

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of The Amendment of Ohio	)	
Adm. Code 4901-1-24 Regarding Motions	)	Case No. 18-322-AU-ORD
for Protective Orders.	)	
	)	

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**COMMENTS OF INTERSTATE GAS SUPPLY, INC.**

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**March 16, 2018**

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**I. INTRODUCTION**

On February 28, 2018, the Public Utilities Commission of Ohio (“Commission”), pursuant to R.C. 4901.13, entered an order to amend paragraphs (D) through (F) of Ohio Adm. Code 4901-1-24 to require a party seeking to move for protective treatment to supplement its motion and supporting memorandum with an affidavit. The proposed amendments would also authorize the Commission, legal director, deputy legal director, or attorney examiner to schedule a hearing to consider any motion for protective treatment under the rule.<sup>1</sup>

The impetus for Commission’s proposal is a recent Ohio Supreme Court decision in *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, in which the Court reversed a Commission decision to grant trade-secret protection under Ohio Adm. Code 4901-1-24 because the Commission cited no evidence nor offered any explanation to justify its order granting the moving party’s

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<sup>1</sup> In the Matter of the Amendment of Ohio Adm. Code 4901-1-24 Regarding Motions for Protective Order (hereinafter “Order”), Attachment A at 3.

motions for protective treatment.<sup>2</sup> In response, the Commission now seeks to require that any motion for protective treatment include an affidavit and opportunity for the Commission to schedule a hearing. The Commission's proposal appears to be motivated by the need for sufficient facts and information necessary to draft an order that will pass legal muster under the Court's recent precedent. The Commission's ends, however, do not justify its means for accomplishing its objective.

The Commission's order acknowledges that the proposed rulemaking should balance the critical objectives of the proposed regulation with the costs of compliance by regulated parties. In other words, the proposed amendments should satisfy the "Common Sense Initiative" and should not adversely impact businesses that are subject to the regulations.<sup>3</sup> While the Commission's motivation to improve a rule that governs its proceedings is well-intentioned, the proposal itself is unnecessary since the cost of compliance to impacted businesses significantly outweighs regulatory objectives.

IGS believes that the ends sought to be achieved in response to the Supreme Court's recent decision can be accomplished through Ohio Adm. Code 4901-1-24 as written. Nonetheless, IGS commends the Commission for addressing the Court's decision and hereby provides its comments and insights for consideration below.

## **II. COMMENTS**

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<sup>2</sup> *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, at 14.

<sup>3</sup> Order at 2.

Under the “Common Sense Initiative,” the Commission must review its rules and attempt to balance the critical objectives of regulation against the cost of compliance by the regulated parties. *Id.* Rules that are unnecessary, redundant, inefficient, needlessly burdensome, or that have negative unintended consequences, or unnecessarily impede business growth must be rescinded. *Id.* The Commission identified that the proposed rule may impact the business community by requiring commitment of additional resources—employer time and additional cost for regulatory compliance.<sup>4</sup> The Commission also indicated that small businesses will be treated like all other persons filing for protective treatment in PUCO proceedings. *Id.*

IGS agrees with the Commission that the costs associated with the proposal are likely to be felt in terms of employer productivity and cost of regulatory compliance. Indeed, IGS believes that the additional administrative and regulatory costs associated with compliance are significant. The proposal to amend 4901-1-24(D) and (F) would obligate a party moving for protective treatment to supplement its motion and supporting memorandum with an affidavit that sets forth facts supporting the motion.<sup>5</sup> In practical effect, the proposal will increase the time employers spend on ensuring compliance with the additional requirement as well as drive up the legal costs associated with drafting a motion seeking protective treatment. Small businesses and other entities that do not have in-house legal support capable of fulfilling the proposed requirement will have to spend

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<sup>4</sup> Order, Attachment B at 4.

<sup>5</sup> Order, Attachment A at 3.

additional capital on outside legal resources for purposes of drafting and reviewing the affidavit needed to satisfy the Commission's proposal.

Moreover, the Commission's proposed rule implicitly assumes that a party moving for a protective order can only provide evidence and facts necessary for the Commission to support its conclusions through an affidavit; yet a well-drafted motion in support, which is already required under the existing rule, can perform the same function. The information—the main factual documents at issue—for which protection is sought will be filed under seal in a Commission-docketed proceeding. That information can be described, and discussed, in the motion itself to provide a sufficient explanation and analysis of the facts at issue. In any event, the Commission is not strictly bound by the Ohio rules of evidence such that an affidavit is necessary in all circumstances—particularly in those situations where a motion is uncontested.<sup>6</sup>

The Court overturned the Commission's order to protect certain confidential information from discovery because it violated R.C.4903.09 by neglecting to cite evidence and offer a reasonable explanation for its findings.<sup>7</sup> The Court made no mention or recommendation that the Commission could better achieve its objective through an affidavit or administrative hearing. What's more, Chapter 4901-1-24 requires that a party moving for protective treatment include with its motion a supporting memorandum that

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<sup>6</sup> In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 13 (December 14, 2011). See also *Greater Cleveland Welfare Rights Org., Inc., v. Pub. Util. Comm.*, 2 Ohio St.3d 62, 68 (1982) ("We agree with appellants' contention that the commission is not stringently confined by the Rules of Evidence.")

<sup>7</sup> *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229, at 14.

sets forth the specific basis for the motion. The Commission already has the tools it needs to effectuate the Court's decision, so a requirement that a party also include an affidavit explaining the reasons supporting confidentiality of the identified information is redundant, unnecessary, and needlessly burdensome.

The proposal to amend 4901-1-24(E), which would authorize the Commission, legal director, deputy legal director, or attorney examiner to schedule a hearing to consider any motion for protective order, will similarly increase the amount of employer time and capital needed to attend a Commission-ordered hearing. Here again, small businesses and other entities that do not have in-house legal support will need to allocate additional resources to retain outside legal counsel for purposes of attending a hearing. It follows then that the time and cost associated with attending a hearing on a motion for protective treatment, where one was previously not required, will unnecessarily impede business growth.

Alternatively, if the Commission sees fit to amend the rules to require an affidavit for a party seeking a motion for protective treatment, IGS encourages the Commission to require an affidavit only in the event where a motion for protective treatment is contested. Doing so would more efficiently allocate resources where to instances where the Commission provides substantive legal and factual analysis that may be ultimately reviewed by an appellate court.

### **III. CONCLUSION**

For the foregoing reasons, IGS recommends that the Commission not modify the existing rule, given that the cost of compliance with the Commission's proposal significantly outweigh the objective of the regulation.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing *Comments of Interstate Gas Supply, Inc.* was served this 16th day of March 2018 via electronic mail upon the following:

William.wright@ohioattorneygeneral.gov

/s/ Michael Nugent  
Michael Nugent



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Summary: Comments Comments of Interstate Gas Supply, Inc. Regarding Motions for Protective Orders electronically filed by Mr. Michael A Nugent on behalf of Interstate Gas Supply, Inc.