BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF OHIO ADM. CODE CHAPTER 4901-1 RULES OF PRACTICE AND PROCEDURE BEFORE THE COMMISSION.	)	CASE NO. 18-275-AU-ORD
IN THE MATTER OF THE REVIEW OF OHIO ADM. CODE CHAPTER 4901:1-1 RULES REGARDING UTILITY TARIFFS AND UNDERGROUND UTILITY PROTECTION SERVICE REGISTRATION.	)	CASE NO. 18-276-AU-ORD
IN THE MATTER OF THE REVIEW OF OHIO ADM. CODE CHAPTER 4901-3 RULES REGARDING OPEN COMMISSION MEETINGS.	)	CASE NO. 18-277-AU-ORD
IN THE MATTER OF THE REVIEW OF OHIO ADM. CODE CHAPTER 4901-9 RULES REGARDING COMMISSION COMPLAINT PROCEEDINGS.	)	CASE NO. 18-278-AU-ORD

REPLY COMMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

I. Introduction

Pursuant to the Commission's Entry of January 16, 2020, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively the "Companies"), respectfully submit these Reply Comments in response to: (1) the comments filed by The Office of the Ohio Consumers' Counsel ("OCC") and The Northwest Ohio Aggregation Coalition ("NOAC") in Case No. 18-275-AU-ORD (regarding Chapter 4901-1)[1]; (2) the

[1] Referred to here as the "OCC/NOAC Comments."

comments of the Environmental Law and Policy Center ("ELPC") in Case No. 18-275-AU-ORD (regarding Chapter 4901-1)[2]; and (3) the comments filed by OCC, NOAC, Northeast Ohio Public Energy Council, and Edgemont Neighborhood Coalition (collectively "Tariff Commenters") in Case No. 18-276-AU-ORD (regarding Chapter 4901:1-1).[3]

In their initial comments,[4] the Companies proposed changes to the Commission's rules with the objective of intending to improve practice and procedure before the Commission. As explained below, many of the proposed revisions offered by these other commenters are not designed to improve Commission practice and procedure or to address any deficiency in the current rules. Rather, the recommendations are motivated by dissatisfaction with how Attorney Examiners ("AEs") or the Commission has applied the rules in isolated instances. The proposals would remove the Commission's and AEs' flexibility and discretion and inject unnecessary or unworkably rigid procedures into the rules. Further, they would effectively discourage settlement of utility proceedings to the detriment of customers, the Commission, and utilities. The Commission should reject the proposed rule revisions as set forth below.

The Companies respectfully request that the Commission adopt and incorporate the Companies' Comments and these Reply Comments to address the rules currently under review.

II. Reply Comments Regarding OAC 4901-1 – Administrative Provisions and Procedure

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

OCC/NOAC advocate an unnecessary and unworkable expansion of the existing rule against *ex parte* communications. The current rule prohibits *ex parte* communications with decision makers, *i.e.*, the presiding AE(s) and the Commissioners. OCC/NOAC have not offered

[2] Referred to here as the "ELPC Comments."
[3] Referred to here as the "Tariff Comments."
[4] Filed on 1/13/2020 and referred to here as the "Companies' Comments."

any instances where the existing rule was insufficient. Nevertheless, OCC/NOAC recommend expanding the rule to include communications with "those who are reasonably expected to be involved in the decisional process of a proceeding."[5]

This recommended rule revision is unnecessary. Existing Rule 4901-1-09 provides ample safeguards against the risk of a party trying to influence a decision maker. Under the current rule and practice, Commissioners and AEs are tasked with declining to engage in *ex parte* communications. They should be trusted to exercise their judgment properly.

Further, OCC/NOAC's recommendation would create much uncertainty. OCC/NOAC borrow the phrase they recommend adding from a FERC rule. However, OCC/NOAC omit to mention that the remainder of that rule includes *significant* additional detail regarding how the rule is applied. This detail includes, but is not limited to, that FERC may modify the rule on a proceeding-by-proceeding basis,[6] and that the rule applies only to contested, on-the-record proceedings (which is a defined term, and which does not include notice-and-comment rulemakings, investigations, proceedings not having a party(ies), and proceedings in which no party disputes a material issue).[7] In addition, the FERC rule defines numerous terms and phases, including "off-the-record communication" and "relevant to the merits,"[8] and it exempts certain communications and provides exceptions to the rule.[9] If the Commission were to adopt just the cherry-picked phrase suggested by OCC/NOAC, Ohio's new rule would be problematically vague. But adopting the entirety of the FERC rule would inject unnecessary complexity into Commission rules and proceedings.

[5] OCC/NOAC Comments at 4-5.
[6] 18 C.F.R. 385.2201(a) and (j).
[7] 18 C.F.R. 385.2201(a) and (c)(1).
[8] 18 C.F.R. 385.2201(c).
[9] 18 C.F.R. 385.2201(e).

OCC/NOAC present a confusing and unworkable solution where there is no problem. No modification is needed, and the suggested revision should be denied.

B. 4901-1-10. Parties.

OCC/NOAC propose to amend this rule to make Commission Staff a party for discovery purposes – for depositions only – if, among other things, Staff signs a stipulation and will testify to support it.[10] OCC/NOAC's proposed rule revision would give parties an opportunity to pursue at deposition, without an AE present, improper and potentially harassing questions of Staff regarding confidential settlement communications. The Commission has recognized that questions regarding the contents of settlement discussions are "wholly inappropriate."[11] Allowing discovery regarding confidential settlement negotiations would have a chilling effect on settlement negotiations. This proposed rule revision, which would result in a significant change to Commission procedures, should be rejected.

C. 4901-1-15. Interlocutory appeals.

OCC/NOAC recommend changes to allow interlocutory appeals if a motion to compel is denied, if a motion for protective order is granted, or if the Commission quashes a subpoena.[12] These changes are unnecessary and inappropriate. It is a fundamental principle of jurisprudence that only a final decision or judgment can be appealed,[13] so generally, there is no right to an immediate or interlocutory appeal. Interlocutory appeals remove case management responsibilities and discretion from presiding AEs, and they can result in a fragmented, piecemeal presentation of issues. Thus, the right to an interlocutory appeal should be narrowly tailored to a limited set of situations.

[10] OCC/NOAC Comments at 6-7.
[11] Case No. 16-481-EL-UNC, *et al*., 7/17/2019 Opinion and Order at ¶ 19.
[12] OCC/NOAC Comments at 9-11.
[13] *See, e.g., General Accident Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266, 269 (explaining the "well-established" Final Judgment Rule).

As currently drafted, 4901-1-15 meets these objectives. Divisions (A)(1) and (A)(3) of Rule 4901-1-15 make sense as drafted, because they protect against the potential improper disclosure of information or testimony, which, once disclosed cannot be "un-disclosed."[14] The same is not true of the scenarios where OCC/NOAC would allow interlocutory appeals. The denial of a motion to compel, the granting of a motion for protective order, or the quashing of a subpoena can all be raised (if properly preserved) in any appeal of the final order in the case. Contrary to OCC/NOAC's argument, the current rule is not one-sided in favor of utilities. Rather, the rule appropriately protects any party (or non-party) who may be forced to disclose information or provide testimony.[15]

Division (A) of Rule 4901-1-15 appropriately provides a narrowly tailored list, and Division (B) allows a party to request the certification of an interlocutory appeal in other situations. Additionally, 4901-1-15(F) makes clear that an issue not raised in an interlocutory appeal or presented to but not certified by the AE is not waived and may be presented in an initial brief or other appropriate filing before the Commission issues its decision. The current rule should not be revised, and OCC's request should be declined.

Further, OCC/NOAC's proposal that a non-presiding AE should consider certifying interlocutory appeals is not well-taken.[16] Presiding AEs are capable of reviewing certification

[14] *See* Case No. 11-776-AU-ORD, 5/2/2011 Joint Reply Comments of "Customer Parties" (including OCC) at 16, where OCC argued that if a motion to compel is granted, the compelled party should be required to file an interlocutory appeal and not wait until the conclusion of the case to challenge the determination, because "[t]he party or parties that received the information most likely built their case presentation around the information that was produced. This is one instance where 'the egg cannot be unscrambled.'" The interlocutory appeal rule as currently drafted appropriately protects against situations where "the egg cannot be unscrambled."

[15] Moreover, subsection (A)(2) of the rule is decidedly not pro-utility; it only allows an interlocutory appeal of the *denial* of a motion to intervene, motion terminating a party's right to participate, or motion requiring intervenors to consolidate their witness examinations. Not surprisingly, OCC/NOAC do not propose making the right to an interlocutory appeal under (A)(2) reciprocal.

[16] OCC/NOAC Comments at 10.

requests objectively, and OCC is again purporting to offer a solution where there is no problem. OCC/NOAC have not advanced any examples to suggest that their proposed change is necessary. The change should be rejected.

OCC/NOAC also offer no justification for their request that undue prejudice or expense be considered an independent basis for an interlocutory appeal.[17] As set forth above, the right to an interlocutory appeal should be narrowly tailored to limited situations. OCC/NOAC's suggested rule change is an unnecessary expansion of the current rule and should be rejected.

In addition, OCC/NOAC's proposed change to 4901-1-15(E)(2),[18] which would restrict the Commission's ability to defer an interlocutory appeal, would deprive the Commission of discretion to dismiss an interlocutory appeal if it determined that the issues would be better raised later. As with their other suggestions, OCC/NOAC offer no basis for their proposed change. There is no indication that the Commission has been inappropriately using its discretion under the current rule, and there is no justification to modify the rule. Further, OCC/NOAC's proposed change is unworkable, because it would allow deferral of an interlocutory appeal only if doing so did not cause "harm to the parties."[19] The Commission would never be able to defer an interlocutory appeal because some party arguably would claim harm by the deferral. OCC/NOAC's rule changes should be denied.

D. 4901-1-17. Time periods for discovery.

OCC/NOAC seek to amend this rule so that discovery begins immediately upon the filing for intervention in any case[20] – regardless of whether the discovery is a premature fishing expedition and regardless of whether there will ultimately be a hearing in the case. OCC/NOAC's

[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] OCC/NOAC Comments at 11.

proposed rule change is a challenge to prior decisions against OCC, finding that discovery does not always begin immediately after a proceeding is commenced, and that discovery in a monitoring case or rider audit is premature until after the filing of the monitor's report or audit report.[21] Such decisions are correct, and OCC/NOAC's proposed rule modification should be rejected for the same reasons.

A wide array of different matters come before the Commission. Contrary to the premise of OCC/NOAC's recommendation, not all matters require the same process. It is not always appropriate for discovery to begin immediately, and the Commission and AEs should be afforded flexibility to address and manage discovery on a case-by-case basis.[22] In some proceedings, (*e.g.*, monitoring and audit proceedings), there can be no meaningful discovery until there is a filed report or an established process leading to a hearing or a schedule for comments. Otherwise, the issues to be decided, and therefore discovery, cannot be properly framed and discovery would proceed without reasonable boundaries. Additionally, the premature discovery contemplated by OCC/NOAC would create additional administrative burden and problematic overlap between the auditor/monitor and other parties by allowing party discovery to occur while the audit was underway.

The Commission should preserve its flexibility to develop the best process based on the facts and circumstances of each docket and reject OCC/NOAC's recommendation to amend the rules to convert every matter into a full-blown adjudication. The rule change OCC/NOAC seek here will hinder the flow of information to Staff in certain matters, such as audit proceedings, where today a utility may provide Staff with more than the minimum information required, in an

[21] *See, e.g.*, Case No. 17-2474-EL-RDR, 11/1/2018 Entry at ¶15; *see also*, Case No. 15-1739-EL-RDR (the Companies' Rider DCR 2015 audit case), 12/1/2016 Prehearing Conference Transcript at 20, 21.
[22] *See* Case No. 17-2474-EL-RDR, 11/1/2018 Entry at ¶15 (citing R.C. 4903.082 and Ohio Adm. Code 4901-1-16(B)).

effort to be helpful. If audit proceedings entailed discovery from the outset, then utilities will naturally be more circumspect in responding to Staff data requests, and inclined to provide only what is legally required.[23]

Consistent with its need for flexibility to determine the appropriate level of process in a given matter, the Commission has determined that discovery is not necessarily proper in every matter before it. For example, in *In re Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD (a previous review of Chapter 4901-1's rules), the Commission rejected OCC's proposed addition of "proceeding" as a defined term under the rules, explaining that not every Commission case rises to the level of a "proceeding" requiring extensive process:

> If OCC's proposal were adopted, any interested person would have the right to intervene, conduct discovery and present evidence in any Commission case. *The Commission does not believe that such rights exist*. In addition, OCC's proposed definition would eliminate the Commission's discretion to conduct its proceedings in a manner it deems appropriate and would *unduly delay the outcome of many cases*. The request is denied.[24]

In another matter, the Commission held that the full discovery process was not appropriate where no hearing was required:

> [T]he Commission's procedural rules and its governing statutes convey significant discretion and flexibility on the governance of its own proceedings. This is particularly so for proceedings where no hearing is required by law. There is no right to an evidentiary hearing in this proceeding or to the full discovery process *normally reserved for cases where a hearing is required."*[25]

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[23] *See, e.g.*, Case No. 17-2474-EL-RDR, 11/1/2018 Entry at ¶11.

[24] *In re Matter of the Review of Chapter 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at ¶9 (12/6/2006) (emphasis added).

[25] *In re Triennial Review Regarding Local Circuit Switching*, Case No. 03-2040-TP-COI, Entry on Rehearing, ¶ 8 (10/28/2003) (emphasis added) (denying OCC and CLEC's application for rehearing claiming that it has full discovery rights in a proceeding).

For these reasons, OCC/NOAC's proposed rule change is inappropriate and should be rejected.

E. 4901-1-19 and -20. Interrogatories and response time. Production of documents and things; entry upon land or other property.

OCC/NOAC seek to amend these rules to shorten the discovery response deadline to seven days in matters where a response to an application or other filing is due within 45 days or less or in any case subject to automatic approval in less than 45 days.[26] The proposal is unnecessary and should be rejected. The existing rules allow any party to request an expedited discovery response time[27] and appropriately place the onus for such a request upon the party who wants the faster response. Moreover, if the General Assembly enacts legislation that allows for automatic approval in less than 45 days, it can articulate a shorter discovery response time if it deems it necessary. Where the General Assembly is silent, it should be presumed that no change to default discovery response times is contemplated.

Further, OCC/NOAC's recommendation lacks any safeguards to prevent the abuse of expedited discovery through ill-timed service, such as service late in the afternoon on the day before a legal holiday. A more sensible rule change would be an amendment to the existing rule to provide that if discovery is served after 12:00 p.m. on a Friday, or on the last business day before a legal holiday, then the discovery is deemed served on the next regular business day following the weekend or legal holiday.

OCC/NOAC also ask the Commission to provide in the rules that parties have a duty to respond to discovery unless the Commission has ordered otherwise. This proposal is ill-conceived and does not make sense in application. There are numerous situations where a party may rightfully decline to respond to discovery without a Commission order allowing them to do so: a

[26] OCC/NOAC Comments at 12-14.
[27] OAC 4901-1-19(A), 4901-1-20(C).

party may object to discovery without responding,[28] a party may move for a protective order,[29] and a party may seek additional time to respond.[30] A party also is under no duty to substantively respond to a request for information from any party which is available in pre-filed testimony, prehearing data submissions, or other documents which that party has filed with the commission in the pending proceeding.[31] In each of these instances there would not be a Commission order relieving a party of the "duty" to respond.[32]

Finally, OCC/NOAC asks the Commission to require, without exception, that electronically stored documents be produced electronically, rather than requiring the requesting party to review the materials at the producing party's location. OCC/NOAC's inflexible suggestion does not allow for the possibility that on-site review – even of electronically stored documents – may be more convenient, less burdensome, less costly, or otherwise preferable in certain situations, such as when needed to protect the confidentiality of highly-sensitive business information. When faced with an issue about the production of electronic records, the parties should attempt to resolve the issue among themselves, and if unable to do so, should present the issue to the AE for determination.

Once again, OCC/NOAC attempt to inject unnecessary rigidity into the rules and to present purported solutions to non-existent problems. The Commission should not adopt the proposed revisions to 4901-1-19 and -20.

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[28] OAC 4901-1-19(A).
[29] OAC 4901-1-24.
[30] OAC 4901-1-17(G), OAC 4901-1-19(A), 4901-1-20(C), 4901-1-22(B).
[31] OAC 4901-1-16(G).
[32] Note also that OCC/NOAC advocate for an amendment to 4901-1-15 to allow interlocutory appeals of denials of motions to compel. If the Commission adopted OCC/NOAC's amendment to 4901-1-15 (which it should not do), a responding party would also have no "duty" to respond to discovery while the denial of the motion to compel was on interlocutory appeal. This typifies the way in which OCC/NOAC's proposed amendments fail to work in harmony with one another and would create countless unworkable situations in practice.

F. 4901-1-21. Depositions.

OCC/NOAC propose a handful of revisions to the deposition rule. All of the proposals should be rejected, because each one attempts to impose unnecessary rigidity into the Commission's discovery rules. OCC/NOAC's revisions appear motivated by isolated discovery rulings with which OCC/NOAC was dissatisfied. To the extent that OCC/NOAC (or any party) faces a specific discovery dispute regarding depositions, requests for documents or things in deposition notices, production of corporate witnesses, and review of deposition transcripts, those issues should be addressed on a case-by-case basis – first between the affected parties, and then with the AE if resolution cannot be achieved. The Commission should decline to adopt OCC/NOAC's proposed changes, which will remove important flexibility from the AE and the Commission in addressing discovery matters.

The Companies addressed OCC's proposal to require depositions of Staff in section B above.

Rule 4901-1-21(E) allows parties to include in a deposition notice a request for documents or tangible things to be produced "at the taking of the deposition."[33] OCC/NOAC propose a revision to clarify that the items requested under this rule are to be produced by the earlier of seven days after issuance of the deposition notice or at the deposition.[34] The Commission should reject a requirement to produce documents prior to the taking of the deposition. This proposal goes beyond what the rule intended. It also could be misused to circumvent the requirements of Rule 4901-1-20. Under the proposed rule, rather than issue a request for production of documents, which allows the responding party 20 days to respond, a party could issue a deposition notice

[33] OAC 4901-1-21(E).
[34] OCC/NOAC Comments at 14-15.

including a document request, which would shorten the response time to seven days – regardless of when or if the deposition was ever convened.

OCC/NOAC also propose extensive additions to subsection (F) of the rule regarding deposition notices to corporations or other business associations.[35] The changes OCC/NOAC request are unnecessary because the rule already addresses depositions of corporate representatives and the respective obligations of the deposing party and the responding party.[36] Further, the proposed rule modifications require subjective determinations (e.g., "fully answer questions" "reasonably related to the scope of the matters on which examination is requested"[37]) and would be difficult or impossible to implement in practice – particularly in situations where the deposition notice contains overbroad or vaguely worded deposition topics. Finally, the Commission must reject the suggestion that the responding party bear the cost of subsequent depositions, because the rule itself allows a corporation or business entity to designate one or more officers, agents, employees, etc. to respond.[38] Thus, multiple depositions are already contemplated under the rule. OCC/NOAC's revisions invite more problems than they purport to address, and they should be rejected.

OCC/NOAC suggest that when a witness is deposed shortly before a hearing, the time to review a deposition transcript should be reduced to the earlier of ten days after the transcript is submitted to the witness or on the date on which the witness is scheduled to testify at hearing.[39] This revision is unnecessary and should be rejected. AEs presently have discretion to address this

[35] OCC/NOAC Comments at 15.
[36] *See* OAC 4901-1-21(B) and (F).
[37] *Id*. (emphasis added).
[38] OAC 4901-1-21(F).
[39] OCC/NOAC Comments at 15-16.

issue on a case-by-case basis given all of the facts and circumstances of each case. The Commission should not revise the rule to remove the flexibility and judgment of the presiding AE.

OCC/NOAC seek to insert additional language into proposed new rule 4901-1-21(N)(2) to create an ill-conceived exception to the rule where a deposition could be used as substantive evidence at hearing, in lieu of live testimony, if a subpoena for the witness's attendance at hearing has been quashed.[40] Staff's proposed new rule already indicates that it applies "[u]nless otherwise ordered. . . ."[41] Thus, the Commission has the ability and discretion to consider (on a more appropriate case-by-case basis) the relief that OCC/NOAC are attempting to prescribe by rule. OCC/NOAC's proposal also presents due process concerns. If a party was not present at the witness's deposition (which can occur for any number of reasons), then using the deposition transcript at hearing in lieu of live testimony would deprive that party of its right to cross-examine the witness. Additionally, if a discovery deposition could be used as substantive evidence at hearing, counsel defending the deposition will be much more rigorous in interposing objections and must also be permitted to conduct his or her own direct/redirect exam of the witness. AE rulings on inadmissible testimony will also be needed. The proposal should be rejected.

G. 4901-1-25. Subpoenas.

OCC/NOAC propose revisions to the subpoena rule to indicate that corporations, business associations, government agencies, and municipalities are subject to subpoena.[42] This rule revision is unnecessary because the ability to subpoena these entities already exists. For the same reason, OCC/NOAC's recommended revision to permit subpoenas to be issued to CRES and CRNGS suppliers[43] is unnecessary as well.

[40] OCC/NOAC Comments at 16.
[41] Case No. 18-275-AU-ORD, 12/4/2019 Entry, Attachment A at 26.
[42] OCC/NOAC Comments at 18.
[43] *Id.*

OCC/NOAC request that the subpoena rule be modified to allow service of a subpoena on the witness's attorney.[44] The proposed rule should be rejected. Proper service of a subpoena is the responsibility of the party requesting the subpoena,[45] and proper service also protects important due process considerations. Under OCC/NOAC's approach, a person serving a subpoena could be mistaken about the identify and affiliation of the witness's attorney. Therefore, service upon a witness's attorney should not be permitted unless the witness's attorney acknowledges the representation and agrees to accept the service. This can be handled by communications between counsel rather than a modification to the rule.

OCC/NOAC suggest that the Commission modify the rule to allow the service of subpoenas outside of Ohio.[46] Absent a statute to the contrary, however, the Commission's subpoena power, like that of Ohio's courts, does not reach out-of-state witnesses.[47] The authorities cited by OCC/NOAC are not on point.[48] Thus, the Commission should reject OCC/NOAC's recommendation.

OCC/NOAC also seek a revision that would allow parties to subpoena Commission Staff for deposition.[49] For the reasons set forth above regarding depositions of Staff, the Companies urge the Commission to reject this proposed change to the rule.

H. 4901-1-28. Reports of investigation and objections thereto.

OCC/NOAC seek to amend this rule to provide that any Staff Reports admitted into the record are not hearsay and that any facts set forth in Staff Reports are facts admitted (into evidence)

[44] OCC/NOAC Comments at 18.
[45] 4901-1-25(B).
[46] OCC/NOAC Comments at 18.
[47] *See, e.g. McFarland v. Slattery*, 1983 Ohio App. Lexis 12925, at *5 (8th Dist.) (citing Civ. R. 45(E) and *Daniels v. Steven's Lessee* (1850), 19 Ohio St. 222, 238-39).
[48] R.C. 4928.09(A)(1)(a) and R.C. 4929.21(A)(1)(a), cited by OCC/NOAC, require certain entities to consent to service of summonses and subpoenas in Ohio; they do not authorize the Commission to issue subpoenas nationwide.
[49] OCC/NOAC Comments at 18.

for their truth. Such a rule revision is unnecessary. The rule itself currently provides that "[t]he report shall be deemed to be admitted into evidence as of the time it is filed with the commission. . . ."[50] If, pursuant to the rule, the Staff Report is deemed to be admitted into evidence, there is no reason to further indicate in the rule that the Staff Report is not hearsay. Indeed, OCC/NOAC's proposed revision is based upon the mistaken idea that there is an issue that needs to be addressed due to a disjointed colloquy among counsel in one recent case.[51] The current rule allows for the admission of Staff reports into evidence and further allows for challenges and objections to Staff reports,[52] and no revision to the rule is needed or appropriate.

I. 4901-1-29. Expert Testimony.

OCC/NOAC propose rule revisions to change the timing for filing expert testimony.[53] The rule revisions are unnecessary and would take discretion away from AEs who already have the ability to modify and adjust testimony deadlines on a case-by-case basis. Moreover, OCC/NOAC's proposed timeline for expert testimony in long-term forecast proceedings under 4901-1-29(A)(1)(g) and in other proceedings under 4901-1-29(A)(1)(h) would require the utility to file its testimony no later than 18 days before hearing (instead of 16 days for long-term forecast proceedings and seven days for other proceedings) but allow all other parties until just seven days before the hearing to file their expert testimony. The Commission should not adopt a rule that allows non-utility parties to file expert testimony only one week before hearings in any proceeding. The rule as drafted is appropriately reciprocal and should not be changed.

[50] OAC 4901-1-28(A) and (E).
[51] OCC/NOAC Comments at 20, n. 17 (referencing a portion of the hearing transcript in Case No. 19-957-GE-COI).
[52] OAC 4901-1-28(A), (B), and (E).
[53] OCC/NOAC Comments at 21-22.

J. 4901-1-30. Stipulations.

As drafted, the referenced rule provides a straightforward, workable framework in which "any two or more parties" may enter into a stipulation. This framework, which is supported by more than thirty-four years of Commission and Ohio Supreme Court precedent, has been used countless times by parties of diverse and divergent interests to facilitate the efficient resolution of cases, to the benefit of customers, utilities, and the Commission. Notwithstanding this history, OCC/NOAC propose drastic revisions to longstanding precedent and extensive additions to the rule that would have the effect of destroying the use of stipulations in utility cases in Ohio. OCC/NOAC's proposals are overreaching, unnecessary, and unsupported by law; they must be rejected in total.

OCC/NOAC propose to change the rule to require that all parties be invited to all settlement meetings.[54] The Commission must reject this proposal. The Supreme Court of Ohio has already addressed this issue,[55] and there is no basis to disrupt longstanding precedent. In *Time Warner*, the court expressed "grave concern" where an entire class of customers is intentionally excluded from negotiations, but the court also explicitly cautioned that its holding did "not create a requirement that all parties participate in all settlement meetings."[56] Further, in *In re Ohio Edison Co.*,[57] the court refused to hold that a settlement process lacked serious bargaining where there was no conventional meeting with all parties in attendance.[58] The court found "no legal support" for such a requirement and declined to impose or promulgate specific negotiation process rules (*e.g.*, time, manner, place requirements) for the purpose of satisfying the "serious bargaining" prong of

[54] OCC/NOAC Comments at 22.
[55] *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St.3d 229, 1996-Ohio-224, 661 N.E.2d 1097.
[56] *Time Warner*, 75 Ohio St.3d at 233, n.2.
[57] *In re Ohio Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218.
[58] *Id.* at ¶46.

the stipulation test.[59] The Commission has repeatedly rejected the notion that specific negotiation processes or procedures must be followed, so long as there is no evidence that an entire class of customers has been intentionally excluded.[60] Not only is OCC/NOAC's proposal contrary to Ohio Supreme Court and Commission precedent, but it also would prohibit the one-on-one discussions and small group caucuses that are typical, practical, and essential in any multi-party settlement negotiation. The proposal must be rejected.

OCC/NOAC also propose to change the rule so that when stipulations are reached with utilities in electric security plan proceedings, there shall be a rebuttable presumption that serious bargaining did not occur.[61] This proposal must also be rejected. OCC/NOAC premise their change on their own dissatisfaction with R.C. 4928.143(C)(2)(a) and an 11-year-old dissenting opinion of a former Commissioner.[62] However, the Commission cannot re-write the Revised Code through this rule review process, and there is no legal basis for creating a rebuttable presumption or otherwise altering the three-factor test for the reasonableness of stipulations that has been in place for more than thirty-four years.[63]

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[59] *Id*.

[60] *See, e.g.,* Case Nos. 16-481-EL-UNC, 17-2436-EL-UNC, 18-1604-EL-UNC, 18-1656-EL-ATA, 7/17/2019 Opinion and Order at 28-29; *In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to Its Energy Efficiency and Demand Response Programs for 2014,* Case No. 15-534-EL-RDR, 2016 Ohio PUC LEXIS 963, 10/26/2016 Opinion and Order, ¶¶28, 30-31 (Commission refusing to impose its own set of time, manner, and place rules for the negotiation process and determining that so long as there was no evidence an entire customer class had been intentionally excluded, serious bargaining occurred under the circumstances, even though no intervenor signed the stipulation).

[61] OCC/NOAC Comments at 22.

[62] *Id*. at 22-23.

[63] *See*, Case Nos. 16-481-EL-UNC, 17-2436-EL-UNC, 18-1604-EL-UNC, 18-1656-EL-ATA, 7/17/2019 Opinion and Order at 21 (citing *In re Cincinnati Gas & Elec. Co.,* Case No. 91-410-EL-AIR, 4/14/1994 Order on Remand; *In re Western Reserve Telephone Co*., Case No. 93-230-TP-ALT, 3/30/1994 Opinion and Order; *In re The Edison Co.,* Case No. 91-698-EL-FOR, *et al.,* 12/30/1993 Opinion and Order; *In re The Cleveland Elec. Illum. Co*., Case No. 88-170-EL-AIR, 1/31/1989 Opinion and Order; *In re Restatement of Accounts and Records,* Case No. 84-1187-EL-UNC, 11/26/1985 Opinion and Order).

OCC/NOAC further request that the rule be modified so that a stipulation shall not be found to be the product of serious bargaining if "a particular interest (such as OCC's representation of all residential consumers)" is lacking.[64] This unreasonable proposal, which would allow a single intervenor such as OCC to hold every stipulation hostage, must be rejected. The Commission has repeatedly rejected this proposal, because it would discourage settlements by giving any one party the ability to veto a hard-fought compromise reached by a multitude of parties representing diverse (and often divergent) interests.[65] The Commission should not revise the rule to include this unworkable, one-sided proposal.

OCC/NOAC ask the Commission to replace its longstanding three-factor stipulation test with an arbitrary eight-factor test invented by OCC and NOAC.[66] OCC/NOAC do not provide any explanation of how their proposed test balances interests. As it has repeatedly done, the

[64] OCC/NOAC Comments at 24.

[65] *See, e.g., In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, et al.*, Case No. 16-1852-EL-SSO, *et al.*, 2018 Ohio PUC LEXIS 800, Second Entry on Rehearing, ¶¶59-61 (8/1/2018) (rejecting arguments to revise the three-part test because the current standard "enables the Commission to conduct a careful review of all of the terms and conditions set forth in the proposed stipulation, in order to determine whether it is in the public interest and should otherwise be approved"); *In the Matter of the Application of the Dayton Power & Light Company to Establish a Standard Service Offer in the form of an Electric Security Plan, et al.*, Case No. 16-395-EL-SSO, *et al.*, 2017 Ohio PUC LEXIS 909, Opinion and Order, ¶21 (10/20/2017) (noting that the Commission has "consistently rejected numerous proposals that any one class of customers can effectively veto a stipulation. . ."); *In the Matter of the Application Seeking Approval of Ohio Power company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider, et al.*, Case No. 14-1693-EL-RDR, *et al.*, 2016 Ohio PUC LEXIS 269, Opinion and Order, at *121-22 (3/31/2016) (same); *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, 2016 Ohio PUC LEXIS 270, Opinion and Order, at *87 (3/31/2016) (same); *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval of an Alternative Rate Plan for Continuation of its Distribution Replacement Rider*, Case No. 13-1571-GA-ALT, 2014 Ohio PUC LEXIS 33, Opinion and Order at *20 (2/19/2014) ("No one possesses a veto power over stipulations"); *In the Matter of the Application of The Dayton Power and Light Company for the Creation of a Rate Stabilization Surcharge Rider and Distribution Rate Increase*, Case No. 05-276-EL-AIR, 2005 Ohio PUC LEXIS 694, Opinion and Order, at *10-11 (12/28/2005).

[66] OCC/NOAC Comments at 24-25.

Commission should again decline to overturn thirty-four years of precedent (which has been repeatedly endorsed by the Supreme Court of Ohio)[67] regarding the test for reviewing stipulations. The Commission should avoid the radical departure from existing precedent suggested by OCC/NOAC. As the Commission first recognized in 1985, the development and application of the existing three-part test promotes "sound regulatory policy to encourage parties to its proceedings to resolve issues through negotiated settlements."[68] The Commission should not revise the rule to include OCC/NOAC's brand-new legal standard for assessing the reasonableness of stipulations.

OCC/NOAC ask the Commission to revise the rule so that utilities cannot offer cash or cash equivalents to induce parties to enter into stipulations.[69] The proposal must be denied. The Commission has previously rejected this argument.[70] The proposed rule revision not only ignores the fundamental nature of the bargaining process, it suggests that the inherent "give-and-take" of multi-party negotiations is illegitimate. OCC/NOAC asks the Commission to impose a standard on stipulations that would be impossible to meet. If parties cannot agree to give something up to get something in return, no party could ever engage in "serious bargaining" and there would never be any stipulations approved by the Commission. Consideration – including the exchange of

[67] The Commission first established and applied its three-part criteria for evaluation of stipulations in Case No. 84-1187-EL-UNC. *See In the Matter of the Restatement of the Accounts and Records of The Cincinnati Gas & Electric Company, The Dayton Power & Light Company, and Columbus & Southern Ohio Electric Company* ("Restatement of Accounts Case"), Case No. 84-1187-EL-UNC, 1985 Ohio PUC LEXIS 9, Opinion and Order, at *19 (11/26/1985). The Supreme Court first affirmed the three-part criteria in 1992. *See Office of Consumers' Counsel v. Pub. Util. Comm,* 64 Ohio St.3d 123, 126, 1992-Ohio-122, 592 N.E.2d 1370 ("We endorse the commission's effort utilizing these criteria to resolve its cases in a method economical to ratepayers and public utilities."). *See also, In re Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement*, 2018-Ohio-4698, ¶39 (endorsing the three-part test); *In re Ohio Edison Co.*, 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, ¶37 (same).

[68] Restatement of Accounts Case, at *19.

[69] OCC/NOAC Comments at 25.

[70] *See* Case No. 14-1297-EL-SSO, Mar. 31, 2016 Opinion and Order at 44; Case No. 16-395-EL-SSO, *et al*., Oct. 20, 2017 Opinion and Order at 19.

money, promises, and concessions – is a part of every negotiated resolution and every agreement. Utilities may commit financial support to the programs and initiatives championed by stakeholders in exchange for stakeholder support of utility initiatives. It is naïve to suggest that stipulations could be negotiated without such consideration. OCC/NOAC's suggested rule revision is completely unworkable and would signal the end of stipulations in contested multi-party matters. Thus, the proposed rule would also result in increased administrative burden and litigation costs, because all cases would have to be fully litigated without possibility of settlement. The proposed revision must be rejected.

OCC/NOAC advocate a new section of the rule to indicate that after a stipulation is reached, the burden of proof remains with the party that initially bore that burden.[71] The proposed change is unnecessary, because the law is already clear on this point. Although the terms of a stipulation are accorded substantial weight,[72] they do not shift the burden of proof.

ELPC asks the Commission to amend the rule to provide that where a stipulation is not unanimous, the stipulating parties must meet the original burden of proof applicable to the proceeding.[73] ELPC contends, without offering any examples, that the Commission does not scrutinize non-unanimous stipulations and that because only a single piece of testimony in support of the stipulation is required by the current rule, the Commission is presented with only minimal detail regarding the merits of the utility's proposal.[74] ELPC's concern is unfounded and its proposed amendment should be rejected. Under the current rule and longstanding precedent, the Commission does scrutinize the merits of utility proposals when evaluating (unanimous or non-

[71] OCC/NOAC Comments at 25-26.
[72] *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123,125, 592 N.E.2d 1370 (1992), *citing Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155,157, 378 N.E.2d 480 (1978). *See also*, Case No. 12-1497-EL-SSO, Mar. 31, 2016 Opinion and Order at 39.
[73] ELPC Comments at 3.
[74] *Id.*

unanimous) stipulations using the three-part stipulation test.[75] ELPC's proposed rule change should be rejected.

K. 4901-1-35. Applications for rehearing.

If the Commission grants rehearing under R.C. 4903.10, OCC/NOAC ask the Commission to limit rehearing to a total of sixty days after a party's application for rehearing was filed unless the Commission schedules an evidentiary hearing.[76] Indeed, OCC/NOAC propose a rule that would prohibit the Commission from granting rehearing if it is possible that a final order would not be issued within sixty days from the date of the filing of an application for rehearing.[77] This severe limitation on the rehearing process exists nowhere in R.C. 4903.10, which simply authorizes the Commission to grant and hold rehearing if sufficient reason exists and, following rehearing, to abrogate or modify any part of the original order that is unjust or unwarranted.[78] The General Assembly has not imposed such a severe and unworkable limit on rehearing, and no reason exists to do so by rule.

Moreover, the Ohio Supreme Court has found that nothing in R.C. 4903.10 prohibits the Commission from granting rehearing for the limited purpose of allowing additional time to consider arguments made in applications for rehearing.[79] Some proceedings are simply too complex, with records that are too voluminous, to allow proper consideration of all rehearing arguments within thirty days. The OCC/NOAC rule amendment would artificially limit the

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[75] *See, e.g.*, Case No. 14-1297-EL-SSO, Mar. 31, 2016 Opinion and Order at 41 (citing *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 578 (2004) and holding that "[u]nder the three-prong test, we always carefully review all terms and conditions of a proposed stipulation in order to determine whether the stipulation is in the public interest; in making this determination, we exercise our independent judgment, based upon our statutory authority, the evidentiary record, and the Commission's specialized expertise and discretion.").
[76] OCC/NOAC Comments at 28.
[77] *Id.*
[78] R.C. 4903.10.
[79] *State ex rel. Consumers' Counsel v. Pub. Util. Comm.*, 102 Ohio St.3d 301, 2004-Ohio-2894, 809 N.E.2d 1146, ¶ 19.

Commission's discretion to act reasonably and judiciously in such cases, which would not be to any parties' benefit. OCC/NOAC's proposed amendment also ignores that an entry on rehearing is not necessarily "final" but may be the subject of additional applications for rehearing.[80] To the extent OCC/NOAC's proposal is intended to prevent additional applications for rehearing, it clearly violates R.C. 4903.10 and Ohio Supreme Court precedent.

The Commission should reject OCC/NOAC's proposed amendment to Rule 4901-1-35.

L. 4901-1-39. Proposed new rule: Supporting documentation for tariff filings.

OCC/NOAC propose a new rule that would require a utility to file workpapers every time it makes a tariff filing, including a rider update, unless the rate in the tariff in question has not changed from the previously approved rate or if the tariff is zero.[81] This rule is unnecessary and should not be added. There is already an established practice for providing supporting documentation and workpapers to the Commission. For example, the Companies have a Commission-approved rider update and audit process that was approved in the Companies' ESP III proceeding[82] and continued in the ESP IV proceeding.[83] According to this process, the Companies update their riders at agreed-upon intervals (*e.g.*, semi-annually) and they also file annual audit applications for the prior calendar year, which filing includes the supporting workpapers.

OCC/NOAC's proposed new rule is really an attempt to circumvent the Commission's decision in Case No. 17-2474-EL-RDR,[84] where the Commission denied OCC's motion to compel

[80] *See, e.g., Senior Citizens Coalition v. Pub. Util. Comm.*, 40 Ohio St.3d 329, 333, 533 N.E.2d 353 (1988) (finding that R.C. 4903.10 "permits an application for rehearing after *any* order").
[81] OCC/NOAC Comments at 28-29.
[82] *See* Case No. 12-1230-EL-SSO, July 18, 2012 Opinion and Order, p. 44.
[83] *See*, Case No. 14-1297-EL-SSO, August 16, 2017 Eighth Entry on Rehearing. OCC was a participant in both ESP III and ESP IV and is well-aware of the Companies' Commission-approved rider update and audit process.
[84] Case No. 17-2474-EL-RDR, 11/1/2018 Entry.

on the basis that the discovery in that rider update/audit case was premature. As discussed in Section D above, the Commission has held that discovery does not always begin immediately after a proceeding is commenced,[85] and discovery is unwarranted and premature upon the initial filing of a rider update. The Commission should not adopt the proposed rule, which seeks to avoid established Commission practice and legal precedent.

III. Reply Comments Regarding OAC 4901:1-1 – Rules Regarding Utility Tariffs

Tariff Commenters recommend the Commission adopt a rule requiring that all public utility tariffs include refund language. In fact, Tariff Commenters recommend the exact refund language they want the Commission to include in every schedule and rider.[86] The Commission should reject this recommendation because it is inappropriate for an all-utility rulemaking and will create regulatory uncertainty in Ohio.

Tariff Commenters' recommendation is inappropriate for an all-utility rulemaking because the Commission should consider the need for, and form of, refund language on a case-by-case basis. In enacting R.C. 4905.32, the General Assembly gave the Commission discretion to decide if refund language is appropriate. When determining whether to include refund language, the Commission can consider all the circumstances, such as a rider's purpose or the existence of other Commission-ordered customer protections. In contrast, under Tariff Commenters' recommendation, the Commission, instead of exercising this discretion, would simply require by rule that every public utility rider include the same refund language, regardless of the circumstances. Had the General Assembly intended that every utility rider contain standard refund

[85] Case No. 17-2474-EL-RDR, 11/1/2018 Entry at ¶15.

[86] OCC/NOAC Comments at 3. This language would require reconciliations or adjustments that fully compensate customers for charges determined to be unlawful, unreasonable, or imprudent by the Commission or the Supreme Court of Ohio. It would not, however, provide for the converse by allowing a utility to recoup losses sustained when utility rates are found to have been set too low.

language, it would have directed this result in R.C. 4905.32. Because the General Assembly gave the Commission discretion to determine whether to include refund language, and the form any such language should take, Tariff Commenters' recommendation should be rejected.

Tariff Commenters' recommendation would also create regulatory uncertainty. Standard tariffs allowing for refunds of approved, established rates would place added risk on utilities and their investors due to a loss of rate certainty. As a result, utilities could face lower credit ratings, which will increase the cost of accessing capital markets and entering into financing arrangements which are necessary for utilities to provide safe, reliable and affordable utility services. Given the higher risk investors face, utilities would need to offer a higher rate of return to secure necessary capital. This would increase utilities' cost of service and translate into higher rates for customers. For these reasons, it is no surprise that Tariff Commenters identify no other state with a regulation requiring similar language in utility tariffs.

IV. Conclusion

The Companies appreciate the opportunity to provide these Reply Comments regarding the proposed Rules. The Companies urge the Commission to adopt the Companies' Comments, which were filed on January 13, 2020, and to reject: (1) the comments filed by OCC and NOAC in Case No. 18-275-AU-ORD (regarding Chapter 4901-1); (2) the comments of ELPC in Case No. 18-275-AU-ORD (regarding Chapter 4901-1); and (3) the comments filed by OCC, NOAC, Northeast Ohio Public Energy Council, and Edgemont Neighborhood Coalition in Case No. 18-276-AU-ORD (regarding Chapter 4901:1-1).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 10th day of February, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/*s/Christine E. Watchorn*
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Summary: Reply Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company electronically filed by Ms. Christine E. Watchorn on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company