BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of Chapters 4901-1, Rules of Practice and Procedure; 4901-3, Commission Meetings; 4901-9, Complaint Proceedings; and 4901:1-1, Utility Tariffs and Underground Protection, of the Ohio Administrative Code.	:	Case No. 11-776-AU-ORD
	:	**COMMENTS REGARDING PROCEDURAL RULES/SUBSTANTIVE ORDERS**
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This is submitted, for constructive consideration, in response to the Commission's solicitation of comments regarding its rules of practice and procedures.

Procedural Comments:

Rule 4901-1-02:

We welcome and would appreciate the ability to file electronically in railroad matters. So thank you for considering an amendment to this rule.

Rule 4901-1-21(N):

This section states that depositions "may be used to the same extent permitted in civil actions in courts of record". In civil actions, this would mean that the parties could introduce as substantive evidence the depositions of any witnesses who reside outside of Franklin County, the county in which the Commission's action is pending. See, *e.g.*, Civ.R. 32(a)(3) which states in pertinent part as follows: "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (b) that the witness *** resides outside of the county in which the action is pending ***." See also *Fitzwater v. Speco Corp.* (Oct. 26, 1992), 2nd Dist. Nos. 2916, 2919, 1992 Ohio App. LEXIS 5473 at *6-8 (permitting the testimony of a corporate employee to be presented by deposition transcript where the witness resided outside the county in which the action was pending); *Heiland v. Miller* (Apr. 24, 1986), 2nd Dist. No. 9344, 1986 Ohio App. LEXIS 6744 at *14, fn. 5 (noting that in an action pending in Montgomery County, witness testimony was presented by deposition transcript where the witness resided in Toledo, Lucas County).

Yet to our understanding, the Commission has not generally permitted such depositions to be introduced into evidence – rather, it has required such witnesses to appear live, which can be a significant inconvenience to the witnesses – *e.g.*, assuming they would need to travel from distant counties, *etc.*

So we would welcome clarification of the Commission's position here.

Rule 4901-1-29:

We are not certain as to the intent of this rule, nor what the Commission requires by way of compliance.

The rule purports to require that the **direct** testimony of an expert be reduced to writing, filed, and served upon all parties in advance the scheduled hearing, and then states that the Commission has the discretion to allow additional testimony from the expert at hearing, albeit with limitations. The rule does not speak to whether this direct testimony must be conducted in the presence of other involved counsel, nor does it speak to cross examination.

So again, we are not certain here as to the rule's intent, but are concerned because our understanding is that the rule has been enforced, in that absent the pre-hearing filing of an expert's direct testimony, parties have been barred from presenting expert testimony at hearing.

Is the Commission simply indicating that it insists that the trial depositions of all experts (meaning both direct and cross-examinations) be completed prior to hearing, and that the testimony is then to be presented at hearing, in writing and perhaps via video? If that is the case, again, the rule is not patently clear in this regard.

In civil actions, parties have the discretion to complete the trial depositions of expert witnesses in advance of trial, or to call the experts live at trial. We might suggest that this practice be followed before the Commission as well.

Assuming the intent of the rule is to ensure that neither the Commission nor any involved party is surprised by an expert's appearance and/or any opinion offered, then such concern could seemingly be resolved in other, less burdensome ways – *e.g.*, as required in many civil cases, the introducing party cold be required to file a brief notice identifying: any experts to be called at hearing, the subject matter upon which each such expert intends to offer testimony, and the general substance of the expert's opinion.

And we are also unclear as to the proposed amendment to this rule, which states that the pre-hearing filing requirements "do not apply to a witness who is subpoenaed to testify on behalf of a party." So does this mean that, toward circumventing the pre-hearing filing requirement, we can simply subpoena any and all experts, including our own, and even assuming that these experts are our own corporate employees?

In sum, we would appreciate and welcome some clarification of this rule, as to the Commission's preferred practice, or, perhaps preferably, some further amendment.

Rule 4901-1-30(D):

In the event the involved parties agree to enter into a stipulation regarding certain involved facts, this rule still requires the parties to file or provide testimony that supports the stipulation. In large part, this defeats the primary purpose of such stipulations – that is, to avoid the time and expense of proving certain facts which are not in dispute. The rule also appears inconsistent with the way this issue is handled in civil actions whereby courts are ordinarily deemed bound by the factual stipulations of the litigants. This is the longstanding law of the State of Ohio. See, *e.g.*, *Ish v. Crane* (1862), 13 Ohio St.574 ("While courts are ordinarily bound by the factual stipulations of the litigants, courts are not bound in there determination of questions of law."). More recently, see *Westhoven v. Westhoven*, 6th Dist. No. OT-07-003, 2008-Ohio-2875 at Paragraph 35 (holding that "stipulations of fact bind the parties and, ordinarily, the court to the facts to which stipulations have been entered. The court is thus relieved of inquiry as to evidence which may exist to prove those facts."); *Toth v. Toth*, 6th Dist. No. OT-05-006, 2005-Ohio-7001 at Paragraph 17; *Hatch v. Lallo*, 9th Dist. No. 20642, 2002-Ohio-1376 (holding that if parties have agreed upon facts by which they wish to be bound, the court need not inquire about the evidence that may exist to prove those facts).

Construction Orders in Railroad Cases:

Currently, the Commission enters construction orders with the following standard deadlines:

- 90 days from date of issuance: site plans and cost estimates due;
- 97 days or thereabouts from date of issuance: notice due verifying that site plans and cost estimates have been submitted;
- 120 days from date of issuance: notice due verifying that initial contact has been made with any involved utility company; and
- 12 months from date of issuance: project completion.

With respect to future construction orders, we would appreciate it if the Commission would consider the following standard deadlines:

- 120 days from date of issuance: site plans and cost estimates due;
- 127 days from date of issuance: notice due verifying that site plans/cost estimates have been submitted and that initial contact has been made with any involved utility company; and
- 12 months from date of issuance: project completion.

The changes suggested above would assist us at the engineering level (*e.g.*, by providing additional time for the preparation and submission of the preliminary engineering estimates, *etc.*), and would streamline compliance with the Commission's orders by consolidating at least certain deadlines and requiring the filing of only one notice as opposed to two.

The requested changes should have no impact on our ability to comply with the standard one year in-service deadline. Assuming necessary and appropriate, however, we would welcome the right: 1) to request an in-service deadline of longer than twelve months (in the event of a complex project, *etc.*); and 2) to request a reasonable extension of the standard twelve month deadline (in the event of an unforeseen complication, *etc.*).

Also, we have three final concerns which we place before the Commission for its consideration: 1) prior to the issuance of the Commission's construction order, we would welcome input with respect to whether the project appears sufficiently complex so as to warrant a project completion deadline of greater than 12 months; 2) assuming multiple crossings are involved in one construction order, we would welcome a staggering of the assigned deadlines, particularly if the projects are in more than one county; and 3) assuming that electrical service is already in existence at any involved crossing, then we seek to clarify whether we are still obligated to initiate contact with the involved utility company.

We sincerely appreciate the Commission taking into consideration the above comments.

Please call us, of course, if you have any related questions or concerns.

Thank you.

Respectfully submitted,

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PROOF OF SERVICE

A copy of the foregoing ***Comments Regarding Procedural Rules/Substantive Orders*** was filed with the PUCO electronically this 1st day of April, 2011 and copies were sent by e-mail to: **Leah Thomas-Dalton**, Transportation Department, Railroad Commission, Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215; and **Ohio Rail Development Commission, c/o Susan J. Kirkland**, Manager, Safety Programs, 1980 West Broad Street, 2nd Floor, Columbus, Ohio 43223.

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Summary: Comments Comments Regarding Procedural Rules/Substantive Orders electronically filed by Mr. D. Casey Talbott on behalf of Norfolk Southern Railway Company