the PUCO is specifically exempted from the provisions of this Act, the majority of state agencies in Ohio follow these procedures.[19]

In the 06-685 O&O, the Commission rejected OCC's request, stating

> As indicated by AT&T Ohio, the Commission saw fit to eliminate the attorney examiner reports many years ago. The Commission did this to eliminate a then-existing backlog of cases and to speed up the process for completing future cases. The goals were achieved and the Commission sees no need at this time to revert to prior practices which were problematic.[20]

[18] See OCC 06-685 Comments at 28-29; 06-685 Finding and Order at 48-49.

[19] OCC 06-686 Comments at 32-33 (citations omitted).

[20] 06-685 O&O at 52.

Having long ago eliminated the backlog in its cases, the Customer Parties submit that the Commission should reconsider this issue. Many other state commissions utilize procedures equivalent or similar to attorney examiners reports[21]. Returning to attorney examiners' reports as a standard practice would increase the transparency of the Commission decision process.

4901:1-1-01 Consumer information

This rule requires utilities to provide customers with copies of the "applicable tariffed rules and regulations." Especially in telecommunications, utilities regulated by the Commission are no longer required to tariff many of their services. Therefore, utilities should also be required to provide customers with copies of their contracts and the rules and regulations applicable to their non-tariffed but still-regulated services with copies of their contracts, with rules and regulations applicable.

III. CONCLUSION

The Customer Parties present these comments in the interest of due process for Ohioans whose utility service providers are regulated by the Public Utilities Commission of Ohio. These comments are submitted in order to assist the Commission in the review of its rules of practice and procedure. The Customer Parties' comments are directed at, *inter alia*, bringing the rules in conformance with the Revised Code and in conformance with the rules of civil procedure. The Customer Parties appreciate the opportunity to provide its comments on the rules of practice and procedure.

[21] See, e.g., California (Procedural Rules, Article 14); Delaware (Chapter 1001, Rule 2.18); Maine (Chapter 110, Rules of Practice); Michigan (Rule 460.17341); Minnesota (Rule 7829.2700); Texas (PUC Procedural Rule 22.261). Other states do so by statute: e.g., Colorado (Colo. RS 40-6-109-2); Connecticut (CGS 4-179) Illinois (Public Utility Act 10-111); Maryland (Md. Public Utilities Article Sec. 3-113); Pennsylvania (66 Pa. C.S. § 334-335); West Virginia (CSR 105-1-1)

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Summary: Comments Joint Comments of the Office of the Ohio Consumers' Counsel, Advocates for Basic legal Equality, Inc., Citizen Power, and The Ohio Poverty Law Center electronically filed by Mrs. Mary V. Edwards on behalf of Melissa R. Yost and Office of the Ohio Consumers' Counsel