

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of Ohio)	
Admin. Code Chapter 4901-1 Rules)	
Regarding Practice and Procedure)	Case No. 18-275-AU-ORD
Before the Commission.)	

COMMENTS OF THE ENVIRONMENTAL LAW AND POLICY CENTER

The Environmental Law and Policy Center is a regional organization that litigates cases before public utility commissions around the Midwest, including Ohio, Illinois, Michigan, Wisconsin, Minnesota, and Iowa. We have seen how different commissions take different approaches on different issues, and we have seen how different rules operate in different states. Hence, we hope that the Ohio Commission will find our perspective helpful when discussing its rules of practice. Our comments focus on two issues that, based on our recent experience litigating before the Commission, have become increasingly important: (1) Staff’s participation in cases as a party without following the rules that apply to other parties; and (2) the rules for stipulations. Both issues have significant effects on the outcome of cases. Staff’s ability to act like a party without being subject to the discovery rules applying to other parties gives it undue influence on the outcome of cases. Additionally, given how many cases now get settled with stipulations, the Commission should revisit the requirements regarding the evidentiary record in cases without unanimous settlement.

Commission Rule 4901-1-10 (Parties)

As the Commission reviews the rules, ELPC hopes it will consider ways to address some of the fairness issues related to Staff’s participation in the process. Under the current rules the Commissioners can communicate with Staff even when it participates actively in proceedings, including discussions with parties regarding substantive issues or filing testimony.

Staff has a uniquely large influence on the outcome of proceedings. Staff can and does predetermine the outcome of cases by starting and leading settlement discussions and then leaving parties with very limited options other than to sign on or get shut out completely. Moreover, Staff does this without having to respond to any discovery or ever explaining its rationale for positions. This is particularly important because Staff often drives the stipulation process, first negotiates with a utility, and only later involves other parties. Transparency is particularly important in these situations, and parties and the public should have better information on how and why Staff reached its positions.

In other states—Illinois for example—once notice of a hearing is posted in a contested case, the rules prohibit Staff that may reasonably be expected to be involved in the case from contact with Commissioners or the Hearing Examiner (ALJ). 83 Ill. Adm. Code 200.710. Other

Staff who do not participate in the case can assist and advise Commissioners, but the Staff participating directly in the case cannot.¹ This safeguard ensures that Staff acts as an independent body that represents the public interest. The Illinois Rules also subject Staff to discovery, so that parties have the information they need to effectively oppose Staff when there is disagreement on issues. 83 Ill. Adm. Code 200.340.²

In order to address these issues, ELPC proposes adding a reference to sections 4901-1-09 and 4901-1-16 to the Rule 4901-1-10 (Parties) and proposes adding additional clarifying language to subsection (C) of that rule.

ELPC's Proposed Edits to Current Rule 4901-1-10 Parties

4901-1-10 Parties.

(A) The parties to a commission proceeding shall include:

- (1) Any person who files an application, petition, long-term forecast report, or complaint.
- (2) Any public utility, railroad, or private motor carrier against whom a complaint is filed.
- (3) Any public utility, railroad, or private motor carrier whose rates, charges, practices, policies, or actions are designated as the subject of a commission investigation.
- (4) Any person granted leave to intervene under rule 4901-1-11 of the Administrative Code.
- (5) Any municipal corporation which has enacted an ordinance which is subsequently challenged in a complaint filed under section 4909.34 of the Revised Code.
- (6) Any person cited for failure to maintain liability insurance as required by section 4921.11 or 4923.08 of the Revised Code.
- (7) Any person who files a request for an administrative hearing in a transportation civil forfeiture case.
- (8) Any other person expressly made a party by order of the commission.

(B) If any public utility, railroad, or private motor carrier referred to in paragraph (A)(2) or (A)(3) of this rule is operated by a receiver or trustee, the receiver or trustee shall also be made a party.

(C) Except for purposes of rules 4901-1-02, 4901-1-03, 4901-1-04, 4901-1-05, 4901-1-06, 4901-1-07, 4901-1-09, 4901-1-12, 4901-1-13, 4901-1-15, 4901-1-16, 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. Additionally, any commission staff member involved in any way in a contested proceeding shall not have ex-parte communications. This

¹ Illinois Commerce Commission Rule of Practice 200.710(a) prohibits Commissioners, Commission employees and Hearing examiners from communicating directly or indirectly with any party to the proceeding on any issue in the proceeding; a party's representative on any issue in the proceeding; or any other person concerning an issue of fact in the proceeding, without notice and opportunity for all parties to participate. Pursuant to Rule of Practice 200.710(b), the prohibition in subsection (a) does not apply to communications between parties and Commission employees who are engaged in investigatory, prosecutorial or advocacy functions, provided that Commission employees are still prohibited from communicating on an *ex parte* basis with members of the Commission, any hearing examiner (ALJ) in the proceeding, or any Commission employee who is or may reasonably be expected to be involved in the decisional process of the proceeding.

² Illinois Commerce Commission Rule of Practice 200.340 states that "it is the policy of the Commission to encourage voluntary exchange by the parties and staff witnesses of all relevant and material facts to a proceeding through the use of requests for documents and information." 83 Ill. Adm. Code 200.340.

includes any Commission employee involved in the case on any level. This provision does not apply to rulemakings.

Commission Rule 4901-1-30 (Stipulations)

The other issue ELPC hopes the Commission addresses is the Stipulation process. ELPC believes changes are needed with the stipulation process in order to promote fairness and protect ratepayers. In terms of these rules, the Commission needs to address the standard of review it applies to non-unanimous settlements. ELPC proposes modifications that require parties to create a complete record and meet a reasonable burden of proof.

Under the current rules once parties agree to the settlement the Commission does little review of the facts underlying the utility proposal. The Commission does not scrutinize non-unanimous stipulations to ensure they meet the burden of proof that is applicable to the proceeding notwithstanding the stipulation. Parties to Commission proceedings therefore regularly file non-unanimous stipulations addressing significant utility proposals and spending, but support the stipulation with a single piece of testimony that describes the settlement while providing minimal detail on the merits of the utility's proposal. That practice is not in the best interests of ratepayers, the Commission, or other interested parties. Technically, however, it is consistent with the Commission's current Rule 4901-1-30 (D), which requires stipulating parties to "file or provide the testimony of at least one signatory party that supports the stipulation." ELPC therefore proposes an addition to OAC 4901-1-30 (a new subsection (E)) that would require stipulating parties to meet the original burden of proof applicable to the proceeding when filing a non-unanimous stipulation.

ELPC's Proposed Edits to Current Rule 4901-1-30 Stipulations

4901-1-30 Stipulations.

(A) Any two or more parties may enter into a written or oral stipulation concerning issues of fact, the authenticity of documents, or the proposed resolution of some or all of the issues in a proceeding.

(B) A written stipulation must be signed by all of the parties joining therein, and must be filed with the commission and served upon all parties to the proceeding.

(C) An oral stipulation may be made only during a public hearing or record prehearing conference, and all parties joining in such a stipulation must acknowledge their agreement thereto on the record. The commission or the presiding hearing officer may require that an oral stipulation be reduced to writing and filed and served in accordance with paragraph (B) of this rule.

(D) Unless otherwise ordered, parties who file a full or partial written stipulation or make an oral stipulation must file or provide the testimony of at least one signatory party that supports the stipulation. Parties that do not join the stipulation may offer evidence and/or argument in opposition.

(E) Where a stipulation is not unanimous, the stipulating parties must meet the original burden of proof applicable to the proceeding.

~~(F)~~ No stipulation shall be considered binding upon the commission.

Conclusion

ELPC believes that these two changes regarding Staff and stipulations will make the Commission process fairer and more transparent. ELPC does not take a position on any of the other proposed revisions to Ohio Adm. Code Chapters 4901-1, 4901:1-1, 4901-3 and 4901-9 offered by the Commission in this proceeding. ELPC thanks the Commission for its attention to these issues.

Dated: January 13, 2020

Respectfully submitted,

/s/ Robert Kelter

Robert Kelter

Senior Attorney

Environmental Law & Policy Center

35 E. Wacker Drive, Suite 1600

Chicago, IL 60601

P: 312-795-3734

F: 312-795-3730

E-mail: rkelter@elpc.org

Nikhil Vijaykar

Staff Attorney

Environmental Law & Policy Center

35 E. Wacker Drive, Suite 1600

Chicago, IL 60601

P: 312-795-3747

F: 312-795-3730

E-mail: nvijaykar@elpc.org

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Comments was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on January 13, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Robert Kelter
Robert Kelter
Senior Attorney
Environmental Law & Policy Center
35 E. Wacker Drive, Suite 1600
Chicago, IL 60601
P: 312-795-3734
F: 312-795-3730
E-mail: rkelter@elpc.org

Nikhil Vijaykar
Staff Attorney
Environmental Law & Policy Center
35 E. Wacker Drive, Suite 1600
Chicago, IL 60601
P: 312-795-3747
F: 312-795-3730
E-mail: nvijaykar@elpc.org

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Summary: Comments of the Environmental Law & Policy Center electronically filed by Mr. Robert Kelter on behalf of Environmental Law & Policy Center