

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of Ohio)	Case No. 18-275-AU-ORD
Adm. Code Chapter 4901-1 Rules)	
Regarding Practice and Procedure)	
Before the Commission.)	
)	
In the Matter of the Review of Ohio)	Case No. 18-276-AU-ORD
Adm. Code Chapter 4901:1-1 Rules)	
Regarding Utility Tariffs and)	
Underground Utility Protection)	
Service Registration.)	
)	
In the Matter of the Review of Ohio)	Case No. 18-277-AU-ORD
Adm. Code Chapter 4901-3 Rules)	
Regarding Open Commission)	
Meetings.)	
)	
In the Matter of the Review of Ohio)	Case No. 18-278-AU-ORD
Adm. Code Chapter 4901-9 Rules)	
Regarding Commission Complaint)	
Proceedings.)	

INITIAL COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

I. INTRODUCTION

On December 4, 2019, the Public Utilities Commission of Ohio (“Commission”) solicited comments regarding proposed revisions to Chapters 4901-1, 4901:1-1, 4901-3, and 4901-9, Ohio Administrative Code (“O.A.C.”).¹ In accordance with that Entry and the Commission’s January 2, 2020 Entry, the Industrial Energy Users-Ohio (“IEU-Ohio”) hereby offers its initial comments on the proposed rule revisions.

¹ Entry at 1 (Dec. 4, 2019).

II. COMMENTS

A. General Comments

This proceeding includes a review of Chapter 4901-1 and specifically Rule 4901-1-24, which addresses protective orders. In Case No. 18-322-AU-ORD, the Commission solicited comments in response to a Supreme Court decision in an appeal of FirstEnergy Alternative Energy Rider (“AER”) proceeding.² As it did in that proceeding, IEU-Ohio again urges the Commission to revise Rule 4901-1-24 along the following lines.³

First, the Commission should require an affidavit with motions for protective orders attesting that information is a trade secret.

Second, the Commission should establish a process for parties to object to trade secret claims. In addition to allowing parties to respond to a motion for protective order through a memorandum contra, the Commission should modify the rule to allow parties to raise objections to trade secret claims by their own motion. The reason for this is some parties may not be able to object in the 15 days after a motion for protective order was filed, *e.g.*, if a motion for protective order was filed with an initial application or if the 15 days to respond expires before a party is given access to the confidential information. Additionally, much of the confidential information in a proceeding is exchanged in the discovery process and challenges to those confidential designations could not likely be raised in a memorandum contra context.

If a trade secret claim is objected to in a Commission proceeding, either by memorandum contra or by an opposing party’s own motion, the Commission should then establish a process to allow the party making the trade secret claim to move forward and

² Case No. 18-322-AU-ORD, Entry at 1 (Feb. 28, 2018).

³ Case No. 18-322-AU-ORD, Comments of Industrial Energy Users-Ohio at 2-3 (Mar. 16, 2018).

carry its burden of proof and the objecting party to present its contrary view. IEU-Ohio recommends that the Commission give the Attorney Examiners discretion on what process should be utilized based on the circumstances.

Regardless of what process occurs in a particular instance, IEU-Ohio requests that the Commission require the parties and attorney examiners to resolve trade secret claims prior to start of evidentiary hearings unless good cause exists for a party to raise the issue during or after a hearing (e.g., if it is subsequently determined that information marked confidential is in the public domain or if the party does not obtain the confidential information in advance of the hearing).

B. 4901-1-1(D) (formerly (C))

This rule contains the internet address for the Commission's docketing information system (DIS). Later in the rules, the address is updated to <https://www.puco.ohio.gov/docketing>. For consistency, this rule should be updated to include this address as well. The new rule would read as follows:

"Docketing information system" means the commission's system for electronically storing documents filed in a case. The internet address of the docketing information system is ~~http://dis.puc.state.oh.us~~
<https://www.puco.ohio.gov/docketing>.

C. 4901-1-05(C)

This rule addresses the manner of service when parties are represented by attorneys. In the vast majority of proceedings (where the parties are represented by counsel), the general practice among those attorneys is to electronically serve all listed counsel for each party, not just the counsel of record or first-listed counsel. This current practice creates no additional burden and helps avoid confusion or delay in circumstances where the counsel of record or first-listed counsel may be unavailable or unable to

address a filing in a timely manner. IEU-Ohio believes this rule should be updated to reflect that practice, as follows:

If a party has entered an appearance through an attorney, service of pleadings or other papers shall be made upon the attorney instead of the party. If the party is represented by more than one attorney, service ~~need be made only upon the “counsel of record” designated under rule 4901-1-08 of the Administrative Code. If no counsel of record is listed for a party with multiple counsel then service shall be made on the first-listed counsel in the initial pleading.~~ **shall be made upon all designated counsel for each party having properly made an appearance in the proceeding, unless otherwise ordered by the commission or agreed to by the parties.**

D. 4901-1-05(D)

IEU-Ohio generally supports the Commission’s proposed rule change, which would require electronic service on attorney-represented parties, unless service is being achieved via the Commission’s e-filing system. Electronic service among attorney-represented parties has proven to be the most effective and reliable form of service available, and IEU-Ohio appreciates the Commission’s move to promote this form of service.

In certain circumstances, however, reliance on the e-filing system to provide notice of service may not be practical or timely. For instance, if multiple parties file documents very close to the 5:30 pm deadline, the automatic notice sent out by DIS to subscribers most likely will not arrive in parties’ email inboxes until the following morning. If the filing occurs on a Friday, that further delays receipt of service until after the weekend. This can be particularly problematic when parties wishing to respond to filings are subject to short deadlines, since being required to wait until the following business day can shorten the deadline by multiple days.

As such, IEU-Ohio proposes to add a revision to the Commission's proposed rule which would require electronic service the day a document is filed. In some circumstances, particularly rulemakings where a party's first appearance is the filing deadline, it would be impractical and cumbersome to update a service list in real time. Accordingly, IEU-Ohio suggests that the obligation to electronically serve be limited to parties that have made an appearance no later than the day before a document is filed. The revision to the proposed rule would read as follows:

~~Unless service is completed through the commission's e-filing system as set forth in paragraph (B) of this rule or email service is impractical (e.g., due to file size),~~ an attorney representing a party before the commission shall accomplish service by email upon other attorney-represented parties that have either intervened or made an appearance no later than the day before filing by email. Otherwise . . .

IEU-Ohio still urges the Commission to maintain and enhance the current DIS service process. This dual approach will help ensure all parties have timely and redundant access to important documents in the proceedings in which they participate.

E. 4901-1-14

IEU-Ohio proposes a rule be added that would encourage the Commission to hold prehearing conferences and issue procedural schedules near the outset of a contested proceeding. An early prehearing conference can reduce unnecessary motion practice by the parties fighting over a procedural schedule, educate the Commission and parties about the scope of potential contested issues, and establish the timeframe necessary to review those issues. Practitioners can also discuss any potential scheduling issues and then have advance notice of deadlines and hearing to plan accordingly.

F. 4901-1-16(I), 4901-1-21(A), 4901-1-25(D)

These rules govern the discovery process in Commission proceedings, and specifically those times where Staff is exempt from particular discovery requirements even when acting as a party.

IEU-Ohio recognizes the unique position Staff occupies and understands, though it has disagreed at times, why current rules largely exempt Staff from discovery rules. There are times, however, where the current rules hinder rather than further due process, and in these circumstances, IEU-Ohio believes it is appropriate to consider alternatives to the current structure.

IEU-Ohio is not proposing specific revisions to the rules to make Staff fully subject to the discovery rules as any other party. Instead, IEU-Ohio would request that the Commission consider rules that facilitate an expedited exchange of documents or information housed by Staff and already subject to public records law, but that may not be able to be made available as quickly as necessary through traditional records requests. By doing so, the Commission can help ensure that proceedings move forward in a fair and efficient manner, with all the best and most accurate information possible.

G. 4901-1-29(A)

As with the rule provisions discussed above, IEU-Ohio understands that Staff often has a different burden than other parties in proceedings before the Commission, and therefore cannot always be expected to be subject to the same discovery requirements as those other parties. Testimony, however, is a separate matter. Parties must have an opportunity to prepare as fully as possible for hearing, and the review of testimony is a central component to that preparation. In proceedings where Staff is acting as a party, it is vital that other parties be given ample opportunity to consider the position Staff intends

to take at hearing, to know which Staff members will be testifying, and on what subject matters cross examination will be appropriate. To that end, IEU-Ohio proposes to remove “except testimony to be offered by the commission staff” from Rule 4901-1-29(A).

In addition, if the Commission does not modify its rules to make Staff subject to discovery (which IEU-Ohio is not specifically advocating for), IEU-Ohio would request the Commission create a new rule that requires Staff to identify its witnesses and the subject matter of testimony no later than one week before the commencement of hearing, and either require Staff to also file testimony one week before hearing or provide the other parties a break in the hearing schedule to prepare.

III. CONCLUSION

For the foregoing reasons, IEU-Ohio respectfully requests that the Commission adopt its proposed changes to Rules 4901-1, O.A.C.

Dated: January 13, 2020

Respectfully submitted,

/s/ Rebekah J. Glover

Matthew R. Pritchard (Reg. No. 0088070)
(Counsel of Record)

Rebekah J. Glover (Reg. No. 0088798)

MCNEES WALLACE & NURICK LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

mpritchard@mcneeslaw.com

rglover@mcneeslaw.com

COUNSEL FOR INDUSTRIAL ENERGY USERS-OHIO

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Summary: Comments Initial Comments of Industrial Energy Users-Ohio electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio