BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER 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 OHIO POWER COMPANY

INTRODUCTION

Pursuant to Public Utilities Commission of Ohio's ("Commission") Entry filed January 16, 2020 ("Entry"), Ohio Power Company ("AEP Ohio" or the "Company") respectfully submits these reply comments regarding proposed changes to Ohio Adm.Code 4901:1. 4901:1-1, 4901-3, and 4901-9.

REPLY COMMENTS

4901:1-1-04 Refund language in tariffs

AEP Ohio disagrees with The Office of the Ohio Consumers' Counsel ("OCC"), Northeast Ohio Public Energy Council, Northwest Ohio Aggregation Coalition ("NOAC") and Edgemont Neighborhood Coalition's (collectively referred to as the "Consumer Parties")

proposed addition of a section that attempts to establish a regulatory rule requiring utilities to refund funds collected under a filed tariff schedule.[1] The Commission should not adopt this new section as it would be unlawful to do so.

The Consumer Parties claim that the Ohio Supreme Court's decision in *In re Alternative Energy Rider Contained in the Tariffs of Ohio Edison*, which held that funds First Energy collected under a filed tariff were not subject to refund, was based on the fact that the tariff at issue did not have a refund provision.[2] First, although the Court did make such a finding, the decision also made clear that the Commission could not require First Energy to refund the funds collected under a filed rate schedule tariff because requiring such a refund violates the rule against retroactive ratemaking.[3] Specifically, the Court held that R.C 4905.32 requires public utilities to charge its customers the rates that are in effect at the time and set forth in the schedule filed with the Commission; therefore, where a utility recovers costs under filed rate schedule, the Commission is prohibited from later ordering a disallowance or refund of those costs.[4] The Court went on to say that the statutory framework requires such result and, as such, is an issue for the General Assembly to remedy, not the Ohio Supreme Court or the Commission.[5]

The Court's decision in that case is consistent with long-standing precedent regarding the "filed rate doctrine" and the prohibition against retroactive ratemaking. The filed rate doctrine forbids a regulated entity from charging rates other than those properly filed with the appropriate

[1] Joint Comments of the Consumer Parties, at 3.
[2] Id. at 1.
[3] *In re Review of Alternative Energy Rider Contained in Tariffs of Ohio Edison Company*, 153 Ohio St.2d 289, 2018-Ohio-229, ¶18 (Ohio 2018); *see also Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co*., 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957); *In re Application of Columbus S. Power Co*., 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 15–17; *In re Application of Columbus Southern Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, 8 N.E.3d 863, ¶ 56; R.C. 4905.32.
[4] Id.
[5] Id.

federal regulatory authority.[6] The Supreme Court and jurisdictions across the country have continued to find that the filed rate doctrine is necessary to protect customers from discriminatory pricing,[7] to protect utilities from antirust and other tort claims based on the rates the utilities charge,[8] and to ensure predictable and stable rates that benefit of both the regulated entity and its customers.[9]

The Ohio Supreme Court also has recognized the continued applicability of the filed rate doctrine and rule against retroactive ratemaking in an era in which electric distribution utility ratemaking no longer follows the traditional rate base formula and sometimes employs flexible cost recovery mechanisms. In *In re Columbus Southern Power Co.*, 2011-Ohio-1788 at ¶¶ 12-16, the Court held that the Commission violated the rule against retroactive ratemaking by authorizing additional rates in an electric security plan to make up for regulatory delay but also held that, because the retroactive increase was fully recovered, there could be no refund to

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[6] *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.D.C. 2006) (quoting *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981)). *See also AT & T v. Cent. Office Tel., Inc*., 524 U.S. 214, 222, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) ("[T] century-old 'filed rate doctrine' associated with the ICA tariff provisions applies to the Communications Act as well."); *Ark. La. Gas Co. v. Hall*, 453 U.S. at 574 (finding that the filed rate doctrine is embedded in the Natural Gas Act and bars the Federal Energy Regulatory Commission from imposing a rate increase for gas already sold at the tariffed rate); *Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co*., 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed2d. 912 (1951) (finding the doctrine embedded in the Federal Power Act).

[7] *See, e.g., Sancom, Inc. v. Qwest Comm. Corp*., 643 F.Supp.2d 1117, 1131 (D.S.D. 2009) ("The filed rate doctrine bars claims that would result in some customers paying different rates than the rates filed with the FCC."); *Curtis v. Cenlar FSB*, S.D.N.Y No. 13 CIV 3007, U.S. Dist. LEXIS 161687, *10 (Nov. 12, 2013) (holding doctrine barred plaintiff's claim that defendant charged inflated rates because resolving that issue would implicate rate-discrimination concerns underlying doctrine).

[8] *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 415, 106 S.Ct. 1922, 90 L.Ed. 2d 413 (1986) (filed rate doctrine bars claim that shippers colluded to fix rate subsequently approved by ICC); *Simon v. KeySpan Corp.*, 694 F.3d 196, 206-207 (2nd Cir. 2012) (applying doctrine to bar antitrust and tort claims attacking market based rates charged by an producer of electricity); *In re Title Ins. Antitrust Case*s, 702 F.Supp.2d 840, 864 (N.D. Ohio 2011)(recognizing that the doctrine necessarily bars private civil claims in order to protect against discrimination and to preserve the regulating agency's authority to determine the reasonableness of the rates).

[9] *See, e.g., Consol. Edison of N.Y. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) ("By authorizing only prospective rate changes, [the filed rate doctrine and the corollary rule against retroactive ratemaking] ensure rate predictability. . . ."); *NSTAR*, 481 F.3d at 800 (noting the two rules work together and serve the dual purposes of "ensur[ing] rate predictability" for purchasers of regulated electricity and promoting equity among customers by "preventing discriminatory pricing") (quoting *Consol. Edison of N.Y. v. FERC*, 347 F.3d at 969-70)).

customers of the amount collected. In *In re Application of Columbus Southern Power Co.*, 2014-Ohio-462 ¶ 54, the Court similarly rejected the argument that a mechanism put in place to prospectively recover deferred fuel costs could be used to refund other previously collected rates that the Court had found were improper. As these cases make clear, the rule against retroactive ratemaking prohibits using a cost recovery mechanism to recoup costs incurred, or refund charges collected, prior to the effect date of the date of the order.

Additionally, there is no question that setting public utility rates falls squarely within the legislative domain and requires the Legislature to establish the rules of law that will best protect the needs of Ohio citizens. The Ohio Legislature concluded that the filed rate doctrine, as codified in R.C. 4905.32, is a proper and necessary rule of law and has stood firm with that conclusion over half a century. The United States Congress and virtually every other state legislature agree. If Ohio is to now decide that the doctrine has out-lived its time or is too harsh, and should be abandoned or diminished, it is a decision to be made by the General Assembly after due consideration of all the consequences of such a drastic departure from a law that has existed here and across the land for decades, which is consistent with the Supreme Court's holding that any changes to the filed rate doctrine are within the exclusive purview of the legislature.[10]

Abrogating the rule against retroactive ratemaking also would be inconsistent with the fact that filed tariffs are substantive quasi-legislative enactments and, as such may not be applied retroactively. "There is no question that tariff schedules and the statutes that authorize tariffs are part of a comprehensive statewide enactment concerning the regulation of public utility rates,

[10] *Square D Co.*, 476 U.S. 424 (stating, "[i]f there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court.").

charges, and services."[11] As a quasi-legislative enactment, a public utility tariff is subject to Ohio Constitution, Article II, Section 28, which prohibits the passage of retrospective laws. Allowing the Commission to make retroactive changes to tariffs, or requiring tariffs to be applied retroactively by allowing utilities to recover past costs or lost profits or allowing refunds to utility customers, would violate the constitutional prohibition against retroactive laws.

Finally, abandoning the filed rate doctrine could have any number of unintended consequences. For example, disavowing the rule against retroactive ratemaking would foist considerable added risk on investors in Ohio public utilities because of the loss of rate predictability. This added risk could actually increase the cost of service and rates in Ohio by requiring Ohio utilities to offer a higher rate of return to investors in order to secure necessary capital. The necessary increase in rates to account for this added risk, in turn, could disadvantage Ohio businesses vis-à-vis competitors in other states that continue to ensure rate stability and predictability by following the filed rate doctrine. Increased rates due to the greater risk also will affect Ohio consumers and require the State to expand state programs designed to protect low-income consumers. Allowing retroactive adjustments to rates inevitably also will foster more appeals by utilities and by their customers alike because there would be so much more at stake in any appeal. Finally, as noted previously, abrogation of the filed rate doctrine would expose Ohio utilities to antitrust and other tort claims and the cost of defending such claims as class actions. As these few examples of the unintended consequences demonstrate, any change in the current law evokes a seismic change in public policy that should not be made without first fully exploring all the potential ramifications, and finding a suitable regulatory

[11] *Complaint of City of Reynoldsburg v. Columbus S. Power Co.*, 134 Ohio St.3d 29, 2012-Ohio-5270, 979 N.E.2d 1229, ¶ 42 (citing *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 150, 573 N.E.2d 655 (1991)).

mechanism to provide the protections and predictability that have been provided by the filed rate doctrine for more than half a century. Therefore, and for all the foregoing reasons, the Commission should reject the Consumer Parties' proposed Ohio Adm.Code 4901:1-1-04.

4901-1-10 Parties

AEP Ohio opposes OCC and NOAC's proposed subsection that recognizes as a party "any person with a statutorily recognized right to intervene."[12] OCC appears to insinuate that they have a statutory right to intervene, which they do not. OCC has a statutory *opportunity*, not a right, to intervene and the Commission should make that clear in its order in this case.

4901-1-11 Intervention

AEP Ohio opposes OCC and NOAC's proposed changes to 4901-1-11. First, OCC and NOAC demand that Ohio Adm.Code 4901-1-11(B)(5) be deleted because it is "contrary to statute [and] is invalid."[13] However, OCC and NOAC do not attempt to argue that the requirements of Ohio Adm.Code 4901-1-11(A)(2), which permit intervention of a party "unless the person's interest is adequately represented by existing parties," are contrary to statute and invalid. Thus, to the extent OCC and NOAC wish to exempt movants from the language of section (B)(5), they have failed to do so as motions to intervene could be still be denied if a person's interest is adequately represented by existing parties under section (A)(2), which they presumably acknowledge is valid. Further, the Ohio Supreme Court has tacitly recognized the language in (B)(5) is part of the Commission's consideration when determining whether grant or deny a motion to intervene.[14] In *Ohio Consumers' Counsel v. Pub. Util. Comm.*, the Court found that the Commission had abused its discretion by denying OCC's motion to intervene because,

[12] OCC Initial Comments at 6.
[13] OCC & NOAC Joint Comments, at 7-8.
[14] *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 2006-Ohio-5853, 111 Ohio St.3d 824 ¶16 (Ohio 2006).

among other things, OCC's interest were not represented by any other party to the proceeding.[15] Finally, this proposed revision seeks only to further delay proceedings and increase the burden on the utilities and Staff. For the foregoing reasons, the Commission should reject OCC and NOAC's proposed deletion of section (B)(5).

The Commission should similarly reject OCC and NOAC's recommendation that section (F) be modified to reduce the standard for granting untimely motions to intervene from "extraordinary circumstances" to "good cause shown."[16] Reducing the burden on parties who do not timely file motions to intervene is unnecessary, would serve only to delay proceedings, and incentivizes untimely filings, all of which increases the burden on the Commission and the utilities. As such, the Commission should reject OCC and NOAC's proposed change to section (F).

4901-1-17 Time Periods for Discovery

AEP Ohio opposes OCC and NOAC's modification to this section that would allow discovery immediately upon a party *filing* for intervention.[17] Consistent with the Company's initial comments filed in this docket,[18] allowing a person to take, and requiring a party to respond to, discovery before the person is granted intervention only delays the proceeding and places an unnecessary burden the responding party. Therefore, the Commission should reject this proposal.

4901-1-21 Depositions

AEP Ohio supports the suggested edits to this section provided by Columbia Gas of Ohio, Inc. ("Columbia") and Duke Energy Ohio, Inc. ("Duke"). Limiting the scope of documents and tangible things a deponent must produce to items that the deponent has personal knowledge

[15] Id.
[16] OCC & NOAC Joint Comments, at 8-9.
[17] Id. at 11.
[18] AEP Initial Comments, at 3-4.

facilitates the efficient exchange of information at deposition. Currently, when a deponent is required to bring items based on overly broad request, the deposition becomes less productive as that parties must sort through irrelevant material and/or spend time dealing with items the deponent cannot provide information about. Further, the Company agrees that there has been some misuse of the deposition rule to obtain documents after the deadline for formal requests for production of documents has past. This practice is inappropriate and the Commission should adopt the revisions proposed by Duke and Columbia because they will help curtail this improper practice.

4901-1-30 Stipulations

AEP Ohio strongly opposes OCC and NOAC's comments and proposed changes to this section. First, it appears that OCC and NOAC insinuate that a stipulation or settlement impacting utility rates and/or the service provided to its customer could be reached without the utility being a party to such stipulation or settlement.[19] This suggestion is completely unreasonable and has no basis in law or logic. When a utility makes any filing, they are in the best position to determine the needs of its system and its customers as well as the level of investment and programs necessary to meet those needs for providing safe and reliable service to its customers. Allowing multiple intervenors to enter into a settlement or stipulation without the utility allows those parties to arbitrarily change the utility's rates, limit the utility's investment, and/or modify the utility's service to its customers, all of which significantly hinder the utility's ability to provide adequate and necessary service to customers across its service territory. Further, to the Company's knowledge, there have been no instances of the Commission approving a stipulation or settlement changing the utilities rates and/or service without that utility being a party to the

[19] OCC & NOAC Joint Comments, at 23.

settlement. Allowing such stipulations to be reached would only harm customers across the state and make it extremely difficult, if not impossible, for the utilities to provide safe and reliable service to its customers. As such, to the extent OCC and NOAC attempt to provide for stipulations or settlements without that utility being a party to such agreement, the Commission should dispel that notion as entirely unreasonable.

Further, AEP Ohio opposes all the additional requirements OCC and NOAC propose related to the Commission's evaluation a settlement or stipulation.[20] First, OCC and NOAC fail to demonstrate why the Commission's current criteria for evaluating stipulations and settlements, which has been endorsed by the Ohio Supreme Court,[21] is inadequate. Although they assert that the utilities have unfair bargaining power in settlement negotiations, OCC and NOAC fail to demonstrate how the benefits associated with allowing a utility to enter into a stipulation or settlement with capable and knowledgeable parties are outweighed by not having a party who broadly represent the interest of an entire class of customer be a party to the stipulation or settlement. In fact, the Commission already considers whether the settlement benefits ratepayers and the public interest and, if the Commission finds that it does not, will not approve the settlement. Additionally, when Staff is a party to a settlement, Staff represents the interest of all intervenors and, therefore, would seemingly satisfy OCC and NOAC's proposed requirement to have a party who "broadly represents the interest of an entire class of customers." Thus, to the extent OCC and NOAC attempt to ensure customers and ratepayers are adequately considered and represented in settlement decisions, the Commission's current practice does so and, as such, OCC and NOAC's proposed revisions are unnecessary.

[20] Id. at 23-25.
[21] *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994), citing Consumers' Counsel at 126.

Further, OCC and NOAC's proposed changes would only increase the costs to ratepayers and the utilities because the proposed requirements for a stipulation would reduce the instances of settlement, increasing the time and resources the utilities and Commission are required to spend to fully litigate cases that would have otherwise settled. Finally, OCC and NOAC's proposal essentially gives OCC veto power over all settlements, which is completely unreasonable and will only harm the ratepayers and the utilities ability to provide safe and adequate service to them. For similar reasons, AEP Ohio also opposes the Environmental Law and Policy Center's proposed revisions to this section.

Given the above, the Commission should reject the proposed revisions and additions to this rule proposed by OCC and NOAC and the Environmental Law and Policy Center.

4901-1-39 Supporting Documentation for Tariff Filings

AEP Ohio opposes OCC and NOAC's addition of this section requiring the utilities to file "supporting documentation," including workpapers, with their updated tariffs.[22] This requirement seeks only to place an unnecessary burden on the utilities, especially given that parties can obtain this information by requesting it from the utilities. Further, making these workpapers part the docket would only lead to greater customer confusion and serves no purpose other than to provide OCC with access to the documents without requesting permission from the utility. Thus, the Commission should also reject this proposal.

4901-9-03 Motions for Summary Judgment

Finally, AEP Ohio supports Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's (collectively "First Energy") proposal to add a new Ohio Adm.Code 4901-9-03 allowing for motion for summary judgment practice in complaint

[22] OCC & NOAC Joint Comments, at 28-30.

proceedings.[23] This proposal would allow the utilities to eliminate spending time and resources to attend settlement conferences, prepare for and attend hearings, and fully brief compliant proceedings where there is no genuine issues of material fact. Reducing this expense benefits all ratepayers and reduces the burden of an unnecessary proceeding on the complainants, the Commission, and the utility. Therefore, AEP Ohio believes that Commission should adopt the proposed provisions.

Respectfully submitted,

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[23] First Energy Initial Comments, at 8-9.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 10th day of February, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

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