

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of Ohio Adm.)
Code Chapter 4901-1 Rules Regarding) Case No. 18-275-AU-ORD
Practice and Procedure Before the)
Commission.)

**REPLY COMMENTS ON THE PUCO'S RULES OF PRACTICE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
THE NORTHWEST OHIO AGGREGATION COALITION**

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February 10, 2020

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Stakeholders filed initial comments regarding Ohio Administrative Code 4901-1, which contains the PUCO’s rules of practice for fair, just, and efficient resolution of administrative proceedings. Some of these initial comments (including the joint comments of OCC and NOAC) would improve protection of consumers. Others would harm consumers, decrease transparency, and further tilt the balance of power in favor of utilities in proceedings before the PUCO.

The Office of the Ohio Consumers’ Counsel and the Northwest Ohio Aggregation Coalition appreciate the opportunity to provide reply comments for the protection of the consumers and the public interest that they represent.

I. REPLY COMMENTS

O.A.C. 4901-1-9: Ex parte discussion of cases

O.A.C. 4901-1-10: Parties

The Environmental Law and Policy Center (“ELPC”) recommends that the PUCO Staff be considered a “party” for purposes of the PUCO’s ex parte rules.¹ Under the PUCO’s current ex parte rules, parties generally may not communicate with Commissioners and attorney examiners assigned to the case regarding the merits of a case. As ELPC notes in its comments, the Staff is generally not considered a “party” for purposes of the ex parte rules.² ELPC is correct that exemption of the Staff from the ex parte rules could create inequities in the PUCO’s processes.

For example, the Staff routinely participates in PUCO proceedings and often signs settlements, which it is allowed to do under Ohio Adm. Code 4901-1-10(C).³ In those cases, the Staff’s role is similar, if not identical, to intervening parties: it is litigating an active proceeding before the PUCO, taking a position, and encouraging the PUCO to rule one way as opposed to another. It would be unfair if, in this situation, the Staff—and only the Staff—is allowed to communicate with Commissioners or the Attorney Examiner off the record about the merits of the case, without disclosing those communications. Further, this arrangement could result in communications that a party (such as a utility) is itself barred from having directly with Commissioners being indirectly relayed by the Staff. Accordingly, the PUCO should adopt the position of ELPC that when the PUCO

¹ Comments of the Environmental Law and Policy Center at 1-3 (Jan. 13, 2020) (the “ELPC Initial Comments”).

² ELPC Initial Comments at 2 (noting that under Ohio Adm. Code 4901-1-10(C), Staff is not a party for purposes of the ex parte rules).

³ See Ohio Adm. Code 4901-1-10(C) (recognizing Staff as a “party” for purposes of stipulations).

Staff is actively participating in a particular proceeding, the PUCO Staff should be subject to the ex parte rules under Ohio Adm. Code 4901-1-9.

O.A.C. 4901-1-11: Intervention

O.A.C. 4901-1-16: General Provisions on Discovery

- A. The PUCO should reject AEP’s proposal to tilt the regulatory process in favor of utilities (and to the detriment of consumers) by substantially reducing parties’ ability to examine and challenge utility proposals through discovery.**

AEP makes various proposals aimed at limiting parties’ rights to discovery. These proposals should be rejected because they (1) violate the reform law of 1982 (R.C.

4903.221 and 4903.082) that promoted fairness in PUCO proceedings (that AEP would like to undo), (2) would create a wildly one-sided regulatory process where utilities hold all the relevant information while everyone else sits on the sidelines in the dark, and (3) would add considerable administrative burden to every PUCO proceeding.

First, AEP proposes that parties not be allowed to serve *any* discovery unless (1) a hearing is required by statute, (2) a hearing has been ordered by the PUCO, or (3) the ALJ allows discovery “for good cause shown.”⁴ Second, AEP proposes that the ALJ be given the authority to grant parties “limited intervention” with no right to discovery. These proposals are unreasonable and violate the law.

The reform law (R.C. 4903.221) guarantees parties a right to intervene in any PUCO proceeding where they may be adversely affected. The law speaks to full intervention, not limited intervention. The law (R.C. 4903.082) also guarantees “all parties and intervenors” “ample rights of discovery.” R.C. 4903.082 does not say that parties have ample rights of discovery in cases involving hearings, and it does not say

⁴ Initial Comments of Ohio Power Company at 3-4 (Jan. 13, 2020) (the “AEP Initial Comments”).

that parties only have the right to discovery “for good cause shown.” It says, “ample rights of discovery.” It is impossible for a default rule outright prohibiting discovery to constitute “ample rights of discovery”—it is literally the opposite.

Further, AEP’s proposal that discovery be limited to cases with a hearing simply ignores the reality of the regulatory litigation process at the PUCO in several ways. Not all proceedings have a hearing. Regardless of whether there is a hearing, discovery can be necessary to obtain sufficient information regarding an application or other pleading in order to provide substantive comments. Many PUCO proceedings are decided based on parties’ comments and reply comments, as opposed to witness testimony and a hearing. Discovery is essential in these proceedings so that parties have an opportunity to explore the utility’s proposal. Additionally, allowing discovery in such cases helps to inform the PUCO for better decision-making. In fact, in a recent proceeding decided based on comments, the utility *complained* that parties were taking positions without serving discovery, arguing that parties’ positions should be discounted because they were not based on information gained through discovery.⁵

A default rule prohibiting discovery would also cause problems in many cases where there is a statute or rule requiring a response in a short period of time. For example, the PUCO’s energy efficiency rules allow any party to file objections within 30 days after the filing of a utility’s application to charge consumers.⁶ The only way a party can meaningfully participate in a case like this is to serve discovery almost immediately upon the utility’s filing. If instead, as AEP proposes, the party must seek leave from the

⁵ Case No. 19-2080-EL-ATA, Reply Comments of [FirstEnergy] at 3 (Dec. 27, 2019).

⁶ Ohio Adm. Code 4901:1-39-07.

ALJ “for good cause” shown, it is practically guaranteed that the party will not receive any discovery responses until after the deadline for objections.

AEP’s proposal that parties seek leave from the ALJ to serve discovery “for good cause shown” would also overburden ALJs with constant motions for discovery. As explained above, discovery is essential in all types of cases, not just those that are scheduled for a hearing. ALJs will be inundated with parties in virtually every case filing motions for discovery, seeking a ruling that good cause exists. This is administratively inefficient and not a good use of ALJs’ or parties’ time.

Additionally, parties to a PUCO proceeding have adequate means to protect themselves from improper discovery requests without further limiting the opportunities to conduct discovery. As the PUCO has noted before, in response to suggestions like those made by AEP, the better course is to permit the party upon whom discovery has been served to move for protection should the party find itself subject to perceived, unreasonable discovery requests.⁷

The goal of AEP’s proposal is clear: to reduce parties’ ability to gain important information from the parties – the utilities – that generally are the filers of cases and have the most information about whatever they are seeking from the PUCO (and consumers). AEP would make it more difficult for parties to oppose utilities’ many requests to charge customers more money.

And if AEP is concerned that it is being overburdened by discovery requests, then one solution (in addition to seeking protection from discovery) would be to stop

⁷*In the Matter of the Commission’s Review of Chapters 4901-1 Rules of Practice and Procedure*, Case No. 11-776-AU-ORD, Opinion and Order at 46 (Jan. 22, 2014).

proposing electric security plans with so many riders. The reason that AEP and other utilities have so many simultaneous proceedings before the PUCO is because many of their dozens of electric security plan riders require updates and audits annually, if not more frequently. Utilities benefit from these riders at the expense of consumers. Yet now, AEP wants to limit parties' rights to information about those very same riders by unfairly limiting discovery. The PUCO should reject AEP's self-serving proposal to tilt the scale in PUCO proceedings further in favor of utilities.

AEP also proposes that parties not be allowed to serve discovery until their motion to intervene is granted.⁸ The current rule (Ohio Adm. Code 4901-1-16(H)) provides that a party may begin serving discovery as soon as its motion to intervene is filed. The current rule should remain in place. Parties' motions to intervene are often not ruled upon immediately. And in some cases, motions to intervene are not granted until the hearing. AEP's proposed rule would result in more delays and denials of parties' discovery contrary to Ohio law that grants discovery rights to all parties. AEP's proposal should be rejected. The present rule should not be altered as AEP argues. Parties should continue to be allowed to serve discovery as soon as they file a motion to intervene.

In reality, the present system should be reformed to better protect the statutory rights to discovery. There are examples of regulated entities unilaterally declining to

⁸ AEP Initial Comments at 4.

answer discovery.⁹

Moreover, PUCO rulings on motions to compel should be expedited to ensure rights to discovery are enforced. In some cases, a dispute among parties eventually requires a motion to compel. If there is not a timely ruling on the motion to compel, a party may be entirely unable to explore certain topics (or all topics when a utility outright refuses to respond to any discovery). Thus, the PUCO should modify Ohio Adm. Code 4901-1-23 to require the ALJ to rule on any motion to compel within 14 days of the final pleading (whether it be a reply in support of a motion to compel or a memorandum contra when a motion to compel is filed on an expedited basis).

B. The PUCO should reject AEP's procedurally inefficient proposal that parties be required to serve the same discovery questions in multiple proceedings.

AEP proposes a new rule that “[d]iscovery responses obtained in a prior proceeding may not be used in a subsequent proceeding” unless the party either (1) asks the same question again, (2) seeks an admission as to the existence of the response in the subsequent proceeding, or (3) stipulates with all “affected parties” regarding the use of such responses.¹⁰ It is unclear what purpose this proposal serves, other than to waste parties’ time and give utilities like AEP more advantages than they already have.

⁹ For example, in a current case (Case No. 19-2153-GE-COI) involving PALMco Power OH, LLC, OCC intervened and properly served discovery under Ohio Adm. Code 4901-1-16(H), which explicitly provides that a party may serve discovery while its motion to intervene is pending. PALMco unilaterally refused to provide any response to any of OCC’s discovery requests. PALMco’s only explanation was that it opposes OCC’s motion to intervene. In another case involving Verde Energy (Case No. 19-958-GE-COI), Verde similarly refused to respond to OCC’s lawfully served discovery requests based on its own manufactured rule that OCC not be allowed to serve more discovery sets than Verde wants to respond to. *See also* Case No. 17-2344-EL-CSS, Commissioners’ Comments at May 15, 2019 Commission Meeting, minutes available at <https://www.puco.ohio.gov/calendar/commission-minutes-may-15-2019/>, wherein the Commissioners expressed “actionable disappointment with Duke Energy Ohio’s litigation practices and its failure to follow the directives of the attorney examiner.”

¹⁰ AEP Initial Comments at 2.

When a utility responds to a discovery request, it is supposed to do so under oath.¹¹ The information provided is to be true and accurate, regardless of whether it was provided in one case or another. There is no good reason that information obtained in one case should not be used in another case, but AEP would seem to have reasons that are not good (for the administration of justice in PUCO cases).

It is also interesting that AEP would want to add this additional burden of *more* discovery to the discovery process. All of AEP's other proposals are alleged to be aimed at reducing the amount of discovery (to the benefit of utilities, who would then have the upper hand in PUCO proceedings). But this proposal seeks to *increase* the amount of time parties spend asking and answering discovery. The common thread is that this proposal and AEP's other proposals advantage AEP and utilities to the disadvantage of others.

Parties participate in many proceedings that are related to each other. Information from one proceeding commonly is relevant to another proceeding. It does not cease to be relevant simply because a party asked for it in a different case. The PUCO should reject AEP's proposal to require parties to ask the same discovery questions in different cases. In any event, AEP and other parties have the right to object to the use of such discovery at hearings or in proceedings and thus already have a means to protect themselves against any alleged unfairness.

¹¹ See, e.g., Ohio Adm. Code 4901-1-19(A).

C. The PUCO should adopt the proposal of the Industrial Energy Users-Ohio (“IEU”) to streamline the process for parties to gain access to files in the possession of the PUCO Staff that are subject to public records requests.

As a public entity, the PUCO is subject to Ohio’s public records laws.¹² This means that in many proceedings, the results of the PUCO Staff’s investigation can be accessed by any member of the public through a public records request. Parties to PUCO proceedings at times seek to obtain documents from the Staff through public records requests. Under the law, there is no specific deadline for responding to public records requests. The law states only that requests shall be fulfilled “within a reasonable period of time.”¹³

IEU proposed that the PUCO “consider rules that facilitate an expedited exchange of documents or information housed by Staff and already subject to public records law, but that may not be able to be made available as quickly as necessary through traditional records requests.”¹⁴ While Ohio’s public records law must be respected as distinct from PUCO-related discovery law – with separate enforcement and remedies outside the PUCO, IEU’s proposal for expediting PUCO responses to public records requests should be supported.

D. The PUCO should modify the discovery rules so that the PUCO Staff is subject to limited discovery, as ELPC recommends.

In its initial comments, ELPC proposes expanding the scope of the PUCO’s rules to allow discovery on the PUCO Staff.¹⁵ ELPC notes that in Illinois, the commission staff

¹² R.C. 149.43.

¹³ R.C. 149.43(B)(1).

¹⁴ Initial Comments of Industrial Energy Users-Ohio at 6 (Jan. 13, 2020) (the “IEU Initial Comments”).

¹⁵ ELPC Initial Comments at 1-3.

is subject to discovery “so that parties have the information they need to effectively oppose Staff when there is disagreement on issues.”¹⁶

In our initial comments, we similarly suggested that allowing discovery on the Staff would promote fairness in PUCO proceedings by allowing parties an adequate opportunity to prepare for PUCO hearings.¹⁷ Our initial proposal is somewhat more limited than ELPC’s, though both proposals seek to increase transparency and fairness in PUCO proceedings. We proposed that the PUCO Staff be subjected to limited discovery, meaning depositions only, and only if the Staff submits pre-filed testimony or signs a settlement and will testify to support it.¹⁸ In any event, ELPC’s approach should be favorably considered for expanding parties’ opportunities to obtain discovery from the Staff, which can be done without placing undue burden on the Staff.

O.A.C. 4901-1-19: Interrogatories

O.A.C. 4901-1-20: Production of documents

O.A.C. 4901-1-22: Requests for admission

AEP proposes that parties be limited to 40 interrogatories, 40 requests for production of documents, and 40 requests for admission.¹⁹ Under AEP’s proposal, parties could exceed this number only upon ALJ approval based on good cause shown.²⁰ The PUCO should reject this unfair proposal.

¹⁶ ELPC Initial Comments at 2.

¹⁷ Comments on the PUCO’s Rules of Practice by the Office of the Ohio Consumers’ Counsel and the Northwest Ohio Aggregation Coalition at 6-7 (Jan. 13, 2020) (the “OCC/NOAC Initial Comments”).

¹⁸ OCC/NOAC Initial Comments at 6-7.

¹⁹ AEP Initial Comments at 5-6.

²⁰ AEP Initial Comments at 5-6.

Similar to AEP's proposal above where parties would have no right to discovery in many cases, AEP proposes further limitations on parties that would allow just 40 discovery requests. And again, AEP's goal is clear: to advantage itself by reducing the discovery served on it. AEP's proposal would make it harder for parties to develop a case against the many rate increases that utilities such as AEP seek through a variety of bill riders. The PUCO should reject AEP's proposal.

As explained above, the law guarantees parties "ample rights of discovery."²¹ AEP's proposal would end ample discovery, in favor of limited discovery. Indeed, 40 discovery requests would be woefully inadequate in numerous PUCO proceedings. Utility proposals are often complex and multi-faceted. As one example, Duke Energy recently filed a proposal for a new grid modernization plan.²² Duke's proposal includes a 16-page application, plus testimony of seven different witnesses totaling nearly 200 pages. It would be impossible for anyone to evaluate a proposal like this in anything close to 40 discovery requests. And that is before the utilities start objecting to the discovery.

Also troubling are cases where the utility files virtually nothing. In one recent case involving FirstEnergy, for example, the utility filed tariff sheets and nothing else (i.e., no supporting documentation or analysis).²³ Parties were then required to use discovery to figure out even the most basic of information about the filing, including core details about how rates were derived. If parties were limited to just 40 discovery requests, it would encourage utilities to include less information in their public filings, so that

²¹ R.C. 4903.082.

²² Case No. 19-1750-EL-UNC.

²³ Case No. 19-1904-EL-RDR.

parties would be forced to “waste” their 40 requests obtaining information that should have been publicly filed in the first place.

If AEP wants less process, it should stop asking for so many riders in its electric security plans. Fewer riders means fewer cases and that means less discovery for AEP to respond to. But AEP obviously wants to keep benefiting from its cornucopia of single-issue charges to customers. Therefore, it should not be allowed to undercut a fair process for other parties by withholding information through an arbitrary limit of 40 discovery requests.

Further, as with AEP’s other proposals, the discovery limitation is administratively inefficient and would create more work for the ALJs. Parties would routinely need leave to serve more than 40 discovery requests, and ALJs would constantly be required to adjudicate disputes over whether there is “good cause shown” for such requests.

The proposal also results in a double whammy for parties in light of AEP’s other proposal that parties be required to re-ask discovery questions in multiple cases. Under AEP’s proposal above, parties would not be allowed to take discovery from one case and use it in another. If parties are also limited to 40 discovery requests, then they would have to waste many of those 40 discovery requests on questions they already know the answer to because of having asked that question in another proceeding. This is inefficient and senseless. The PUCO should not adopt this approach to unnecessarily burden litigation. The existing rule should not be modified as AEP proposed because parties upon whom discovery is served already have a means under the PUCO rules to protect themselves from discovery they perceive to be objectionable.

O.A.C. 4901-1-21: Depositions

- A. Contrary to proposals by Columbia Gas and Duke Energy, document requests through a deposition notice should not be limited to those documents the deponent has personal knowledge of.**

Ohio Adm. Code 4901-1-21 provides that a party noticing a deposition may include in the deposition notice “a request, made in compliance with rule 4901-1-20 of the Administrative Code, for the production of documents or tangible things at the taking of the deposition.” Columbia and Duke propose that the PUCO place limitations on such documents requests such that the document requested must be one for “which the party deponent has personal knowledge.”²⁴ The PUCO should reject this proposed rule change for several reasons, just as it has rejected this request in the last rules review.²⁵

First, parties could easily game the system by intentionally withholding relevant documents from a witness so that the witness could then claim lack of personal knowledge and refuse to produce the relevant documents.

Second, the fact that a document exists and that the witness in question is unfamiliar with it might itself be relevant evidence. For example, suppose a witness files testimony claiming that he reviewed “all invoices.” But suppose that there were in fact invoices that the witness failed to review. In that situation, the deposed party could decline to produce the unreviewed invoices on the grounds that the witness didn’t review them and thus lacked personal knowledge. But certainly, parties should have access to all available invoices to be able to impeach the witness by pointing out to the PUCO that he didn’t review some of them. Under Columbia and Duke’s proposal, however, utilities

²⁴ Initial Comments of Columbia Gas of Ohio, Inc. and Duke Energy Ohio, Inc. at 2-3 (Jan. 13, 2020) (the “Columbia/Duke Initial Comments”).

²⁵ See *In the Matter of the Commission’s Review of Chapters 4901-1 Rules of Practice and Procedure*, Case No. 11-776-AU-ORD, Opinion and Order (Jan. 22, 2014).

could use lack of personal knowledge as a means to thwart other parties' legitimate need for those documents.

Third, there may not always be a witness with "personal knowledge" of a relevant document. This could occur in a number of ways. For example, a document could be in possession of a party's counsel of record, who obviously could not be deposed and required to produce the document. Or perhaps the utility is in possession of a relevant document but the utility employees with personal knowledge of it have all left the utility. Again, there might not be any utility witness with "personal knowledge" of the document, and the utility could refuse to produce it no matter who was being deposed.

Fourth, Columbia and Duke's stated concern is that parties might "ask a witness to produce an overly broad collection of documents at his or her deposition."²⁶ There is already adequate protection against this type of request, as the party receiving the deposition notice can make objections to such a request, just as it could do if it was a request for production of documents under Ohio Adm. Code 4901-1-20. There is no need to place further limitations in the rules.

Fifth, the rule as written promotes administrative efficiency in the discovery process and at hearings by providing the name of the individual with knowledge to depose and to cross-examine.²⁷

²⁶ Columbia/Duke Initial Comments at 2.

²⁷ See *In the Matter of the Commission's Review of Chapters 4901-1 Rules of Practice and Procedure*, Case No. 11-776-AU-ORD, Opinion and Order at 50 (Jan. 22, 2014).

B. Document requests through deposition notices should be allowed even if the deadline for other written discovery has passed.

Columbia and Duke also propose that parties not be allowed to include document requests with a deposition notice if the deadline for written discovery has passed.²⁸ But that would defeat the entire purpose of the rule. The PUCO's rules allow for document requests to be served *both* under Ohio Adm. Code 4901-1-20 as a request for production of documents *and* under Ohio Adm. Code 4901-1-21 as part of a deposition. If parties could only seek documents before the deadline for document requests under 4901-1-20, then the ability to request documents under Ohio Adm. Code 4901-1-21 would be rendered entirely useless.

Further, parties often have to file testimony under compressed timelines, especially in cases in which a settlement is filed. Obtaining documents through a deposition notice might be the only way to obtain any documents at all. When the PUCO considered this rule change in the last rules review, it saw no reason to modify or adopt new language to address the issue raised by Columbia and Duke.²⁹ It should make that same determination once again here.

C. Deposition transcripts should be admissible as evidence if a subpoena seeking to compel testimony of a witness is quashed.

In its initial comments, FirstEnergy states, "An important part of due process is requiring a testifying witness to appear at the hearing and be available for cross

²⁸ Columbia/Duke Initial Comments at 2-3.

²⁹ *In the Matter of the Commission's Review of Chapters 4901-1 Rules of Practice and Procedure*, Case No. 11-776-AU-ORD, Opinion and Order at 52 (Jan. 22, 2014).

examination.”³⁰ FirstEnergy is correct—it is important that the PUCO require parties to produce witnesses to appear at the hearing to be cross-examined.

In some situations, however, this has been rendered impossible. For example, if a party deposes a witness, subpoenas the witness to appear at the hearing, but the subpoena is quashed, then there would be no opportunity for cross-examination at the hearing.³¹ At a minimum, under such circumstances, the deposition transcript should be admitted into evidence.

O.A.C. 4901-1-24: Motions for Protective Order

A. Contrary to the proposal of Columbia Gas and Duke Energy, motions to extend a protective order should not be automatically approved.

In their initial comments, Columbia and Duke propose that under Ohio Adm. Code 4901-1-24(F), a motion to extend a protective order be “automatically approved on the expiration date of the existing order, unless otherwise ordered by the commission.”³² This modification is superfluous. Ohio Adm. Code 4901-1-24(E) already provides that while a motion to protection is pending, the information remains protected and is not publicly disclosed. Thus, Columbia and Duke’s proposed addition to Ohio Adm. Code 4901-1-24(F) is unnecessary.

Further, automatic approval of the continuation of protective orders is against the public interest and inconsistent with the goal of transparency in PUCO proceedings. Under R.C. 4901.12, with limited exceptions, “all proceedings of the public utilities commission and all documents and records in its possession are public records.”

³⁰ FirstEnergy Initial Comments at 4.

³¹ See OCC/NOAC Initial Comments at 16.

³² Columbia/Duke Initial Comments at 3.

Likewise, under R.C. 4905.07, again with limited exceptions, “all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys.” Ohio’s public records laws generally provide: “To facilitate broader access to public records, a public office ... shall organize and maintain public records in a manner that they can be made available for inspection or copying.”³³

And while it is true that certain information in PUCO proceedings must be redacted (*i.e.*, trade secrets), the PUCO should closely scrutinize trade secret claims to maximize public transparency. Allowing automatic approval of requests for protective orders would reduce PUCO oversight regarding the critical issue of transparency in regulatory proceedings, to the detriment of consumers and the public.

B. The PUCO should adopt IEU’s proposal that outstanding disputes regarding trade secret claims should be resolved before the hearing.

IEU recommends changes to Ohio Adm. Code 4901-1-24 that would “require the parties and attorney examiners to resolve trade secret claims prior to [the] start of evidentiary hearings.”³⁴ We support this proposal.

In some cases, a utility claims that certain information is a trade secret, another party challenges that designation, and the dispute is not resolved until *after* the hearing. As a result, some portion of the hearing is held in closed session, with members of the public and parties who did not sign a protective agreement barred. If after the hearing, the ALJ or PUCO rules that the information was *not* a trade secret, then the parties and

³³ R.C. 149.43(B).

³⁴ IEU Initial Comments at 3.

PUCO are required to go back through all of the evidence, including trial transcripts, to remove any redactions to this information. Further, it is impossible to go back in time and allow the public or parties to participate in the confidential closed portion of the hearing. In the interests of transparency in PUCO regulation, these trade secret disputes should be resolved before the hearing starts, as IEU recommends.

C. The PUCO should modify IEU’s proposal that all motions for protective order be accompanied by an affidavit.

IEU states in its initial comments that “the Commission should require an affidavit with motions for protective orders attesting that information is a trade secret.”³⁵ We agree that when a party files a motion for protective order regarding its *own* trade secrets, an affidavit would be appropriate. But in some circumstances, a party has to file a motion for a protective order regarding information it received from another party through discovery (even if the party believes the information is not a trade secret).

For example, OCC routinely signs protective agreements with utilities allowing it access to information that the utility deems to be a trade secret. When OCC uses this information in comments or testimony, it is obligated to file a motion for protective order. OCC should not be required to file an affidavit with that motion, because it is not OCC that can attest to the trade secret status of the information in question. Otherwise, IEU’s proposal should be adopted.

O.A.C. 4901-1-29: Expert testimony

IEU proposes that under Ohio Adm. Code 4901-1-29, the PUCO Staff be required to “identify its witnesses and the subject matter of testimony no later than one week

³⁵ IEU Initial Comments at 2.

before the commencement of hearing, and either require Staff to also file testimony one week before hearing or provide the other parties a break in the hearing schedule to prepare.”³⁶ This requirement would increase transparency and fairness in PUCO proceedings. And IEU’s proposal would be consistent with our recommendation that the PUCO Staff be subject to depositions under certain limited circumstances.³⁷ IEU’s proposal should be adopted.

O.A.C. 4901-1-30: Stipulations

In its initial comments, ELPC explains the shortcomings of the PUCO’s standard for reviewing settlements. Indeed, as explained in our initial comments, the PUCO’s three-prong test needs substantial revisions to adequately protect consumers from unfair settlements reached by parties spending other people’s money. ELPC proposes the following new rule under Ohio Adm. Code 4901-1-30: “Where a stipulation is not unanimous, the stipulating parties must meet the original burden of proof applicable to the proceeding.”³⁸ ELPC’s proposal should be adopted, with some slight revising.

Under ELPC’s proposed rule, the stipulating parties must meet the original burden of proof. But in some cases, the party that bears the original burden of proof might not be one of the stipulating parties. For instance, by statute, in base rate cases, “the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility.”³⁹ If a stipulation is filed in a base rate case that the utility does not sign, then under ELPC’s proposed language, the burden of proof would shift away from

³⁶ IEU Initial Comments at 7.

³⁷ See OCC/NOAC Initial Comments at 6-7.

³⁸ ELPC Initial Comments at 3.

³⁹ R.C. 4909.18.

the utility and onto the stipulating parties, which would violate the law. Thus, to properly implement the intent of ELPC's proposal, the rule should say: "The filing of a stipulation does not alter the burden of proof. Any party that bears an applicable burden of proof in the proceeding prior to the filing of a stipulation shall continue to bear that burden of proof, notwithstanding the filing of the stipulation."

II. CONCLUSION

This opportunity to provide comments on the PUCO's rules of practice is appreciated. The rules should be modified as proposed in our initial comments, and as supplemented above, to allow for greater transparency, fairness, efficiency, and justice in PUCO proceedings. There, in the cases that need to be administered by fair rules, the PUCO does its work to decide important issues that affect the electric bills and service quality for millions of Ohioans.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments was served on the persons stated below via electronic transmission, this 10th day of February 2020.

/s/ Maureen R. Willis

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This foregoing document was electronically filed with the Public Utilities

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Case No(s). 18-0275-AU-ORD

Summary: Comments Reply Comments on the PUCO's Rules of Practice by the Office of the Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.