

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**COMMENTS ON THE PUCO'S RULES OF PRACTICE  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
AND  
THE NORTHWEST OHIO AGGREGATION COALITION**

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The PUCO’s rules should provide for a fair, just and efficient process in its administrative proceedings—a process that promotes justice and allows all interested parties a chance to be fully heard on the significant issues that affect utilities and millions of Ohio customers. Ohio Administrative Code Chapter 4901-1 contains many of the PUCO’s most important rules in this regard. This opportunity to comment is appreciated.

The Office of the Ohio Consumers’ Counsel (“OCC”) regularly participates in many types of cases before the PUCO. And OCC has spent thousands upon thousands of hours over the last 40-plus years for consumer protection in the PUCO’s regulatory process. For its part, the Northwest Ohio Aggregation Coalition (“NOAC”) and its local community members have advocated for Northwest Ohioans since the advent of electric deregulation. Accordingly, these Comments contain recommendations for modifications and improvements to the PUCO’s current rules.

## **I. RECOMMENDATIONS**

### **O.A.C. 4901-1-02 Filing of pleadings and other documents**

First, there should be changes to the rule for opening a closed case. Currently, when a case is closed, any person seeking to reopen a case must contact the attorney examiner. The rule should require that all other parties to the case be included on any such communication. This process should be treated similarly to an ex parte communication to promote fairness. The following changes to O.A.C. 4901-1-02(E)(2) should be adopted:

A closed case is one in which no further filings may be made without the consent of the commission's legal department. When a case is closed, any person seeking to make a filing in a case must first contact the ALJ assigned to the case or the commission's legal director. If the contact is made by email, all parties to the case shall be copied on such email. If the contact is to be made by phone, all parties shall be invited to participate on such call. If the contact is to be made in person, all parties shall be invited to attend such in-person meeting. If the ALJ or legal director agrees to permit the filing, the docketing division will be notified to reopen the case. If an additional filing is permitted, the case status will be changed to open and service of the filing must be made by the filer upon the parties to the case in accordance with rule 4901-1-05 of the Administrative Code.

### **O.A.C. 4901-1-03 Form of pleadings and other papers**

The PUCO should adopt a new rule, 4901-1-03(D), which would promote administrative efficiency by requiring parties represented by counsel to file all papers (except scanned attachments) as searchable PDFs. When a party files a paper as an image, other parties reading the paper cannot use the search function to identify key words and cannot cut and paste text from the file.<sup>1</sup>

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<sup>1</sup> See also Docketing Information System Electronic Filing Technical Requirements and Manual, Rule 5, available at [https://www.puco.ohio.gov/emplibrary/files/docketing/E-File\\_Manual.pdf](https://www.puco.ohio.gov/emplibrary/files/docketing/E-File_Manual.pdf).

Requiring parties to file their documents as readable PDFs imposes no undue burden in the 21<sup>st</sup> Century. For example, when documents are converted from Microsoft Word to PDF, they are readable and searchable. Readable PDF files are generally smaller documents as well (in terms of file size), thus reducing the burden on the PUCO's server and saving space on parties' hard drives or cloud servers.

Accordingly, the following new O.A.C. 4901-1-03(D) should be adopted:

For any party represented by counsel, all pleadings or other papers to be e-filed (except scanned attachments) shall be filed as a searchable PDF.

**O.A.C. 4901-1-05 Service of pleadings and other papers**

One minor change should be made to this rule. The PUCO recommended adding the following language to Rule 4901-1-05(D): "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, an attorney representing a party before the commission shall accomplish service upon other attorney-represented parties by email." In this regard, the words "or email service is impractical" should be deleted. In 2020 and beyond, email service from one attorney to another should never be less practical than another form of service, like snail mail. Thus, this qualification does not appear necessary.

**O.A.C. 4901-1-08 Practice before the commission, representation of corporations, and designation of counsel of record.**

The PUCO recommends that rule 4901-1-08(D) be expanded, by broadening the applicability of the rule to all cases. This approach would potentially place further limits on the ability of parties to use non-lawyer experts in settlement discussion. Currently, the rules address complaint cases only. But with the PUCO's proposed changes the

restrictions would apply to all cases before the Commission. This change should not be adopted, as it may lead to unintended consequences.

In many settlement discussions, parties—including utilities, OCC, the PUCO Staff, and others—rely on the technical expertise of non-lawyer regulatory experts. As amended, the rule could be interpreted to mean that these technical experts are not allowed to speak during settlement meetings without running the risk that they might be deemed to be “representing” a party in violation of the rule. This would likely interfere with candid and in-depth settlement discussions, which can require the direct input of technical experts. The PUCO should not adopt the expansive change.

Alternatively, the rule should be modified to clarify that it only applies when settlement is discussed as part of a prehearing conference (*i.e.*, in the presence of an ALJ) and not to private settlement discussions between parties. Such a clarification would be more in line with preventing behavior that could allegedly amount to unauthorized practice of law.

#### **O.A.C. 4901-1-09 Ex parte discussion of cases**

The rule should be changed to provide more definition and structure for the rule that protects record-based decision-making for the public, the PUCO and others. Ideally, the law itself could be improved, but here the focus is on rules.

Currently, O.A.C. 4901-1-09 only includes communications with a “commissioner” or “attorney examiner assigned to the case” as being considered an ex parte communication. The scope of this rule should be broadened to include communications as ex parte with those who are reasonably expected to be involved in the decisional process of a proceeding. As stated, expanding the scope of agency personnel

that are included in the ex parte prohibition is consistent with ex parte restrictions in some other jurisdictions.<sup>2</sup>

With respect to the provision in the rule for providing upfront notice of ex parte communication, there should be a timeline for the ex parte communicator to give notice before the planned communication.<sup>3</sup> The notice should be seven days. Otherwise, there is no time period mentioned in the rule. Seven days gives parties who might want to attend the discussion adequate time to arrange for participation in the communication.

The Ohio rule (4901-1-09) gives parties the chance to voice disagreement with the ex parte disclosure document where the representation is not accurate or communications are not fully disclosed. But they do not provide parties with an opportunity to substantively respond to the communication. Parties to the case involved in the ex parte communication should be allowed to substantively respond to the disclosing document “within fourteen (14) days on the record.”

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<sup>2</sup> See, e.g., FERC, 18 C.F.R. §385.2201(c)(3) (ex parte restrictions apply to communications with decisional employees, defined as “a Commissioner or member of his or her personal staff, an administrative law judge, or any other employee of the Commission, or contractor, who is or may be reasonably expected to be involved in the decisional process of a proceeding”); Federal Administrative Procedure Act, 5 U.S.C. §557 (d)(1)(A) (ex parte restrictions apply in formal rulemaking proceedings to “any member of the body comprising the agency, administrative law judge, or other employee who is or may be expected to be involved in the decisional process;” Illinois Commerce Commission: 83 Ill. Admin. Code §200.710, subd.(a) (in contested proceedings ex parte restrictions apply to “commissioners, commission employees, and hearing examiners”); 220 Ill Comp. Stat. 5/9-201, subd.(d)( in ratesetting proceedings restrictions apply to commissioners, commissioners assistants, hearing examiners and “decisional employees”; 220 Ill Comp. Stat. 5/10-103 (restrictions placed on “any commissioner, hearing examiner, or other person who is or may be reasonably be expected to be involved in the decisional process of a proceeding”); Washington Utilities and Transportation Board, Wash. Admin. Code §480-07-310(1)(in adjudicatory proceedings any person who has a direct or indirect interest in the outcome of the proceeding, including the commission’s advocacy, investigative, or prosecutorial staff may not directly or indirectly communicate about the merits with the commissioners, the ALJ, or the commissioners’ staff assistants, legal counsel, or consultants assigned to advise the commissioners in the proceeding); see also the Supreme Court of Ohio Rule of Practice 3.5 and Ohio Rule of Judicial Conduct 2.9.

<sup>3</sup> See, e.g., California Pub. Util. Comm., Rule 8.3(c)(2) (notice of ex parte discussion must be provided three days before the communication).



In sum, the proposed modifications are as follows:

After a case has been assigned a formal docket number, no commissioner or anyone else reasonably expected to be involved in the decisional process of the proceeding ~~or attorney examiner assigned to the case~~ shall directly or indirectly discuss the merits of the case with any party to the proceeding ~~or a representative of a party~~, unless all parties have been notified within seven days of the planned communication and given the opportunity to be present or to participate by telephone, or a full disclosure of the communication insofar as it pertains to the subject matter of the case is made. When an ex parte discussion occurs, a representative of the party or parties participating in the discussion shall prepare a document identifying all the participants, attendees, and the location of the discussion, and fully disclosing the communications made. Within two business days of the occurrence of the ex parte discussion, the document shall be provided to the commission's legal director or his designee or to an attorney examiner present at the discussion for review. Upon completion of the review, the final document with any necessary changes shall be filed with the commission's docketing division in the case subject to the ex parte discussion within two business days and the filer shall serve a copy upon the parties to the case and to each participant in the discussion. The document filed and served shall include the following language: Any participant in the discussion who believes that any representation made in this document is inaccurate or that the communications made during the discussion have not been fully disclosed shall prepare a letter explaining the participant's disagreement with the document and shall file the letter with the commission and serve the letter upon all parties and participants in the discussion within two business days of receipt of this document. Parties to the case in which the ex parte communication took place may respond in the record to the ex parte filing within fourteen (14) days.

#### **O.A.C. 4901-1-10 Parties**

There should be three rules modifications. First, a new subsection (9) should be added to rule 4901-1-10(A) that recognizes as a party “Any person with a statutorily recognized right to intervene.”

Second, rule 4901-1-19(C) should be modified to provide that the PUCO Staff is considered a party for purposes of discovery, but only in certain circumstances. First, the PUCO Staff should be subject to discovery if the PUCO Staff (1) signs a stipulation and will testify to support it or (2) will submit pre-filed testimony. Second, discovery on Staff

should be limited to taking the deposition of the relevant Staff witnesses. In the interest of fairness, it is reasonable for parties to have an opportunity to depose Staff witnesses before they are cross-examined at hearing. It is consistent with Ohio Rule 4901-1-16, that the purpose of the discovery rules is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings. Allowing limited discovery on Staff would promote fairness in PUCO proceedings.

#### **O.A.C. 4901-1-11 Intervention**

**A. Rule 4901-1-11(B)(5) should be deleted as contrary to R.C. 4903.221 and Ohio Supreme Court precedent.**

The law guarantees parties a right to intervene in any PUCO proceeding where they may be adversely affected.<sup>4</sup> It also directs the PUCO to consider four criteria in considering a timely motion to intervene: (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) “[w]hether the intervention by the prospective intervenor will unduly prolong or delay the proceedings,” and (4) “[w]hether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.”<sup>5</sup> The Supreme Court of Ohio has interpreted this law to mean that “intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO.”<sup>6</sup>

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<sup>4</sup> R.C. 4903.221.

<sup>5</sup> *Id.*

<sup>6</sup> *Ohio Consumers’ Counsel v. PUC*, 111 Ohio St.3d 384, 388 (2006).

The PUCO’s intervention rule should be modified to be consistent with the Ohio Revised Code. Currently, the PUCO’s rule includes the four requirements from R.C. 4903.221, but it also adds a fifth factor: the “extent to which the person’s interest is represented by existing parties.”<sup>7</sup> Essentially, this factor suggests that if two parties have similar interests in a proceeding, one of those parties—presumably whichever files its motion to intervene later—could be denied intervention. This fifth factor must be deleted from the rule.

As the Supreme Court of Ohio ruled long ago, “Administrative rules may facilitate the operation of what has been enacted by the General Assembly but may not add to or subtract from the legislative enactment.”<sup>8</sup> Similarly, the Court has ruled that a “rule that is contrary to statute is invalid.”<sup>9</sup> And of course, the PUCO, as a creature of statute, cannot go beyond what is provided by law.<sup>10</sup>

Here, PUCO Rule 4901-1-11(B)(5) attempts improperly to “add to ... the legislative enactment”<sup>11</sup> found in R.C. 4903.221. Thus, this part of the PUCO’s intervention rule is “contrary to statute [and] is invalid.”<sup>12</sup>

In addition, one other change to this rule should be made. Rule 4901-1-11(F) should be modified as follows: “A motion to intervene which is not timely ~~will be granted only under extraordinary circumstances~~ may be granted for good cause shown.”

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<sup>7</sup> Ohio Adm. Code 4901-1-11(B)(5).

<sup>8</sup> *State ex rel. Foster v. Evatt*, 144 Ohio St. 65, 102 (1944).

<sup>9</sup> *Hoover Universal v. Limbach*, 61 Ohio St.3d 563, 569 (1991).

<sup>10</sup> *Columbus S. Power Co. v. PUCO*, 67 Ohio St.3d 535, 537 (1993) (the PUCO is a “creature of statute” that “may exercise only that jurisdiction conferred upon it by the General Assembly”).

<sup>11</sup> *State ex rel. Foster*, 144 Ohio St. at 102.

<sup>12</sup> *Hoover Universal*, 61 Ohio St.3d at 569.

Parties should generally be required to file timely motions to intervene. At the same time, however, the rule's "extraordinary circumstances" standard is inconsistent with Ohio law. R.C. 4903.221 provides that the PUCO may grant a late motion to intervene "for good cause shown." The Rule should mirror the statutory language rather than imposing a higher standard of "extraordinary circumstances."

#### **O.A.C. 4901-1-15 Interlocutory appeals**

Currently, rule 4901-1-15(A)(1) allows an interlocutory appeal if a motion to compel is granted but not if one is denied. It also allows an interlocutory appeal if a motion for protective order is denied but not if one is granted. These rules have long favored utilities. Most discovery is served on the applicant in a case, which tends to be the utility. Thus, motions for protective orders (against discovery) tend to be filed by utilities. And motions to compel answers to discovery tend to be filed against utilities. So it favors the utilities to be able to file an interlocutory appeal from a denied protective order that they sought or from a granted motion to compel that they opposed. Both of these rules should be made symmetrical. Thus, the rule should be modified as follows: "Grants or denies a motion to compel discovery or denies a motion for a protective order."

Similarly, Rule 4901-1-15(A)(3) should be modified. It allows an interlocutory appeal if the PUCO "Refuses to quash a subpoena."

Utilities tend to be the subject of subpoenas, so they tend to file motions to quash subpoenas. So it favors utilities that an interlocutory appeal can only be taken from a denial of a motion to quash. The same appeal allowance does not apply to the granting of a motion to quash against the filer of the subpoena request. The rule should be changed as

follows: “Quashes or refuses ~~Refuses~~ to quash a subpoena.” Again, this rule should be symmetrical so that a party can file an interlocutory appeal if a subpoena is improperly quashed.

Third, Rule 4901-1-15(B) should be amended to provide that a *non-presiding* ALJ, as opposed to the presiding ALJ, should consider certifying an interlocutory appeal. It makes more sense for a non-presiding ALJ to make this determination to avoid the presiding ALJ being asked to certify an appeal from his or her own decision which is in dispute.

Fourth, Rule 4901-1-15(B) should be modified to provide that the likelihood of undue prejudice or expense to a party is an independent justification for an interlocutory appeal. Currently, the rule provides that the appeal must be one that “presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent *and* an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties.”<sup>13</sup> The word “and” should be changed to “or” so that undue prejudice is, by itself, sufficient for granting an interlocutory appeal.

Fifth, Rule 4901-1-15(E)(2) should be modified. Currently, the rule allows the PUCO to defer ruling on an interlocutory appeal until “some later point in the proceeding.” This rule should be qualified to provide that deferring the ruling is only appropriate if there is no harm to the parties by deferring the ruling. Thus, the following language should be added to the end of the current rule: “provided that there is no harm to the parties by deferring the ruling.”

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<sup>13</sup> Ohio Adm. Code 4901-1-15(B).

### **O.A.C. 4901-1-16 General provisions and scope of discovery**

O.A.C. 4901-1-16(E) should be modified as follows: “The supplementation of responses required under paragraphs (D)(1) to (D)(3) and (D)(6) of this rule shall be provided within five business days of discovery of the new information. The supplementation of responses required under paragraph (D)(5) shall be provided within five business days or any shorter deadline established by the ALJ.” The rule should provide a specific deadline for supplementing responses when a party asks for supplementation; OCC proposes five business days.

Rule 4901-1-16(I) should be modified as follows: “Rules 4901-1-16 to 4901-1-24 of the Administrative Code do not apply to the commission staff, except as provided in rule 4901-1-10(C) of the Administrative Code.” This edit simply recognizes our recommended changes to Rule 4901-1-10(C) allowing depositions of Staff in limited circumstances.

### **O.A.C. 4901-1-17 Time periods for discovery**

The PUCO should adopt additional language in Rule 4901-1-17(A) to make it more clear that discovery (including the duty to answer discovery) begins immediately upon filing for intervention in a docketed case. The rule should be modified as follows:

“Except as provided in paragraph (E) of this rule, discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible. A proceeding is commenced with the docketing of the matter by the commission. Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of the hearing.”

### **O.A.C. 4901-1-19 Interrogatories and response time**

First, the current 20-day deadline for responding to interrogatories should be modified in certain circumstances. For example, by rule,<sup>14</sup> in an economic development, energy efficiency arrangement, or unique arrangement case, parties are required to file comments and objections within 20 days of the filing of the application. With a 20-day discovery deadline, it is impossible for a party to obtain any discovery before filing comments or objections, which makes it difficult (if not impossible) for a party to meaningfully evaluate the application.

Therefore, the following change to rule 4901-1-19(A) should be adopted: “The party upon whom the interrogatories have been served shall serve a copy of the answers or objections upon the party submitting the interrogatories and all other parties within twenty days after the service thereof, or within such shorter or longer time as the commission, the legal director, the deputy legal director, or an ALJ may allow. However, in any case in which there is a deadline for response to an application or other filing that is less than 45 days, or in any case subject to automatic approval in less than 45 days, the party upon whom the interrogatories have been served shall serve a copy of the answers or objections within seven days after the service thereof.”

Second, the end of O.A.C. 4901-1-19(A) should be modified as follows: “Parties have a duty to respond to discovery unless the PUCO has ruled otherwise.”

Further, O.A.C. 4901-1-19(D) should be amended to require electronic documents to be shared electronically. For example, if the response to an interrogatory requires the responding party to produce an electronic document (Excel spreadsheet, PDF, etc.), the

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<sup>14</sup> Ohio Adm. Code 4901:1-38-03(E), 4901:1-38-04(D), 4901:1-39-05(F).

responding party must produce the document by email, download link, USB drive, DVD, or similar method. There have been times when OCC has sought a document, and a responding party has refused to provide the document to OCC and instead insisted that OCC travel to the responding party's office to look at the electronic document there. This is not a good use of anyone's time. It should not be sufficient for the responding party to allow only an onsite inspection of such file. Thus, the following modification should be adopted to rule 4901-1-19(D):

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, and the burden of deriving the answer is substantially the same for the party submitting the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford the party submitting the interrogatory a reasonable opportunity to examine, audit, or inspect such records. If such records are stored electronically, then the party upon whom the interrogatory has been served shall provide an electronic copy of such records to the party making the request. It shall not be sufficient for the party receiving the request to permit on-site inspection of electronically-stored documents.

**O.A.C. 4901-1-20 Production of documents and things; entry upon land or other property**

Comments on this rule are the same as above for rule 4901-1-19 on interrogatories.

First, Rule 4901-1-29(C) should be modified as follows:

The party upon whom the request is served shall serve a written response within twenty days after the service of the request, or within such shorter or longer time as the commission, the legal director, the deputy legal director, or an ALJ may allow. However, in any case in which there is a deadline for response to an application or other filing that is less than 45 days, or in any case subject to automatic approval in less than 45 days, the party upon whom the requests have been served shall serve a copy of the response within seven days after the service thereof. The response shall state, with respect to each item or category, that the inspection and related activities



will be permitted as requested, unless the request is objected to, in which case the reason for the objection shall be stated. If an objection is made to part of an item or category, that part shall be specified. The party submitting the request may move for an order under rule 4901-1-23 of the Administrative Code with respect to any objection or other failure to respond to a request or any part thereof, or any failure to permit inspection as requested. The Party upon whom a request is served must respond to discovery unless the PUCO has ruled otherwise.

Second, a new rule 4901-1-20(E) should be added, which states: “Any document that is stored electronically shall be provided electronically to the party making the request. It shall not be sufficient for the party receiving the request to merely permit on-site inspection of electronically-stored documents.”

#### **O.A.C. 4901-1-21 Depositions**

First, rule 4901-1-21(A) should be modified to delete the phrase “other than a member of the commission staff,” consistent with OCC’s recommendation that Staff be subject to depositions under certain limited circumstances.

Second, rule 4901-1-21(E) should be modified as follows: “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. Any such documents or tangible things shall be produced no later than the earlier of seven (7) days following the notice of deposition or at the beginning of the deposition.” There has been some confusion among parties about the deadline for producing documents when the request accompanies a deposition notice. Rule 4901-1-21(E) references rule 4901-1-20, which has a 20-day turnaround for discovery. But Rule 4901-1-21(E) also provides that the deposition notice can include a request to produce documents “at the taking of the deposition.” A deposition notice is often served fewer than 20 days before the deposition. Under such circumstances, the responding party

might claim it can refuse to provide the requested documents at the deposition and instead provide them under the 20-day deadline found in Rule 4901-1-20. The following proposed language solves this issue.

Third, rule 4901-1-21(F) should be modified to ensure that parties have a right to depose the relevant corporate witnesses. If a party produces a corporate witness of its choosing under this rule, and that witness is unable to answer questions within the scope of the deposition, then the party should be required to produce another witness for a future deposition who can answer the questions. Thus, the following change should be adopted to rule 4901-1-21(F):

A party may in the notice and in a subpoena name a corporation, partnership, association, government agency, or municipal corporation and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its officers, agents, employees, or other persons duly authorized to testify on its behalf, and shall set forth, for each person designated, the matters on which he or she will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. If any person so designated is unable to fully answer questions reasonably within the scope of the matters on which examination is requested, then the corporation, partnership, association, government agency, or municipal corporation shall designate another individual who shall be subject to a future deposition regarding those questions that the initial person was unable to fully answer. The party producing the witness who was unable to answer questions reasonably within the scope of the matters on which examination is requested shall bear the cost of the subsequent deposition, including any costs for a court reporter and additional transcripts.

Fourth, rule 4901-1-21(K) should be modified to account for the situation where a witness is deposed shortly before a hearing. Under the current rule, a witness has ten days to review a deposition transcript. In many instances, however, a witness is deposed fewer than ten days before testifying at the hearing. (This typically occurs when a settlement is filed, a witness testifies regarding the settlement, and a hearing is scheduled on short order thereafter.)

Thus, the following change to the rule should be adopted to ensure that the transcript is reviewed before the witness testifies at hearing: “If the deposition is not signed by the witness ~~within~~ before the earlier of ten days after its submission to him or her or the date on which the witness is scheduled to testify at the hearing, the officer shall sign it and state on the record the fact of the waiver or the illness or absence of the witness, or the fact of the refusal to sign together with the reasons, if any, given for such refusal.”

Sixth, some additional language should be adopted in the newly proposed rule, 4901-11-21(N)(2), as follows: “Unless otherwise ordered, a deposition may not be used as substantive evidence in lieu of the deponent appearing to present testimony at hearing, provided, however, that if a subpoena seeking to compel the testimony of a witness at hearing is quashed, then the deposition for that witness may be used as substantive evidence.” In a recent hearing, a marketer was able to avoid providing any witness because all of its employees are out of state, and the only way for OCC to have cross-examination in evidence was via deposition transcript. This rule would allow for that in similar situations in the future.<sup>15</sup>

#### **O.A.C. 4901-1-22 Requests for admission**

Modifications should be adopted to this rule to address a potential problem that OCC has encountered when parties mix answers to requests for admission with objections. Under the current rule, requests for admission must be objected to or answered and the objections and the answers must be signed by either the party or the

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<sup>15</sup> OCC has challenged the ruling prohibiting OCC from subpoenaing a marketer’s out-of-state witness. OCC’s challenge remains pending before the PUCO. OCC does not concede that resorting to the use of a deposition should be necessary if the subpoena law and rules are followed properly.

attorney. When parties mix the answers to requests for admission with objections to the request it undermines the PUCO's rule on request for admissions. The requirement to sign both the objections and answers is important in that a signature by a party would allow the person seeking discovery to call the answering party as a potential deponent or witness. When a party mixes objections with answers and offers one signature for both, the rules don't work as they should.

To clarify the existing rules, a sentence should be inserted (after the second sentence in this rule) that states that "Objections shall be separately noted and not combined with answers to requests for admission." Additionally, similar clarifying language should be added to clarify that reasons for the objections must be stated separately from the answer admitting or denying the request.

### **O.A.C. 4901-1-25 Subpoenas**

Recent experience suggests that the PUCO's subpoena rules should be improved to provide better transparency in PUCO proceedings. This rule should be modified in several ways.

First, the rules should explicitly state that corporations can be subpoenaed to produce relevant witnesses. Rule 4901-1-25(A) should be modified as follows:

The commission, any commissioner, the legal director, the deputy legal director, or an ALJ 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. This rule applies to corporations, partnerships, associations, government agencies, and municipal corporations. If any such entity receives a subpoena, it shall designate one or more of its officers, agents, or employees as the relevant person to appear pursuant to the subpoena, subject to the following paragraphs.

This modification makes it explicit that a corporation, partnership, association, government agency, or municipal corporation that is participating in a PUCO proceeding can be subpoenaed to produce a relevant witness on a relevant topic.

Second, the PUCO's rules should provide that service of a subpoena on a person's attorney or on the attorney who represents the person's employer (if a party) is sufficient. Rule 4901-1-25(B) should include the following language: "Service of a subpoena on a party, on party employees, or on party witnesses may be made by delivering it the party's attorney."

Third, service of a subpoena should not be limited to the State of Ohio and instead should be allowed throughout the United States. The law allows out of state subpoenas,<sup>16</sup> so the PUCO's rules should allow service out of state. Rule 4901-1-25(B) should thus be modified as follows: "A subpoena may be served at any place within the United States ~~this state~~."

Fourth, rule 4901-1-25(D) should be modified to allow a member of Staff to be subpoenaed for a deposition, in those limited circumstances where it is requested that Staff be deposed.

Finally, a new subsection (H) should be added as follows: "Competitive retail electric service suppliers and competitive retail natural gas suppliers shall be subject to subpoena, as required by R.C. 4928.09(A)(1)(a) and R.C. 4929.21(A)(1)(a). This shall include, but shall not be limited to, (1) subpoenas requiring individual officers, agents, or employees of such suppliers to appear for deposition or hearing, regardless of whether such individuals are located within the State of Ohio, and (2) corporate subpoenas

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<sup>16</sup> See R.C. 4928.09(A)(1)(a); R.C. 4929.21(A)(1)(a).

requiring the supplier to identify the relevant officers, agents, or employees to appear for a deposition or hearing pursuant to a subpoena, regardless of whether such individuals are located within the State of Ohio.” The law requires marketers to consent to jurisdiction, including subpoena. It also explicitly contemplates out-of-state subpoenas. The rules should be updated accordingly to properly apply R.C. 4928.09(A)(1)(a) and 4929.21(A)(1)(a). (Current rule 4901-1-25(H) should be changed to (I) as a result.)

#### **O.A.C. 4901-1-26 Prehearing conferences**

First, rule 4901-1-26(B) should be modified to provide that failure to attend a prehearing conference is a waiver only if it is a transcribed prehearing conference. Prehearing conferences can be scheduled informally and with little advance notice, thus making it unfair for a party to be deemed to waive its rights for failing to attend. Thus, the following change should be made: “Reasonable notice of any prehearing conference shall be provided to all parties. Unless otherwise ordered for good cause shown, the failure of a party to attend a transcribed prehearing conference constitutes a waiver of any objection to the agreements reached or rulings made at such conference.”

#### **O.A.C. 4901-1-28 Reports of investigation and objections thereto**

First, for rule 4901-1-28(A), the following changes should be made:

In all rate proceedings in which the commission is required by section 4909.19 of the Revised Code to conduct an investigation, a written report of such investigation shall be filed with the commission and shall be served upon all parties. The report shall be deemed to be admitted into evidence as of the time it is filed with the commission, but all or part of such report may subsequently be stricken, upon motion of the commission, the legal director, the deputy legal director, or the ALJ assigned to the case, or upon motion of any party for good cause shown. The commission shall not be bound by any recommendations or findings in the report, but any such report admitted into evidence shall be admitted for the truth of the matters asserted in the report, and subject to subsection (E) to this rule, the report shall not be

considered hearsay. Any party may submit evidence at the hearing to rebut or support the matters asserted in the report. Any person making or contributing to the report may be subpoenaed to testify at the hearing in accordance with rule 4901-1-25 of the Administrative Code, but the unavailability of such persons shall not affect the admissibility of the report.

This rule should be amended to clarify that any facts set forth in a Staff report are facts admitted into the record for their truth. In a recent case, one party argued that a Staff Report could be admitted only as evidence of what Staff said, and not for the truth of what is stated in the Staff Report.<sup>17</sup> There seems to be some confusion.

When evidence is admitted for the truth of the matter asserted, that does *not* mean that the Commission is bound by it or that the evidence is a conclusive finding of fact. It just means that the Commission *can* consider it when making its findings of fact. If a Staff Report is not admitted for its truth, then in every case with a Staff Report, Staff would be required to put on a witness to personally testify to every single line in the Staff Report. This would defeat the purpose of there being a Staff Report and the rule admitting the Staff Report. Additional language is needed to clear up any confusion among parties about how the rules of evidence work. A similar change should be made to rule 4901-1-28(E), which addresses staff reports in other types of cases.

Second, in some cases, the PUCO Staff might issue a report and then change its position *after* parties have filed their objections to the report. In that situation, the parties should have an opportunity to make new objections to Staff's modified position. Thus, the following language should be added to rule 4901-1-28(C): "If the commission staff modifies any portion of the report after objections are filed, then any party may raise new objections in response to such modification."

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<sup>17</sup> See Case No. 19-957-GE-COI, Tr. Vol. I at 94 (counsel for PALMco arguing that a staff report would not necessarily be admitted "for the truth of its contents").

### **O.A.C. 4901-1-29 Expert testimony**

The sequence for parties to file testimony should reflect, for fairness, such considerations as the placement of the burden of proof and support for a settlement to be adopted. In such cases, those with the burden of proof and those supporting a settlement should file testimony first. Other parties should have the opportunity to file testimony second, for an opportunity to review such other testimony before their due dates for filing testimony. The rule should be revised to include the following language: “The commission, the legal director, the deputy legal director, or an ALJ shall establish a schedule in any proceeding for the sequence in which parties will file expert testimony, where parties with the burden of proof or supporting a settlement shall have testimony due before testimony by other parties is due.”

Second, the rules for testimony in long-term forecast proceedings should be modified to require the utility to file testimony before other parties. Accordingly, rule 4901-1-29(A)(1)(g) should be modified as follows: “All direct expert testimony to be offered by a utility ~~any party~~ in a long-term forecast report proceeding shall be filed and served no later than eighteen days prior to the commencement of the hearing.” And there should be a new rule 4901-1-29(A)(1)(h), which should provide: “All direct expert testimony to be offered by any other party in a long-term forecast report proceeding shall be filed and served no later than seven days prior to the commencement of the hearing.” (Current rule 4901-1-29(A)(1)(h) should be changed to (i) as a result.)

Third, the rules for testimony in other proceedings should be modified such that the utility, applicant, complainant, or petitioner is required to file testimony before other parties. Accordingly, rule 4901-1-29(A)(1)(h) (which would now be (i) per earlier suggestions) would now read: “All direct expert testimony to be offered by a utility,



applicant, complainant, respondent, petitioner, or party supporting a stipulation in any other commission proceeding shall be filed and served no later than ~~eighteen~~ seven days prior to the commencement of the hearing.” And a new rule 4901-1-29(A)(1)(j) would be added as follows: “All direct expert testimony to be offered by any other party in any other commission proceeding shall be filed and served no later than seven days prior to the commencement of the hearing.”

### **O.A.C. 4901-1-30 Stipulations**

The PUCO proposes a slight revision to this rule where it clarifies that oral stipulations may be made during a prehearing conference conducted on the record. However, there are more modifications needed to this rule to promote fairness in settlements.

First, O.A.C.4901-1-30(B) should require inviting all parties in a proceeding to all settlement meetings, consistent with best practices.

Second, there needs to be a solution and counteraction to the unfairness of superior bargaining power by utilities in settlement negotiations at the PUCO. In its most problematic form, electric utilities have superior (unequal) bargaining power in so-called electric security plan cases. In 2009, just one year after the enactment of the 2008 energy law that favors electric utilities over consumers in ratemaking, former Commissioner Cheryl Roberto described this unfairness in an important separate opinion regarding settlement negotiations in FirstEnergy’s first electric security plan. Noting that the 2008 law (R.C. 4928.143(C)(2)(a)) allows electric utilities to withdraw their rate plans (if, for example, the PUCO adopts another party’s position against the utility’s wishes), she wrote:

In the case of an ESP, the balance of power created by an electric distribution utility's authority to withdraw a Commission-modified and approved plan creates a dynamic that is impossible to ignore. I have no reservation that the parties are indeed capable and knowledgeable but, because of the utility's ability to withdraw, the remaining parties certainly do not possess equal bargaining power in an ESP action before the Commission. \*\*\* In light of the Commission's fundamental lack of authority in the context of an ESP application to serve as the binding arbiter of what is reasonable, a party's willingness to agree with an electric distribution utility applicant can not be afforded the same weight due as when an agreement arises within the context of other regulatory frameworks. (PUCO Case 08-0935-EL-SSO, Opinion of Cheryl L. Roberto, Concurring in part and dissenting in part (March 25, 2009).

But the problem of settlement outcomes being influenced by the superior bargaining power of utilities, as identified by Commissioner Roberto, is not limited to electric security plans. One problem for a fair settlement process is that there seems to be an unwritten "rule" in PUCO cases that virtually all settlements will be negotiated to include the utility (and what it will or will not accept in a settlement). Another problem relates to the utility's unique standing (and resources) to make offers of cash or cash equivalents to induce parties to sign settlements. For these reasons, when settlements involve the utility, the PUCO should not give weight to the first prong of its settlement standard when the utility is a party to the settlement. And the PUCO should also not give weight to the first prong of its settlement standard when the settlement lacks parties with the diversity of interests reflected by a substantial representation of a particular interest (such as OCC's representation of all residential consumers).

Therefore, consistent with former Commissioner Roberto's opinion, section (E) of the PUCO's rule 4901-1-30 should be amended by adding the following sentences: "In stipulations that are reached with utilities in electric security plan proceedings, there shall be a rebuttable presumption that serious bargaining did not occur. Additionally, in

stipulations of electric security plan proceedings, the PUCO shall not consider the stipulation as a package, but shall evaluate every provision on its own merits.”

Further, there should be a rule revision added for stipulations where the utility is a party and the settlement lacks one or more other parties with the diversity of interests reflected by a substantial representation of a particular interest (such as OCC’s representation of all residential consumers): “A settlement shall not be found to be the product of serious bargaining if the stipulation lacks diversity of interests, including, but not limited to, where the signatory parties to the stipulation do not include a party that broadly represents the interests of an entire class of customers.”

Further, the PUCO should evaluate stipulations by considering numerous factors, most of which are in keeping with (and derived from) the PUCO’s three-prong settlement standard. The revisions include the following new section to Rule 4901-1-30, as follows:

(F) The commission shall balance the following factors when evaluating a stipulation, though the following is not an exhaustive list of all factors that the commission may consider, and no single factor is necessarily determinative:

- (1) The nature and breadth of the interests represented by the parties that support the stipulation and the nature and breadth of the interests represented by the parties that oppose the stipulation.
- (2) Whether the settling parties directly represent the broad interests of a class of customers
- (2) The extent to which the stipulation provisions would benefit or harm customers.
- (3) The extent to which the stipulation provisions would benefit or harm the public interest.
- (4) The extent to which the stipulation provisions violate any regulatory principle or practice.

- (5) The extent to which any party to the stipulation did or did not make concessions compared to its litigation position as a result of the stipulation.
- (6) The fairness of the process in negotiating the stipulation, including, but not limited to, the extent to which parties were invited to participate in substantially all settlement meetings.
- (7) The amount of profit that the utility would make as a result of the stipulation and the charges to consumers that would result from the stipulation.
- (8) In electric security plan proceedings, with the utility possessing superior bargaining power, is the stipulation what parties view to be their best interest or simply the best they can hope to achieve considering the unequal bargaining power.

The PUCO should also adopt rules that put an end to utilities offering cash or cash equivalents (often using other consumers' money) to induce parties to sign settlements, especially settlements that involve broad public policy issues. An example is a settlement involving DP&L, which contains a list of the utility's offerings to other parties.<sup>18</sup> New section (G) should be revised with the following language: "The commission is unlikely to adopt settlement terms involving agreements for the utility to make a monetary payment, or the equivalent of a monetary payment, to one or more parties. This provision applies regardless of the source of the funding of the monetary payment or its equivalent."

Further, the PUCO should adopt two new subsections of the stipulation rules. Subsection (H) clarifies that after a stipulation is reached, the burden of proof is still

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<sup>18</sup> See Case No. 16-395-EL-SSO, Amended Stipulation and Recommendation (Mar. 13, 2017) (providing that under the stipulation, DP&L will make annual payments of \$145,000 to Industrial Energy Users-Ohio, \$18,000 to Ohio Manufacturers' Association Energy Group, \$160,000 to Kroger, \$250,000 per year for up to five years to the City of Dayton, \$150,000 per year for up to five years to participate in the "Property Assessed Clean Energy" program in partnership with the Montgomery County Port Authority, \$200,000 per year to Ohio Hospital Association, and \$200,000 per year to People Working Cooperatively).

borne by the entity which originally bore the burden of proof. In other words, the mere fact that a stipulation is reached does not mean that the burden of proof shifts to those opposing the settlement. Also, new subsection (I) provides that stipulations cannot be used to violate any law by virtue of agreement by the parties.

These proposed rule changes related to settlements (stipulations) are set forth below, for rule 4901-1-30:

(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. A stipulation can be made without one of the stipulating parties being a utility.

(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. All parties to the proceeding must be invited to the meetings in which terms of the settlement are discussed.

(C) An oral stipulation may be made only during a public hearing or 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) No stipulation shall be considered binding upon the commission. In stipulations that are reached in electric security plan proceedings, there shall be a rebuttable presumption that serious bargaining did not occur. Additionally, in stipulations of electric security plan proceedings, the PUCO shall not consider the stipulation as a package, but shall evaluate every provision on its own merits. A stipulation shall not be found to be the product of serious bargaining if the stipulation lacks diversity of interests, including, but not limited to, where the signatory parties to the stipulation do not include a party that broadly represents the interests of an entire class of customers.

(F) The commission shall balance the following factors when evaluating a stipulation, though the following is not an exhaustive list of all factors that the commission may consider, and no single factor is necessarily determinative:

- (1) The nature and breadth of the interests represented by the parties that support the stipulation and the nature and breadth of the interests represented by the parties that oppose the stipulation.
  - (2) Whether the settlement does not include a party that directly represents the broad interests of a class of customers
  - (3) The extent to which the stipulation provisions would benefit or harm customers.
  - (4) The extent to which the stipulation provisions would benefit or harm the public interest.
  - (5) The extent to which the stipulation provisions violate any regulatory principle or practice.
  - (6) The extent to which any party to the stipulation did or did not make concessions compared to its litigation position as a result of the stipulation.
  - (7) The fairness of the process in negotiating the stipulation, including, but not limited to, the extent to which parties were invited to participate in substantially all settlement meetings.
  - (8) The amount of profit that the utility would make as a result of the stipulation and the charges to consumers that would result from the stipulation.
  - (9) In electric security plan proceedings, with the utility possessing superior bargaining power, is the stipulation what parties view to be their best interest or simply the best they can hope to achieve considering the unequal bargaining power.
- (G) The commission is not likely to adopt settlement terms involving agreements for the utility to make a monetary payment, or a monetary payment equivalent, to one or more parties. This provision applies regardless of the source of the funding of the monetary payment or its equivalent.
- (H) Notwithstanding paragraph (F) of this section, the party that bears the burden of proof in a proceeding shall continue to bear any such burden of proof in the proceeding after a stipulation is filed.
- (I) Notwithstanding paragraph (F) of this section, no stipulation shall be approved which violates any statute or prior commission entry or order.

### **O.A.C. 4901-1-35 Applications for rehearing**

By law, if the PUCO does not rule on an application for rehearing within 30 days, the application for rehearing is deemed denied.<sup>19</sup> The PUCO, however, has long taken the position that it can grant an application for rehearing for the limited purpose of giving itself more time to consider it. It is appreciated that, in more recent months, the PUCO has used this tool less frequently than in the past. That is important where delays in ruling on applications for rehearing can delay and even result in mootness of appeals to the Ohio Supreme Court, thus denying a party's legal right to appeal.

The rule should be modified to provide that the PUCO will rule on applications for rehearing within a specified reasonable amount of time after they are filed so as not to unduly delay a party's right to appeal. This proposal is intended to reasonably balance the PUCO's interest in thoroughly reviewing an application for rehearing and a party's interest in obtaining relief and proceeding to appeal, if necessary, in a timely manner. 4901-1-35(E) should be revised as follows: "If the commission does not grant or deny an application for rehearing within 30 days from the filing thereof, it is denied by operation of law. The commission shall not grant rehearing that delays issuance of a final appealable order in excess of sixty days from the date of the filing of the application for rehearing; unless the delay allows further consideration of the issues for a period in excess of sixty days to schedule a hearing for the taking of additional evidence."

### **New Rule: 4901-1-39 Supporting Documentation for Tariff Filings**

The PUCO should add a new rule, 4901-1-39, entitled "Supporting Documentation for Tariff Filings." In many instances, utilities have filed updated tariffs

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<sup>19</sup> R.C. 4903.10(B).

without sufficient supporting documentation. Without sufficient documentation, including workpapers explaining how the rates are calculated, it is impossible for parties to know whether the rates charged to customers are just and reasonable and consistent with PUCO orders.

The rule should apply to two situations. First, following a PUCO order, the utility is typically required to file new tariffs, consistent with the order, and it should provide workpapers demonstrating that the tariffs comply with the order. Often, the new tariff includes a new rate. Second, some electric distribution utility rider tariffs are updated periodically (quarterly, semi-annually, etc.) and automatically approved, subject to a future audit (for example, utilities' alternative energy riders for renewable mandate compliance).

The PUCO's rules should be modified to reflect that when a utility makes such a tariff filing, the utility must also file in the same docket the applicable workpapers showing how the rate is calculated, including supporting documentation. If the rate is unchanged from the prior rate, the rate is being set to zero, or the rate is a flat monthly dollar amount set in the order (for example, where the order says something like, "the residential charge shall be \$0.50 per month per customers") then this rule would not apply. Accordingly, the following rule 4901-1-39 should be adopted:

- (A) This rule applies to any compliance tariff filed in response to a commission order or any tariff that is filed subject to automatic approval on a periodic basis (quarterly, annually, etc.).
- (B) Any public utility filing a tariff identified in section (A) of this rule shall simultaneously file, in the same docket as the tariff, all documentation



supporting the calculation of any rates found in the tariff, including, but not limited to, workpapers explaining in detail how the tariff rate is derived.

- (C) Section (B) of this rule shall not apply if (i) the rate in the tariff in question has not changed from the previously-approved rate and the method for calculating the rate remains the same, (ii) if the rate in the tariff is zero, or (iii) if the rate is a flat monthly charged, approved as a specific dollar amount in the relevant order.

## **II. CONCLUSION**

This opportunity to provide comments on the PUCO's rules of practice is appreciated. The rules should be modified, as proposed above, to allow greater transparency, fairness, efficiency, and justice in PUCO proceedings where the PUCO decides important issues such as how much Ohioans will pay for their utility services.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Comments was served on the persons stated below via electronic transmission, this 13th day of January 2020.

/s/ Maureen R. Willis

Maureen R. Willis

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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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