

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;) Case No. 11-776-AU-ORD
4901-9, Complaint Proceedings; and 4901:1-1,)
Utility Tariffs and Underground Protection, of)
the Ohio Administrative Code.)

REPLY COMMENTS OF THE AT&T ENTITIES

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REPLY COMMENTS OF THE AT&T ENTITIES

Introduction

The AT&T Entities ("AT&T")¹, by their attorneys, submit these reply comments in response to the comments filed by the other parties on April 1, 2011. The other parties are the Customer Parties (also referred to as "CP"); Duke Energy Ohio ("Duke"); Ohio Edison, CEI, and Toledo Edison ("FE"); Columbia Gas, East Ohio Gas, and Vectren Energy Delivery of Ohio ("LDCs"); Norfolk Southern Railway Company ("NSR"); OMA Energy Group ("OMAEG"); Columbus Southern Power Company and Ohio Power Company ("AEP"); Ohio Partners for Affordable Energy ("OPAE"); and Dayton Power and Light ("DPL").

Two important areas deserve special attention. The first is the improvement of the e-filing process and its expansion to all Commission activity. A number of commentors support requiring e-filing and e-service via the DIS case notification system as the "default" or the "rule" rather than the "exception." As AT&T explained in its initial comments, in a mandatory e-filing environment, with ready access via the internet to all documents filed with the Commission, the proposed rule revisions do not go far enough. AT&T, p. 4. The certificate of service requirements, an unnecessary holdover from the past, should be addressed as well. The Commission should consider eliminating all requirements to serve hard copies of any filing,

¹ The AT&T Entities are The Ohio Bell Telephone Company d/b/a AT&T Ohio, AT&T Communications of Ohio, Inc., TCG Ohio, SBC Long Distance d/b/a AT&T Long Distance, SNET America, Inc. d/b/a AT&T Long Distance East, AT&T Corp. d/b/a AT&T Advanced Solutions, BellSouth Long Distance, Inc. d/b/a AT&T Long Distance Service, Cincinnati SMSA, L.P., and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility.

unless ordered for just cause in a particular case. *Id.* These matters are addressed below in the discussion of Rules 2, 3, and 5.

The second area of primary importance is the protection of trade secrets that are filed with the Commission under seal. Several parties recognize the weakness in the proposed amendment's approach, which is simply to lengthen to 24 months the term of a protective order that today has an 18-month term under the current rule. The Commission should adopt the approach suggested by AT&T and remove from its rule any arbitrary time limit on the protection of trade secrets, consistent with Ohio law. AT&T, pp. 2 and 7-10. This issue is addressed below in the discussion of Rule 24.

Lastly, AT&T must take issue with the Customer Parties' characterization of the need to bring the rules into conformance with the Ohio Rules of Civil Procedure and the Ohio Revised Code. In this argument, the Customer Parties misconstrue R. C. § 4903.22. CP, p. 2 and footnote 2.² The Commission need not align all of its processes to those of the Civil Rules. As an administrative agency, and not a court, it needs to retain flexibility in several important areas.³

² The full text of R. C. § 4903.22 provides as follows: Except when otherwise provided by law, all processes in actions and proceedings *in a court* arising under Chapters 4901., 4903., 4905., 4906., 4907., 4909., 4921., 4923., and 4927. of the Revised Code shall be served, and the practice and rules of evidence in such actions and proceedings shall be the same, as in civil actions. A sheriff or other officer empowered to execute civil processes shall execute process issued under those chapters and receive compensation therefor as prescribed by law for like services. (Emphasis added.)

³ For example, in the context of discovery, R. C. § 4903.82 provides in part as follows: "***Without limiting the commission's discretion*** the Rules of Civil Procedure should be used wherever practicable." (Emphasis added.) Moreover, the Supreme Court of Ohio has held that the Commission is not strictly bound by the rules of evidence. *Greater Cleveland Welfare Rights Organization v. Pub. Util. Comm.*, 2 Ohio St.3d 62 (1982).

The Procedural Rules - Chapter 4901-1

Rule 1

The Customer Parties suggest changing the definition of business day to include a requirement that only the days where Docketing is open until 5:30 p.m. be considered business days. CP, p. 2. AT&T believes this suggestion may have unintended and unnecessary consequences. The inability to file a document due to the early closing of Docketing in, for example, a snow emergency, is addressed in Rule 7(B), as it is proposed to be amended. But the early closing of Docketing should not necessarily impact due dates for documents that are not filed. Since the issue is addressed in Rule 7(B), there is no need to amend the definition in Rule 1(A).

Rule 2(A)(5)

The Customer Parties object to the provision that allows the Commission to redact material prior to posting a filing on the DIS. CP, p. 3. The LDCs support allowing the Commission to redact documents prior to posting them on DIS, but suggest that the Commission should provide the filer and other parties notice of any redactions prior to or contemporaneously with its DIS posting. LDCs, p. 3. The issue is similar to the one in Rule 2(D)(4) addressed by AT&T in its initial comments. AT&T, p. 3. This rule should be clarified with some explanation of the kind of redacting that is contemplated, and perhaps giving the filing party the opportunity to cure the defect itself rather than the Commission Staff resorting to redacting. *See*, AT&T, p. 3.

Rule 2(A)(6)

Duke suggests that the rule change should be modified to exclude applications that are filed under multiple case captions and codes contemporaneously. Duke, pp. 1-2. FE makes essentially the same suggestion. FE, pp. 2-3. These suggestions should be adopted.

Rule 2(B)

FE requests that the Commission keep the current safe harbor provisions contained in existing Rule 4901-1-02(D) and not adopt the phrase "Failure to submit the required copies may result in the document being stricken from the case file," as proposed in Rule 2(B). AT&T agrees with this recommendation.

Rule 2(B)(1)

OPAЕ suggests parties be allowed to file only one paper copy of a filing if the filer makes an e-filing of the same document on the same day. OPAЕ, pp. 1-2. OPAЕ has not specified what circumstances would require the e-filing and a paper filing of the same document, but AT&T does not oppose this suggestion if any paper filing is required.

Rule 2(B)(2)

The Customer Parties suggest that requests for protection should be made via a motion. CP, p. 3. This is the customary practice, and AT&T agrees with this suggestion.

Duke suggests that this rule should be amended to provide for additional specific circumstances, and should also refer more specifically to Rule 24(D). Duke, pp. 2-3. AT&T Ohio agrees with Duke.

Rule 2(C)

Duke suggests that the rules for filing via fax are too burdensome. It recommends that the proposed rule be amended to delete the requirement for a "brief description of the document" in subdivision (C)(2), and that subdivisions (C)(3) and (C)(5) be deleted. Duke, p. 3. Because e-filing should be the norm, and paper or fax filing the exception, AT&T agrees with these recommendations. AT&T also has no objection to FE's suggestion that, so long as a fax filing is initiated before 5:30 p.m., the Commission should consider the document filed on that business day. FE, p. 4.

Rule 2(C)(6)

The Customer Parties suggest that the alert to the risk of a failed electronic transmission in Rule 2(D)(7) be duplicated in Rule (C)(6) for faxes. CP, pp. 3-4. This is appropriate, subject to the right of any party to seek relief for good cause shown. This approach would also address the concern expressed by OPAE in connection with Rule 2(D). OPAE, pp. 2-3.

Rule 2(C)(8)

FE suggests eliminating the rule that requires parties who filed documents by fax to send paper copies of the fax no later than the next business. FE, pp. 4-5. This is appropriate because the extra copies of documents serve only to add unnecessarily to the docket.

Rule 2(D)

The LDCs believe that the Commission should require all parties represented by counsel, including Staff, to file electronically with certain exceptions. LDCs, p. 4. The LDCs

also suggest the rules should require all parties to subscribe to cases in the DIS. LDCs, p. 5.

Both suggestions are good ones, and are consistent with the opinion of many parties that e-filing should be the "rule" and not the "exception."

Rule 2(D)(5)

The Customer Parties suggest expanding this rule to address additional instances where filers are required to serve specific entities with documents when a case is originated.

AT&T does not object to this approach.

Rule 2(D)(6)

Duke suggests deleting the Staff-proposed language or, alternatively, clarifying that filers who wait until after 4:00 p.m. bear additional risk that the required review will not be completed prior to 5:30 p.m. and, thus, that they may therefore be unable to correct any filing errors that same day. Duke, p. 4. AT&T believes either approach would work without disrupting Docketing's operations. But the LDCs' proposal that the Commission should ensure same-day review and acceptance for all e-filings submitted on or before 5:30 p.m. may be too much to ask. LDCs, p. 6. Under the current practice, the previous day's filings are usually reviewed and posted no later than the morning of the following business day.

Rule 2(E)

OPAE maintains the rule should be amended to ensure that cases are not closed or archived prematurely. OPAE, pp. 3-4. AT&T shares the concern, and noted in its comments that the proposed change is not problematic if it is coupled with an internal review of the process for closing cases that ensures that cases where such on-going or periodic filings may be needed

are not prematurely closed. *See*, AT&T, p. 4. However, if there is a need to enforce a stipulation of long-standing, that can probably be accomplished by the filing of a new complaint case as opposed to keeping the case in which the stipulation was adopted open for the entire duration of the stipulation.

Rule 3(A)

AT&T strongly endorses FE's recommendation that the Commission should make service via e-mail the rule, and not the exception. FE, p. 5. The LDCs echo support for e-filing and e-service in proposing that all parties represented by counsel should be required to be served via the Commission's DIS notification system. LDCs, p. 7. AEP's suggestion, that the rule should be modified to reflect that a party willing to receive documents by e-mail should be responsible for ensuring that his or her e-mail account is appropriately set to receive documents from the various parties involved in a proceeding, including the Commission, is a good one. AEP, p. 3. The Commission should fully support and implement e-filing, require all parties to adopt it, and streamline its processes and rules accordingly, including deleting the proposed addition of the last two sentences in Rule 3(A).

Requiring e-filing and service via the DIS notification system would make it unnecessary to address the OP&E's suggestion to replace the Staff's proposed language "willing to accept service by fax" (or e-mail) with "serve by e-mail" or "serve by fax." OP&E, p. 4. Reliance on the DIS notification system could also lead to the elimination of the Commission's wasteful practice of mailing out copies of entries and orders to parties who have received them, via the DIS notification system or by simply checking the DIS website, days before the hard copies are eventually received in the mail.

Rule 5(A)

Like its recommendation regarding Rule 3, FE suggests the Commission should modify Rule 5 to require e-mail service as the rule or default, not the exception. FE, pp. 6-7. AT&T supports this recommendation. Electronic filing would greatly streamline the process, and would effectively use the considerable functionality of the DIS, giving the serving party the option of serving all the parties to a case without having to include the new, Staff-proposed language in the certificate of service or listing the parties who have electronically subscribed to the case.

Rule 5(B)

FE suggests another worthwhile improvement here, consistent with its recommendation concerning Rule 5(A). FE, p. 7. The LDCs propose that the rule require all represented parties to subscribe to the case to receive e-mail service from the Commission and that language be added to this paragraph to ensure the e-filing notice is sent the same day a document is filed. LDCs, pp. 8-9. AT&T supports this recommendation, with the caveat that the e-filing notice is sent, as AT&T understands it, on the day the document is accepted for filing. As a result, under the current practice, the e-filing notice is not sent the same day for filings that are made very late in the day. Some flexibility in this area is to be expected given the varying types and sizes of filings that are made, and the timing of those filings. Thus, not every aspect of this process needs to be specified in the rule. Modifying the e-filing practices through changes in the e-filing manual would be more efficient than specifying practices in a rule that would then need to be revised. The issues presented by late-in-the-day filings are also discussed in the context of Rule 2(D)(6) above.

OPAE suggests that Rule 5(B) should describe the methodology for parties to electronically subscribe to a case and to be aware of what other parties have electronically subscribed. OPAE, pp. 4-5. This, AT&T believes, is best left to the e-filing manual and other background documents rather than the rule. A wealth of information on e-filing is readily available on the Commission's website.⁴

Rule 5(C)

The Customer Parties appropriately suggest that, where a counsel of record has not been designated, service on the first-listed counsel should suffice. CP, p. 5. This is an appropriate suggestion, but the process would be simplified by adopting the e-filing and DIS service process noted above, as recommended by FE and the LDCs. FE, pp. 7-9; LDCs, pp. 9-10.

Rule 5(D)(4)

Duke suggests this rule should be amended to delete the requirement that an electronic confirmation of service be retained. Duke, p. 5. Alternatively, Duke suggests amending the language to allow retention of any adequate proof of transmission. Either approach is reasonable. In the context of this rule, OMAEG suggests clarifying the circumstances in which electronic service is appropriate and suggests that electronic service should be the default option unless the party or its attorney has affirmatively opted-out of e-mail service. OMAEG, pp. 3-4. This suggestion should be adopted. OMAEG also proposes that the Commission permit attorneys who regularly practice before the Commission to provide written notice to the Commission that they agree to electronic service in any Commission proceeding in

⁴ See, <http://www.puco.ohio.gov/puco/index.cfm/docketing/electronic-filing-information-amp-links/>

which they are participating. OMAEG, p. 4. In addition, OMAEG proposes that the Commission then creates a webpage on the Commission's website that lists those attorneys and their e-mail addresses who have consented to electronic service. OMAEG, pp. 4-5. Both suggestions are good ones that should be adopted.

Rule 5(E)

The Customer Parties suggest clarifying the term "party" to include, "those identified in Rule 4901-1-10." CP, p. 5. Duke suggests this rule be modified either (1) to require service of a new intervenor provided that the person filing "has been served with and has received a copy of the motion to intervene" or (2) to require service of a new intervenor providing that the person "has been served with a copy of the motion to intervene and such motion appears on the DIS docket for that proceeding at the time when service is made." Duke, p. 6. FE wants to add a sentence at the end of this rule that states: "If a person's motion to intervene is denied, service is no longer necessary to this person." FE, p. 9. Both Duke's and FE's suggestions are appropriate and should be adopted.

Rule 6

Duke recommends that the rule be amended to provide that, where an applicant files an amendment or modifications to a prior filing without a motion asking for authorization, such amendment or modification shall be deemed accepted for filing unless the legal director, the deputy legal director, or an attorney examiner rules otherwise within three days after filing. Duke, p. 6. In AT&T's experience, this rule is not always followed and is also not always enforced by the Commission. The need to request permission before filing an amendment can certainly be questioned. The Commission should adopt Duke's recommendation.

Rule 7(A)

The Customer Parties agree with the proposed clarification of the timeline. CP, p. 5. But AT&T echoes its comment on this rule that the new "forward" and "backward" computation of time would appear to cut short the "backward" time in some instances. AT&T, p. 6. FE is correct that the reference to the filing of expert testimony five days before the start of the hearing is an error that should be corrected. FE, pp. 9-10.

Rule 7(B)

Several parties oppose the elimination of the time-honored "three-day" rule that allows an additional three days to respond to filing that is served by mail. CP, p. 5; FE, pp. 10-11; Duke, p. 7; LDCs, p. 11. AT&T believes that adopting a default e-filing, DIS service approach, as recommended here, will alleviate most of the circumstances where this rule would come into play. AT&T does not object to retaining the rule for the hopefully rare circumstances where service is made by mail.

Several parties also oppose the elimination of division (C), which gives a party one additional day to take a prescribed action when a pleading is served after 5:30 p.m. CP, p. 6; Duke, p. 8; FE, p. 11. AT&T would support retention of this rule even in a broad-based, e-filing and DIS service environment, but would suggest it apply only where an e-filed document is accepted for filing (and thus notice of which distributed via the DIS) on the business day following the actual filing. With a broad-based e-filing, DIS service approach, the need for such a rule is minimized, but it still provides some protection for those whose time to respond would otherwise be unfairly cut short.

Rule 8

Duke recommends that the rule should specify that motions requesting permission to appear *pro hac vice* will be granted or denied on the same bases as the Ohio rules. Duke, p. 8. This suggestion should be adopted.

The Commission could run afoul of the unauthorized practice of law rules if it were to adopt the OPAAE's suggestion that parties may be represented by persons other than attorneys and/or by out-of-state attorneys. OPAAE, pp. 5-6. The Commission should not adopt this suggestion.

FE correctly highlights the unauthorized practice of law issue in its recommendation that the Commission eliminate division (D) of this rule, which provides that any person with the requisite authority to settle the issues in the case may represent a party at a settlement conference. As FE notes, allowing corporate parties to represent themselves at settlement conferences may constitute the unauthorized practice of law. FE, pp. 11-12.

Similar to their recommendation in connection with Rule 5(C), the Customer Parties suggest that Rule 8(E) be modified to specifically address the instances where a party is represented by more than one attorney and the counsel of record is not identified. CP, p. 7. Following the rule contained in the Rules of Practice of the Supreme Court of Ohio, cited by the Customer Parties, would be an appropriate addition here. For this reason, AT&T disagrees with Duke's suggestion that designating a single counsel of record should be discretionary. Duke, p. 8.

Rule 9

The Customer Parties suggests clarifying the rule to require ex parte documents be corrected, if necessary, before being filed. CP, p. 8. The review contemplated by the rule assumes that there may be suggested changes to the draft filing. AT&T does not object to a specification that the "final document, *with any necessary changes, . . .*" is what should be filed.

Rule 10

AT&T supports the position, advanced by the LDCs, that the Commission Staff should be considered a party to Commission proceedings and should be subject to discovery obligations in cases where the Staff is issuing a Staff Report, will sponsor a witness, or is otherwise substantially engaged in a case. LDCs, pp. 12-14. The justification for the Staff's exemption from the rules that apply to all other parties has been lost in history. The Commission should revisit this issue for the reasons advanced by the LDCs.

Rule 11

The Customer Parties criticize the rule as not consistent with the statutory language concerning intervention. CP, pp. 8-10. Adopting their view would improperly limit the Commission's power to control its own proceedings. The Commission has historically reviewed whether an intervenor's position will duplicate that of another intervenor in deciding whether to allow multiple intervenors to participate in a case and to advance the same arguments. This is fundamental to assuring that proceedings can be conducted efficiently without unnecessary duplication of effort and expenditure of time and resources. The Customer Parties are wrong to suggest that the Commission does not have the power to exercise some reasonable discretion in this area. Even the statute on which they rely, R. C. § 4903.221, has as one of the

criteria the Commission should consider "[w]hether the intervention by the prospective intervenor will unduly prolong or delay the proceedings." For this to make any practical sense, it must allow restricting intervention by those with the same positions or arguments as other, existing, intervenors. The Customer Parties' proposed amendments should not be adopted.

While Duke is correct that the rule does not specifically address "full" intervention, that is apparently what is covered by division (A) since division (D) addresses only limited intervention. Duke, p. 9. Given the ambiguity, Duke's suggestion is a good one, as is its request for a clarifying reference to the specific intervention deadline in division (E). Duke, p. 9.

Rule 12

Duke recommends an "automatic approval" process for motions for extensions of time of five days or less. Duke, p. 9. Duke also proposes that the rule be amended to add a standardized set of requirements for expedited cases. Duke, p. 9. The Commission should adopt these proposals. The first one would streamline the Commission's processes with no apparent adverse impact, but it should be limited to one or a few such requests. As to the second one, in the telecommunications arena, the Commission's "carrier-to-carrier" rules currently allow for an expedited process in "carrier-to-carrier" complaint cases.⁵

Rule 13

FE's make a good suggestion that the rule be modified to allow for oral motions and rulings regarding continuances and extensions of time during all prehearing conferences and during telephone conferences, where the parties agree on the extension of time or continuance,

⁵ See, O.A.C. § 4901:1-7-28.

which would be followed up with a written Entry. FE, pp. 12-13. AT&T supports this recommendation.

Rule 14

The Customer Parties suggest that the issuance of oral rulings in non-transcribed conferences is problematic, and that any party should be able to request that such a ruling be transcribed. CP, p. 10. In the rare circumstances where this issue arises, the recommendation would appear to be appropriate.

Rule 15

Duke recommends adding a new provision to require that interlocutory appeals be handled, within the legal department, only by the legal director or deputy legal director. Duke, pp. 10-11. AT&T agrees with the sentiment expressed that an interlocutory appeal should not be handled by the Attorney Examiner who issued the ruling being challenged. AT&T believes that, with that limitation, the Commission can appropriately manage its own internal processes.

Several parties address the new 15(D) language that requires a "pre-filing" notice of certain interlocutory appeals. CP, p. 11; Duke, pp. 10-11; FE, pp. 13-14. If the Commission were to adopt the suggestion that e-filing and DIS notification of filed documents be uniformly followed, the issue that this proposed change addresses could be largely mooted. The need for this additional "pre-filing" notice, in that circumstance, must be questioned.

Rule 16

Several parties address various discovery issues. AEP proposes that the Commission limit discovery to those proceedings in which a hearing has been scheduled, or, in the alternative, require that a party obtain approval from the Commission, the legal director, the deputy legal director or an attorney examiner to conduct discovery in those proceedings in which there is no hearing. AEP, pp. 4-5. This is a worthwhile suggestion that should be adopted.

"Ample rights of discovery," provided for in R. C. § 4903.082, does not mean unfettered rights. It should be recognized, however, that hearings are rarely held in telecom cases any longer and that "notice and comment" telecom proceedings are more customary. For example, discovery was appropriate in the notice and comment-style intrastate carrier access reform case, Case No. 10-2387-TP-COI. No hearing has been held in that case, and yet discovery was appropriate and necessary.

The LDCs' four proposals on discovery limitations are good ones that should be adopted. They propose that, upon a party's motion, the parties should be required to meet at one prehearing conference to discuss procedural matters, including limits on discovery. LDCs, p. 15. If the parties agree to limit discovery, the LDCs suggest that the terms should be included in a Commission procedural order. LDCs, p. 15. The LDCs also suggest that if a person's motion to intervene is opposed, any discovery served by such person should be stayed pending resolution of the motion to intervene. LDCs, pp. 15-17. Lastly, the LDCs suggest that it would not be unreasonable to require Staff to serve written discovery through the Attorney General. LDCs, p. 17.

The Customer Parties' suggestion to replace the reference to expert witnesses expected to "testify at the hearing" with a reference to expert witnesses expected to "submit testimony" is also appropriate and should be adopted. CP, p. 11.

Rule 17

In the context of this rule, AEP proposes another reasonable limitation on discovery. It suggests that the rule be modified to prohibit discovery in those proceedings in which no hearing will be held, unless the party seeking discovery demonstrates a need for the discovery and obtains the approval of the Commission, the legal director, the deputy legal director or an attorney examiner. AEP, p. 5. This recommendation should be adopted in order to limit the impact on the parties of discovery that may not serve any valid purpose. However, as noted in the discussion above concerning Rule 16, it should be recognized that hearings are rarely held in telecom cases any longer and that "notice and comment" telecom proceedings are more customary. For example, discovery was appropriate in the notice and comment-style intrastate carrier access reform case, Case No. 10-2387-TP-COI. No hearing has been held in that case, and yet discovery was appropriate and necessary.

Rule 18

AEP suggests that the rule specify that discovery requests and responses can be served by fax and e-mail. AEP, p. 6. This is common practice today and the rule should be amended to reflect it. FE's suggestion that all parties should be required to serve discovery requests and response via e-mail goes a step further, and should be adopted. FE, p. 14.

Rule 19

AT&T agrees with the LDCs' position that the Commission Staff should be considered a party for purposes of this rule. LDCs, p. 18. The Commission should also adopt the LDCs' suggestion that this rule should be amended to make it clear that interrogatories served on a corporation must be verified by someone on behalf of the corporation, and not in an individual capacity. LDCs, pp. 18-19.

Rule 20

The Commission should adopt FE's suggestion that the rule be modified to make it clear that the party responding to a request for the production of documents is required to only serve or make available to the requesting party the responsive documents. FE, pp. 14-15.

Rule 21

The Customer Parties suggest an appropriate change to the rule to reflect the fact that there should be a distinction between party and non-party deponents as recognized in the Rules of Civil Procedure. CP, p. 12.

Four parties commented on the division (B) addition that depositions should generally be completed prior to the commencement of a hearing. CP, p. 12, Duke, p. 11; AEP, pp. 6-7; FE, pp. 15-16. The rule should be strengthened as proposed by the utility parties. It should require a showing of good cause to allow a deposition to be conducted after the commencement of the hearing for good cause shown. AEP, pp. 6-7.

The LDCs raise a valid issue with Rule 21(E) to the extent this rule is being used to circumvent the twenty-day response time provided pursuant to Rule 20(C) by requesting production of documents in conjunction with depositions. LDCs, pp. 19-20. This issue should be addressed to close this apparent loophole.

The clarifications sought concerning Rule 21(N) by various parties are appropriate. CP, p. 12; NSR, p. 2; AEP, p. 7.

Rule 23

Duke points out an inconsistency between this rule and the interlocutory appeal rule, Rule 15. Duke states that this rule provides that, if an aggrieved party does not file an interlocutory appeal, an order to compel discovery "becomes the order of the commission" and that this conflicts with the more appropriate provision of the interlocutory appeal rule that clearly states that a party may choose to brief an issue rather than file an interlocutory appeal. Duke, p. 11. The Commission should reconcile the two rules in the manner suggested by Duke.

Rule 24

The Customer Parties believe that 18 months is a sufficient time frame for the protection of confidential information, and do not support the proposed increase of that time frame to 24 months. CP, p. 13. FE believes that protective orders should not have a designated expiration date, citing Ohio Rule of Civil Procedure 26(C). FE, pp. 16-17. For the reasons set forth in its comments, AT&T urges the Commission to revisit the need to protect trade secrets that are filed with it under seal, consistent with Ohio law, and to remove from its rule any arbitrary time limit on their protection. AT&T, pp. 2 and 7-10.

Duke strongly opposes the Staff's proposal to amend this rule to provide that the Commission may, at any time, reexamine the need for continued confidentiality. Duke, p. 12. AT&T agrees that the "reexamination" language is open-ended and suggests that a protective order, once granted, cannot be relied upon. Parties should be able to rely on a protective order, once it is granted.

The Customer Parties' suggestion for reorganizing this rule is a good one. CP, pp. 13-16. The two types of protective orders (one relative to limiting discovery and one relative to the filing of trade secret information) are separate and distinct and the rule would likely be clearer if they were addressed separately, even in separate rules, as the Customer Parties suggest.

Rule 25

The utility commentors' suggestions for improving the subpoena rule are reasonable and should be adopted. AEP, pp. 7-8; LDCs, pp. 20-22; Duke, p. 12. But the Customer Parties' criticism of the proposed amendments is not valid and should not be recognized. CP, pp. 17-18. Contrary to their arguments, the time limits and service requirements proposed are reasonable and will not prejudice any party. They are consistent and uniform. They mark a change from the current practice but are not, for that reason, unreasonable.

Rule 26

The LDCs believe that prehearing conferences should be mandatory. LDCs, pp. 23-24. The Customer Parties propose changes that recognize that parties engaged in a settlement conference may need input from persons other than those in attendance at the settlement

conference in order to respond to settlement proposals. CP, p. 18. Both suggestions are good ones and should be adopted.

Rule 27

AT&T agrees with the commentators that suggest retaining unsworn testimony as a component of local public hearings. FE, pp. 17-19; LDCs, pp. 24-25; CP, p. 19. Unsworn testimony is in the nature of testimony at a legislative hearing or a city council meeting. The Commission can, in some cases, glean valuable insight from such testimony in its "quasi-legislative" role, as FE and the LDCs note. Local public hearings should not be converted into quasi-judicial proceedings with all the trappings of an evidentiary hearing at the Commission. Unsworn testimony should continue to be permitted at the portion or session of the hearing designated for the taking of public testimony.

Rule 28

The Customer Parties reiterate objections by OCC in the previous rule review concerning the treatment of Staff Reports. CP, pp. 19-21. They suggest that by accepting a Staff Report as evidence, and then allowing only comments to be filed concerning that report, that due process is somehow compromised. They cite no authority for this proposition. As part of managing its own processes, the Commission can follow this practice and still comply with its statutory and constitutional obligations. It should be free to do so.

Rule 29

FE suggests adding a provision that gives the presiding hearing officer the discretion to require parties to pre-file lay testimony, either *sua sponte* or upon motion of a party.

FE, pp. 19-20. The presiding officer would exercise such discretion, when in the judgment of the presiding hearing officer, the pre-filing of lay testimony would aid the Commission in its decision making, improve the quality of the record, make for more efficient proceedings at the Commission, or for other similar reasons. Id. This is a good suggestion. The practice has been followed on occasion where all testimony has been prefiled. It should be within the Attorney Examiner's discretion to require the pre-filing of all testimony in appropriate circumstances.

AT&T would not object to the clarification requested by Norfolk Southern Railway Company. NSR, pp. 2-4. It is customary that prefiled testimony is simply testimony that is written out in question and answer format. It facilitates the development of the record and, when prefiled, gives opposing parties a better opportunity to prepare and conduct cross-examination in cases where a hearing is held or to prepare comments and reply comments in a "notice and comment" proceeding.

AT&T agrees with the LDCs' position that the Staff should not be exempt from pre-filing testimony prior to a hearing. LDCs, p. 25.

Rule 30

The proposed requirement to submit testimony in support of all stipulations generated several responses. Duke, p. 12; DPL, pp. 1-2; OPAE, pp. 6-7; NSR, p. 4; FE, p. 20. The rule as proposed is probably too broad. As AT&T stated in its comments, a requirement that parties "file or provide" testimony in support of a full or partial stipulation is not necessary in all cases. The AT&T Entities suggested that the requirement be reversed: if ordered, the parties must file or provide such testimony. Much depends on the nature of the stipulation. But it does

not seem wise to require testimony in all such cases unless the necessity is established and it is otherwise ordered. It should only be required when it is ordered. This is within the discretion of the Attorney Examiner and perhaps need not even be addressed in the rule.

Rule 33

As is the case with requiring testimony to support a stipulation in all cases, the Customer Parties' suggestion that Attorney Examiner's Reports should be reinstated is simply overkill. CP, pp. 21-22. The Commission has the authority to request the preparation and filing of an Attorney Examiner's report, and it can do so when it is appropriate. To adopt the Customer Parties' suggestion would add unnecessary delay to all proceedings.

4901:1-1-01 Consumer Information

The Customer Parties suggest that utilities should also be required to provide customers with copies of their contracts and the rules and regulations applicable to non-tariffed but still-regulated services. CP, p. 22. The Customer Parties do not explain the need for this change. Telephone service customers can obtain this information by checking their telephone company's website or by calling their customer service representatives. Especially as to detariffed services, the Commission should maintain a light regulatory touch; the Customer Parties' suggestion would take the Commission in the wrong direction.

4901-9-01 Complaint Proceedings

FE suggests that the rule be amended 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. FE, pp. 20-22. This is a good suggestion that should be adopted. It is sometimes the

Certificate of Service

I hereby certify that a copy of the foregoing has been served this 2nd day of May, 2011 by e-mail on the parties shown below.

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Summary: Reply comments electronically filed by Jon F Kelly on behalf of The AT&T Entities