

## Before the Public Utilities Commission of Ohio

In the Matter of the Review of Ohio  
Administrative Code Chapter 4901-1 Rules  
Regarding Practice and Procedure Before the  
Commission

Case No. 18-275-AU-ORD

In the Matter of the Review of Ohio  
Administrative Code Chapter 4901:1-1 Rules  
Regarding Utility Tariffs and Underground  
Utility Protection Service Registration

Case No. 18-276-AU-ORD

In the Matter of the Review of Ohio  
Administrative Code Chapter 4901-3 Rules  
Regarding Open Commission Meetings

Case No. 18-277-AU-ORD

In the Matter of the Review of Ohio  
Administrative Code Chapter 4901-9 Rules  
Regarding Commission Complaint  
Proceedings

Case No. 18-278-AU-ORD

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### Comments of Ohio Telecom Association

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### **I. Introduction**

The Public Utilities Commission of Ohio (“Commission”) has proposed a new rule, Proposed Rule 4901-9-02, that would permit the Commission to dismiss or otherwise sanction the presentation of frivolous claims and to declare parties that habitually present frivolous claims to be vexatious litigators and subject them to filing restrictions. While the frequency of the problems addressed by this proposal is not high, the practical need for the rule is real. Therefore,

Ohio Telecom Association recommends that the Commission adopt this rule with a minor revision.<sup>1</sup>

## **II. Discussion**

Proposed Rule 4901-9-02 contains provisions similar to statutory provisions available to courts of common pleas to sanction frivolous claims and vexatious litigators, R.C. 2323.51 and R.C. 2323.52.

Under R.C. 2323.51, a court of common pleas may sanction a party for frivolous conduct. Frivolous conduct includes the filing of an action or assertion of a claim or defense that serves merely to harass or maliciously injure another party or is for an improper purpose such as causing delay, that is not warranted under existing law or supported by a good faith argument for an extension, modification, or reversal of existing law, or consists of allegations or other factual contentions that have no evidentiary support.

Under R.C. 2323.52, a court of common pleas may declare as a vexatious litigator “any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions.” If the court determines that a party is a vexatious litigator, the court may enter an order requiring the party to seek court leave to institute or continue legal proceedings. *Id.*

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<sup>1</sup> The initial comments of Ohio Telecom Association are limited to Proposed Rule 4901-9-02. The Association’s failure to address other proposed rule changes is not intended to indicate that it supports those changes, and it reserves the right to file reply comments regarding those changes or others recommended by other persons in their initial comments in these proceedings.

The point of adopting such statutes is to protect the interests of the courts and the parties whose interests are insulted by frivolous or vexatious litigation. As the Supreme Court of Ohio explained in a decision finding that R.C. 2323.52 was constitutional, these kinds of laws are directed to limit “the untoward effects of vexatious litigation in depleting judicial resources and unnecessarily encroaching upon the judicial machinery needed by others for the vindication of legitimate rights. In addition, vexatious litigators oftentimes use litigation, with seemingly indefatigable resolve and prolificacy, to intimidate public officials and employees or cause the emotional and financial decimation of their targets.” *Mayer v. Bristow*, 91 Ohio St. 3d 3, 13 (2000).

The General Assembly has not provided specific guidance regarding frivolous or vexatious litigation at the Commission, but the Commission has the legal authority to adopt Proposed Rule 4901-9-02. Under R.C. 4901.13, the Commission “may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all ... hearings relating to parties before it.” As the Supreme Court of Ohio has repeatedly explained, this section of the Revised Code provides the Commission broad authority to adopt rules to conduct its hearings. *See, e.g., Vectren Energy Delivery v. Pub. Utils. Comm’n of Ohio*, 113 Ohio St. 3d 180, ¶ 49 (2007).<sup>2</sup> Rules governing practice before the Commission have long been understood to be within the Commission’s authority. *See, e.g.,* Rule 4901-1-08 (rules of practice regarding representation of a party).

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<sup>2</sup> The proposed rule would expand the tools available to the Commission and parties to address frivolous litigation. Under current practice, some claims lacking merit can be addressed through alternatives such as motions to dismiss for failure to state a claim or failure to prosecute. *See, e.g., Von Blon v. TDS Telecom, Inc.*, Case No. 18-1556-TP-CSS, Entry (June 19, 2019). The proposed rule addresses a more limited set of problems and provides express sanctions for especially deleterious behavior.

It is also reasonable for the Commission to adopt a rule governing deleterious behavior. Although the frequency of frivolous or vexatious litigation at the Commission does not appear to be high, the interests of parties and the Commission in the proper use of its resources are similar to those involved in civil litigation. Transcript at 21 (July 12, 2018). Time and money are limited resources, and the Commission rightly should address the losses inflicted by frivolous claims or vexatious litigators. Frivolous claims should be dismissed or otherwise sanctioned, and parties that habitually assert frivolous claims should be further limited or otherwise sanctioned if they fail to correct their behavior.

Moreover, the proposed rule is properly limited to the egregious cases. Under division (A) of the proposed rule, the Commission would dismiss a claim or sanction its proponent only if the claim was indefensible under the law or facts. Under division (B), the Commission would determine that a party is a vexatious litigator in only those instances in which the party “habitually, persistently, and without reasonable cause” engages in conduct that is determined to be frivolous. Thus, the application of the rule should be limited to “those who have historically engaged in prolific and vexatious conduct.” *Mayer v. Bristow*, 91 Ohio St. 3d at 13.<sup>3</sup>

### **III. Recommended Revision to Paragraph (B) of Proposed Rule 4901-9-02**

The second sentence of Proposed Rule 4901-9-02(B) provides that the Commission may impose filing restrictions on a party if the Commission determines that the party is a vexatious litigator under paragraph (A). Rather than paragraph (A), it appears that the determination that a party is a vexatious litigator would be determined under the first sentence of paragraph (B). The

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<sup>3</sup> As suggested by an author that reviewed practice under a similar Canadian court rule, “[the Rule] is powerful, and its use should prompt some pause in judges and lawyers. By and large, however, the Rule has been very well employed. It has resulted in significant savings of time and financial expense, for both courts and defendants, while almost always being fair to plaintiffs.” Gerrard J. Kennedy, *Rule 2.1 of Ontario’s Rules of Civil Procedure: Responding to Vexatious Litigation While Advancing Access to Justice?* 35 Windsor Yearbook of Access to Justice 243, 245 (2018) (citations omitted).

second sentence of paragraph (B), therefore, should be revised as follows: “If the Commission determines that a party is a vexatious litigator under paragraph (B) of this rule, the commission may impose filing restrictions on formal complaint proceedings initiated by the party under section 4905.26 or 4927.21 of the Revised Code.”

#### **IV. Conclusion**

While frivolous or vexatious conduct is not frequent, the complaint process at the Commission has suffered from parties’ misuse. When abuse occurs, it is costly to the Commission and the adversely affected parties. Providing for explicit rules that would sanction parties in complaint cases is a reasonable response that should expedite the process for addressing frivolous claims and place the costs of such behavior where it belongs.

Respectfully submitted,

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## **Certificate of Service**

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/s/ Frank P. Darr

Frank P. Darr

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Summary: Comments Comments of Ohio Telecom Association electronically filed by Frank P. Darr on behalf of Ohio Telecom Association