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 COLUMBIA GAS OF OHIO, INC., THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO, AND VECTREN ENERGY DELIVERY OF OHIO, INC.

Pursuant to the Commission's March 2, 2011 Entry, Columbia Gas of Ohio, Inc., The East Ohio Gas Company d/b/a Dominion East Ohio, and Vectren Energy Delivery of Ohio, Inc. (collectively, the "Large Gas LDCs") submit these Reply Comments.

I. INTRODUCTION

Various parties have filed Initial Comments proposing certain changes to Chapter 4901-1, Ohio Administrative Code that the Large Gas LDCs expressly support. Some proposed changes to the procedural rules, however, would make Commission proceedings less efficient, or establish practices that conflict with Ohio law. Ohio Partners for Affordable Energy ("OPAE"), for example, propose a rule change to allow unlicensed attorneys and laypersons to represent parties at the Commission. The Commission is without authority to enact rules that conflict with the Supreme Court Rules for the Government of the Bar and Ohio law. The Office of the Ohio Consumers' Counsel, along with Advocates for Basic Legal Equality, Inc., Citizen Power, and The Ohio Poverty Law Center, (hereinafter collectively referred to as the "Customer Parties") propose to water down the existing rule requiring parties to obtain settlement authority before attending settlement conferences. Their rule would encourage parties to obtain settlement authority "to the extent practicable," but no explanation is provided as to why it is not practical, as a matter

of course, to obtain settlement authority prior to a settlement conference. The Customer Parties' proposal to require thirty days notice of all public hearings is similarly unnecessary and misguided. No evidence has been provided that existing notice requirements are in any way inadequate.

The Large Gas LDCs respectfully request the Commission to adopt or reject changes to Chapter 4901-1 and 4901:1 consistent with these Reply Comments.

II. REPLY COMMENTS

A. Chapter 4901-1

Rule 4901-1-02 Filings of Pleadings and Other Documents

4901-1-02(A)(5)

The Customer Parties oppose Staff's proposed rule to allow the Commission to redact any material prior to posting it to the docketing information system ("DIS") if the material is "confidential personal information, a trade secret, or inappropriate for posting to its website." (Customer Parties Comments at 3.) Similar to the Large Gas LDCs, the Customer Parties raise the question of notice to the filer when the Commission determines redaction is necessary. *Id.* The Customer Parties believe the Commission should not be allowed to sua sponte redact confidential information because, it claims, such redaction is only appropriate pursuant to a protective order issued under Ohio Adm. Code 4901-1-02(B)(2). (Customer Parties Comments at 2.) The Customer Parties also contend that Staff's proposal lacks a standard to determine what is "inappropriate for posting on the Commission's website." *Id.*

The Customer Parties' recommendation should be rejected. The Commission is bound by the public records law when posting information to DIS; however, it should be allowed to exercise its discretion to determine whether certain material is inappropriate for public posting. For

example, there have been consumer complaints which have contained customers' account numbers, libelous statements or profanities.[1] It is both reasonable and lawful for the Commission to exercise its discretion to determine when certain information should be redacted from public documents, and to notify the filing party when its exercises this discretion.

Rule 4901-1-07 Computation of Time

4901-1-07(B) & (C)

Several commenters oppose the proposal to eliminate the three extra days currently allotted under Rule 4901-1-07(B) to respond to filings served by mail. As noted by the Customer Parties, some parties continue to rely on mail service to serve pleadings and motions. (Customer Parties Comments at 5.) In addition, documents do not always post the same day to DIS. (Customer Parties Comments at 6.) The Customer Parties also note that the three-day rule is consistent with Ohio Civ. R. 6(E). *Id.* Similarly, FirstEnergy notes that the Federal Rules of Civil Procedure 6(d) contain a three-day grace period, in spite of requiring parties to file and serve through the Electronic Case Filing ("ECF") System. (FirstEnergy Comments at 10.) The Large Gas LDCs agree with these parties' comments.

The proposal to eliminate the extra day to respond to documents served electronically after 5:30 p.m. should also be rejected. Duke points out that without the additional day, there can be a problem "in a proceeding with short response periods." (Duke Comments at 8.) FirstEnergy also agreed that a party may be penalized by shortening its response time by receiving a document after business hours. (FirstEnergy Comments at 11.) The Customer Parties also point out that since most offices typically close at 5:30, a party will not receive a document served after

[1] *See*, *e.g.*, *Jon A. Olivito v. Columbia Gas of Ohio*, Case No. 09-1841-GA-CSS, Complaint (November 20, 2009) (racists comments about Jewish persons)); *Jon A. Olivito v. Columbia Gas of Ohio*, Case No. 02-2681-GA-CSS, Letter to Withdraw Complaint (December 30, 2002) (referring to company employee and attorney as "bastards"); *Sarunas Abraitis v. The East Ohio Gas Company d/b/a Dominion East Ohio*, Case No. 10-650-GA-CSS, Complaint (March 14, 2010) (various profanities and outrageous statements).

5:30 until the following business day. (Customer Parties Comments at 6-7.) The Large Gas LDCs agree with these comments. It should also be noted that no comments have been filed supporting the changes to Rules 4901-1-07(B) and (C).

Rule 4901-1-08 Practice Before the Commission

4901-1-08(A)

OPAE requests that the Commission amend this rule to allow parties to be "represented by persons other than attorneys and/or by out-of-state attorneys." (OPAE Comments at 5.) Specifically, OPAE recommends that the Commission allow a non-Ohio licensed attorney or lay person to represent an intervening organization or corporation "as the party sees fit." (OPAE Comments at 6.) At a minimum, OPAE requests that the Commission allow a non-Ohio licensed attorney or lay person to "file pleadings and participate in prehearing conferences, settlement conferences, or other meetings related to the case." *Id.*

The Commission does not have the authority to change its rules in the manner that OPAE requests. Appearing at the Commission constitutes the practice of law, and the practice of law is regulated by the General Assembly and Supreme Court of Ohio. The Ohio Revised Code provides:

> No person shall be permitted to practice as an attorney or counselor at law, or to commence, conduct, or defend any action or proceeding in which the person is not a party concerned, either by using or subscribing the person's own name, or the name of another person, unless the person has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules. Except as provided in section 4705.09 of the Revised Code or in rules adopted by the supreme court, admission to the bar shall entitle the person to practice before any court or *administrative tribunal* without further qualification or license.

R.C. 4705.01 (emphasis added). R.C. 4705.07(A)(3) also prohibits a person "not licensed to practice law in this state" to "commit any act that is prohibited by the supreme court as being the unauthorized practice of law." The Supreme Court's Governing Bar Rules define the unautho-

rized practice of law as "[t]he rendering of legal services for another by any person not admitted to practice in Ohio under Rule I of the Supreme Court Rules for the Government of the Bar…." Gov. Bar R. VII, §2(A).

The Ohio Supreme Court has held that the practice of law "includes conducting cases in court, preparing and filing legal pleadings and other papers, appearing in court cases, and managing actions and proceedings on behalf of clients before judges, whether before courts or *administrative agencies*." *Cleveland Bar Assn. v. Coats*, 98 Ohio St. 3d 413, 2003 Ohio 1496, 786 N.E.2d 449, ¶3 (per curiam) (internal citations omitted) (emphasis added) (holding that a paralegal assisting and appearing as a representative for others front of the Ohio Bureau of Employment Services engaged in the unauthorized practice of law). The Court specifically held that engaging in this activity before an administrative agency constitutes the practice of law. *Columbus Bar Ass'n v. Smith*, 100 Ohio St. 3d 278, 2003 Ohio 5751, 798 N.E.2d 592, ¶ 4 (per curiam) (an attorney engaged in the unauthorized practice of law when representing a client in front of the Columbus Vehicle for Hire Board with a suspended license). Thus, any practice before the Commission, whether formal or "informal," constitutes the practice of law.

The Governing Rules set forth the pro hac vice admission before an administrative tribunal, including the Commission. Under these rules, "A tribunal of this state may grant permission to appear pro hac vice to an out-of-state attorney who is admitted to practice in the highest court of a state, commonwealth, territory or possession of the United States…." Gov. Bar R. XII, §2(A). A tribunal is defined as a "court, legislative body, *administrative agency*, or other body acting in an adjudicative capacity," and "[a] legislative body, *administrative agency*, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by the party or parties, will render a binding legal judgment directly affecting a

party's interests in a particular matter." Gov. Bar R. XII, §1(A). There are new limitations on repeated pro hac vice admissions. An attorney "may participate pro hac vice in no more than three proceedings under this rule in the same calendar year the application is filed." Gov. Bar R. XII, §2(A)(5).

OPAE fails to present any statute or case to support its recommendation. Instead, OPAE advocates that the Commission allow lay persons and out-of-state attorneys to practice before the Commission because "it is not necessary that an attorney represent a party," since "[a] case may simply involve a policy or interest of an organization, including a corporation, and a knowledgeable member or employee of the organization, including corporate attorneys, should be permitted to represent the organization." (OPAE Comments at 5-6.) OPAE fails to acknowledge that an organization "simply" representing a policy or interest *engages* in the practice of law by preparing pleadings or motions, attending settlement conferences, conducting discovery, and participating in evidentiary hearings to advocate that policy or interest. In addition, to say that allowing lay persons and non-Ohio licensed attorneys to represent parties would "significantly contribute to the full development and equitable resolution of the factual issues" does not help OPAE's case. (OPAE Comments at 6; Ohio Adm. Code 4901-1-11(B)(4).) By definition, developing factual issues constitutes the practice of law.

Under Staff's proposed rules, an out-of-state attorney must satisfy the pro hac vice rules contained in Gov. Bar R. XII, §2(A)(6), and may not attend settlement conferences unless the attorney moves for pro hac vice admission. See Proposed Rules 4901-1-08(B), 4901-1-08(D). Staff's recommendation is consistent with the regulation of the practice of law and should be adopted.

Rule 4901-1-16 General Provisions and Scope of Discovery
Rule 4901-1-17 Time Periods For Discovery

4901-1-16(B) & 4901-1-17(A)

Columbus Southern Power Company and Ohio Power Company (collectively, "AEP") recommend that the Commission only allow discovery in cases where a hearing has been scheduled. (AEP Comments at 4, 5.) Absent scheduling of a hearing, a party demonstrating a need for discovery could seek leave to do so under AEP's proposal. (AEP Comments at 4.) AEP states:

> Requiring that a party demonstrate his or her need for obtaining discovery in these situations would impose no greater burden on a party seeking to propound legitimate discovery requests, reduce Commission involvement in discovery disputes and at the same time adequately facilitate preparation for participation in the fundamental aspect of an administrative proceeding—the hearing.

Id.

In Initial Comments, the Large Gas LDCs proposed a change to Rule 4901-1-16(H) that would require a stay of discovery in cases where a motion to intervene is contested. The Large Gas LDCs support AEP's proposal as an alternative. Indeed, limiting discovery to cases in which a hearing will be held is consistent with existing rules. Rule 4901-1-16(A) states that the discovery rules are to "encourage the prompt and expeditious use of *prehearing* discovery." Ohio Adm. Code 4901-1-16(A) (emphasis added). Rule 4901-1-16(B) state that parties may not object to information sought because it "would be inadmissible *at the hearing*…." Ohio Adm. Code 4901-1-16(B) (emphasis added). Rule 4901-1-16(G) limits parties to not seek, through discovery requests, any information "which is available in prefiled testimony, *prehearing* data submissions, or other documents which that party has filed…." Ohio Adm. Code 4901-1-16(G) (emphasis added). Rule 4901-1-17(A) states that discovery must be completed "prior to the commencement of *the hearing*." Ohio Adm. Code 4901-1-17(A) (emphasis added).

If the Commission does not adopt AEP's proposal, it should adopt the Large Gas LDCs' recommendation. It is not at all unreasonable to stay discovery in those relatively-rare instances when a motion to intervene is contested. Indeed, adopting the Large Gas LDCs' recommendation would be consistent with established Commission practice. For example, in the Commission's review of the natural gas companies' uncollectible expense rider, the Commission denied intervention and granted a motion to stay discovery because no decision had been made about what further proceedings (if any) would be held in the proceeding.[2] Similarly, in Case No. 05-732-EL-MER, the Commission stayed discovery in the Duke Energy Holding Corp. and Cinergy Corp. change in control proceeding until the Commission determined "the scope and nature of its review."[3] The Commission issued a second entry, directing its staff to "examine the application and file comments and to make appropriate recommendations."[4] OCC filed an application for rehearing, arguing that the Commission's second entry failed to define the nature and scope of the Commission's review and that the stay on discovery should be lifted.[5] The Commission responded that R.C. 4903.082 "states that ample discovery must be granted to intervenors," and because OCC's motion to intervene had not been granted, "it is not necessary to allow discovery to commence."[6]

AEP's recommendation is reasonable and should be adopted. If the Commission does not adopt AEP's proposal, it should adopt the change proposed by the Large Gas LDCs.

[2] *Id.*, Entry (November 3, 2010) at Finding 12.
[3] *In the Matter of the Joint Application of Cinergy Corp., on behalf of the Cincinnati Gas & Electric Company, and Duke Energy Holding Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company*, Case No. 05-732-EL-MER, et al., Entry on Rehearing (December 7, 2005) at Finding 3.
[4] *Id.* at Finding 5.
[5] *Id.* at Finding 7.
[6] *Id.* at Finding 13.

Rule 4901-1-24 Motions for Protective Orders

4901-1-24(F)

With respect to protective orders issued by the Commission, Duke opposes Staff's proposal to allow the Commission to reexamine "the need for protection issue de novo during the twenty-four month period." (Duke Comments at 12.) Duke argues that "confidential treatment of sensitive business information is an important matter to [regulated] companies…" *Id.* Duke concludes that "[i]t is entirely unreasonable to provide that, for apparently no reason and at apparently any time, the Commission may reconsider and terminate a protective order that is in place." *Id.*

The Large Gas LDCs support Duke's recommendation. Granting protection to confidential material for twenty-four months provides certainty to all parties. Protected material becomes public after two years unless the party that sought confidential treatment affirmatively moves for an extension to obtain continued confidential treatment. Allowing the Commission to sua sponte revoke confidential treatment would promote uncertainty. A protective order that may be revoked at any time would provide cold comfort that confidential material will be protected on an ongoing basis. The Commission should adopt Duke's proposal and reject Staff's.

Rule 4901-1-26 Prehearing Conferences

4901-1-26(F)

The existing rule requires party representatives attending settlement conferences to have settlement authority. This makes sense. There is little point in talking settlement unless the parties have authority to settle. But the Customer Parties propose to water down this rule by requiring parties to have settlement authority "to the extent practicable." (Customer Parties Comments at 18.) The Customer Parties' proposal should be rejected.

Although it claims that "[t]here are legitimate reasons why persons attending may not have the authority to settle particular issues," the Customer Parties fail to identify any such reasons. (Customer Parties Comments at 18.) Settlement conferences are not surprise parties. They are typically scheduled weeks, if not months, in advance. The Customer Parties do not explain what it is impracticable about devising a settlement strategy and obtaining settlement authority in preparation for a settlement conference. In the Large Gas LDCs' experience, the Consumers' Counsel must personally approve all settlements on behalf of OCC. This does not prevent the Consumers' Counsel from delegating at least *some* settlement authority *prior* to a settlement conference. Unfortunately, OCC frequently attends settlement conferences with *no* settlement authority. "Settlement conferences" with OCC are usually an exercise of conveying an offer to OCC and waiting days or weeks for a counter-offer. This is very frustrating for counterparties of OCC that travel several hours to Columbus for settlement meetings.

Settlement conferences should produce settlements -- not future discussions that may occur after OCC representatives obtain settlement authority. In any event, given that there is no history of the Commission ever actually enforcing its rule that parties must have settlement authority, the Customer Parties' proposal is unnecessary.

Rule 4901-1-27 Hearings

4901-1-27(C)

The Customer Parties want the Commission to require "at least thirty days notice of public hearings…whenever practicable." (Customer Parties Comments at 19.) The Customer Parties, however, neither provide rationale for this rule nor identify any reasons why the Commission's current practice is ineffective. The Large Gas LDCs oppose the Customer Parties' recommendation. Requiring thirty days notice of all public hearings would unnecessarily delay the regulatory

process and provide no meaningful benefit to the public. The robust attendance at the last round of rate case public meetings certainly does not suggest that the public did not have sufficient notice of these meetings. Any additional notice provisions are contrary to Governor Kasich's January 10, 2011 Executive Order 2011-01K to agencies to "[a]mend or rescind rules that are unnecessary, ineffective…and needlessly burdensome." Exec. Order 2011-01K(2)(i). The Commission should reject the Customer Parties' proposal.

B. Chapter 4901:1

Rule 4901:1-1-01 Consumer Information

The Customer Parties propose to require all utilities to provide to customers "copies of their contracts and the rules and regulations applicable to their non-tariffed but still-regulated [sic] services with copies of their contracts, [sic] with rules and regulations applicable." (Customer Parties Comments at 22.) The Large Gas LDCs are not sure what the Customer Parties seek to accomplish with this change, or what is meant by a "non-tariffed but still-regulated service." The Large Gas LDCs have no problem giving a customer a copy of that particular customer's contract or applicable tariff. To the extent the Customer Parties are suggesting that a utility must provide any customer a copy of any contract the utility has with any other customer, the Large Gas LDCs obviously object to this. Since it is not really clear what the Customer Parties intend, this proposal should be rejected.

III. CONCLUSION

For the reasons discussed above, the Commission should revise the rule language as commented or proposed as reflected in these Reply Comments.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments was served by electronic mail or the PUCO's e-filing system will electronically serve notice of the filing of this document to persons who have electronically subscribed to the case to the following persons on this 2nd day of May, 2011:

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Summary: Reply Comments electronically filed by Ms. Melissa L Thompson on behalf of Columbia Gas of Ohio, Inc. and The East Ohio Gas Company d/b/a Dominion East Ohio and Vectren Energy Delivery of Ohio, Inc.