

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Adoption of Ohio Adm. Code Chapter 4901:1-2 Concerning Rules Involving the Underground Technical Committee and the Protection of Underground Utility Facilities.)))))	Case No. 15-0282-AU-ORD
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**COMMENTS OF
THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO**

I. INTRODUCTION

In accordance with the Commission’s May 6, 2015 Entry in this case, The East Ohio Gas Company d/b/a Dominion East Ohio (DEO) files its initial comments to Staff’s proposed rules of Ohio Adm. Code Chapter 4901:1-2, concerning the Underground Technical Committee (UTC).

II. COMMENTS

Before addressing the specific language of the proposed rules, DEO will address a few broader comments regarding the timing and scope of this proceeding.

A. General Comments

1. The Commission must ensure that the rulemaking process involves consultation with the UTC.

The statute authorizing these rules requires the Commission to adopt them in “consultation” with the UTC. R.C. 4913.45(A). At this time, the UTC has not yet been constituted, and this raises questions concerning whether the Commission is in compliance with the statutory “consultation” requirement. In turn, this could raise various questions about the validity and enforceability of the rules at a later time. DEO also believes that it could prove counterproductive to establish, as the proposed rules do, such detailed procedures and responsibilities without consulting the persons who will actually carry out these requirements. The rules impose numerous obligations concerning meetings, elections, and other matters. All of

these topics will have significant practical impacts, and these issues should not be set in stone until the UTC has a chance to weigh in.

The Commission “can exercise only the authority conferred upon it by the General Assembly.” *In re Appl. of Ohio Power Co.*, 140 Ohio St. 3d 509, 2014-Ohio-4271, ¶ 42. Unless and until it consults with the UTC, the Commission lacks authority to adopt these rules.

Accordingly, DEO recommends that the Commission build into the rulemaking process an opportunity for public review and comment by the UTC prior to the adoption of the rules. This opportunity should be given *before* final rules are proposed and then subject to the rehearing process. After the UTC has been consulted on the rules, DEO and other stakeholders should be granted another opportunity to comment on the rules.

All of DEO’s following comments are subject to the understanding that the UTC will be consulted prior to the adoption of the rules.

2. The rules fail to address several topics that will be critical to the success of the statutory enforcement regime.

The rules fail to address a few topics that will be critical to implementing Chapter 4913. Most importantly, the rules do not clearly explain who will be responsible for providing the data required to actually apply the rules.

The law specifically requires the rules to address “tracking compliance of persons on whom fines or penalties have been imposed.” R.C. 4913.45(A)(2). Several other statutes instruct the UTC, Commission, or Staff, as applicable, to consider certain factors in recommending or imposing penalties. For example, R.C. 4913.151 and R.C. 4913.17 establish different maximum penalties depending on how many violations the person responsible has committed. Likewise, R.C. 4913.20 requires consideration of the responsible party’s operational history, organizational size, financial condition, and compliance history.

The UTC has first-line responsibility to determine fines and penalties. But how will the UTC comply with its obligation to consider the detailed history of each respondent appearing before it? The rules do not specifically explain who will gather and maintain this data, or provide any specific instructions to that end. These are critical points to be addressed, because the UTC does not consist of full-time members, meets only periodically, lacks its own staff, and thus will not be able to efficiently determine such information on its own. As DEO also discusses below (*see supra* § II.F), this information should also be clearly summarized and presented in reports of inquiry.

The rules should clearly identify who is responsible for maintaining such records and information so there is no regulatory gap in applying the enforcement statutes. Whether the coordinator, the docketing division, or some other person or entity should be responsible for gathering and maintaining data is a matter for the Commission to consider, but this topic must be addressed.

B. Ohio Adm. Code 4901:1-2-01

Paragraph (D): The definition of “Coordinator” states that it “shall be a full-time employee of the commission.” It is ambiguous whether this definition defines the coordinator’s duties or qualifications. In other words, does “full-time employee” mean that the coordinator position will be a full-time commitment? Or does it mean that the coordinator simply must be a full-time employee of the Commission, but not that the coordinator will be devoted full-time to his or her duties?

DEO recommends that the coordinator should be devoted full-time to assisting the UTC and not be subject to competing, non-UTC-related duties.

Paragraph (G): There is an unmatched quotation mark at the end of the definition of “director,” which should be deleted.

Paragraph (H): In the definition of “Filing,” facsimile is misspelled “facsimilie” and should be corrected.

Paragraph (I): In the definition of “Hearing,” DEO recommends adding the word “conducted” after either the word “proceedings” or “commission.”

Paragraph (J): DEO recommends two modifications of the definition of the term “Participants.” First, DEO recommends replacing the phrase “the person that requested the inquiry” with “the aggrieved person.” The statute only permits an aggrieved person to request an inquiry. *See* R.C. 4913.05(A). The definition should match this statutory requirement and leave no doubt whether any other person is entitled to request an inquiry.

Second, DEO recommends adding the word “alleged” before the phrase “compliance failure.” Not every person subject to a request for inquiry will be responsible for a compliance failure, and no person will be determined to be responsible for such failure until later in the enforcement process. Therefore, the definition reaches too narrowly and should be written to encompass those alleged subject to a request for inquiry. This is also consistent with the language of the statute, which generally describes “the alleged compliance failure,” *see, e.g.*, R.C. 4913.01(A) & .09(B), and “the person responsible for the alleged compliance failure,” *see, e.g.*, R.C. 4913.05(A)–(B).

The rule should read as follows:

“Participants” means ~~the person that requested the inquiry~~ the aggrieved person and the person responsible for the alleged compliance failure [*or* respondent] and any persons permitted to intervene after commencement of a proceeding.

Paragraph (L): For the definition of “Respondent,” as discussed above, DEO again recommends adding the word “alleged” before the phrase “compliance failure.”

DEO would also note that the term “respondent” does not appear elsewhere in the rules. A number of rules, however, use the phrase “person responsible for the compliance failure.” *See, e.g.,* Ohio Adm. Code 4901:1-2-01(J), 4901:1-2-11(B), 4901:1-2-13(A), 4901:1-2-14(A). DEO recommends that the Commission replace these phrases with the term “respondent.” If not, it should eliminate the definition.

Paragraph (N): DEO proposes deleting the definition of “Underground technical committee” and adding in an appropriate location the following definition:

“Committee” means the underground technical committee, the body created pursuant to section 3781.34 of the Revised Code that shall carry out the duties outlined by section 3781.36 of the Revised Code.

DEO also proposes that all references in the rules to “underground technical committee” be revised to “committee.” This usage would be similar to the definition of “Commission,” as shorthand for public utilities commission, and is proposed solely for the purpose of brevity and readability.

C. Ohio Adm. Code 4901:1-2-04

This rule pertains to matters internal to the UTC, and DEO would again emphasize the importance of consulting the UTC before establishing these requirements.

Paragraph (A): DEO has two comments regarding this paragraph. First, the last sentence states, “The selection of the chairperson and secretary shall be by the persons receiving the most votes for those two positions.” The meaning of this sentence is unclear. As written, it is not clear whether the two persons receiving the most votes (1) thereby *become* the chairperson and secretary or (2) are given *the right to select* the chairperson and secretary. If election is by the latter method (*i.e.,* the winning members in turn select the officers), the Commission should also consider clarifying whether the members select the position for which he or she received the most votes, whether these two members must reach consensus, and how a deadlock would be

resolved. The Commission should either clarify or rephrase the rules to account for these issues—and again, this decision should be done in consultation with the UTC.

Second, this paragraph does not address how many members are required to vote to select the chairperson and secretary. Other rules (*see* paragraph (B)) specify the minimum number necessary to achieve a vote. DEO recommends that the rule require an absolute majority of the UTC (that is, at least 9 votes) to elect an officer.

Paragraph (B): This paragraph permits the chairperson or secretary to “be removed from office by a simple majority vote of a quorum at any regularly scheduled or special meeting.” DEO is concerned that this rule creates the possibility of manipulation. A special meeting requires as little as 24-hours-and-1-minute notice to be valid, and a majority of a quorum is only five members. Thus, depending on the circumstances, the proposed rule could permit a small group of UTC members to oust a chairperson or secretary. DEO recommends that the Commission should consider allowing officers to be removed only at regularly scheduled meeting, or only permitting such removal at a special meeting upon a showing that exigent circumstances require it.

For similar reasons, DEO also recommends that the rule be revised to require an absolute majority of the UTC (that is, 9 votes) to remove an officer, instead of a majority of a quorum.

Paragraph (D): This paragraph requires the secretary to “record the minutes of the meetings.” DEO recommends that this rule provide the secretary with discretion either to record the minutes or to designate another person (*e.g.*, the coordinator) to record the minutes subject to the secretary’s review and approval. Requiring the secretary to take minutes may impose an unnecessary burden on a member who could otherwise contribute more fully to the decision-making process.

Paragraph (F): This rule addresses the scheduling of meetings if there is neither a chairperson nor secretary. As drafted, it is grammatically unclear which of the coordinator's duties (to schedule a meeting, to cause notice to be sent, or both) are contingent on receipt of written request by two members. DEO believes both duties are meant to be subject to this contingency, and it proposes the following revision to clarify this:

If the underground technical committee is without a chairperson and secretary, the coordinator of the committee shall, upon receipt of a written request signed by at least two members of the underground technical committee, schedule a meeting of the underground technical committee and cause notice of the meeting to be sent to members of the committee ~~upon receipt of a written request signed by at least two members of the underground technical committee.~~

D. Ohio Adm. Code 4901:1-2-05

Paragraph (A): DEO recommends revising the term "opened" to "open and accessible" to match the statutory language of R.C. 3781.342(B) and avoid any question whether a different meaning is intended. DEO also recommends eliminating the reference to the official action, to ensure consistency with R.C. 121.22(C), which states, "All meetings of any public body are declared to be public meetings open to the public at all times." The rule, as revised should read as follows:

All meetings of the underground technical committee ~~at which official action is taken and deliberation upon official business is conducted~~ shall be opened open and accessible to the public. * * *

Paragraph (D): Under R.C. 121.22(G), executive sessions may only be held at regular or special meetings. As drafted, the rule could be construed to permit the holding of executive session at an emergency meeting. DEO recommends the following revision to adhere to the statutory language:

* * * Such executive session may be held only at a regular or special meeting for which notice has been given in accordance with rule 4901:1-2-08 of the Administrative Code * * *.

E. Ohio Adm. Code 4901:1-2-08

Paragraph (A): As drafted, this paragraph states that a “person may determine the time, place, and purpose of all regularly scheduled, special, and emergency meetings” by writing to the Commission, calling it, or checking its website. It is not clear to DEO whether this determination is retrospective or prospective, that is, to learn about meetings that have already been, or are yet to be, conducted. The Commission should consider clarifying this issue. If the rule pertains to future meetings, it seems unlikely or impossible that a person could learn of many special or emergency meetings via the methods listed by the rule.

Paragraph (F): DEO recommends revising this paragraph to reflect the requirement in R.C. 121.22(F) that when emergency meetings are scheduled, “immediate” notice is given to the members of the news media who have requested notification. *See* R.C. 121.22(F) (“In the event of an emergency, the member or members calling the meeting shall notify the news media that have requested notification immediately of the time, place, and purpose of the meeting.”). As drafted, it is unclear how quickly notice of an emergency meeting must be given after it is scheduled.

F. Ohio Adm. Code 4901:1-2-11

Paragraph (A): In the first sentence, DEO recommends replacing the phrase “seek an inquiry” with the phrase “request an inquiry.” The statute uses the latter formulation. Although DEO recognizes that these phrases are synonymous, the language of the rule should match the statutory language to avoid any possible implication that different meanings are intended.

Paragraphs (D) & (E): These sections address reports of inquiry. DEO has two comments to these sections.

First, DEO recommends that these rule provisions specifically require that the report of inquiry provide the UTC with the information that is, by law, to be considered in imposing fines

or penalties. This would include information on past violations under R.C. 4913.151 and R.C. 4913.17 and the various factors required for consideration under R.C. 4913.20 (such as operational history, organizational size, financial condition, and compliance history). This information must be considered in making enforcement determinations, and it should be provided in the report of inquiry. If the Staff does not provide this information, it is not clear whether or how the UTC will be able to carry out its statutory duty to consider it. And if the Staff is not to provide this information, then the Commission (either through these rules or some other mechanism) should clarify who will provide it for the UTC's review.

Second, given the potential that the UTC will be reviewing a great number of reports of inquiry, DEO recommends that the rules require that each report contain a concise executive summary stating whether staff recommends that a compliance failure occurred, what standard was violated, and (if not apparent by the standard in question) a brief description of the facts constituting the violation. This will ensure that the reports of inquiry serve their intended purpose and that the UTC will be able to efficiently perform its duties.

Paragraph (E): Given that the rules create a defined term, "Report of inquiry," DEO recommends using the term consistently throughout the rules. For example, in Ohio Adm. Code 4901:1-2-12(E), the rule says "report of each inquiry" and "inquiry report." *See also* Ohio Adm. Code 4901:1-2-10(B)(1) ("inquiry report"). To avoid any possible ambiguity, DEO recommends that the rules be revised so that the defined term be used.

Paragraph (F): DEO proposes the following revision for purposes of clarity:

The underground technical committee shall review every report of inquiry submitted to it by the staff and consider making a recommendation ~~that imposing~~ a fine, a penalty, or a combination of fine and penalty ~~be imposed~~, or that no enforcement action be taken pursuant to sections 4913.15, 4913.16, 4913.17, or 4913.19 of the Revised Code.

Paragraph (G): This paragraph covers the issuance of subpoenas. To ensure that this rule does not expand the Staff’s investigation authority beyond the statutory limit—namely, “whether there was a compliance failure,” R.C. 4913.09(B)—DEO recommends adding the following sentence to the end of the paragraph: “Any subpoena issued under this section shall be limited to the determination of facts regarding the specific alleged compliance failure under investigation.”

G. Ohio Adm. Code 4901:1-2-13

Paragraph (A): This section refers to a “completed report of inquiry,” the receipt of which triggers Staff’s duty to notify the aggrieved person and the respondent. DEO believes that what is meant by a “completed report of inquiry” is the UTC’s determination whether or not to impose a fine or penalty. But the term itself is vague and not defined by the rules. DEO recommends one of two solutions: either revise the phrase as shown below, or adopt a new defined term, “Completed report of inquiry,” to the same effect. DEO also recommends replacing the phrase “person that requested the inquiry” with the statutory term “aggrieved person,” and replacing the phrase “person responsible for the compliance failure” with the defined term “respondent.”

~~Within ten business days of receiving a completed report of inquiry from the committee either a recommendation to impose a fine or penalty or a determination that no enforcement action should be taken, the staff will serve upon the person that requested the inquiry aggrieved person and the person responsible for the compliance failure respondent a letter notifying the participants of any fine or penalty or of a no-enforcement determination.~~

Paragraph (B): This section suggests that the director of the service monitoring and enforcement division possesses authority to impose fines under R.C. 4913.151. The rules should clarify that the director only has authority to collect fines if duly imposed under the statute. As written, the rule seems to create a free-standing authority to “impose any fine or penalty,” which would be contrary to the statute. DEO recommends that this section be revised as follows:

The director of the service monitoring and enforcement department or the director's designee has the authority to collect ~~impose~~ any fine or penalty imposed by the commission under Chapter 4913 of the Revised Code ~~set forth in section 4913.151 of the Revised Code.~~

H. Ohio Adm. Code 4901:1-2-15

Paragraph (A): This paragraph specifies that the deadline for an application for reconsideration expires “thirty days after *receiving* notice.” Although DEO recognizes that the statute provides that receipt of notice is the event triggering the reconsideration deadline, this is not an ideal trigger. The date of receipt is generally unknown except to the recipient, and could fall well after the date of decision. DEO recommends that the rules (likely section -13) should provide that notices will be sent with receipt confirmation, to help clarify when notice was received and to eliminate disputes over whether reconsideration applications are timely.

I. Ohio Adm. Code 4901:1-2-16

Given that there is only one paragraph in this rule, the label “(A)” appears unnecessary.

III. CONCLUSION

DEO appreciates the opportunity to comment on the proposed rules. For the foregoing reasons, DEO respectfully requests that the Commission act in accordance with its comments.

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Respectfully submitted,

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Summary: Comments electronically filed by Ms. Rebekah J. Glover on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio