

**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

REPLY COMMENTS OF INTERSTATE GAS SUPPLY, INC.

Bethany Allen (0093732)
Counsel of Record
bethany.allen@igs.com
Michael Nugent (0090408)
Michael.nugent@igs.com
Joseph Olikier (0086088)
joe.oliker@igs.com
IGS Energy
6100 Emerald Parkway
Dublin, Ohio 43016
Telephone: (614) 659-5000
Facsimile: (614) 659-5073
(Willing to accept e-mail service)

Attorneys for IGS Energy

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I. INTRODUCTION

On January 3 and 13, 2020, stakeholders filed comments in response to amended rules issued by the Commission, including those in Ohio Adm.Code Chapter 4901-1 which govern practice and procedure before the Commission. Those stakeholders include the Ohio Consumers' Counsel ("OCC") and the Northwest Ohio Aggregation Coalition ("NOAC") (jointly, "OCC/NOAC"); Columbia Gas of Ohio, Inc. ("Columbia") and Duke Energy Ohio, Inc. ("Duke") (jointly, "Columbia/Duke"); the Retail Energy Supply Association ("RESA"); The East Ohio Gas Company d/b/a Dominion Energy Ohio ("Dominion" or "DEO"); the Environmental Law & Policy Center ("ELPC"); Industrial Energy Users-Ohio ("IEU-Ohio"); Ohio Power Company ("AEP Ohio"); Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("FirstEnergy"); and the Ohio Farm Bureau Federation ("OFBF"). Interstate Gas Supply, Inc. ("IGS" or "IGS Energy") appreciates the opportunity to provide comments on these rules.

II. COMMENTS

A. Proposed Limitations on Discovery

In its Initial Comments, AEP Ohio provides a series of proposed amendments to the current rules that would unnecessarily limit discovery in Commission proceedings. IGS urges the Commission to reject these attempts to frustrate the development of a complete record.

The Commission has previously noted that its “rules are designed to allow broad discovery of material that is relevant to the proceeding in question and to allow the parties to prepare thoroughly and adequately for hearing.”¹ Adopting any of the suggestions provided by AEP Ohio would directly contradict this stated policy. When a party’s ability to conduct a proper review is limited, the Commission’s ability to reach a thoughtful decision on the merits is limited as well. As such, these recommendations should be denied.

1. Use of Discovery Responses in a Prior Proceeding

First, AEP Ohio suggests a provision that would prohibit the use of discovery responses obtained in a prior proceeding, unless that party “(1) requests the same information in the subsequent proceeding, (2) seeks an admission as to the existence of content of the response in the subsequent proceeding, or (3) forms an agreement or stipulation among all affected parties concerning use of the responses in the subsequent proceeding.”²

However, IGS notes that the Commission has previously rejected attempts to limit the use of discovery in subsequent proceedings, stating that “a protective agreement may

¹ *In re Duke Energy Ohio Inc.*, Case Nos. 08-920-EL-SSO et al., Entry (Oct.1, 2008) at 3.

² AEP Initial Comments at 2.

not contain a clause prohibiting a recipient of the confidential information from using the information in a subsequent proceeding, but that intervenors may retain a copy of such information and the Commission will rule upon any future attempted use within the context of that subsequent proceeding.”³ The Commission’s reasoning promotes transparency and development of the record, whereas AEP Ohio’s proposal would work against those goals. As such, IGS urges the Commission to maintain its current practice of considering the use of discovery in subsequent proceedings on a case-by-case basis, where the ALJs are best suited to make a relevancy determination based upon the specific circumstances.

2. Limiting Number of Discovery Requests

AEP Ohio also recommends establishing a limit on the number of interrogatories, up to forty, that may be served upon another party, and any subparts within an interrogatory will be counted as individual interrogatories.⁴ Additionally, AEP Ohio asks the Commission to place this limitation on requests for documents and requests for admission.⁵ As proposed, the limit may only be exceeded upon a motion with good cause shown, granted by the ALJ.

³ *In re FirstEnergy*, Case No. 14-1297-EL-SSO, Entry (July 22, 2015) at 17, citing *In re Duke Energy Ohio*, Case Nos. 14-841-EL-SSO, et al., Entry (Aug. 27, 2014) at 5-6; Entry on Rehearing (Oct. 22, 2014) at 5.

⁴ AEP Initial Comments at 6.

⁵ *Id.* at 6.

IGS urges the Commission to reject this proposal. Cases before the Commission can be lengthy and complex, covering a multitude of issues and proposals. IGS notes the last electric security plan application filed before the Commission contained over 1,200 pages.⁶ This proposal would require a party to limit its review of such a voluminous case with an equally hefty impact on Ohio's ratepayers to a mere forty interrogatories. Additionally, multiple cases are often consolidated into one proceeding, which would further amplify the harm this provision would place on a party's ability to properly prepare for hearing.

Moreover, it would encourage gaming and reward parties that submit non-responsive or incomplete discovery responses up until the arbitrary limit is met. Rather than reducing discovery, the arbitrary limit would increase the volume of motions to compel. Finally, the Commission has rejected such a limitation before, and should continue to do so here.⁷

3. Supplementation of the Record

AEP Ohio recommends prohibiting the inclusion of requests to supplement discovery within the initial discovery request.⁸ The proposal would require a separate request to supplement, and it must be submitted after the initial discovery request and

⁶ See *In re Duke Energy Ohio*, Case Nos. 17-1693-EL-SSO, et al., Application (June 1, 2017).

⁷ See *In re FirstEnergy*, Case Nos. 99-1212-EL-ETP, et al., Entry (Jan. 31, 2000) at 4.

⁸ AEP Initial at 3.

within the period for discovery.⁹ AEP Ohio believes including a request to supplement within the initial request “defeats the purpose of the rule’s narrow supplemental requirement.”¹⁰

IGS submits that AEP Ohio’s proposal is simply inefficient. Regardless of when or how the request to supplement is submitted, the response is exactly the same – the subsequently acquired information.

Additionally, the requirement to file requests to supplement the record within the time period of discovery directly conflicts with existing Ohio Adm.Code 4901-1-17(F), which explicitly states that the time period for discovery do not apply to requests for the supplementation of prior responses served under Ohio Adm.Code 4901-1-16(D)(5). Therefore, this suggestion should be rejected.

4. Limiting Discovery to Only Select Proceedings

AEP Ohio also recommends prohibiting the submission of discovery requests unless a hearing has been ordered by the Commission or required by statute, or unless authorized to do so by an ALJ.¹¹ AEP Ohio argues that discovery requests in any proceedings except a contested case is inefficient, unnecessary, and counter-productive, and serves no other purpose except to burden AEP Ohio.¹²

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 3-4.

¹² *Id.* at 3.

IGS strongly disagrees with this addition and AEP Ohio's disingenuous description of the purpose of discovery. Most notably, discovery requests are necessary in proceedings even without hearings. For example, when an EDU filed an application proposing an addition to its energy efficiency & peak demand reduction portfolio plan, parties used interrogatories to request additional details and clarifications about the proposal. This enabled the parties to include more thorough feedback on the proposal in comments, and in turn, provided a more meaningful review for the Commission. If discovery had not occurred, the missing details would have simply been risen by the parties in comments as questions and concerns.

Further, discovery can be used as a tool to avoid a hearing. In some cases, a hearing will only occur if requested by a party. Without the ability to inquire about some of the details of an application through a formal process, parties will be more likely to request hearings simply to access discovery rights. Therefore, the Commission should reject this proposal.

5. Limitations on Party Status

In another attempt to limit discovery rights, AEP Ohio proposes that parties must have been granted party status prior to submitting any discovery requests.¹³ AEP Ohio submits that this "will help streamline proceedings and reduce the burden on the

¹³ *Id.* at 4.

Company by eliminating the requirement that the Company respond to discovery requests from a party whose request for intervention may eventually be denied.”¹⁴

Initially, IGS notes the Commission’s consistent adherence to precedent from Supreme Court of Ohio, which has held that intervention should be liberally allowed for those with an interest in the proceedings.¹⁵ Thus, IGS questions the frequency in which AEP Ohio has responded to discovery requests from an entity which subsequently was denied intervention. Should AEP Ohio have concerns regarding a motion to intervene, IGS notes that the rules already provide an avenue for a prompt ruling which could prevent the concern presented by AEP Ohio.¹⁶

Additionally, the proposed rule would place a new burden on the ALJ to ensure pending motions to intervene are ruled upon in a timely manner. In cases with multiple intervenors, the ALJ could be required to issue multiple entries in an effort to provide parties with access to discovery rights as quickly as possible. This is simply inefficient. Moreover, IGS fears this would exclude pending parties from communications and the exchange of information about the proceeding between the current parties. When intervention is subsequently granted, these parties would be at a disadvantage.

Similarly, AEP Ohio proposes an addition that would provide the ALJ with the ability to grant limit intervention to a party and prohibit that party from serving any

¹⁴ *Id.*

¹⁵ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853.

¹⁶ See Ohio Adm.Code 4901-1-12.

discovery until a subsequent entry is issued by the ALJ.¹⁷ IGS believes this is unfair, unreasonable and merely another attempt by AEP Ohio to frustrate the discovery process. Thus, the Commission should reject AEP Ohio's proposed limitations.

B. Staff & Discovery throughout Ohio Adm.Code Chapter 4901-1

Multiple stakeholders commented on Staff's exemption from certain discovery rules in Chapter 4901-1. In response, IGS agrees with general sentiment of these comments that subjecting Staff to certain discovery provisions will allow cases to proceed efficiently with the most accurate information possible. Specifically, IGS agrees with IEU-Ohio, which requested "that the Commission 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."¹⁸ Additionally, IGS supports IEU-Ohio's proposal to "require Staff to also file testimony one week before hearing or provide the other parties a break in the hearing schedule to prepare."¹⁹ IGS believes small changes like these further the Commission's intent that these rules provide broad discovery rights and ability for the parties to adequately prepare for hearings,²⁰ while placing a minimal burden on Staff.

¹⁷ *Id.* at 4-5.

¹⁸ IEU-Ohio Initial at 6.

¹⁹ *Id.* at 7.

²⁰ See *In re Duke Energy Ohio, Inc.*, Case Nos. 08-920-EL-SSO et al., Entry (Oct.1, 2008) at 3.

C. Subpoenas in Ohio Adm.Code 4901-1-25

In its comments, OCC/NOAC suggest the following addition:

“Competitive retail electric service suppliers and competitive retail natural gas suppliers shall be subject to subpoena, as required by R.C. 4928.09(A)(1)(a) and R.C. 4929.21(A)(1)(a). This shall include, but shall not be limited to, (1) subpoenas requiring individual officers, agents, or employees of such suppliers to appear for deposition or hearing, regardless of whether such individuals are located within the State of Ohio, and (2) corporate subpoenas requiring the supplier to identify the relevant officers, agents, or employees to appear for a deposition or hearing pursuant to a subpoena, regardless of whether such individuals are located within the State of Ohio.”²¹

In support, OCC/NOAC states this is to “properly apply” R.C. 4928.09(A)(1)(a) and 4929.21(A)(1)(a).

IGS disagrees that OCC/NOAC’s proposed addition is the “proper” application of R.C. 4928.09(A)(1)(a) and 4929.21(A)(1)(a). These statutes require CRES and CRNGS Suppliers to consent to the jurisdiction of the courts in this state for any civil or criminal proceeding arising from their operations by providing an irrevocable consent through a process established by the Commission. The Commission accomplishes this by requiring a Supplier to attest to its consent in the supplier certification application process.²² Thus, the Commission has already properly applied the requirements of these provisions, and OCC/NOAC’s suggestion should be rejected.

²¹ OCC/NOAC Initial at 18-19.

²² “Initial Filing Instructions for Retail Electric Generation Providers and Power Marketers,” <https://www.puco.ohio.gov/emplibrary/files/smed/CRES/1ERCRESFormsComRetGenPowMark.pdf> at 11; “Initial Filing Instructions for Competitive Retail Natural Gas Suppliers,” <https://www.puco.ohio.gov/emplibrary/files/SMED/crng/CRNGSSupplierInstructionsandApplicationForm.pdf> at 11.

D. Staff Reports in Ohio Adm.Code 4901-1-28

In its comments, OCC/NOAC propose a new provision that would allow the admittance of Staff Reports for the truth of the matter asserted and specify that Staff Reports are not considered hearsay.²³

IGS does not support this proposal because it unreasonably interferes with a party's due process. Indeed, while the Staff Report typically frames the issues for hearing, a party may submit objections to a Staff Report filed in a rate case.²⁴ This places the burden on Staff to defend the Staff Report with testimony, and if this does not occur, all or portions of the Staff Report may be stricken.²⁵ If a Staff Report simply comes into the record—facts and all—without supporting testimony, no party would have an opportunity to cross-examine the opinions and assertions in the Report. This would severely interfere with a party's ability to challenge provisions within the Staff Report. Therefore, this suggestion should be rejected.

E. Searchable Filings in Ohio Adm.Code 4901-1-03

OCC/NOAC proposes a new rule to require parties represented by counsel to file all papers as searchable PDFs.²⁶ IGS notes that is recommended the same requirement in its Initial Comments and renews its support for its incorporation into the rules.

F. Proper Service in Ohio Adm.Code 4901-1-05(C)

²³ OCC/NOAC Initial at 19-20.

²⁴ Ohio Adm.Code 4901-1-28(A) & (B).

²⁵ Ohio Adm.Code 4901-1-28(A) & (C).

²⁶ OCC/NOAC Initial at 2-3.

In its comments, IEU-Ohio discusses the benefits of electronic service via email to all counsel listed for each party, instead of just the counsel of record. IGS agrees with IEU-Ohio that it is a benefit, but in order to maintain a reasonable service requirement, IGS suggests the following in response to IEU-Ohio's recommendation:

If a party has entered an appearance through an attorney, service of pleadings or other papers shall be made upon the attorney instead of the party. If the party is represented by more than one attorney, service shall be made upon all designated counsel for each party having properly made an appearance in the proceeding. However, for purposes of compliance with paragraph (A) of this rule, service need be made only upon the "counsel of record" designated under rule 4901-1-08 of the Administrative Code. If no counsel of record is listed for a party with multiple counsel then service shall be made on the first-listed counsel in the initial pleading.

IGS believes this strikes an appropriate balance by requiring service to all counsel yet preventing the disqualification of proper service based on a procedural technicality.

G. Commission's E-Filing System

In its initial comments, the OFBF provides suggestions to improve the "Parties of Record" tab within a docket on the Commission's website.²⁷ IGS agrees with OFBF and believes small adjustments could be made to the format of this tab that would ensure all parties are receiving proper notice. Having one current list of email addresses for counsel in the proceeding accessible on DIS, as suggested by OFBF, would be especially beneficial for all involved.

III. CONCLUSION

For the foregoing reasons, IGS recommends that the Commission adopts IGS' recommendations regarding the proposed rules of Ohio Adm.Code Chapter 4901-1.

²⁷ OFBF Initial at 1-2.

Respectfully submitted,

/s/ Bethany Allen

Bethany Allen (0093732)

Counsel of Record

bethany.allen@igs.com

Michael Nugent (0090408)

Michael.nugent@igs.com

Joseph Olikier (0086088)

joe.oliker@igs.com

IGS Energy

6100 Emerald Parkway

Dublin, Ohio 43016

Telephone: (614) 659-5000

Facsimile: (614) 659-5073

(Willing to accept e-mail service)

Attorneys for IGS Energy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Reply Comments of Interstate Gas Supply, Inc.* was served this 10th day of February, 2020 via electronic mail upon the following parties:

Maureen.willis@occ.ohio.gov Christopher.healey@occ.ohio.gov Amy.botschner.obrien@occ.ohio.gov sseiple@nisource.com josephclark@nisource.com Andrew.j.campbell@dominionenergy.com Rocco.D'Ascenzo@duke-energy.com Jeanne.Kingery@duke-energy.com Larisa.Vaysman@duke-energy.com trhayslaw@gmail.com cendsley@ofbf.org lcurtis@ofbf.org	JABorell@co.lucas.oh.us Leslie.Kovacik@toledo.oh.gov mpritchard@mcneeslaw.com rglover@mcneeslaw.com Fdarr2019@gmail.com stnourse@aep.com cblend@aep.com amilam@ofbf.org Attorney Examiner: Patricia.schabo@puco.ohio.gov
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/s/ Bethany Allen
Bethany Allen

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