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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of Chapters)
Chapters 4901-1, 4901-3, and 4901-9 of the) Case No. 06-685-AU-ORD
Ohio Administrative Code)

**REPLY COMMENTS OF
DUKE ENERGY OHIO**

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I. INTRODUCTION:

Pursuant to R.C. 119.032, the Public Utilities Commission of Ohio (Commission) conducted a review of the current rules contained in O.A.C. Chapters 4901-1, 4901-3, and 4901-9. In its Entry dated May 16, 2006, the Commission proposed revisions and amendments to Chapters 4901-1, 4901-3, and 4901-9 and now seeks comments from interested parties concerning its recommendations. On or about June 26, 2006, interested parties submitted initial comments to the Commission's proposed rule changes. Accordingly, Duke Energy Ohio respectfully submits the following reply comments regarding Chapter 4901-1, 4901-3, and 4901-9 of the O.A.C.

II. SPECIFIC COMMENTS:

A. O.A.C. 4901-1-01 Definitions

Duke Energy Ohio agrees with the addition of the 'facsimile transmission' to the definitions contained in O.A.C. 4901-1-01. OCC also proposes to have the definition of the word 'proceeding' added to this section. The definition is to be 'any filing, hearing, investigation, inquiry, or rulemaking, which the Commission is required or

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permitted to make, hold, or rule upon.’ Duke Energy Ohio believes that this addition to the definition section is not necessary.

B. O.A.C. 4901-1-02 Filings of Pleadings and Other Papers

In its comments OCC proposes that 4901-1-02(B)(6) be reworded so that a party filing by facsimile transmission not bear all the risk should the equipment in docketing fail. The language OCC suggests would place the risk on the sender and exclude ‘errors occurring due to the inoperability of the Commission’s facsimile machine or unsuccessful alternative arrangements by the Commission’s docketing division.’ Duke Energy Ohio concurs with this proposal and believes it is reasonable.

C. O.A.C. 4901-1-03 Form of Pleadings and Other Papers

In its comments, OCC proposes that 4901-1-03(B) be amended to add clarifying language conforming to the Supreme Court requirements regarding size of paper and 12-point type. Duke Energy Ohio believes that this would be unfair for those consumers who file complaints against a utility. Many customer complaints are not typed but hand written. Further, it is not unheard of that customer complaints are submitted on paper other than 8½ by 11. OCC’s proposed change would require the Commission to reject those filings which are not in compliance with the type and paper requirements. Duke Energy Ohio is not aware of any issues regarding the filing of pleadings which do not already conform to this standard other than in the instance of customer complaints. OCC’s proposed change seems unnecessary.

D. O.A.C. 4901-1-05 Service of Pleadings and Other Papers

Currently, in O.A.C. 4901-1-05(C)(4) service by electronic mail is complete upon ‘the sender receiving a confirmation generated by the sender’s computer that the

electronic message has been sent.’ OCC proposes to delete this phrase and insert ‘transmission’ so that the sentence would read ‘[s]ervice by electronic message is complete upon transmission.’ OCC’s proposed language continues with ‘service by electronic message is not effective if the party making service learns that the attempted service did not reach the person to be served.’ The explanation of OCC as to the rationale behind this change does not coincide with the proposed language, and therefore is confusing as to its intent. Instead, service should be considered complete and confirmed when the sender receives a ‘delivery receipt’ from its e-mail service.¹ Upon delivery the sender receives an e-mail receipt message back indicating that individuals on a service list received the message. The sender can then check this against their service list they will know immediately that someone did not receive service. Duke Energy Ohio finds no problem with the current language and would urge the Commission to not adopt OCC’s suggested changes. In the alternative, if the Commission wishes to add clarification, Duke Energy Ohio suggests the Commission amend its rule to make delivery complete upon the sender’s receipt of a delivery confirmation.

E. O.A.C. 4901-1-06 Amendments

In its comments, OCC is proposing that an applicant certify under oath that an amendment is non-substantive and that the timeframe of the case will not be affected. OCC wants substantive amendments to result in a new computation of time and to suspend the application and that all amendments ‘shall be contemporaneously reflected in a docketed filing.’ OCC is proposing additional language that is unnecessary. The filing of an amendment to any application is not taken lightly by any utility. Duke Energy Ohio

¹ For example in Micro Soft Outlook, a ‘delivery receipt’ can be set by going into ‘Message options’ and check marking the box ‘request a delivery receipt for this message’.

believes that 4901-1-06 has worked in the past and will continue to work in the future without the additional burden that the OCC language would impose. Duke Energy Ohio knows of no amendment to an application that was not ‘reflected in a docketed filing.’ The current rule provides that an amendment is reviewed by the attorney examiner who can, if necessary, cause the case timeframe to be adjusted and give the parties time to respond. Duke Energy Ohio urges the Commission to keep 4901-1-06 as is.

F. O.A.C. 4901-1-07 Computation of Time

With respect to comments submitted regarding O.A.C. 4901-1-07, Duke Energy Ohio agrees with nearly every commentor that the Commission should keep the rule allowing three days for service. O.A.C. 4901-1-07(B) is the Commission’s equivalent to Civil Procedure Rule 6(E) which also allows for the addition of three days to the prescribed time for taking action if the party has been served by mail. The Three Day Rule has been a mainstay of civil and administrative procedure for many years, and its deletion could have a prejudicial effect on customer complaints.

G. O.A.C. 4901-1-08 Practice Before the Commission, Representation of Corporations, and Designation of Counsel of Record

With respect to comments on 4901-1-08(D) Vectren Energy Delivery of Ohio, Inc. (Vectren), The Ohio Telecom Association, Columbia Gas of Ohio, The Ohio State Bar Association Public Utilities Committee, East Ohio Gas Company d/b/a Dominion East Ohio(Dominion), and Duke Energy Ohio all agree that corporations must be represented by attorneys and that non-attorneys are not to practice law. As Duke Energy Ohio indicated in its initial comments, it is likely that issues of law and interpretation of the Commission Rules will be discussed at settlement conferences. The Commission

should not permit non-attorneys to appear in such a representative capacity, even for settlement purposes.

H. O.A.C. 4901-1-09 Ex Parte Discussion of Cases

Staff is proposing to add language which allows for participation by telephone. Duke Energy Ohio does not oppose such participation. OCC, however, proposes to go further and to have the disclosure of the ex parte session filed within one business day. Duke Energy Ohio is not aware of any situation where the filing of the discussion under the current 'two business' days has presented any problems. The purpose of the current rule is to have the ex parte discussion made public. To have it done within one business day is unduly burdensome on the parties involved. There is no prejudicial effect under the current rule requiring filing within two business days. Duke Energy Ohio urges the Commission to reject the proposed change.

I. O.A.C. 4901-1-10 Parties

OCC proposes to add a specific section noting particular entities as parties to the proceeding involving long-term forecast reports. Further, OCC would automatically make an entity a party upon filing a motion to intervene. OCC is seeking to circumvent established rules of procedure where an entity must first meet established criteria before being considered a party. Participants in long-term forecast proceedings should not be given special treatment in becoming a party to a case. Participants should be treated as any other interested participant to a case who must first file a motion to intervene, and be granted intervention status by the Commission before becoming a party.

OCC also seeks to add 4901-1-10(A)(8) to the listing of parties to a proceeding. Specifically, OCC's addition would state "Any other person expressly made a party by

order of the Commission, *including, pursuant to Section 4903.221 of the Revised Code.*”

This addition is redundant, confusing and unnecessary. Any other person expressly made a party by order of the Commission would necessarily include persons made a party under 4903.221. Duke Energy Ohio asks the Commission to reject OCC’s proposed modification and not complicate the wording of its rules.

J. O.A.C. 4901-1-11 Interventions

Duke Energy Ohio believes that the addition of 4901-1-11(B)(5), which clarifies the Commission’s consideration of whether a hearing will be held in deciding whether to permit intervention, is reasonable and should be adopted. This proposed change does not deny any interested person the opportunity to intervene, but merely clarifies existing criteria to intervention. This language will not automatically deny intervention, and the Commission has discretion to grant intervention even if no hearing will be held. In fact OCC cites in its footnote 12 to their initial comments in this proceeding that intervention was granted in several instances where no hearings were held.

This proposed change to 4901-1-11(B)(5) is consistent with relevant Ohio Jurisprudence. For instance, in *Ohio Domestic Violence v. PUCO*,² The Ohio Supreme Court held that where the authority expressly granted to the Commission via statute³ vests the Commission with discretion as to whether or not to hold an evidentiary hearing, there is no right to intervention absent a determination that a hearing is necessary.⁴

In its comments, OCC seeks to rewrite the criteria under which a person is granted intervention. Duke Energy Ohio believes the current rule adequately and fairly

² 70 Ohio St. 3d 311 (1994).

³ The statute governing the Commission’s authority was R.C. 4009.18 which allows the Commission to approve a new service without a hearing if it determines that the new service is just and reasonable.

⁴ *Id.*

provides when intervention is appropriate. The Commission's inclusion of whether a hearing will occur further clarifies the procedure for intervention. OCC's proposed modification is unnecessary and removes from consideration the extent to which a person's interest is already represented by existing parties. Duke Energy Ohio supports the Commission's proposed modification and respectfully requests the Commission reject OCC's proposed modifications.

K. O.A.C. 4901-1-12 Motions

The idea of timely filing motions for extension of time is welcomed by all. While Duke Energy Ohio supports the proposed addition of 4901-1-12(D) it found no problem with the term 'sufficiently in advance of the existing filing date.' However, others did propose that specific times be involved. For instance, Verizon recommends a five-day deadline for filing requests for extension of time, thus eliminating 'guessing' as to the timely filing of the motions. The last minute technical problems of machines breaking down would still be taken into account. OCC wishes to change 'timely filed' with 'filed three days prior to the established filing date.' Duke Energy Ohio supports the five-day deadline proposal of Verizon and feels this is a fair solution.

L. O.A.C. 4901-1-15 Interlocutory Appeals

In O.A.C 4901-15(F) Staff proposes that someone not taking an interlocutory appeal or one not yet certified, may raise the issue in its brief or some other filing prior to the Opinion & Order or finding and order being issued. Duke Energy Ohio supports this addition because this will lead to the expeditious outcome of the case by limiting multiple appeals that may delay the final ruling.

Duke Energy Ohio supports raising the issue in a brief or some filing prior to the Commission order in the case. Duke Energy Ohio disagrees with OCC's assertion that Staff's proposal of only reversing a ruling if it is in error and directly impacts the outcome of a case is rewriting the Revised Code and increases the likelihood of improper procedural rulings going unchecked and uncorrected. Duke Energy Ohio supports the adoption of the newly proposed 4901-1-15(F).

M. O.A.C. 4901-1-16 Scope of Discovery

In its comments OCC proposes to modify 4901-1-16(D)(6) and add a new situation in which parties would be required to supplement discovery responses. Specifically, OCC would require supplemental responses if 'the response identified persons and the location of persons having knowledge of discoverable matters.' OCC's proposed addition is vague, confusing, and seems overly broad requiring supplemental answers to every discovery response in which a person is identified. Such a request is unreasonable and the Commission should not consider it.

In its proposed 4901-1-16(I), OCC seeks to add language which excludes auditors hired by or at the direction of PUCO. It is well established that auditors hired by the Commission are an arm of the Commission. OCC's proposal effectively makes the commission staff open to discovery by parties to a case. If the auditors are open to discovery they may not be able to do an effective unbiased job in the investigation of cases. Further, often times auditors are given access to sensitive company information which should not be made public or subject to open and unprotected discovery. For these reasons Duke Energy Ohio urges the Commission to reject this addition to 4901-1-16(I).

N. O.A.C. 4901-1-23 Motions to Compel Discovery

In its comments OCC wants to expedite time periods for responding to motions to compel. These motions should not be treated any different than other motions. Currently, 4901-1-12(B)(1) states that any party may file a memorandum contra within fifteen days after the service of a motion. The Staff has not proposed a change to this rule. Duke Energy Ohio urges the Commission to reject the proposal of OCC.

O. O.A.C. 4901-1-24 Motions for Protective Orders

With respect to the time limit for Motions for Protective Orders, staff has no new proposal for the time frame but wishes to keep eighteen months. Duke Energy Ohio generally agrees with the comments submitted by The Ohio Telecom Association (OTA) which OTA correctly states ‘if a document is confidential when filed, it is no less confidential 18 months later.’ OTA further states that Revised Code §1333.61 which applies to trade secrets, imposes no temporal limitation on the protection of confidential trade secret information. Information is either a trade secret or it isn’t and if it is a trade secret it remains one until disproved. Duke Energy Ohio is mindful of doing business under an increasingly competitive world. In order to maintain that competitive state, it is necessary to maintain the confidentiality of documents beyond 18 months and is finding itself filing for extensions of the protective orders many times over in those cases and the Attorney Examiners are having to issue new entries each time. Duke Energy Ohio agrees with OTA when it advocates revision of the Rule to permit perpetual confidentiality of information.

In its comments, OCC proposes an order granting protection of confidential information to expire within twelve months. Duke Energy Ohio strongly disagrees with this proposal as it unreasonably increases the burden on companies already vigilantly

defending its trade secrets. Presently, companies must file their requests to renew motions for confidential treatment within 45 days of expiration. Under OCC's proposal, the ink would barely be dry on a Commission order granting confidential treatment before companies would have to file for an extension. OCC's proposal is unreasonable and the Commission should not adopt it.

P. O.A.C. 4901-1-25 Subpoenas

In its proposed amendment to O.A.C. 4901-1-25(B), OCC would have a subpoena effectively served upon a party through delivery to the party's attorney. Duke Energy Ohio disagrees with this proposal. Subpoenas by definition compel a person to attend or give testimony at a prescribed time and date. As such subpoenas must be served upon the person who is being compelled to attend or give testimony. This is consistent with Ohio Rules of Civil Procedure which also requires a subpoena to be served upon the person named.⁵ The Commission should reject OCC's proposal allowing service to be perfected upon delivery to a party's attorney.

Q. O.A.C. 4901-1-26 Prehearing Conferences

Duke Energy Ohio supports OCC's addition of 4901-1-26(G) which states that any or all parties may attend a conference by telephone when approved. Often times attempting a settlement conference in person presents a scheduling difficulty. In the case of customer complaints, it could be a true hardship. Allowing telephone attendance would encourage participation and likely result in efficient resolution of proceedings.

Further, Duke energy Ohio agrees with nearly all commentators that the Commission's proposed change to 4901-1-26 and 4901-9-1(G), which require

⁵ Rule 45(B).

participants to settlement conferences to have settlement authority, should not be interpreted that parties be required to reach settlement. Moreover, parties should not be subject to punishment for not settling.

R. O.A.C. 4901-1-27 Hearings

OCC has suggested an addition to 4901-1-27(B)(7)(e) which requires the hearing officer to indicate via a ruling the amount of time that any sealed portion of the hearing record is to remain sealed. Sealed portions of the hearing, whether testimony, discovery, or cross examination, coincide with trade secret portions of the record. Currently, when a confidential portion of one's prefiled testimony is to be cross examined, a party notes the confidential nature on the record prior to the witness being sworn in. The attorney examiner invites those who have signed a protective agreement to remain and those who have not to leave the hearing room. The part of the record concerned is then filed under seal, and the public portion of the record indicates the missing portion as filed under seal. There is no need to require a ruling from the bench as to how long the record will then remain sealed.

S. O.A.C. 4901-1-28 Reports of Investigation and Objections Thereto

With respect to this section in the Staff Reports of Investigations in other than rate cases, it is proposed that the reports be automatically admitted into evidence. While there is disagreement as to whether this rule should be enacted, there is no disagreement that all parties should have the opportunity to file objections to the report and have the opportunity to cross examine those responsible for producing the report. It is correctly pointed out in the initial comments of Ohio Edison, CEI, and Toledo Edison that

Commission Staff is beyond the reach of subpoenas.⁶ Therefore, the Commission should allow parties the opportunity to file objections and cross examine the reports authors. Such an opportunity will allow for a complete exploration of issues and a just and reasonable result.

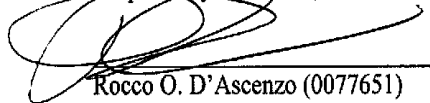
T. O.A.C. 4901-1-35 Applications for Rehearing.

With respect to applications for rehearing generally the commentors do not want to limit rehearing and clarification opportunities. A party may have a legitimate need to seek clarification. Duke Energy Ohio concurs with Verizon's proposal that a motion for clarification would be considered an application for rehearing if the granting of the motion resulted in 'the reversal of any substantive determination made by the commission in the order.' Motions for clarification are necessary when a portion of an order is not clear in its intent. Duke Energy Ohio urges the Commission to take into consideration R.C. §4903.10 in its finalization of these proposed rules.

III. CONCLUSION

For all the foregoing reasons, Duke Energy Ohio requests that the Commission revise the Rules in accordance with Duke Energy Ohio's suggestions herein and clarify each of the provisions as identified by Duke Energy Ohio.

Respectfully submitted,




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⁶ O.A.C. 4901-1-25(D).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via first class U.S. Mail, postage prepaid, this 19th day of July 2006, upon the following:.


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