

**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) Case No. 15-0282-AU-ORD
Underground Technical Committee and the)
Protection of Underground Utility Facilities)

**REPLY COMMENTS OF
THE AMERICAN PETROLEUM INSTITUTE OHIO**

I. INTRODUCTION

By Entry dated May 6, 2015, the Public Utilities Commission of Ohio (“Commission” or “PUCO”) provided parties an opportunity to file comments regarding the consideration and adoption of new rules in conformance with Ohio Revised Code (“R.C.”) 4913.45 in order to implement Substitute Senate Bill 378 (“SB 378”). In addition to the comments filed by the American Petroleum Institute (“API”) Ohio, the following parties also filed initial comments: Ohio Utilities Protection Service (“OUPS”), The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO”), and the “Joint Commenters.”¹

II. REPLY COMMENTS

A. The adoption of rules should not be delayed simply because the Underground Technical Committee is not yet functioning.

As an initial matter, API Ohio respectfully disagrees with DEO’s position that the Commission is unable to adopt rules in this proceeding until the Underground Technical

¹ 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.

Committee (“UTC”) is appointed. Specifically, DEO states that the statute authorizing these rules requires that the Commission adopt them in “consultation” with the UTC.² DEO argues that “unless and until it consults with the UTC, the Commission lacks the authority to adopt these rules.”³ DEO then 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,” which would then be followed by yet another round of comments by DEO and other stakeholders.⁴

DEO’s position would cause unnecessary delay to the implementation of these important rules. As DEO acknowledged, the UTC has not yet been constituted. The appointment of the UTC membership is the responsibility of president of the Senate, the speaker of the House of Representatives, the minority leader of the Senate, and the minority leader of the House of Representatives.⁵ At this time there is no functioning UTC with which the Commission may consult.

While R.C. 4913.45(A) provides for consultation with the UTC by the Commission when rules are adopted, the language of the statute of does not mandate such consultation as a condition to the adoption of rules. A further examination of the UTC’s implementing statutes does not establish any rulemaking authority on the part of the UTC.⁶ For instance, R.C. 3781.36, which establishes the functions of the UTC, establishes that the UTC shall “*coordinate* with the public utilities commission” and “[p]rovide subject matter expertise *when requested*” and “make

² DEO Initial Comments, at 1, citing R.C. 4913.45(A).

³ *Id.* at 2.

⁴ *Id.*

⁵ R.C. 3781.34(C).

⁶ *See*, R.C. 3781.34 (establishing the creation of the UTC);

recommendations”—nowhere does the Revised Code provide that it is the responsibility of the UTC to adopt rules. Rather, the responsibility to adopt rules is solely the Commission’s. The fact that there is no functioning UTC does not alleviate the Commission of this duty.

SB 378 was written to enable the Commission to operate and enforce the provisions of Chapter 4913 *with or without* the UTC. The complaint process under Chapter 4913 illustrates this principle. When a complaint is filed with the Commission, the Commission must conduct an inquiry of the complaint and make a report to the UTC. The UTC then has a ninety day period to review the report and determine a fine and/or penalty. If the UTC fails to act, the Commission must then amend report and recommend a fine and/or penalty. If the UTC again fails to take action, the Commission shall, *at its sole discretion*, impose a fine and/or penalty.⁷ Thus, while the participation of the UTC is contemplated and encouraged, it is not required,

The intent of the UTC under SB 378 is to give stakeholders a voice in the enforcement process. It is not the intent of SB 378 to create an indeterminate delay in the implementation and enforcement of Chapter 4913’s provisions in the event that the UTC is not functioning. For these reasons, the Commission should proceed with the finalization and adoption of these rules.

B. 4901:1-2-11 – Inquiry procedures

OUPS recommends the following addition to proposed Rule 4901:1-2-11(D): “The staff shall conduct an inquiry. The staff’s investigation shall be limited to whether there was a compliance failure and to determine the legitimacy of the inquiry.”⁸

API Ohio respectfully disagrees with the added language because it exceeds the Commission’s jurisdiction at this stage in the complaint process. The Commission’s initial

⁷ R.C. 4913.15(C), 4913.16, and 4913.21.

⁸ OUPS Initial Comments, at 2.

review of a complaint “shall be limited to whether there was a compliance failure.”⁹ Rather, it is the role of the UTC to either dismiss the case or make a recommendation to the Commission as to the imposition of a fine, penalty, or both.¹⁰ The Commission only makes a determination in the event that the UTC fails to do so.¹¹

C. 4901:1-2-18 –Payment of Fines

API Ohio recommends that the payment of any fine or penalty not be allocated to administrative fees associated with the enforcement of Chapter 4913.

III. CONCLUSION

API Ohio respectfully submits its Reply Comments for the Commission’s consideration.

⁹ R.C. 4913.09(A).

¹⁰ R.C. 4913.15.

¹¹ See discussion *supra*, at 3.

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Summary: Comments Reply Comments of the American Petroleum Institute (API) Ohio electronically filed by Mrs. Christina H Polesovsky on behalf of API Ohio