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

Reply Comments of Ohio Telecom Association

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I. Introduction

In these proceedings, the Public Utilities Commission of Ohio ("Commission") is conducting a five year review of several chapters of its rules and 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 sanction parties that habitually present frivolous claims. Interested parties filed initial comments addressing the amendments and proposed rule on January 2 and 13, 2020.

Two parties, the Office of the Ohio Consumers' Counsel/Northwest Ohio Aggregation Coalition (collectively "OCC") and Four A Consulting Services ("Four A"), encourage the Commission to either reject or substantially modify Proposed Rule 4901-9-02. Additionally, OCC recommends that the Commission further amend its rules regarding stipulations and discovery timelines for certain cases. For several reasons, the Commission should not adopt the recommendations of these parties.[1]

II. Discussion

A. Proposed Rule 4901-9-02 should be adopted with a minor correction

Proposed Rule 4901-9-02 would permit the Commission to police activities at the Commission that are determined to be frivolous or vexatious. OCC charges that the rule violates a right to a hearing and urges the Commission to reject it. Four A urges the Commission to purge the rule of one of its key terms and encase it in requirements that would prevent the use of the proposed rule. Neither result is warranted.

In Part I of its comments filed in Case No. 18-278-AU-ORD, OCC apparently urges the Commission to reject Proposed Rule 4901-9-02 because no person can be denied the right to file a complaint under R.C. 4905.26 or 4927.21. Its supporting argument seems to be that the Commission lacks authority to adopt Proposed Rule 4901-9-02 because R.C. 2323.51 and 2323.52 are applicable to state courts.[2] OCC's unstated conclusion seems to be that the Commission lacks the authority to address frivolous claims or vexatious litigators.

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[1] Ohio Telecom Association is limiting its reply comments to the three areas identified in the text. The Association's failure to address other proposed rule changes or initial comments is not intended to indicate that it supports those recommendations..

[2] Case No. 18-278-AU-ORD, Comments on the Public's Right to File a Complaint Against a Public Utility by the Office of the Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition at 1 (Jan. 13, 2020).

OCC's supporting argument is not correct because it assumes too much about the scope of R.C. 2323.51 and 2323.52 and ignores the express statutory authority of the Commission to adopt rules governing its proceedings. Neither R.C. 2323.51 and 2323.52 expressly prevents other political entities such as the Commission from adopting rules limiting vexatious or frivolous conduct in proceedings before them. Further, and as explained in earlier comments,[3] the Commission does have broad authority to govern hearings before it, and OCC points to nothing in the statutes governing Commission proceedings to suggest that the Commission may not adopt a rule such as Proposed Rule 4901-9-02 under R.C. 4901.13. Thus, OCC's argument attempts to prove too much with too little.

Additionally, OCC's broad statement that a person's right to file a complaint would be "denied" is not correct. Under division (A) of the proposed rule, a person can file whatever he wishes, but the person may be sanctioned if the Commission determines that he has abused the process by filing a frivolous claim. Likewise, a person determined to be a vexatious litigator under division (B) of the proposed rule is not precluded from filing new actions; however, that person's right to proceed may be slowed while the Commission determines whether the new complaint has some colorable merit. Thus, OCC's implication that the Commission could close its doors to claims or claimants does not address the actual content of Proposed Rule 4901-9-02.

In contrast to OCC's attempt to undermine the legal basis for the rule, Four A offers two amendments to "fix" the Proposed Rule. Based on its belief that parties suffer from unequal resources, it would remove the term "frivolous" from division (A) of the Proposed Rule and delete the first sentence of division (B) since a determination whether a claim was frivolous "will

[3] Case Nos. 18-275-AU-ORD, et al., Comments of Ohio Telecom Association at 3 (Jan. 13, 2020), referencing R.C. 4901.13 and *Vectren Energy Delivery v. Pub. Utils. Comm'n of Ohio*, 113 Ohio St. 3d 180, ¶ 49 (2007).

be cause for time and dollars expended on the definition of the adjective and what constitutes a frivolous matter."[4] Additionally, it recommends a new division (C) that would create a presumption that a case was not frivolous if the matter is set for a settlement conference and place the burden on the administrative law judge to request parties to submit comments on whether a claim or party is frivolous or a vexatious litigator, respectively.[5] Finally, Four A proposes a new division (D) that would authorize the administrative law judge to "proceed with a formal inquiry" in which the administrative law judge would apparently serve as counsel for a complainant that cannot afford legal representation.[6] None of these recommendations has merit.

The initial recommendation to eliminate reference to claims that are frivolous guts the proposed rule. The point of the rule is to reduce and penalize behavior that has no legal or procedural merit. Removing the term "frivolous" would eliminate much of the rule's scope.

The recommendation to create a presumption that a complaint is valid would encase the rule in a requirement that all matters be heard regardless of merit.[7] Under the proposed change, a claim would be deemed meritorious if a settlement conference is set under Rule 4901-9-9-01(H). What is hidden in this proposal, however, is that Rule 4901-9-01(G) governing settlement conferences provides that the legal director, deputy legal director, or an attorney examiner assigned to a complaint case "*shall* schedule a settlement conference to attempt to resolve the issues in the case prior to hearing." (Emphasis added.) Thus, the compulsory act of setting the matter for settlement conference would result in a determination that the complaint had merit. Setting a matter for a compulsory settlement conference, however, does not have anything to do

[4] Case No. 18-278-AU-ORD, Comments of Four A Energy Consulting Services, LLC, at 2 (Jan. 2, 2020).

[5] *Id*. at 3.

[6] *Id*. at 4.

[7] The lack of apparent coherence in this proposed addition is further demonstrated by Four A's inclusion of the term "frivolous" in its proposed division (C), the same term it seeks to strike in divisions (A) and (B).

with the lack of merit of a complaint. Thus, it is nonsense to suggest that the procedure of setting a mandatory settlement conference should result in a determination that a complaint has merit and deserves the further use of resources.

Under its proposed division (C), Four A also would further limit a party's ability to proceed with a motion under division (A) or (B) by precluding a party from making such a motion unless the administrative law judge requests the parties to address whether the complaint is frivolous or the complainant is a vexatious litigator. In essence, then, either the injured party must file an additional motion to ask for the right to file a motion to address the frivolous or vexatious behavior or the administrative law judge must, sua sponte, determine that there is a problem. The incoherence of this approach is apparent.

Finally, Four A would place the administrative law judge in the unenviable role of both prosecutor and judge. Under Four A's proposed division (D), the unrepresented complainant would provide questions to the examiner and the examiner will proceed with an "inquiry." Although Four A does not define what an "inquiry" is, Four A apparently contemplates that the administrative law judge will act on questions presented to it by the complainant. Apart from the ethical concerns presented by this suggested approach,[8] this recommendation has no apparent relationship to the rule Four A is seeking to amend. Proposed Rule 4901-9-02 addresses abusive conduct; proposed division (D) goes to the conduct of the hearing. Thus, proposed division (D) raises ethical questions and ignores the underlying issue of whether the claim is proper or the claimant is abusing the Commission and the other party's resources.

[8] While not applicable to the Commission's hearing examiners, the Code of Judicial Ethics should provide some guidance. Under the Code, a judge or magistrate must demonstrate a high level of independence. Code of Judicial Conduct Canon 2. In the sense that an administrative law judge serves as a "third-party neutral" when a matter is set for a mediation conference, the proposed rule also raises potential issues under Rule of Professional Conduct 2.4.

As several parties noted, Proposed Rule 4901-9-02 (with the change to correct an apparent drafting error recommended in the initial comments submitted by OTA) would be a useful addition to the Commission's rules governing complaint cases. Neither OCC nor Four A offers any reason for the Commission to reject the proposed rule or gut it with amendments.

B. Proposed amendments to the stipulations rules are unworkable

In its comments regarding the Commission's procedural rules, OCC takes the opportunity to offer a complete restructuring of the rules regarding stipulations. The heart of OCC's recommendation is contained in proposed division (F) to Rule 4901-1-30.[9] Because of the confusion the recommendation would provoke, the Commission should not adopt it.

In proposed division (F), OCC initially recommends a new balancing test in place of the current three-pronged test approved by the Supreme Court of Ohio for the review of stipulations.[10] Under this test, the Commission would balance eight (the ninth offered by OCC apparently applies to only electric security plan cases, a matter covered separately in an amendment to division (E)[11]), but these factors are not "exhaustive" and "no single factor is necessarily determinative."[12]

If the goal was to propose an unbridled review process, OCC has generally succeeded. The problem created by OCC's proposed division (F), however, is not limited to unbridled discretion within a stated framework. Because no factor is conclusive and the list is not exhaustive, any of

[9] Case No. 18-275-AU-ORD, Comments on the PUCO's Rules of Practice by the Office of the Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition at 22-28 (Jan. 13, 2020) ("OCC Procedural Rules Comments").

[10] *Industrial Energy Consumers of Ohio Power Co. v. Pub. Utils. Comm'n of Ohio*, 68 Ohio St. 3d 559 (1994). The three part test for approving stipulations is set out in many Commission orders. *See, e.g., In the Matter of the Application of Ohio Gas Company for an Increase in Gas Distribution Rates*, Case No. 17-1139-GA-AIR, *et al.*, Opinion and Order ¶¶ 20-22 (Feb. 21, 2018).

[11] OTA is not commenting on the proposal to adopt alternative standards for electric security plan cases.

[12] OCC Procedural Rules Comments at 26.

the listed factors could be trumped by some unanticipated matter that is not among the listed eight (or nine) factors, creating essentially a free-for-all hearing. Nothing is irrelevant since anything could be considered by the Commission under OCC's proposed test.

Further, the listed factors are so broadly worded as to be blank slates. Under subdivision (1), for example, the Commission would consider the "nature and breadth of the interests" represented by the parties that support and oppose the stipulation.[13] Although these interests oddly enough could be "determinative," OCC's proposed rule provides no guidance as to what the nature and breadth of an interest is. The only thing that one can take from this "factor" is that everyone has a voice that should be listened to. Many of the other proposed provisions reduce themselves to similar broad sentiments. As a result, this proposed division provides nothing actionable for a party or the Commission.

On a more technical level, an amendment to division (B) is not consistent with one of the factors listed in division (F). Under the proposed amendment to division (B), all parties would be required to be invited to settlement meetings.[14] In proposed division (F)(7), however, the Commission would consider the fairness of the settlement process, including "the extent to which parties were invited in substantially all settlement meetings."[15] Either parties have to be invited or not; the rules should at least be internally consistent.

For these reasons, OCC's proposed amendments of Rule 4901-1-30 are not reasonable and should not be adopted.

C. Discovery time frames should not be changed for proceedings subject to the approval processes contained in the Retail Telecommunications Services Rules

[13] *Id*. at 27.

[14] *Id*. at 26.

[15] *Id*. at 27.

OCC proposes to modify the discovery response timeframe to seven days in proceedings that are subject to automatic approval in less than 45 days.[16] For telecommunications companies that are subject to extensive competition and make filings which are effective immediately, this proposed change to the discovery rules is unnecessary.

Competition is alive and well in the Ohio telecommunications marketplace.[17] The level of regulation of these competitive services, however, is not consistent across the industry. Voice over Internet Protocol telephony, interconnected services that became available after September 13, 2010, and wireless service largely are not regulated, but more traditional wireline telephone companies remain subject to Commission regulation, including limits on the pricing of basic local exchange service.[18] In particular, Ohio law continues to require the regulated telephone companies to file tariff revisions and other notifications.[19] Somewhat responsive to the competitive disadvantage embedded in Ohio law, the Commission's rules provide for rapid changes for those activities that remain subject to some regulation including automatic approvals 30 days after a filing or zero-day notices.[20]

OCC's solution to the discovery issues it identifies appears to be too general. The cases in which problems occur due to a shortened approval process that OCC is seeking to address arise in the electric utility sector.[21] The telephone environment is fundamentally different if the lack

[16] *Id*. at 12.

[17] Telecom in Ohio, A Report on the State of the Industry (Oct. 2013), available at http://www.ohiotelecom.com/aws/OTIA/asset_manager/get_file/169746?ver=21378.

[18] R.C. 4927.03 and 4927.12.

[19] HB 402 has further reduced the amount of paperwork associated with a change of control, but notification requirements remain. *See* R.C. 4905.402(G) &(H).

[20] Customer protections also exist within this framework. This is accomplished through consumer notifications and extended processes for the more important changes that might affect a customer. For example, a change in basic local exchange rates is subject to customer notifications of at least 30 days. R.C. 4927.124.

[21] OCC Procedural Rules Comments at 12.

of protests and suspensions is indicative. The current system of notification and automatic approvals has worked well within the existing discovery processes since tariff, control, and process changes sought by telephone companies generally are not controversial and there is ample notification. Applying a new rule to address a non-existent problem makes no sense.

Discovery, moreover, is often cumbersome and resource intensive. In a competitive environment, the regulatory process can be used to slow or frustrate business responses, especially in an industry in which only some face Commission oversight of their business practices. Thus, the rule changes sought by OCC may be anticompetitive as well as unnecessary.[22]

Finally, the existing discovery rules provide that the Commission can adjust the time for responses to discovery,[23] and the Commission has shortened response dates when it became apparent that the time line of the case justified the need to do so.[24] Thus, no change is needed to the current rules to accommodate the concerns OCC has.

Accordingly, the Commission should not adopt a change in Commission rules regarding discovery that would adversely affect telephone competition in Ohio. Although OCC apparently has concerns with the current process available to it to address a limited number of applications, these concerns do not extend to telephone matters, and there is nothing in the current practice before the Commission that warrants a change to the discovery rules in those cases. If the Commission does not reject OCC's request for shortened discovery timelines, it should limit the

[22] State policy encourages the Commission to consider market forces and the regulatory climate in carrying out its regulatory responsibilities regarding the provision of telephone services. R.C. 4927.02.

[23] *See, e.g.*, Rule 4901-1-19(A).

[24] *See, e.g., In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, Entry at 2 (June 6, 2014).

application of those timelines to specific cases in which the Commission agrees that there is a potential problem.

III. Conclusion

While frivolous or vexatious conduct is not frequent, the complaint process at the Commission has suffered from parties' misuse. The proposed rule to address frivolous claims and vexatious litigators is a reasonable response within the Commission's rulemaking authority. The Commission should not reject or materially modify the proposed rule . However, the Commission should reject OCC's attempt to rewrite the standards for approval of contested stipulations since the proposed changes are unworkable. Finally, the Commission should make clear that the automatic approval process in telephone cases will not be upended by shortened discovery timelines.

Respectfully submitted,

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