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**

APPLICATION FOR REHEARING OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

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Pursuant to R.C. 4903.10 and Rule 4901:1-35, Ohio Administrative Code ("O.A.C."), Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies"), hereby file their Application for Rehearing of the Finding and Order entered in the journal on January 22, 2014, in the above-captioned case. As explained in more detail in the attached Memorandum in Support, the Commission's Finding and Order in this case is unreasonable and unlawful on one distinct ground:

1. Rule 4901-1-27(C), O.A.C. is unreasonable and unlawful by removing unsworn testimony as an option for the taking of public testimony because it fails to provide due process for the Companies related to such public testimony and has negative unintended consequences.

For these reasons, as discussed in greater detail below, the Companies respectfully request that the Commission grant the Companies' Application for Rehearing and appropriately modify the rule.

Respectfully submitted,

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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-EL-ORD**

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY

INTRODUCTION

On March 2, 2011, the Commission issued an Entry ("March 2 Entry") requesting comments on proposed amendments to the rules contained in Chapters 4901-1, 4901-3, 4901-9 and 4901:1-1 (collectively, "Chapters"), Ohio Administrative Code ("O.A.C."). Comments were filed by several parties on April 1, 2011 and reply comments on May 2, 2011. On January 22, 2014, the Commission issued its Finding and Order adopting several amendments to those Chapters ("Order"). Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("Toledo Edison") (collectively, the "Companies") hereby apply for rehearing on one issue in that Order.

Pursuant to Section 119.032(C), Ohio Revised Code ('O.R.C."), the Commission must consider the following factors when it reviews the rules and determines whether the rules should be amended, rescinded or continued without change:

> (1) Whether the rules should be continued, without amendment, be amended or be rescinded, taking into consideration the purpose, scope and intent of the statute under which the rule was adopted;
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> (2) Whether the rule needs amendment or rescission to give more flexibility at the local level;
>
> (3) Whether the rule needs amendment to eliminate unnecessary paperwork;
>
> (4) Whether the rule duplicates, overlaps with, or conflicts with other rules; and
>
> (5) Whether the rule has an adverse impact on businesses, reviewing the rule as if it were a draft rule being reviewed under sections 107.52 and 107.53 of the Revised Code, and whether any such adverse impact has been eliminated or reduced.

Subpart (D) of Section 119.032, O.R.C. also provides:

> In making the review required under division (C) of this section, the agency shall consider the continued need for the rule, the nature of any complaints or

comments received concerning the rule, and any relevant factors that have changed in the subject matter area affected by the rule.

Additionally, pursuant to the Governor's Executive Order 2011-01K, the Commission must:

(a) Determine the impact that a rule has on small businesses;

(b) Attempt to balance the critical objections of regulation and the cost of compliance by the regulated parties; and

(c) Amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, or needlessly burdensome, or that have had negative unintended consequences, or unnecessarily impede business growth.

The elimination of the option for unsworn testimony during the portion or session of the hearing designated for the taking of public testimony as provided for in Rule 4901-1-27(C), O.A.C. ("Rule") delves into the violation of the due process rights of electric distribution utilities ("EDUs"), among others, and has several unintended negative consequences rendering the rule unreasonable and unlawful. For those reasons the Commission should grant rehearing.

ARGUMENT

I. Rule 4901-1-27(C), O.A.C. is unreasonable and unlawful by removing unsworn testimony as an option for the taking of public testimony because it fails to provide due process for the Companies related to such public testimony and has negative unintended consequences.

The Commission has amended Rule 4901-1-27(C), O.A.C. to eliminate the option for unsworn testimony "at the portion or session of the hearing designated for the taking of public testimony." Now, the Rule only permits members of the public to offer sworn testimony to be taken at hearings.[1] Public hearings have historically provided members of the public, testifying on their own behalf, an opportunity to provide the Commission

[1] In this context, public hearings are typically held at locations other than the Commission's offices and distinct from the evidentiary hearing held at the Commission's offices.

with their thoughts and comments regarding a particular Commission proceeding without the rigors of litigation such as written discovery, depositions, and cross examination as generally occurs with evidence admitted at an evidentiary hearing. Such public hearings have been a part of the Commission's quasi-legislative role as an administrative agency, which is separate and distinct from the Commission's quasi-judicial role that is fulfilled through the conduct of an evidentiary hearing together with full discovery practice such as interrogatories, requests for production of documents, requests for admission, depositions, and the offering of witnesses at hearing, both lay and expert, and the pleading and motion practice that accompany providing parties constitutional due process.

In striking unsworn testimony from Rule 4901-1-27(C), O.A.C. and rejecting several parties comments against striking this portion, the Commission stated:

> The Commission has conducted public hearings involving sworn public testimony for many years without the need to conduct discovery or cross-examine those consumers offering such statements. It is, in fact, quite a leap to argue that sworn public testimony must be subject to discovery and cross-examination. However, in those rare instances where some form of discovery is necessary, some accommodations can be arranged. Importantly, testimony provided by public witnesses at public hearings is vital to the Commission's function and once taken is given the weight that the Commission determines such testimony deserves.

As an initial matter, both the Companies' and the Gas Companies' comments expressed concern over the drastic change to previous practice from offering *the option* of sworn *or* unsworn testimony at public hearings, to mandating only sworn testimony. Allowing the option of sworn or unsworn testimony during public hearings has been a long-standing practice and has been permitted by the Rule for over a decade, if not more, with little to

no issues.[2] Under Section 119.032(D), Ohio Revised Code ("O.R.C"), the Commission *shall* consider the "nature of any complaints or comments received concerning the rule" and "any relevant factors that have changed in the subject matter area affected by the rule." None of the commenting parties indicated any complaints or changes with the current Rule. The Commission did not articulate a reason as to why removing this option was necessary. For that reason alone, striking the option of unsworn testimony should not be adopted.

Second, the removal of the option of unsworn testimony, and the Commission's Order indicating that sworn testimony: i) need not be subject to discovery and cross-examination; and ii) be given the weight that the Commission determines such testimony deserves raises serious due process concerns.[3] "Even though an administrative authority has statutory power to make independent investigations, it is improper for it to base a decision or findings upon facts so obtained, unless such evidence is introduced at a hearing or otherwise brought to the knowledge of the interested parties prior to decision, with an opportunity to explain and rebut."[4] In addition, the Supreme Court of Ohio has found that due process is afforded when a party is permitted to present evidence through the calling of its own witnesses, the cross-examination of the other parties' witnesses and the filing of exhibits.[5]

If the Commission gives such testimony equal weight to testimony offered at an evidentiary hearing, then the Commission must allow full protections of due process,

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[2] *See e.g.* Case Nos. 00-2192-AU-ORD; 06-0685-AU-ORD. Upon review of the information contained in dockets available on the Commission's system, it appears that this Rule has been in place for at least twenty years. *See* Case Nos. 95-0985-AU-ORD.
[3] Order at ¶55.
[4] *Forest Hills Utility Co. v. Public Util. Comm'n*, 39 Ohio St. 2d 1, 3 (1974).
[5] *Vectren Energy Delivery of Ohio v. Public Util. Comm'n*, 113 Ohio St. 3d 180, 192.

such as discovery and cross examination and rebuttal rights, to all parties associated with all witnesses who offer sworn testimony at public hearings. Further, such testimony along with any exhibits would be subject to objections and motions to strike at the public hearing. Even if parties had a meaningful opportunity for cross-examination, such cross examination could take a significant amount of time per witness, since that would be a party's only opportunity to conduct any cross examination/discovery of that witness. Such an approach would cause public hearings to potentially last late into the night or extend over multiple days, thereby undermining the purpose of public hearings, which is to allow members of the public to comment on proceedings. Parties may well be forced to take this approach in order to attempt to protect their interests, as limited as that may be.

Third, further raising due process concerns, given the historic nature of public hearing testimony, i.e., a person can simply show up and testify[6], a party's opportunity to conduct meaningful cross examination is purely illusory, as they have had no opportunity to conduct written discovery, take depositions, or otherwise prepare for cross examination. If the Commission were to rely on this testimony in its decision-making process, the parties to the proceeding would be indisputably denied their most basic rights of discovery and therefore unconstitutionally denied due process.

Fourth, the removal of unsworn testimony as an option in the Rule has may have several unintended negative consequences prohibited by Governor's Executive Order 2011-01K. If the Commission were to begin relying upon sworn public testimony, parties would be encouraged to have their witnesses or persons speaking on their behalf appear at public hearings instead of as a witness at the evidentiary hearing, such as expert

[6] Parties are not typically even provided a list of persons who have indicated they wish to testify.

witnesses who otherwise must pre-file testimony under Rule 4901-1-29, O.A.C. Not only would parties be able to have their experts appear to testify, those experts would be able to avoid pre-filed testimony, discovery, depositions, motions to strike, objections, and any meaningful cross-examination. In addition, given that public hearings are the opportunity for members of the public to appear and voice their concerns, requiring those parties to speak under oath may have a serious chilling effect on the willingness for the public to provide testimony, which is the purpose behind public hearings.[7] Last, allowing only sworn testimony, will seriously risk the reliability and accuracy of record evidence upon which the Commission relies to make its decisions.

The solution that accommodates both the desire to have members of the public have their say and to assure due process protections for the parties to the proceeding is to keep the option of unsworn or sworn testimony in the Rule. Indeed, allowing only sworn testimony is unreasonable and unlawful because it raises due process concerns and unintended negative consequences as noted above. For those reasons, the Commission should maintain the current language of Rule 4901-1-27(C), O.A.C.

[7] Indeed, taking at face value the Commission's statement that "importantly, testimony provided by public witnesses at public hearings is vital to the Commission's function" why make rule changes that can only serve to discourage public participation? Order at ¶5. Moreover, to the extent that the Commission receives and will consider letters it receives from members of the public regarding particular matters pending before it, certainly such transmittals are not "sworn" statements or, generally, would not satisfy the evidentiary criteria to become part of a case record. Why, then, should there be an artificial distinction which allows the expression of such views if they appear in written form, but precludes them if intended to be verbally expressed at a public hearing? Such a distinction serves only to elevate form over substance and illustrates the inconsistency in the Commission's position.

CONCLUSION

For all of the foregoing reasons, the Commission should grant rehearing on the issues discussed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The PUCO's e-filing system will electronically serve notice of filing of this document on the following parties and courtesy copies have been emailed to the following parties:

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Summary: App for Rehearing electronically filed by Ms. Carrie M Dunn on behalf of Ohio Edison Company and The Toledo Edison Company and The Cleveland Electric Illuminating Company