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

REPLY COMMENTS OF OHIO PARTNERS FOR AFFORDABLE ENERGY

By Entry dated March 2, 2011, the Commission initiated this docket to conduct a review of Ohio Administrative Code 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. The purpose of the review is to determine whether to continue the rules without change, amend the rules, or rescind the rules. The Entry solicited comments and reply comments from interested persons regarding the Commission Staff's proposed amendments to several of the rules. In accordance with the Entry, Ohio Partners for Affordable Energy ("OPAE") filed initial comments in this docket on April 1, 2011. OPAE hereby submits its reply comments regarding the rules and the proposed amendments.

Rule 4901-1-08(A) Practice before the Commission

FirstEnergy Corp. ("FirstEnergy") argues that the Commission should eliminate Subpart (D) of this rule, which provides that any person with the requisite authority to settle the issues in a case may represent a party at a

settlement conference. FirstEnergy states that a corporation can maintain litigation or appear in court only through an attorney and may not do so through an officer of the corporation or any other agent. According to FirstEnergy, after a complaint is filed, attendance at a settlement conference constitutes "maintaining litigation" so that allowing corporate parties to represent themselves at settlement conferences may constitute the unauthorized practice of law. FirstEnergy at 11.

OPAE disagrees. A settlement conference is not a court proceeding, nor does it maintain litigation; in fact, the purpose of the settlement conference is to avoid litigation. Therefore, there is no credibility to the argument that attendance and participation at a settlement conference constitutes the unauthorized practice of law. In addition, given that FirstEnergy has elsewhere in its comments advocated for efficiency, cost savings, and less paperwork, FirstEnergy should recognize that requiring an attorney be present for each party at a settlement conference only adds to costs and inefficiency. The Commission should not adopt FirstEnergy's recommendation that Subpart (D) of this rule be eliminated.

As OPAE recommended in its initial comments, Rule 4901-1-08 should be amended so that parties may be represented by persons other than attorneys and/or by out-of-state attorneys. In many cases before the Commission, it is not necessary that an attorney represent a party. A case may simply involve a technical matter or a policy or interest of an organization, including a corporation. A knowledgeable member or employee of the organization, including corporate attorneys, should be permitted to represent the organization in such cases that do not require an attorney to pursue.

This Commission has long made its practice to encourage the participation of parties that "will significantly contribute to full development and equitable resolution of the factual issues." Rule 4901-1-11. The requirement that an organization or corporation be represented by an attorney is a barrier to participation in the process. Permitting parties to be represented by individuals authorized to negotiate and settle matters of interest to the organization is efficient and reduces the cost associated with participation in matters before the Commission. At a minimum, a representative of an organization or corporation that is not an attorney should be permitted to file pleadings and participate in prehearing conferences, settlement conferences, or other meetings related to the case. The Commission should amend this rule so that it states that each party the Commission approves to intervene in a case based on the criteria established by Rule 4901-1-11 may be represented by an attorney or non-attorney as the party sees fit.

Rules 4901-1-16(B) and 4901-1-17(A): Discovery

American Electric Power ("AEP") recommends that Rules 4901-1-16(B) and 4901-1-17(A), regarding the scope of discovery and the time periods for discovery, be amended so that discovery may be commenced only after the Commission has set the matter for hearing. AEP complains that the current rules permit discovery even in cases where only a notice and comment process is used to decide the case. AEP proposes that discovery be limited to those proceedings in which a hearing has been scheduled, or, in the alternative, a party

should be required to obtain approval from the Commission to conduct discovery in those proceedings in which no hearing is scheduled.

The Commission should reject AEP's recommendation that discovery be limited to cases where a hearing has been ordered. Parties do not necessarily receive enough information about an application from the application itself. Discovery is often necessary to provide substantive comments on an application and to determine if a hearing will be requested. The Commission's decision to set a matter for hearing or to avoid a hearing and simply provide for comments cannot be properly made if no party has been allowed to conduct discovery prior to the Commission's finding to conduct a hearing. AEP's proposal unreasonably restricts a party's right to conduct discovery on an application filed at the Commission; therefore, AEP's proposal should be rejected.

Rule 4901-1-27: Hearings

Staff proposed to change Rule 4901-1-27(C) to make all public testimony taken at public hearings sworn testimony. Under current practice, if a public witness does not take the oath, the testimony will not be considered part of the record. While the Staff apparently intends to not even take unsworn testimony, this is not a substantive change from current practice to the extent that unsworn testimony is not considered part of the record.

The Large Gas LDCs are "confused" by the Staff's proposal to allow only sworn testimony at public hearings. Large Gas LDCs at 24. According to these gas companies, if individuals must be sworn before they can speak at a public hearing, public hearings will be converted from informal public feedback sessions

to an extension of the evidentiary hearing. If public testimony is part of the evidentiary record, utilities will have to cross examine public witnesses. The gas companies recommend that the Commission amend the rule to recognize the purpose of public hearings is to gather "comments" and not take sworn testimony that will be considered evidence. The gas companies recommend a rule that refers only to "comments" and not to "sworn or unsworn" "testimony."

FirstEnergy agrees with the gas companies about the use of public testimony as evidence. FirstEnergy complains that public testimony is provided without any opportunity for any party to obtain discovery beforehand so that parties are left without any meaningful opportunity to conduct cross examination. FirstEnergy at 17.

It is quite a leap to argue that any sworn public testimony constitutes evidence that must be subject to discovery and cross examination. The Commission has conducted public hearings with sworn public testimony for many years without burdening attorneys for utilities to conduct discovery or cross examine all the sworn witnesses. On the other hand, the attorney may conduct cross examination at a public hearing if she believes that such cross examination is necessary. In the rare circumstance that some form of discovery is necessary, that can also be arranged. While there have been times when public hearings were lengthy and contentious, this alone is not sufficient reason to transform public testimony into mere comments that have no evidentiary value. The proposals of the gas companies and FirstEnergy should be rejected.

FirstEnergy also recommends that the Commission determine and advise all stakeholders as to how the Commission will use sworn testimony at public hearings in its decision making process. According to FirstEnergy, if the Commission gives such testimony equal weight to testimony offered at the evidentiary hearing, then the Commission must allow the utilities full due process protections such as discovery and cross examination of witnesses who offer sworn testimony at public hearings. FirstEnergy also complains that parties may have witnesses speak on their behalf at public hearings instead of having a witness at the evidentiary hearing. FirstEnergy argues that a rule should preclude persons speaking at a public hearing on behalf of or as a member of a party and that testimony at public hearings should not be considered evidence on an equal footing with testimony offered at the evidentiary hearing. FirstEnergy at 19.

FirstEnergy is obviously reacting to recent events at public hearings on one of its applications, but the problem FirstEnergy describes is not normally so serious. In fact, any party, including a utility company or a consumer advocate, could solicit testimony from public witnesses to support its case. The testimony is taken and given the weight that the Commission determines it deserves. Testimony provided by public witnesses at public hearings is vital to the Commission's function. The Commission should not encourage utility efforts to demean public testimony or to dismiss its importance; therefore, this suggestion made by FirstEnergy should not be adopted.

Rule 4901-9-01: Complaint Proceedings

FirstEnergy proposes a change to Rule 4901-9-01 to allow either the public utility or the customer (or both) to file a motion for judgment on the pleadings or a motion for summary judgment. FirstEnergy proposes a new Rule 4901-9-02 for the purpose of allowing a process for motions for summary judgment. FirstEnergy at 21. According to FirstEnergy, such a process will greatly eliminate the need for "unnecessary hearings" in complaint proceedings. Adding summary judgment to the rules will eliminate unnecessary paperwork and costs of compliance for utilities. Utilities will not have to prepare for and attend hearings in Columbus if the complaint does not warrant it; this will save time and resources. FirstEnergy at 22.

Complaint proceedings are governed by statute. R.C. 4905.26 provides for complaint proceedings against utility companies. When a complaint is filed, if reasonable grounds for complaint have stated, the Commission sets the matter for hearing. Summary judgment is inconsistent with the statute and should not be allowed. At the same time, there is no reason to believe that complaint proceedings result in large numbers of unnecessary hearings. Most complaints are resolved at settlement or pre-hearing conferences, and complainants are generally made aware of their chances for success in their complaints. The current system for complaints works well and, in any event, it is governed by statute, which the Commission has no authority to alter.

Conclusion

In conclusion, OPAE respectfully requests that the Commission adopt OPAE's recommendations contained herein. OPAE also reiterates its request that the Commission adopt the recommendations made by OPAE in its initial comments filed on April 1, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments was served electronically upon the persons identified below on this 29th day of April 2011.

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Summary: Reply Comments electronically filed by Ms. Colleen L Mooney on behalf of Ohio Partners for Affordable Energy