BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Mater of the Review of Ohio Adm. 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 Adm. 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 Adm. Code Chapter 4901-3 Rules Regarding Open Commission Meetings.	))))))	**Case No. 18-277-AU-ORD**
In the Matter of the Review of Ohio Adm. Code Chapter 4901-9 Rules Regarding Commission Complaint Proceedings.	))))	**Case No. 18-278-AU-ORD**

REPLY COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO

I. INTRODUCTION

On December 4, 2019, the Public Utilities Commission of Ohio ("Commission") solicited comments regarding proposed revisions to Chapters 4901-1, 4901:1-1, 4901-3, and 4901-9, Ohio Administrative Code ("O.A.C.").[1] In accordance with that Entry and the Commission's January 2, 2020 Entry, several interested parties submitted initial

[1] Entry at 1 (Dec. 4, 2019).

comments and proposed revisions.[2] Industrial Energy Users-Ohio ("IEU-Ohio") responds to certain comments and recommendations below.[3]

II. COMMENTS

A. 4901-1-02 and -03

IGS Energy proposes a provision be added to either Rule 4901-1-02 or 4901-1-03 that would require parties to abide by a recommendation already found in the Commission's electronic filing manual and technical requirements on the Commission's website, namely that "all type-written, electronically filed documents must have the capability to electronically search the text within the document."[4] OCC and NOAC make a similar proposal, that filings other than "scanned attachments" be searchable PDFs.[5] IEU-Ohio is generally in favor of these proposals or a similar revision that largely requires that documents be searchable. IEU-Ohio recommends a small adjustment to their proposals that would instead provide that: (1) parties are required to ensure that an electronically created document remains searchable; (2) parties are prohibited from intentionally making electronically filed documents unsearchable; and (3) that parties informally work together to resolve any issues with electronically filed documents.

[2] Comments specifically discussed herein include Initial Comments of Interstate Gas Supply, Inc. ("IGS Energy Comments"); Initial Comments of Ohio Power Company ("AEP Ohio Comments"); Comments on the PUCO's rules of Practice by the Office of the Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition ("OCC/NOAC Comments"); Comments of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company ("FirstEnergy Comments"); and Initial Comments of Columbia Gas of Ohio Inc. and Duke Energy Ohio, Inc. ("Columbia/Duke Comments") (January 13, 2020).

[3] Failure to comment on a particular recommendation is not intended to indicate support.

[4] IGS Comments at 1.

[5] OCC/NOAC Comments at 3.

B. 4901-1-03

IGS Energy also proposes a revision to Rule 4901-1-03(A) that would require attorney-represented parties serve filings almost exclusively via email, while still providing exceptions for parties not represented by attorneys.[6] IEU-Ohio is in favor of this revision and encourages the Commission to adopt any such provisions that streamline the use of email to serve documents among attorney-represented parties.

C. 4901-1-05(D)

OCC and NOAC propose removing the phrase "or email service is impractical" from this rule, noting that email service from one attorney to another should never be less practical than another form of service.[7] As IEU-Ohio noted in its own comments, email service should certainly be the preferred method of service among attorney-represented parties. However, there are inevitable exceptions that must be provided for in the rule. For example, the file size of documents quite often exceeds the limits of email servers, necessitating multiple emails or service by another means. Recently, this has included mailing CDs and USB flash drives, although many parties are starting to switch to FTP and other cloud-based file transfer systems. The Commission should require attorneys to serve documents by email but should also retain an exception where email service is impractical.

[6] IGS Comments at 3.

[7] OCC/NOAC Comments at 3.

D. 4901-1-09

1. FirstEnergy

FirstEnergy proposes a revision that would exclude from the restrictions on ex parte communications "discussions between a party and an ALJ assigned to mediate a case while the case is being mediated."[8] IEU-Ohio does not take a formal position on this proposed revision but would ask that if this proposal be adopted, this exception be limited to instances where a formal mediation has been initiated.

2. OCC/NOAC

OCC and NOAC propose a number of revisions to this rule that would expand the scope of what is included in "ex parte communications," would require a specific notice period to other parties, and would allow parties to substantively respond to such communications "on the record."[9]

IEU-Ohio opposes the proposed revisions by OCC and NOAC. Initially, OCC and NOAC would include communications with certain, but undefined, Staff members as ex parte communications. It is not possible for parties to ascertain which Staff members would fall into OCC and NOAC's proposed expanded definition. Moreover, the process OCC and NOAC propose is also unduly burdensome. After communications with undefined Staff members, parties would be required to make formal filings, and other parties would have a chance to respond on the record. The Commission should be encouraging all parties to work collaboratively with the Commission Staff, not retreating to avoid the potential additional expense and hassle that would accompany this proposal.

[8] FirstEnergy Comments at 3-4.

[9] OCC/NOAC Comments at 4-6.

E. 4901-1-10(A)

OCC and NOAC propose adding a provision to this rule that would include as a party to a proceeding "any person with a statutorily recognized right to intervene."[10] The change is unnecessary as Rule 4901-1-11 already includes an allowance where "a statute of this state or the United States confers a right to intervene." It is also unclear if the proposal would automatically make OCC a party to many proceedings. If OCC has a statutory right to intervene, then OCC is free to exercise that right. But there are many proceedings that do not warrant OCC's participation, even if OCC (or other parties) may have a right to intervene. There is no need for this proposed change, and adopting it would create additional unnecessary regulatory costs and burdens for other parties.

F. 4901-1-11(D)

The Commission should not accept AEP Ohio's proposed addition to this rule that would allow the Commission to grant limited intervention to parties but not allow those parties to serve discovery or notice depositions until either a procedural schedule is established or the ALJ otherwise authorizes.[11] The rationale AEP Ohio offers for this proposed change, as discussed below, is to hinder due process and the public interest by denying discovery opportunities until the Commission grants intervention, which historically is often deferred until later stages of a proceeding. AEP Ohio offers no reasonable basis for this rule change and it should therefore be rejected.

[10] OCC/NOAC Comments at 6.

[11] AEP Ohio Comments at 4-5.

G. 4901-1-14

Columbia and Duke propose a rule change that would allow parties to request, or for the Commission or ALJ to elect to hold, a procedural conference prior to a procedural entry being issued.[12] IEU-Ohio supports this proposal and notes that allowing all parties to consult with one another and with the ALJ regarding scheduling issues could prevent conflicts later in the proceeding, particularly if parties or the ALJ are involved in multiple concurrent proceedings.

H. 4901-1-15

OCC and NOAC propose several revisions to the rules governing interlocutory appeals. These revisions would allow for appeals from either the granting or denial of motions to compel discovery or motions to quash subpoenas; would require that a non-presiding ALJ be responsible for certifying interlocutory appeals; would make "the need for an immediate determination to prevent undue prejudice" an independent justification for an interlocutory appeal; and would amend the provision allowing rulings on interlocutory appeals to be deferred until later in the proceeding only if there is no harm to the parties in doing so.[13]

IEU-Ohio generally supports these proposed revisions and would encourage the Commission to adopt any proposals that facilitate the parties' ability to receive adequate due process under the rules.

[12] Columbia/Duke Comments at 2.

[13] OCC/NOAC Comments at 7-9.

I. 4901-1-16

AEP Ohio proposes a number of revisions to the rules governing the discovery process, starting with Rule 4901-1-16(B), in which AEP Ohio proposes carve-out language to include the "express limits" they propose in the rules to follow.[14] IEU-Ohio opposes these provisions and will address several of them specifically.

1. 4901-1-16(C)

AEP Ohio proposes adding a new section (C) to Rule 4901-1-16 that would restrict the use of discovery responses received in prior proceedings from being used in subsequent proceedings, unless the party seeking to use the response obtains permission to do so.[15]

IEU-Ohio opposes this proposal. Initially, the essence of AEP Ohio's proposal is that only evidence obtained in a certain proceeding is relevant to that proceeding, essentially providing tremendous power to a utility to dictate and limit the information available in a case (especially so given that AEP Ohio seeks to erode due process and the public interest by limiting a party's total discovery requests to only 40, as discussed further below).

Moreover, AEP Ohio's proposal only creates additional regulatory burdens and is in any event unworkable. If a party has information that it does not intend to use, only to find a utility witness taking liberties with past statements, should another party be prevented from impeaching that witness with a prior discovery response if it was not produced in this proceeding? If a party needs to have a utility reaffirm its prior statements,

[14] AEP Ohio Comments at 2.

[15] *Id*.

should that party then be deprived of discovery in the current proceeding under AEP Ohio's theory that it should get to dictate the evidence in a case and parties should only be allowed a few discovery requests? What legitimate purpose is served by AEP Ohio's blanket proposal to exclude potentially relevant and material evidence? AEP Ohio provides no answer to these important questions.

Fundamentally, the determination of whether a piece of evidence is relevant and/or material should be made by the presiding officer of the proceeding in which it is raised, not through a blanket rule. AEP Ohio's proposal should be rejected.

2. 4901-1-16(D)(5)

AEP Ohio also proposes a revision to the rule permitting requests for supplementation to discovery responses made before the commencement of hearing. AEP Ohio proposes removing the ability of parties to request supplementation in their original discovery requests, stating that it defeats the purpose of the rule's narrow supplementation requirement.[16]

IEU-Ohio generally opposes this revision. While every discovery request should not be subject to blanket requests for supplementation, AEP Ohio's proposal goes too far. For example, requesting periodic updates to a utility's forecasted expenses should not require a weekly discovery request asking the utility if there is an update. IEU-Ohio would not oppose general guidance from the Commission that directs parties not to ask that every discovery request be supplemented. A rule that prohibits blanket requests for supplementation, while allowing the parties to use reasonable discretion to seek updates for material information as it becomes available, will allow parties to obtain the needed

[16] *Id*. at 3.

information while not placing undue burdens on utilities. Moreover, to the extent a party is abusing the rule, utilities can avail themselves of the protections available through a protective order, which will also serve to highlight the bad actors and not reduce the due process rights for those parties engaging in good faith discovery.

3. 4901-1-16(G)

AEP Ohio also proposes a revision that would prohibit discovery in cases unless a hearing is required by statute or has been ordered by the commission, or if discovery is authorized by an ALJ for good cause shown.[17]

IEU-Ohio opposes this proposal. The Commission has rejected similar arguments from utilities attempting to limit the rights of intervening parties to seek discovery, including the same arguments made by AEP Ohio in an earlier rulemaking proceeding.[18] Utilities or any party that believes it is the subject of undue burden through discovery already have avenues available to seek redress at the Commission, through motions for protective orders or by seeking stays of discovery in cases where a party's intervention is challenged. There is no benefit to restricting the ability of all parties to have access to as much information as possible, even in cases where a hearing is not required.

4. 4901-1-16(H)

AEP Ohio proposes either to wholly eliminate the provision allowing parties to seek discovery while their motions to intervene are pending, or to modify the rule in such as a way as to achieve the same result, namely, that parties will no longer be able to serve

[17] *Id*. at 3-4.

[18] *See* Case No. 11-776-AU-ORD, Finding and Order at 22-24 (Jan. 22, 2014).

discovery requests until or unless the Commission affirmatively acts and grants their motion to intervene.[19]

IEU-Ohio opposes this proposal. It has long been established practice at the Commission that parties with pending motions to intervene are afforded all the same rights as any other party. AEP Ohio has not proposed a workable alternative to this established practice that would address its purported concerns while still maintaining the rights of the other parties, and it is likely such an alternative does not exist. As previously stated, utilities have a variety of other means already in the rules by which to protect themselves from what they perceive to be improper or unnecessarily burdensome discovery requests. Moreover, motions to intervene are not typically granted immediately upon filing, and the current process provides for nearly a month of briefing (15 days for a memo contra and an additional 7 days for a reply) before the matter would even be before the Commission. It would be very unlikely that opposed motions to intervene (or requests to limit intervention) would be ruled upon in less than 6 weeks. In experience, motions to intervene are often granted in orders following a hearing. AEP Ohio has not offered a reasonable basis to adopt its proposed revisions and offers nothing to address the procedural nightmare that the proposed rule change would create. The proposed change should be rejected.

J. 4901-1-19

1. AEP Ohio

AEP Ohio proposes in this rule and others to limit the number of individual requests (here, interrogatories) each party may submit to any other party. Under AEP Ohio's

[19] AEP Ohio Comments at 4.

proposal, no party could submit more than 40 interrogatories to any other party without leave from the ALJ to do so; this limitation would include any subparts of any question as separate interrogatories.[20]

IEU-Ohio opposes this proposal. This revision would pose an obvious undue burden on any non-applicant, non-Staff party seeking to litigate (or settle) a case with little to no information other than what is publicly available. Further, applications are often incomplete (sometimes as a result of requested waivers of filing requirements and other times simply deficient). Even when not technically incomplete or deficient, it is obviously in a utility's interest not to disclose information negative to its case in an application unless required by rule or statute. Detailed discovery requests are a necessary component to allow parties the opportunity to fully investigate the breadth of a case, rather than waiting until Staff releases its review and recommendation, which may or may not address all the issues of concern to intervening parties. This proposal is an extreme measure to address a concern by AEP Ohio that, once again, could be more readily solved by remedies already allowed under the rules, such as motions for protective order.

2. OCC/NOAC

OCC and NOAC propose a revision to 4901-1-19(D), which would require responses to interrogatories to be produced electronically if the response refers to a document that is stored electronically.[21] The proposed revision also makes clear that if the document is stored electronically, responding parties may not respond by only permitting on-site inspection of the document.

[20] *Id*. at 5-6.

[21] OCC/NOAC Comments at 12-13.

IEU-Ohio supports this proposed revision. The exchange of information between parties, to the extent that information is relevant and responsive to discovery requests, should be made as seamless as possible to facilitate open and productive proceedings before the Commission.

K. 4901-1-20

As with interrogatories, AEP Ohio proposes to limit the number of requests for production of documents other parties may serve to no more than 40, including subparts.[22] As with interrogatories, IEU-Ohio opposes this proposed revision, for the same reasons as stated above.

L. 4901-1-21(E)

Columbia and Duke propose a revision that would limit the scope of documents able to be requested in a deposition notice. The revision would restrict the scope to those of which the deponent has personal knowledge and would prevent parties from requesting documents in deposition notices at all if the general discovery deadline has passed.[23]

IEU-Ohio opposes this proposed revision. Noticing parties should be permitted to require the deponent to bring to the deposition any materials relied on for their testimony, regardless of whether it was already produced, or the deadline has passed, as well as discovery responses where the deponent is the sponsoring witness. In cases where a witness has adopted another person's testimony, parties should be permitted to broadly request the type of documents for a witness to bring to a deposition. Furthermore, where a witness is not identified until after the discovery deadline, such as rebuttal testimony,

[22] AEP Ohio Comments at 6.

[23] Columbia/Duke Comments at 2-3.

parties should again be able to broadly request the types of documents for a witness to bring. Any concern with the scope of discovery requests can be handled through motions for protective orders or a procedural conference.

M. 4901-1-22

As with interrogatories and requests for production of documents, AEP Ohio proposes to limit the number of requests for admission other parties may serve to no more than 40, including subparts.[24] And as with interrogatories and requests for production of documents, IEU-Ohio opposes this proposed revision, for the same reasons.

N. 4901-1-29(A)(1)

OCC and NOAC propose a revision to subsection (h) of this rule to amend the deadline for direct expert testimony in commission proceedings (other than the ones accounted for earlier in the rule) to 18 days prior to the commencement of hearing if that testimony is offered by a utility, applicant, complainant, respondent, petitioner, or party supporting a stipulation. They further recommend the addition of a new rule, which would set the deadline for direct expert testimony in those same proceedings offered by any other party to no later than seven days before the commencement of hearing.[25]

IEU-Ohio opposes this proposal. While IEU-Ohio supports providing parties with sufficient time to review testimony before hearing, 18 days and 7 days is a rigid framework that may or may not work for each individual case. ALJs can and should be active in managing the docket and setting procedural expectations throughout the proceeding, and by doing so be able to set reasonable deadlines for testimony that balance parties' need

[24] AEP Ohio Comments at 6.

[25] OCC/NOAC Comments at 21-22.

for adequate time not only to draft their own testimony but to review testimony submitted by others and otherwise prepare for hearing.

Rather than a rigid framework established by rule, IEU-Ohio would support ALJs proactively managing procedural schedules. While there will always be parties who want more time, and others who want an expeditious decision, uncertainty about a procedural schedule is often times worse than an expedited schedule. Knowing at the start of an ESP case or rate case when a hearing will occur, as well as discovery deadlines, Staff testimony and Staff reports, intervenor testimony, even settlement deadlines, will likely lead to more efficient allocation of resources by all parties.

O. 4901-1-30

OCC and NOAC propose multiple revisions to the rules governing stipulations, seeking to limit the Commission's discretion in how it evaluates stipulations. IEU-Ohio opposes these proposals as specified below.

1. 4901-1-30(B)

OCC and NOAC propose a rule that requires all parties to be invited to meetings in which the terms of settlement are discussed.[26] IEU-Ohio opposes this proposal. Parties should be able to freely negotiate potential terms of settlement with one another, and then to present those terms to all parties for the opportunity to review, consider, and further negotiate. Requiring all parties to be present at all meetings where the terms of settlement may be discussed is often an inefficient use of counsel's time and will likely hinder the ability of parties to negotiate openly. Of course, a stipulation should be shared with all parties for discussion *and* settlement negotiation before it is filed. But requiring each and

[26] *Id*. at 22-27.

every communication among parties in a case to be shared with every party is unlikely to lead to a better outcome, reduce regulatory cost and burden, or enhance the public interest.

2. 4901-1-30(E)

OCC and NOAC propose a revision that, specifically in relation to ESP proceedings, would require a presumption that serious bargaining did not occur and that would require the Commission to evaluate every provision of a stipulation on its own merits, rather than consider the stipulation as a package.[27]

IEU-Ohio opposes these revisions. OCC and NOAC are attempting to solve a problem that largely does not exist. It is a very rare occurrence for parties to present a credible claim that serious bargaining did not occur in settlement negotiations, let alone for the Commission or the Supreme Court to find that to be the case. A review of the ESP cases to date (And the RSP and ETP cases that preceded the ESPs), shows that the settlements have been negotiated by a diverse group of parties, most of which are represented by attorneys with significant amounts of experience practicing before the Commission. The results of these settlements have not always been lawful and reasonable, but the process to reach them is hardly so corrupted that a rebuttable presumption of unreasonableness is warranted. The rebuttal presumption OCC and NOAC propose is unfounded.

The Commission should also reject OCC and NOAC's proposal in subsection (E) that settlements shall not be found to be the product of serious bargaining "if the stipulation lacks diversity of interests, including, but not limited to, where the signatory

[27] *Id*.

parties do not include a party that broadly represents the interests of an entire class of customers."[28] It is unclear whether this proposed provision is meant to be applied to all cases that are settled by stipulation, or just in ESP cases as in OCC and NOAC's other proposed revisions to subsection (E). Regardless, IEU-Ohio opposes the revision. This same position has been rejected by the Commission numerous times before,[29] and if adopted would essentially give veto power to a small number of intervenors. Each party in a proceeding has unique perspectives and interests, and when these collective perspectives and interests are combined it should be indicative of not only the serious bargaining that lead to the stipulation, but also the broad efforts of the parties to guide the Ohio utility regulatory process in a positive direction. Collaboration and not endless litigation should be the encouraged outcome. The OCC/NOAC proposal falls on the wrong side of this divide and should be rejected.

3. 4901-1-30(F) & (G)

The Commission should also reject OCC and NOAC's proposed new rule (F) that would require the Commission to balance a specific list of factors when evaluating stipulations.[30] The proposed revision is another attempt often rejected in cases, that would require or at least strongly weigh OCC's inclusion or exclusion on a settlement when considering whether to approve the stipulation. The proposal reduces the public

[28] *Id*.

[29] *See, e.g.*, *In re Dayton Power & Light Co.*, Case Nos. 16-395-EL-SSO et al, Opin. & Order ¶ 21 (Oct. 20, 2017); *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 13-1571-GA-ALT, Opin. & Order at 10 (Feb. 19, 2014*) In re Columbia Gas of Ohio, Inc.*, Case No. 07-478-GA-UNC, Opin. & Order (Apr. 9, 2008) at 32.

[30] *Id*.

interest because it provides one party, here OCC, a de jure or de facto veto on settlements. No party, utility, OCC, or Staff, should have a veto on a stipulation.

While OCC wants to create a new standard heavily in its own favor, OCC fails to demonstrate any problem with the current 3-part test. OCC's proposed standard is also an implicit attack on prior stipulations that did not include OCC, and a request that the Commission prospectively limit creative ideas that parties might be able to develop and agree upon in order to put down their litigation positions and develop a solution that, broadly speaking, furthers the public interest. The OCC/NOAC standard, again, would facilitate more litigation and not more collaboration. It moves things in the wrong direction and should be rejected.

P. 4901-9-01

AEP Ohio proposes a new rule (C) that would require the Commission to review a formal complaint and determine whether it has jurisdiction over the complaint and whether the complainant has stated reasonable grounds for the complaint; and if the Commission concludes either of these in the negative, it must dismiss the complaint.[31]

If the Commission considers AEP Ohio's proposal, the Commission should clarify at what point in the process it would conduct this review, whether in response to a motion to dismiss, at the outset of a proceeding after the complaint is filed, in the final order, or otherwise. It is hard to envision how AEP Ohio's proposal would work in practice outside of a ruling on a motion to dismiss, in which case the rule change seems largely meaningless. If the rule is seeking some new process, perhaps the Commission undertaking some sort of independent review, then it seems that additional rule changes

[31] AEP Ohio Comments at 7.

would be necessary to clearly state the new process, and procedural deadlines for parties.

Q. 4901-9-02

FirstEnergy proposes a revision to the new vexatious litigator language proposed by Staff, and suggests the addition of "demonstrates a disregard for the commission's rules of practice or amounts to an abuse of process" to the definition of frivolous complaints or courses of conduct.[32] IEU-Ohio does not take a formal position on this proposed revision, but would request clarification, if adopted, on what is meant by either "disregard for the commission's rules of practice" or "abuse of process." For example, certain utility proposals in this proceeding suggest that any more than 40 discovery requests are an undue use of the discovery process, as is seeking discovery in cases without a mandatory hearing. These examples must fall outside of the vexatious litigator category as any finding of vexatious litigation should be reserved to the most egregious situations as the penalties for vexatious litigation, denial of access to the tribunal, is great.

III. CONCLUSION

For the foregoing reasons, IEU-Ohio respectfully requests that the Commission adopt its recommendations regarding the proposed revisions to Rules 4901-1 and -9, O.A.C.

[32] FirstEnergy Comments at 7-8.

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Respectfully submitted,

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Summary: Comments Reply Comments of Industrial Energy Users-Ohio electronically filed by Ms. Rebekah J. Glover on behalf of Industrial Energy Users-Ohio