

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Adoption of Ohio)	
Admin. Code Chapter 4901:1-2 Con-)	
cerning Rules Involving the Under-)	Case No. 15-282-AU-ORD
ground Technical Committee and the)	
Protection of Underground Utility)	
Facilities.)	

**INITIAL COMMENTS OF
JOINT COMMENTERS**

Duke Energy Ohio, Columbia Gas of Ohio, Inc., Vectren Energy Delivery of Ohio, Inc., Ohio Power Company, Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, The Dayton Power and Light Company, Ohio Cable Telecommunications Association, Ohio Telecom Association and Ohio Oil and Gas Association (together “Joint Commenters”) hereby submit the following comments to the Commission Staff’s proposed rules to implement Substitute Senate Bill 378 (“SB 378”) into Ohio Admin. Code Chapter 4901:1-2. The Joint Commenters are committed to ensuring the safety of utility underground infrastructure throughout Ohio. The proposed rules are a first step to ensure compliance with Ohio’s one-call laws and safe excavation standards. The Joint Commenters generally support Staff’s proposed rules and offer several proposed clarifications to the new language.

(1) Clarifying and Utilizing the Definition of “Respondent”

Initially, Staff proposes a definition for “Respondent” in Ohio Admin. Code 4901:1-2-01(L) – the person responsible for the compliance failure. The Joint Commenters recommend clarifying this definition to state the “person” who is a Respondent is the same “person” as defined in R.C. 3781.25. Additionally, the word “alleged” should be used in the definition of respondent because no determination of culpability has been made at the time term is defined. Therefore, the Joint Commenters propose the following change to Ohio Admin. Code 4901:1-2-01(L):

(L) "Respondent" means the person, as defined in 3781.25 of the Revised Code, responsible for the alleged compliance failure.

The Joint Commenters further recommend incorporating this defined term throughout Chapter 4901:1-2, which currently does not incorporate the term. Therefore, Joint Commenters propose the following changes:

Ohio Admin. Code 4901:1-2-11

(B) Not later than ten business days after receiving a request for inquiry, the staff shall notify the Respondent ~~person responsible for the alleged compliance failure~~ that the request for inquiry was made.

(C) The Respondent ~~person responsible for the alleged compliance failure~~ may respond to the request for inquiry by providing any information that the person considers relevant to the inquiry, including an admission of the compliance failure, not later than thirty days after being notified by the staff.

Ohio Admin. Code 4901:1-2-13

(A) Within ten business days of receiving a completed report of inquiry, the staff will serve upon the person that requested the inquiry and the Respondent ~~person responsible for the compliance failure~~ a letter notifying the participants of any fine or penalty or of a no-enforcement determination...

Ohio Admin. Code 4901:1-2-14

(A) The Respondent ~~A person responsible for a compliance failure~~ upon whom a letter has been served in accordance with paragraph (A) of rule 4901:1-2-13 of the Administrative Code who fails within sixty days to pay the fine or who fails to begin compliance with the penalty within thirty days after the letter shall be in default unless reconsideration in accordance with section 4913.25 of the Revised Code is requested....

Ohio Admin. Code 4901:1-2-15

(A) Not later than thirty days after receiving notice under rule 4901:1-2-13 of the Administrative Code, either the person that requested the inquiry

or the **Respondent** ~~person responsible for the compliance failure~~ may file a written application for reconsideration with the commission. The application for reconsideration must state with particularity the grounds for reconsideration.

(2) Amending Definitions of “Participant” and “Violation”

The Staff has provided a definition of the term “Participants” in Rule 4901:1-2-01(J). It should be modified to read as follows:

- (J) “Participants” means the person that requested the inquiry and the person responsible for the alleged compliance failure and any persons permitted to intervene after commencement of a proceeding.

The Staff has also provided a definition of the term “Violation” in subsection (O). The Joint Commenters believe that the term “violation” should be limited to conduct, acts, or failure to act prohibited by the statute. Thus, the Joint Commenters recommend that the definition of “Violation” should be amended to read as follows:

- (O) “Violation” means any conduct, act, or failure to act, prohibited by Chapter 4913 of the Revised Code. ~~statute or commission rule or order.~~

(3) Clarifying the inquiry provision of 4901:1-02-11

Staff’s proposed rules closely follow S.B. 378, and include many of the important technical terms and processes negotiated in the General Assembly. While incorporating the key processes, the rules do not specify the statutory requirements for an inquiry. Therefore, to model R.C. 4913.05(B), the Joint Commenters recommend the following change to Ohio Admin. Code 4901:1-2-11:

- (A) An aggrieved person may seek an inquiry with the staff. The request for inquiry must be made no later than ninety days after discovering the alleged compliance failure. A request for inquiry shall not, by itself, cause the creation of a formal proceeding at the commission. **A request for an inquiry shall state, at a minimum and with particularity:**

- (1) name of the Respondent,**

- (2) date of the compliance failure,
- (3) nature of the compliance failure,
- (4) location of the compliance failure, and
- (5) any other information that the requestor considers relevant.

Further, the Joint Commenters recommend that the Commission modify 4901:1-2-11 and clarify the process for an aggrieved person to initiate an inquiry, as well as the process for responses to any such inquiry. Additionally, the Joint Commenters recommend that subsection (B) of the rule be modified to provide timely notice of the request for inquiry. Accordingly, the Joint Commenters recommend the following changes to 4901:1-2-11(B):

Not later than five ~~ten~~ business days after receiving a request for inquiry the staff shall notify the Respondent ~~person responsible for the alleged compliance failure~~ that the request for inquiry was made. Included as part of the notice shall be the request for inquiry and any supporting materials provided by the person making the request in support of that request.

Similarly, in order to preserve fully Respondent's due process rights to understand exactly what the basis is for any finding of a violation and any evidence discovered in the course of the investigation that would tend to disprove the occurrence of a violation, the report that staff provides to the underground technical committee should also be provided to Respondent along with any exculpatory material. Joint Commenters recommend, therefore, the following additions to proposed 4901:1-2-11(E):

(E) A report of each inquiry will be made by the staff to the underground technical committee and provided to Respondent. The inquiry report should include ~~any documentary, photographic, or other evidence which has been collected regarding the alleged violation~~ all material collected in the course of the proceeding including any documentary and photographic evidence. This report shall not contain a recommendation as to the imposition of a fine or penalty or as to whether any enforcement action should be taken.

Finally, proposed rule 4901:1-2-11 (G) allows for the issuance of a subpoena "upon the request of the staff or upon the request of the underground technical committee." The Joint Commenters suggest that the phrase "upon the request of the staff or" be deleted as the Staff is not a party for discovery purposes

under the Commission's procedural rules (OAC Chapter 4901-1) and does not have authority to request a subpoena. The Joint Commenters believe that the power to request a subpoena should not be made available to the Staff until after the initial report is completed. Once the matter becomes formal and the Commission is involved, then subpoenas may be issued. Therefore, the Joint Commenters suggest the following change:

(G) The commission, the legal director, the deputy legal director, or an attorney examiner may issue subpoenas, ~~upon the request of the staff or~~ upon the request of the underground technical committee, to support the investigation of an inquiry . . .

(4) Other Proposed Changes

Ohio Admin. Code 4901:1-2-03 "Duties of the Underground Technical Committee"

This rule sets forth the duties of the Underground Technical Committee ("UTC"). Subsection (E) purportedly allows the Underground Technical Committee to perform any additional duties as may be required under this chapter. The rule is vague and subjective, allowing the UTC to set its own scope of inquiry. Further the statute does not authorize the performance of any such additional duties. Thus, the Joint Commenters recommend that subsection (E) be deleted from this rule.

Ohio Admin. Code 4901:1-2-09 "Registration Requirements"

R.C. 4913.03(A) requires registration with the Commission and the payment of a safety registration fee not to exceed \$50 annually, which the Commission may lower if the Commission determines lowering the registration to be necessary.

Subsection (B) of proposed 4901:1-2-09 allows the Commission to charge a "discounted" registration fee to "recognize compliance" for those without fines/penalties. The Joint Commenters believe that the Commission's discretion was to be exercised if it was deemed that the \$50 fee was too high, not to "recognize compliance." Reducing the \$50 fee down to something greater than zero would not appear to provide a great deal of incentive. On the other hand, the Commission must be concerned with making sure that there is sufficient cash

flow for the operation of the program as it cannot increase the fee beyond \$50 to cover costs. The Joint Commenters believe that subsection (B) should be rewritten to be consistent with the statute as follows:

- (B) ~~To recognize compliance,~~ The commission may lower the \$50 registration fee if it determines it to be necessary. ~~may charge a discounted safety registration fee to those registrants that have no fines or penalties assessed against them in the previous calendar year.~~

Ohio Admin. Code 4901:1-2-10 (Service during the investigation of an alleged compliance failure)

Subsection (B) of this rule provides for service to parties and allows for that service to be given to a business address or entity. The Joint Commenters believe it is important that notices of alleged compliance failures be sent to the appropriate office. The Joint Commenters recommend that the Commission allow entities to submit an address upon which they wish to have all notices sent concerning any request for inquiry. Thus, the Joint Commenters recommend that subsection (B) have added the following language:

- (3) If the participant wants to have notices or requests for inquiries served at a particular address, such a participant may contact the Commission and request service at such a specific address.

Ohio Admin. Code 4901:1-2-13 (Notice of a completed report of inquiry)

The proposed language in Ohio Admin. Code 4901:1-2-13(B) allows the “director of the service monitoring and enforcement provision or the director’s designee . . . to impose any fine or penalty set forth in section 4913.151 of the Revised Code.” Sections 4913.19, 4913.21, and 4913.22 of the Revised Code identify the Commission as the entity that may impose fines. Explicit statutory authority is provided to the Commission itself in R.C. 4913.21 to **impose** any fine or penalty that results from R.C. 4913.151. Section 4913.21 of the Revised Code provides “[e]xcept as provided in sections 4913.171 and 4913.19 of the Revised Code, the public utilities commission shall impose every recommendation made under section 4913.15 or 4913.16 of the Revised Code by the underground technical committee.” (emphasis added). Fines and penalties may be imposed only by the

Commission, and not by members of the Commission's Staff. Accordingly, the Joint Commenters recommend that subsection (B) be rewritten as follows:

- (B) The Director of the Service Monitoring and Enforcement Department or the Director's designee has the authority to recommend ~~impose~~ any fine or penalty set forth in Sections 4913.15(B)(1) and (C)(1), Revised Code.

Ohio Admin. Code 4901:1-2-14 (Default)

Staff's proposed rule set forth in Ohio Admin. Code 4901:1-2-14 (A) provides that a person who has been found to be responsible for a compliance failure and fails to pay the fine or comply with the penalty within 60 days shall be in default and deemed to have admitted liability and waived all rights to further contest the fine or penalty. This rule appears to be in conflict with the due process provisions set forth in Chapter 4913 of the Revised Code.

Sections 4913.15 through 4913.251 of the Revised Code detail the due process for inquiries filed under 4913.05 of the Revised Code. The process includes an investigation and recommendation made by the Underground Technical Committee and imposition of a fine or penalty only by the Commission. Important to the process is the right to have the ultimate determinations concerning compliance made by the Commission and the statutory right to reconsideration, rehearing and appeal. There is nothing in the statute that implies waiver of these due process rights for the failure to pay a fine or comply with a penalty within 60 days. Default should only apply 60 days after a determination by the Commission, consistent with R.C. 4913.22. Consequently, the Commission may not, through its rulemaking process, deprive a party of a process established by statute.

Furthermore, R.C. 4913.50 provides that "[n]o finding, determination, or recommendation of the underground technical committee, no decision of the public utilities commission under this chapter, and no no-enforcement determination under this chapter shall be determinative of civil liability in a private cause of action for personal injury or property damage." This statutory language conflicts with the rule's proposal that any person who fails to pay a fine or comply with a penalty within sixty or thirty days be deemed to have admitted the occurrence of the violation and will have waived all further rights to contest liability.

Accordingly, the Joint Commenters respectfully request that the Commission modify this rule so that it mirrors the statutory process and provisions set forth in Chapter 4913, Revised Code.

Ohio Admin. Code 4901:1-2-18 (Payment of fines)

The Joint Commenters recommend that this rule be modified to recognize that only the Commission may impose a fine recommended under Section 4913.151, Revised Code. Accordingly, Division (B) should be modified to change “fine demanded in the notice” to “fine recommended in the notice.” Additionally, as noted above the Commission may not waive a party’s statutory rights by rule. The statutory process set forth in Chapter 4913, Revised Code, and discussed above, provides parties a statutory right to have the ultimate determinations concerning compliance made by the Commission, a right to seek reconsideration of an imposed fine, penalty, or no enforcement action, and provides parties the ability to seek further rehearing and appeal under Section 4913.251, Revised Code, and Chapter 4903, Revised Code. The rule’s requirement that full payment of a fine prior to a final Commission order terminates all further proceedings conflict with these statutory provisions.

Additionally, early payment of a fine should never be considered an admission of the occurrence and, therefore, the last section of Division (B) should be stricken. Such a rule would encourage delayed payments and would likely lead to untimely payments of fines. Further, the relevant statutory provisions require a fine to be paid within sixty days, but the rehearing process to produce a final Commission order may (and often does) take longer than sixty days. Therefore, the statutes require a party to pay a fine without respect to whether the Commission has issued a final order. Compliance with a statutory provision should be not deemed an admission of guilt for purposes of considering an entity’s history of violations.

Accordingly, the Joint Commenters respectfully request that the Commission modify this rule.

Ohio Admin. Code 4901:1-2-19 (Damage prevention grant program procedures).

This proposed rule provides the director of the service monitoring and enforcement department or his/her designee the authority to award funds from the underground utility damage prevention grant program. Section 4913.31, Revised

Code, provides that the Commission may administer such a program and subsection (B) specifically provides that the Commission shall determine the appropriate amount of any grant issued under the program. Again, the authority to take action is granted by statute to the Commission and not its Staff or the director of the service monitoring and enforcement department or his/her designee. Accordingly, the Joint Commenters recommend that this rule be modified to provide that the Commission may award grants under the program.

Ohio Admin. Code 4901:1-2-20 “Annual Reports to the General Assembly”

Subsections (A), (B), (C), and (D) refer to reporting “Registrations,” “Investigations,” “Inquiries Submitted,” and “UTC’s Recommendations.” The Joint Commenters believe that this rule is intended to submit the numbers of such registrations, investigations, inquiries submitted and UTC recommendations as opposed to including actual investigations as part of the report.

The Joint Commenters recommend that Rule 4901:1-2-20(A) through (D) be rewritten to insert the phrase “The number of” at the beginning of each of these subsections. Thus, the annual report would include the number of registrations, the number of investigations conducted by the Commission, the number of inquiries submitted to the Underground Technical Committee and the number of the Underground Technical Committee’s recommendations.

Additionally, subsection (H) allows the Commission to include any other pertinent information it feels the General Assembly needs in the review of this report. The Joint Commenters are concerned that this miscellaneous category could be construed to include confidential information. Such confidential information should be excluded. The Joint Commenters recommend that subsection (H) be modified to read as follows:

- (H) Any other pertinent information, **excluding confidential information**, the commission believes ~~feels~~ the General Assembly need in the-review of this report.

The Joint Commenters support the continued efforts of the Commission Staff to ensure the continued protection of underground infrastructure. Therefore, for the reasons stated herein, the Joint Commenters respectfully request that the Commission accept the proposed changes to Chapter 4901:1-2 discussed above.

Respectfully submitted by,

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