ORIGINAL

IN THE SUPREME COURT OF OHIO

In re the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	)	Supreme Court Case No. 14-1505
In re the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)	Second Appeal from the Public Utilities Commission of Ohio
In re the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	)	Case Nos. 12-426-EL-SSO, 12-427-EL-ATA, 12-428-EL-AAM, 12-429-EL-WVR, 12-672-EL-RDR
In re the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	)	
In re the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)	

THIRD MERIT BRIEF AND APPENDIX BY APPELLANT THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") submits this Reply Brief, as the representative of the 456,000 residential utility customers of the Dayton Power and Light Company ("DP&L" or "Utility"). These customers are paying higher electric bills because of certain decisions by the Public Utilities Commission of Ohio ("PUCO" or "Commission").

Under Ohio law, a utility may not collect any generation revenues from distribution customers once the competitive generation market develops. Here, the PUCO authorized DP&L to collect, inter alia, $330 million in generation revenues from distribution customers, after competitive generation developed. The PUCO approved the customer funded subsidy so that DP&L could earn profits of 7 to 11% on all of its operations, including generation. The PUCO erred. The Court should reverse.

II. ARGUMENT

PROPOSITION OF LAW NO. 1: The Public Utilities Commission acted unreasonably and unlawfully when it authorized an electric utility to charge customers for subsidies to competitive generation in an electric security plan.

In the proceeding below, DP&L sought, inter alia, authority to charge customers $330 million over the term of its electric security plan ("ESP"). The Utility fashioned its request for $330 million as a "service stability rider." But it's a subsidy. And it's a subsidy of DP&L's competitive generation service by its distribution customers. The PUCO approved this competitive service subsidy.

But in Ohio such subsidies are unlawful. Under Ohio law, DP&L is to be "wholly responsible for whether it is in a competitive position" and it (generation operations) must be "fully on its own in the competitive market." R.C. 4928.38 (OCC Appx. 148). The PUCO has no

authority to approve "transition revenues" or "any equivalent revenues" for DP&L that subsidize the Utility's generation operations.

Furthermore, subsidies are also expressly prohibited under R.C. 4928.02(H). Subsidies of competitive generation service run counter to the entire premise of S.B. 221. S.B. 221 was designed to permit a competitive market for generation to develop and flourish for the benefit of Ohio consumers. Setting a $330 million competitive service subsidy charge to ensure DP&L's "overall creditworthiness" re-introduces regulatory protection for the deregulated portions of DP&L's business. (OCC Supp. 6). It gives DP&L assistance in the competitive market—assistance that no other competitors have.

But the General Assembly has spoken. Generation is no longer regulated. It is to be provided through a competitive market. Competitive markets cannot function with government mandated subsidies. The General Assembly recognized this and passed laws prohibiting competitive service subsidies. The PUCO erred in permitting this $330 million competitive service subsidy.

A. The competitive service subsidy charge paid for by distribution customers allows DP&L to collect generation-related costs, violating R.C. 4928.02(H).

R.C. 4928.02(H) prohibits public utilities from using revenues from distribution service to subsidize the cost of providing competitive generation service. "In short, each service component was required to stand on its own." *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924, 812 N.E.2d 955, ¶4.

Appellees, however, argue that this law does not bar the competitive service subsidy charge because it is not a generation charge.[1] PUCO Brief at 13; DP&L Brief at 21-22. According to the Appellees, the $330 million charge is a "financial integrity charge" that supports DP&L as a whole. In other words the revenues collected will allow DP&L to maintain its earnings that support all of DP&L's services -- transmission, distribution, and generation. DP&L Brief at 21-22.

This Court should not engage in the game of semantics that Appellees are playing. The competitive service subsidy, even if not a "generation" charge, supports DP&L's competitive generation services. If DP&L is suffering losses from its distribution business, the Utility can file a traditional rate case for financial relief. The PUCO treats Federal Energy Regulatory Commission ("FERC")-approved transmission costs as a pass through to the Utility's distribution customers, thus creating no financial hardship for the Utility from its transmission business. Therefore, but for the financial losses being incurred in the competitive generation market, the financial integrity charge would not be needed. *See* OCC Supp. 51, 116, 197, 210-215. Calling the charge a "financial integrity" charge does not undo the fact that the revenues collected will offset the lower revenues being produced for the competitive generation service offered by DP&L.

The financial integrity charge subsidizes DP&L's generation service and is collected from distribution customers. Revenues from distribution service are being used to subsidize the

[1] The PUCO did not address this assignment of error in its Entry on Rehearing. It merely stated in its Second Entry on Rehearing "[a]ny arguments on rehearing not specifically discussed herein have been thoroughly and adequately considered by the Commission and are hereby denied." OCC Appx. 69, ¶7.

costs of generation service. It is a competitive service subsidy that is not available to the Utility's competitors in the marketplace. This is prohibited under R.C. 4928.02(H).

If this Court was to accept Appellees' arguments—that there is no subsidy because the revenue collected supports all three components of service—it would undermine the entire premise of S.B. 3 and the competitive service framework that has evolved under S.B. 221. S.B. 3 required the unbundling of the three components of service – generation, distribution and transmission. Before S.B. 3, customers received and paid for the three major components on a bundled basis. *Elyria Foundry Co. v. Pub. Util. Comm.,* 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶52. In that scenario, electric utilities used revenues from the bundled electric services to support their generation, distribution, and transmission expenses and investments.

But with S.B. 3, the road to competition was forged. S.B. 3 provided for restructuring of Ohio's electric-utility industry with a goal of achieving retail competition for generation service. *Ohio Consumers' Counsel v. Pub. Comm.,* 109 Ohio St.3d 328, 2006-Ohio-2110, 847 N.E.2d 1184, ¶2. The components of electric service were unbundled to ensure that an electric utility would not subsidize the competitive generation portion of its business by allocating generation expenses to the regulated distribution service. *Migden-Ostrander v. Pub. Util. Comm.,* 2004-Ohio-3924, ¶4. Additionally, S.B. 3 established corporate separation requirements for utilities to ensure that utilities would not undermine generation competition by extending undue preference or advantage to affiliates engaged in generation service. *See* R.C. 4928.17 (Appx. 135).

Here however, the PUCO is permitting DP&L to charge distribution customers $330 million for the financial integrity of its entire operations, including generation. However, as explained above, the financial integrity of the distribution and transmission operations can be addressed through traditional ratemaking at the PUCO and FERC. DP&L has positioned itself to

seek a financial integrity charge for its integrated operations because DP&L has not structurally separated its generation business. (DP&L Brief at 21). DP&L will not have to do so before January 1, 2017. (OCC Appx. 106).

In the end the real problem with the PUCO's order is that it is a subsidy that supports generation service, but is paid for by distribution service customers. And it is exactly what S.B. 3 sought to preclude. The Court should not allow the PUCO to move in the opposite direction—away from unbundling—under the guise of maintaining DP&L's financial integrity. The Court should reverse the PUCO.

B. Even if the competitive service subsidy does not amount to a transition charge, the Court should find that the PUCO erred because it gave DP&L "equivalent revenue" that assisted it in the competitive market, contrary to R.C. 4928.38.

The PUCO argues that it has not violated R.C. 4928.39 because it has not authorized transition charges to be collected. PUCO Brief at 17-20. The PUCO points out that transition charges under the statute refer to historic costs incurred prior to the introduction of competition in Ohio. PUCO Brief at 19. Consequently, it avers that the "historic costs have nothing to do with the service stability rider" which is "entirely related to future solvency." PUCO Brief at 19.

Additionally, the Appellees contend that the service stability charge does not amount to a transition charge because it is not structured to collect any "costs," but is structured to provide revenues to maintain DP&L's financial integrity. PUCO Brief at 19, DP&L Brief at 19. Appellees thus contend that the competitive service subsidy does not qualify as a transition "cost" defined under R.C. 4928.39.

These arguments miss the point. The transition charge statutes are much broader in reach than suggested by the Appellees. Under R.C. 4928.38, the PUCO is prohibited from approving "transition revenues *or any equivalent revenues*." (Emphasis added) (OCC Appx. 148). And after

a utility received transition revenues (like DP&L[2]), it was to be "wholly responsible for whether it is in a competitive position after the market development period." R.C. 4928.38 (OCC Appx. 148). The Court may not ignore these provisions as the Appellees have done.

At the very least DP&L received "any equivalent revenues" when customers were ordered to pay $330 million through a competitive service subsidy charge. *See* Supp. 167-168. The competitive service subsidy revenues are designed to compensate DP&L for reduced revenues it is collecting due to generation competition. (OCC Supp. 191-192). Because the competitive service subsidy charge compensates DP&L for revenues it is not collecting and cannot collect in the competitive generation market, it is equivalent to customer funded transition charges. Customer funded transition charges were also, by definition, related to costs that are not recoverable in a competitive market. *See* R.C. 4928.39(C) (OCC Appx. 149).

Moreover, because the PUCO ordered a competitive service subsidy that benefitted DP&L as a whole, including its generation business, the PUCO violated the requirement that DP&L must be fully on its own in the competitive market. Being fully on its own in the competitive marketplace means that a utility's competitive operations cannot receive a subsidy, either directly or indirectly. DP&L received a subsidy of its generation operations that was disguised as a "financial integrity" charge given to its operations as a whole – which include its generation operations. There was no excluding or separating the subsidy to ensure that it did not support generation operations. DP&L is not structurally separated so the revenues from the financial integrity charge will go to support all three operations, including generation. The PUCO, thus, violated the law. The Court should reverse the PUCO.

[2] DP&L received $441 million of transition revenues. (OCC Supp. 7).

1. The rules of statutory construction do not mandate that R.C. 4928.143(B)(2)(d) prevails.

DP&L argues that even if the stability rider does collect transition revenues (or the equivalent), it would still be lawful because R.C. 4928.143(B)(2)(d) (part of S.B. 221) was enacted after the transition charge statutes (part of S.B. 3). DP&L Brief at 19. And DP&L argues that if two statues conflict then the later-enacted statute (4928.143(B)(2)(d)) controls under R.C. 1.52(A). DP&L Brief at 21.

This argument should be rejected because R.C. 1.52(A) (DP&L Appx. 19) does not apply when statutes are reconcilable. Under R.C. 1.52(A), if statutes enacted at different legislative sessions are irreconcilable, the statute latest in date of enactment prevails. But under (B) of R.C. 1.52, when statutes are enacted without reference to each other, the amendments are to be harmonized, if possible, so that effect may be given to each. The statute also explains that amendments are irreconcilable only when changes made by each cannot reasonably be put into simultaneous operation. R.C. 1.52(B) (DP&L Appx. 19).

Here R.C. 1.52(B) should be followed, not R.C. 1.52 (A), because both of the statutes in question can be harmonized and are reconcilable. Under R.C. 4928.143(B)(2)(d), under an electric security plan a utility may include charges related to, inter alia, bypassability and default service, provided the charges have the effect of "stabilizing or providing certainty regarding retail electric service." (OCC Appx. 130-131). These provisions are reconcilable with the transition charge statutes so long as "bypassability" and "default service" are construed to exclude transition charges. In this way, both statues can simultaneously operate with no conflict. Effect is given to both, consistent with R.C. 1.52(B). DP&L's arguments that R.C. 4928.143(B)(2)(d) prevails over the transition charge statutes (R.C. 4928.38 *et al.*) should be rejected.

2. The Court should reasonably construe the "notwithstanding" provision of R.C. 4928.143(B) to avoid unjust and unreasonable results.

Appellees argue that even if the $330 million competitive service subsidy violates provisions of the Revised Code (R.C. 4928.38, 4928.02((H)), it is of no consequence because of the language contained in R.C. 4928.143(B). DP&L Brief at 2, 17-18; PUCO Brief at 20. Appellees point to the "notwithstanding" provision of 4928.143(B) as dispositive of this issue. That language reads as follows: "Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J) and (K) of section 4928.420, division (E) of section 4928.64, and section 4928.69 of the Revised Code* * *." (OCC Appx. 130). Appellees claim that a charge authorized by R.C. 4928.143(B)(2)(d) is lawful, notwithstanding the transition charge statutes or the policy provisions of R.C. 4928.02 (or any provision of Title 49), because these statutes are not listed as exceptions to the "notwithstanding" language.

But the strict and literal construction of the "notwithstanding" language urged by Appellees will thwart the underlying purpose of S.B. 221. This would in turn violate R.C. 1.47 (OCC Appx. 119) which provides a presumption against statutory construction that would produce unreasonable or unjust consequences.

S.B. 221 and its predecessor S.B.3 changed the way retail electric service is provided to all Ohioans. Retail electric service is no longer provided as a monopoly, regulated service. It is subject to competition where customers can choose their electric supplier, and marketers and the electric distribution utilities compete against one another to be that supplier. Competition was introduced to benefit customers—enabling customers to choose their supplier and obtain reasonably priced electric service.

The underlying premise of S.B. 221 is that customers' electric rates can be kept in check by market forces instead of PUCO regulation. The General Assembly recognized, however, that for competition to work for the benefit of customers, a framework must be established to allow it to flourish. The General Assembly devoted an entire chapter of the Code (R.C. 4928) to set up a "level playing field" for all suppliers of electricity in Ohio. To create the level playing field, the General Assembly passed provisions changing the way electric companies provide services. These changes included requirements to separate and unbundle transmission, distribution, and generation services. The Legislature also prohibited subsidies of electric service through other regulated utility services (transmission and distribution).

The General Assembly, however, recognized that competition would be evolving and that the electric companies would have to transition to this new environment. So the General Assembly gave electric companies assistance for a period of time, through "transition charges." That assistance, in the form of customer funded subsidies, was limited. Transition revenue payments by customers were to end on December 31, 2005.[3]

After that date, the General Assembly precluded further subsidies for the electric companies. In doing so, the General Assembly recognized that subsidies can destroy competition. And if competition is destroyed, the benefits to customers of competition are not realized.

Under Appellees' interpretation of R.C. 4928.38(B) though, utilities could incorporate customer funded subsidies into an electric security plan even though such subsidies are otherwise prohibited by R.C. 4928.39 and 4928.02(H). Under the PUCO's ruling, customers are denied the

[3] Under R.C. 4928.40, the market development period was to end December 31, 2005, "unless otherwise authorized under division (B)(2). The (B)(2) circumstances are limited and do not apply here.

benefit of competition, and instead are forced to pay DP&L $330 million to support its generation operations that are finding it difficult to compete, absent a subsidy. Approving the subsidy under one provision of law that violates other provisions of law, is not good public policy and leads to an unreasonable result where policies of the state are ignored in favor of profits for the utility.

The PUCO's decision to ignore the policy of the state is also inconsistent with its determinations related to DP&L's switching tracker and the adoption of an accelerated auction schedule. On both of those issues, the PUCO found that the policy provisions of the state controlled. The PUCO rejected the Utility's argument that an accelerated auction schedule should be rejected, after it found that more rapid implementation of market rates is consistent with R.C. 4928.02(A) and (B). (OCC Appx. 60). And the PUCO rejected another financial integrity charge – the switching tracker – in part because it violated the policies of the state of Ohio. (OCC Appx. 40). The PUCO also found the switching tracker to be "anti-competitive" and likely to discourage further development of Ohio's retail electric services market. *Id.*

Similarly here, the competitive service subsidy is anti-competitive, and will likely discourage the further development of Ohio's retail electric services market. The competitive service subsidy will undermine the competitive market and the legislative scheme under S.B. 221 and S.B. 3. It creates an uneven playing field where the electric utility receives a government mandated (PUCO) subsidy and other market participants do not. This is not a just and reasonable result. The Court should avoid construing the statute in this manner. The PUCO should be reversed.

PROPOSITION OF LAW NO. 2: The General Assembly did not permit the PUCO to allow electric security plans to include items for cost recovery that are not enumerated in R.C. 4928.143(B)(2). ***In re: Columbus S. Power Co.*****, 128 Ohio St.3d 512.**

R.C. 4928.143(B)(2) (OCC Appx. 131) permits an electric distribution utility to include certain enumerated provisions in its electric security plan. This Court has ruled that electric security plans can include only provisions that are listed following R.C. 4928.143(B)(2). *In re: Application of Columbus Southern Power Company*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶32. The PUCO approved a $330 million charge to customers in order to address the financial integrity of DP&L's consolidated operations – including generation.

But this $330 million competitive service subsidy charge does not meet the requirements of R.C. 4928.143(B)(2). It does not relate to default service. Nor does the $330 million customer funded subsidy relate to "bypassability." And the $330 million subsidy does not have the effect of stabilizing or providing certainty for electric service for DP&L's customers. The PUCO erred in approving the competitive service subsidy. The Court should reverse the PUCO.

A. The competitive service subsidy does not relate to default service.

DP&L and the PUCO claim that "default service" is not defined under R.C. 4928.14 (OCC Appx. 128). Appellees argue instead that default service is synonymous with the standard service offer. DP&L Brief at 11-12; PUCO Brief at 8. But these arguments ignore the title of the statute and ignore how the Court and the PUCO have defined default service in past proceedings.

R.C. 4928.14 is entitled "Default service where supplier fails to provide service to customers." In interpreting statutes, the title has been declared to be persuasive and entitled to great weight. *State v. Glass*, 27 Ohio App.2d 214, 216, 273 N.E.2d 893 (12th Dist. 1971). *See also*, 85 Ohio Jurisprudence 3d (1988) 202-204, Statutes, Sections 201 and 202. The title refers to default service which is then defined in the statute as service provided by the electric company where the supplier (non-EDU) fails to provide generation service.

Default service under R.C. 4928.14 is not the same as the standard offer the utility is obliged to provide under R.C. 4928.141 (OCC Appx. 129). That is what this Court and the PUCO have concluded on a number of occasions. *See* OCC Brief at 29-30. Default service instead is related to a utility's provider of last resort ("POLR") obligations. Appellees' arguments to the contrary should be rejected.

Appellees also place great emphasis on the language of R.C. 4928.141 that states that the standard service offer "shall serve as the utility's default standard service offer." DP&L Brief at 12. But this argument simply disregards the fact that the statute uses the term "default standard service offer" instead of "default service." DP&L would have the Court ignore the two different terms used by the General Assembly and treat them as one. This conflicts with the rules of statutory construction (R.C. 1.47 (OCC Appx. 119)) in Ohio which declare that the entire statute is intended to be effective. This Court has construed this to mean that "words in statutes should not be construed to be redundant." *East Ohio Gas Co. v. Pub.Util. Comm.*, 39 Ohio St.3d 295, 299, 530 N.E.2d 875 (1988).

The PUCO claims that "all reasonable persons would agree that a consumer that never elects to shop receives the utility's default service." PUCO Brief at 7. This statement is simple but inaccurate. A consumer who never elects to shop does not receive default service but receives the utility's standard service offer under R.C. 4928.141.

The Court should find that "default service" as used in R.C. 4928.143(B)(2)(d) is not synonymous with "standard offer service." It should reject the PUCO's interpretation and find as a matter of law that the PUCO erred in equating default service with standard service.

B. The competitive service subsidy is not related to bypassability.

DP&L argues that it is false to claim that charges are either bypassable or non-bypassable, as OCC claims. DP&L Brief at 14. DP&L cites to examples of charges that are not

either bypassable or non-bypassable, including distribution line extension charges, pole attachments, line extensions, customer deposits, late payment charges, or reconnection charges. *Id.*

But these charges are unrelated to electric security plans. Instead the charges DP&L mentions pertain to distribution service, which is a regulated service under Title 4909, Revised Code. OCC agrees that regulated distribution charges differ from electric security plan charges and are generally not classified as either bypassable or non-bypassable charges.

The PUCO in a recent Opinion and Order came to the same conclusion as OCC: that nearly any charge may be bypassable or non-bypassable, and therefore, "'bypassability' alone is insufficient to fully meet the second criterion of R.C. 4928.143(B)(2)(d). *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer*, Pub. Util. Comm. No. 13-2385-EL-SSO, Opinion and Order at 22 (Feb. 25, 2015). A quick look at DP&L's ESP application confirms this conclusion. All of the rider charges DP&L sought to collect from customers were categorized as either bypassable or non-bypassable.
These charges included the fuel rider, service stability rider, reconciliation rider, alternative energy rider, competitive bidding rate, competitive bid true-up rider, transmission cost recovery rider, and the reliability pricing model rider. OCC Supp. 000219.

Appellees' attempt to interpret the words in the statute to justify approving the competitive service subsidy under R.C. 4928.143(B)(2)(d) is unlawful and unreasonable. The Court should reverse the PUCO.

C. The competitive service subsidy charge does not stabilize or provide certainty regarding electric service.

Appellees argue that DP&L needs the competitive service subsidy so that it can provide "stable and certain service." DP&L Brief at 15; PUCO Brief at 10. Appellees tie the Utility's

ability to provide stable and certain service to its financial integrity as a whole. PUCO Brief at 10. The PUCO claims that the entire utility's financial integrity is at risk including its distribution operations. PUCO Brief at 10.

These arguments miss the point. The statute is directed to providing certainty regarding retail electric service, not certainty of revenues for the utility operations as a whole. Under Appellees' interpretation as long as the provision stabilizes the utility's earnings, it is permissible. Such a liberal construction of the statute would render the statute meaningless. Any provision that provided revenues for the utility would suffice.

Nonetheless, even if the Court determines that the competitive service subsidy has the effect of stabilizing or providing certainty regarding retail electric service, this fact alone cannot justify affirming the PUCO's decision. Before getting to this issue, the Court must find that the competitive service subsidy fits within the categories of expenses listed in R.C. 4928.143(B)(2)(d). And as OCC explained earlier, it does not. The competitive service subsidy charge does not relate to bypassability or default service. Once the Court finds that the charge does not fall within the provisions of subsection (d), its inquiry is at an end. It need go no further.

The PUCO's attempt to interpret the words in the statute to justify approving a $330 million competitive service subsidy under R.C. 4928.143(B)(2)(d) is unlawful and unreasonable. While it may be important for DP&L to maintain its financial integrity, it is not the responsibility of customers to ensure it by paying hundreds of millions of dollars in stability charges.

Where there is no mandated competition for a utility's business—in Ohio, a utility's distribution operations—financial integrity can and should be considered in the rates that customers are required to pay for service. For distribution service there are statutes that establish rates and provide for the opportunity to earn a reasonable rate of return on investment (R.C.

4909.15, OCC Appx. 000257). For distribution services, there are also statutes that protect utilities from financial emergencies (R.C. 4909.16, OCC Appx. 000261).

But S.B. 221 does not contain any similar statutory provisions for an electric security plan.[4] The protection from financial emergency threatening the utility's financial integrity is not needed under an electric security plan.[5] Utilities have ultimate veto power over any modifications made to the ESP. If the PUCO modifies and approves, or disapproves the ESP, the utilities may withdraw their application, thereby terminating it and may file a new SSO.[6] And there are other opportunities for utilities to terminate the ESP. For example, if the Commission orders a return of significantly excessive earnings under R.C. 4928.143(E) or (F), a utility may terminate the electric security plan. (OCC Appx.132-133). These provisions already protect the utilities far beyond the means of other parties. No further protection is needed. No further protection is given.

The PUCO has no jurisdiction to set ESP rates for generation service that allow a utility to charge customers hundreds of millions of dollars to ensure that a utility maintains its financial integrity. The Court should reject efforts to reregulate DP&L's generation business by giving it a

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[4] While there is a provision that addresses financial integrity under S.B. 221, it applies only to market rate offers, not electric security plans. *See* R.C. 4928.142(D)(4), allowing the PUCO to adjust a utility's most recent SSO "by such just and reasonable amount" that the Commission determines is "necessary to address any emergency that threatens the utility's financial integrity" or to ensure that the standard service offer rates produce revenues that do not amount to an unconstitutional taking. (PUCO Appx. 16). The General Assembly could have included the "financial emergency" language of R.C. 4928.142(D) in the ESP statute (R.C. 4928.143). But it did not. Under the doctrine of *expressio unius est exclusio alterius*, because the General Assembly did not, neither the Commission nor the utilities can rewrite the law.

[5] A utility filing a market rate offer ("MRO") does not have the same unilateral veto power over modifications made by the PUCO to the MRO. Thus, protections to the utility may be considered a quid pro quo for being unable to withdraw and terminate.

[6] R.C. 4928.143(C)(2)(a) (OCC Appx. 132).

customer funded financial integrity charge that supports all of its operations, including generation.

PROPOSITION OF LAW NO. 3: The Public Utilities Commission acted unlawfully when it amended its Opinion and Order by an Entry Nunc Pro Tunc that authorized an additional $110 million in rate increases, delayed giving consumers the benefit of a competitive bid auction for the standard service offer price, and failed to state the findings of fact required by R.C. 4903.09.

The PUCO and DP&L contend that the Entry *Nunc Pro Tunc* was lawful. The PUCO claims that the original Order was signed by mistake; that "it inadvertently signed the wrong entry." PUCO Brief at 34. Similarly, DP&L asserts that an "administrative error" caused the PUCO to issue an Order it did not intend to issue, and that the Entry *Nunc Pro Tunc* corrected the error. DP&L Brief at 36. But the Entry *Nunc Pro Tunc* did more than that.

The Entry *Nunc Pro Tunc* made multiple substantive changes to the Order, including among other things extending the term of the ESP from 36 to 41 months, extending the stability rider a full year and making the stability rider extension charge available to DP&L in 2017. As a result, DP&L's customers will pay $100 million more than they would have under the original Order. This cannot be justified by a mere "administrative error."

The PUCO did not explain the evidentiary basis for these changes in either the Entry *Nunc Pro Tunc* or the Second Entry on Rehearing. This is contrary to R.C. 4903.09 (OCC Appx. 122).

As for the term of the ESP, the PUCO pointed to no evidence in the record as to why it picked May 31, 2017 as the end date for the ESP. In the Entry *Nunc Pro Tunc* the PUCO merely stated that "[t]he Opinion and Order incorrectly states that the modified ESP term should end on December 31, 2016. The end date of the modified ESP should be corrected to May 31, 2017, and the length of the modified ESP should be corrected to 41 months." Entry *Nunc Pro Tunc* at 2 (OCC Appx. 66). No further reason was given. And, in the Second Entry on Rehearing , the PUCO stated that its decision to modify the term of the ESP was based on "further review of the evidence

on rehearing and as discussed in detail above***." Second Entry on Rehearing at 31 (OCC Appx. 98). Not only does this contradict the "administrative error" claim in the Entry *Nunc Pro Tunc*, but there was no discussion of evidence related to the term of the ESP in the Second Entry on Rehearing.

In fact, it seems that the PUCO relied on analysis by the PUCO Staff in setting a three-year ESP in the original Order. On page 15 of the Order, the PUCO noted that a PUCO Staff witness touted several benefits to a three-year ESP. In the very next paragraph, the PUCO ruled that "DP&L's ESP should be approved for a term beginning January 1, 2014, and terminating December 31, 2016." (OCC Appx. 25). Nothing in the discussion prior to that indicated that a 41-month ESP was preferred or even contemplated. *See id.*

Similarly, in upholding the additional year for the SSR and extending the SSR-E into 2017 the PUCO, in its Second Entry on Rehearing, merely referred to its further review of the evidence on rehearing and the previous discussion. (OCC Appx. 98). But again, there was no discussion in the Second Entry on Rehearing that would justify these changes to the original Order. The PUCO merely reiterated its changes from the Entry *Nunc Pro Tunc* without further explanation or pointing to a single piece of evidence that would support the changes.

Both the PUCO and DP&L contend that even if the Entry *Nunc Pro Tunc* was unlawful, there was no harm because the PUCO reached the same decision in the Second Entry on Rehearing. PUCO Brief at 35; DP&L Brief at 37. But, as discussed above, the Second Entry on Rehearing lacked any evidentiary basis for extending the term of the ESP and the SSR, and for making the SSR-E available in 2017 and costing customers an additional $100 million. Further, both the PUCO and DP&L ignore the fact that the Entry *Nunc Pro Tunc* unlawfully shifted the burden of persuasion on rehearing.

R.C. 4903.10 (OCC Appx. 123) places the onus on the party filing for rehearing to show that the PUCO's decision was unreasonable or unlawful. The application for rehearing "shall set forth specifically the ground or grounds on which the *applicant* considers the order to be unreasonable or unlawful." (Emphasis added). And the PUCO "may grant and hold such rehearing on the matter specified in such application, if in its judgment *sufficient reason therefor is made to appear.*" (Emphasis added). The PUCO's unlawful Entry *Nunc Pro Tunc* placed a burden on intervenors opposing the above changes made in the Entry *Nunc Pro Tunc* to show that the PUCO's decision was unreasonable or unlawful. Absent the changes to the Order made through the Entry *Nunc Pro Tunc*, that burden would not have existed.

Because of the unlawful Entry *Nunc Pro Tunc*, this Court is without a basis for examining the reasoning behind the PUCO's decision to extend the term of the ESP and the SSR, and to make the SSR-E available in 2017 costing customers an additional $100 million. "Although strict compliance with the terms of R.C. 4903.09 is not required, a legion of cases establishes that the commission abuses its discretion if it renders an opinion without record support." *Ohio Consumers' Counsel v. Pub. Util. Comm. of Ohio*, 111 Ohio St. 3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶23. (Citations omitted). The Court should vacate the PUCO's decision.

PROPOSITION OF LAW NO. 4: The PUCO acted unreasonably and unlawfully when it considered a utility's application for rehearing that failed to comply with R.C. 4903.10.

In its application for rehearing of the PUCO's Second Entry on Rehearing, DP&L stated that it sought rehearing of the Commission's March 19, 2014 Second Entry on Rehearing on the following grounds:

1. The Commission should grant rehearing on its decision in its Second Entry on Rehearing (pp. 17-18) to accelerate the deadline for DP&L to transfer its generation assets to January 1, 2016. The Commission should restore the May 31, 2017 deadline that it established in its September 6, 2013 Entry Nunc Pro Tunc.

2. The Commission should grant rehearing on its decision in its Second Entry on Rehearing (pp. 18-19) to accelerate blending in the competitive bidding process. The Commission should restore the blending schedule that it established in its September 6, 2013 Entry Nunc Pro Tunc.

In its Fourth Entry on Rehearing, the PUCO denied rehearing on DP&L's first assignment of error, but granted rehearing on DP&L's second assignment of error. (OCC Appx. 104-107). OCC has appealed this decision as being unlawful. Both the PUCO and DP&L claim that the PUCO acted lawfully. The PUCO makes two arguments. First, it states that "[a]lthough the assignments of error are rather conclusory, that is their purpose, the company provided nine pages of explanation in the supporting memorandum." PUCO Brief at 24. Second, the PUCO states that the only consequence of an application for rehearing that lacks specificity is that it cannot be used as the basis for appeal to this Court. *Id.* at 25. Both of these statements from the PUCO's brief are contradicted by determinations in a PUCO order.

In its most recent decision adopting procedural rules, the PUCO discussed a proposed rule to require that applications for rehearing set forth in numbered or lettered paragraphs the ground or grounds upon which the applicant considers the PUCO order to be unreasonable or unlawful. The PUCO noted that R.C. 4903.10 provides that "[N]o party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application." *In the Matter of the Commission's Review of Chapters 4901-1, Rules of Practice and Procedure; 4901-3, Commission Meetings; 4901-9, Complaint Proceedings; and 4901:1-1, Utility Tariffs and Underground Protection, of the Ohio Administrative Code*, Pub. Util. Comm. No. 11-776-AU-ORD, Finding and Order at 38 (January 22, 2014). (OCC Appx. 000299). The PUCO went on to state the following: "An applicant seeking rehearing must file an application **and must set forth with specificity in the application the ground or grounds on which the applicant believes the Commission order is unreasonable or unlawful**. While rehearing applicant's [sic]

are free to expound upon their assignments of error in a memorandum, **the Commission legally cannot consider any grounds for rehearing not contained within the application itself.**" *Id.* (Emphasis added).

Thus, the PUCO distinguishes between the statutorily-required application for rehearing and the memorandum in support that is only required by the PUCO's rules. The *application* must specifically state the ground(s) why the PUCO's order is unreasonable or unlawful. If it does not, the PUCO acknowledged that it cannot legally consider the application for rehearing.

In this case, DP&L's application for rehearing did not include the grounds on which DP&L believed the PUCO's Second Entry on Rehearing to be unreasonable or unlawful. Instead, as DP&L stated in its brief, its application for rehearing "was specific as to both the exact error that DP&L complained of (including a citation to the page on which the error occurred) and the exact relief that DP&L sought, and was supported by a memorandum that explained in detail the grounds for DP&L's Application." DP&L Brief at 39. Notably, DP&L does not claim that its application for rehearing set forth why the PUCO's Second Entry on Rehearing was unreasonable or unlawful. Identifying an error and the relief sought by DP&L is not the specificity required by R.C. 4903.10.

Reversing the PUCO's decision because it granted DP&L's defective application for rehearing would not "elevate form over substance" or "impose an unjustified procedural barrier" as DP&L asserts. *Id.* at 40. Instead, it would recognize that the PUCO strayed from consistently enforcing R.C. 4903.10 and the rules promulgated under that law. The Court should reverse the PUCO's grant of rehearing to DP&L regarding the blending schedule in the competitive bidding process.

CROSS APPEAL

PROPOSITION OF LAW NO. 5: The Public Utilities Commission acts lawfully when it modifies a utility's electric security plan to limit charges collected during the term of the plan.

The PUCO authorized DP&L to seek an extension of its competitive service subsidy through a charge it called the "service stability rider extension." (OCC Appx. 66). A more appropriate name for the service stability rider extension is the competitive subsidy extension. That is because it allows the Utility to collect more money from customers to support the Utility's financial integrity but over a different time frame and under different conditions than the competitive service subsidy. Under the PUCO's order the Utility was authorized to seek an additional $45.8 million from customers for the last five months of its electric security plan, January 1, 2017 through May 31, 2017. *Id.* The PUCO did however impose five conditions on the Utility's ability to collect this additional $45.8 million from customers. (OCC Appx. 37, 38, 106). These conditions ordered by the PUCO will appropriately constrain the Utility's ability to collect additional moneys from customers.

Nonetheless, the competitive subsidy extension, like the competitive service subsidy, is unlawful and unreasonable. It is unlawful for the same reasons that the competitive service subsidy is unlawful and unreasonable. The PUCO had no authority under R.C. 4928.143 (OCC Appx, 13-133) to approve it. But if the Court determines to uphold the competitive service subsidy or the competitive subsidy extension, it should affirm the PUCO's ability to place conditions on the rider and limit the amount collected from customers during the term of the electric security plan.

A. The Public Utilities Commission has authority to limit the amount of money that DP&L can collect from its customers in 2017 to maintain its financial integrity.

DP&L argues that the limits for the competitive subsidy extension imposed by the PUCO are unlawful and unreasonable. DP&L Brief at 41. DP&L contends there is nothing in the statute (R.C. 4928.143(B)(2)(d)) that authorizes the PUCO to decide now the level of the charge that DP&L would seek in a future proceeding. DP&L Brief at 41-42. DP&L claims that the PUCO cannot impose additional conditions for a stability charge that are not contained in the statute. DP&L Brief at 42.

But DP&L's argument is based on a false premise. DP&L assumes that the PUCO's decision now is separable from its "later" decision in 2017. It is not. The term of the PUCO-approved electric security plan for DP&L extends through the first five months of 2017. (OCC Appx. 66). Thus, the PUCO can decide now, as part of its review of DP&L's electric security plan, what charges may be collected from customers for the first five months of 2017 if the PUCO's specified conditions are met.

The PUCO correctly ruled that it had authorized the extension rider in the ESP proceeding, based upon the record and financial projections provided by the parties. (OCC Appx. 80). It did not determine the level of stability charge that DP&L could seek in a future ESP. *Id.*

In fact, the PUCO had an obligation to decide the issue "now." The PUCO is required by statute to issue an order approving or modifying and approving DP&L's application. *See* R.C. 4928.141(A); 4928.143(C)(1) (OCC Appx. 129, 131-132).

The PUCO must, under R.C. 4928.143(C)(1), determine whether the modified electric security plan is more favorable in the aggregate for customers than the expected results under a market rate offer. In doing that analysis, the PUCO is required to consider "pricing and ***all other***

terms and conditions, including any deferrals and any future recovery of deferrals." (Emphasis added) (OCC Appx.132).

"All other terms and conditions" include terms and conditions offered during the term of the electric security plan. Here the PUCO approved a term for the electric security plan that extends through May 2017. The extension rider is related to the utility's earnings during the last five months of the ESP term—from January 2017 through May 2017. The PUCO through its ruling allowed the Utility to apply to collect additional charges from customers for that period only if specific conditions are met, including that any charge to customers is necessary to maintain DP&L's financial integrity. That application, though to be made in the future, was of necessity ruled upon as part of the PUCO's Order.

If the Court determines to uphold the competitive service subsidy or the competitive subsidy extension, it should affirm the PUCO's ability to limit the amount of money collected from customers during the term of DP&L's electric security plan. Specifically, the PUCO should be permitted to set pre-conditions before the Utility can collect an additional $45 million from customers through the extension of the competitive service subsidy.

B. The Public Utilities Commission has discretion to make the collection of the stability extension charge from customers conditional.

DP&L also argues that the PUCO does not have the discretion to place limits on the competitive subsidy extension because the authorizing statute (R.C. 4928.143(B)(2)(d)) does not contain conditions that the PUCO imposed. DP&L Brief at 42. But DP&L's arguments fail to acknowledge the constraints given to the PUCO by the statutory language—constraints which require it to place limits on stability charges.

R.C. 4928.143(B)(2)(d) requires that all charges authorized under that subsection provide stability and certainty regarding retail electric service. As the PUCO noted, the extension

rider conditions ensure that stability revenues collected by DP&L will continue to have the effect of providing stability and certainty regarding retail electric service during the ESP term. (OCC Appx. 82). The PUCO, thus, was placing conditions on the rider that were intended to ensure the rider complied with the statute.

If the Court determines to uphold the competitive service subsidy or the competitive subsidy extension, it should affirm the PUCO's ability to make the extension charge conditional.

C. The Public Utilities Commission has discretion to require a utility to file an application to implement advanced metering infrastructure and SmartGrid before it can seek approval to collect more money from customers.

DP&L argues that the PUCO decision to impose a condition that it file an application to implement advanced metering infrastructure and SmartGrid is unlawful and unreasonable. DP&L Brief at 43. Specifically, DP&L alleges that this requirement is unlawful because there is no basis in the record for it. *Id.* DP&L notes that no party asked that DP&L implement AMI/SmartGrid and there is no record regarding how much AMI/SmartGrid would cost. DP&L Brief at 44. DP&L also alleges that this condition (regarding AMI/SmartGrid) is unreasonable because it will not necessarily improve the performance of the system and would be expensive to implement. *See* DP&L Brief at 43-44.

But contrary to DP&L's assertions, the PUCO is merely carrying out the policy of the State. Under R.C. 4928.02(D) (OCC Appx. 125), it is a policy of the State to encourage innovation and market access for cost-effective supply- and demand-side retail electric service, including smart grid programs and implementing advanced metering infrastructure. Under R.C. 4928.06 (IEU Appx. 155), the PUCO has a duty to ensure the policies specified under R.C. 4928.02 are effectuated. Indeed the Ohio Supreme Court expressly held that the PUCO may not approve a rate plan that violates the policy provisions of R.C. 4928.02. *Elyria Foundry v. Pub. Util. Comm.*, 114 Ohio St.3d 305,871 N.E.2d 1176, 2011-Ohio-4164.

Here, in the furtherance of State policy, the PUCO ordered DP&L to file an application implementing and deploying smart grid technology and advanced metering infrastructure. The PUCO also directed DP&L to look at other cost effective initiatives or programs that DP&L reasonably believes would promote these State policies. (OCC Appx. 38).

If the Court determines to uphold the competitive service subsidy or the competitive subsidy extension, it should affirm the PUCO's ability to place conditions on the utility, prior to authorizing it to collect more money from customers through the competitive service subsidy extension.

PROPOSITION OF LAW NO. 6: The Public Utilities Commission acts lawfully when it accelerates the deadlines for a utility to transfer its generation assets and implement competitive bidding.

The PUCO ruled that DP&L must fully divest its generating assets by January 1, 2017. (OCC Appx. 106). That date is nearly seventeen years after Senate Bill 3 was enacted mandating structural separation of a utility's generating assets from its transmission and distribution business.

The Court should affirm the January 1, 2017 date for divestiture as lawful and reasonable. The sooner divestiture is ordered, the better for consumers. Divesting generation assets helps ensure that subsidies are not flowing between and among the competitive and non-competitive electric services. And divestiture helps ensure that a utility is not extending undue preference or advantage to its affiliate. *See* OCC Appx. 135-136.

DP&L however, appears to argue that the PUCO accelerating the deadline by six months (from May 31, 2017 to January 1, 2017) was unreasonable. DP&L Brief at 48. It claims there are structural and financial obstacles which prevent it from transferring its assets to an affiliate. *Id.* It faults the PUCO for believing that it could transfer its assets as soon as 2014, despite the fact that the PUCO's belief was based upon DP&L's own statements in another PUCO docket. (OCC

Appx. 84). DP&L claims that although it could transfer its generation assets before May 31, 2017 if it can sell the assets to a third party, no third party has offered to purchase the assets. DP&L Brief at 48. It asks the Court to "order the Commission to restore the May 31, 2017 asset transfer deadline." *Id.*

DP&L thus, is asking the Court to review a question of fact related to the PUCO's finding that DP&L could transfer its assets by January 1, 2017. As to questions of fact, the Court has held that it will not reverse the PUCO unless the PUCO's findings are manifestly against the weight of evidence or are so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 403, 330 N.E.2d 1, 8 (1975) (syllabus), writ of certiorari denied (1975), 423 U.S. 986, 96 S.Ct. 392, 46 L.Ed. 302, appeal after remand (1976), 46 Ohio St.2d 105, 75 O.O.2d 172, 346 N. E.2d 778.

DP&L has failed to show that the PUCO's decision was manifestly against the weight of the evidence. All it has shown is that subsequent to the hearing DP&L made representations in another filing before the PUCO that contradicted DP&L's prior representations. DP&L's representations in its filing—the basis for the PUCO changing its order—were characterized by DP&L as "miscommunications." *See* DP&L Appx. 73. Assuming arguendo that any error occurred, it lies with DP&L, not the PUCO. The Court should affirm the PUCO's decision.

Likewise, the PUCO's decision to accelerate the competitive bidding process for standard service customers was reasonable and lawful and not shown to be against the manifest weight of the evidence. In its Second Entry on Rehearing (OCC Appx. 85-86), the PUCO altered the schedule for competitive bidding, moving DP&L to 100% market based rates over a shorter time period. The basis of the PUCO's change was again information contained in DP&L's

supplemental application. (OCC Appx. 85). Specifically, the PUCO relied upon the statements that DP&L could transfer its generation assets sooner than DP&L had claimed at hearing. (OCC Appx. 85-86); DP&L Brief at 49. The PUCO noted that in determining the blending schedule, it relied upon the fact that DP&L would be unable to divest its generation assets before September 1, 2016. (OCC Appx. 85). The PUCO noted its intent to implement full market-based rates for customers as soon as practicable. *Id.*

DP&L's customers have waited too long for the benefits of competition in a market with historically low energy prices. DP&L's customers are now closer to realizing those potential benefits because the PUCO appropriately accelerated the blending schedule in its Second Entry on Rehearing. As the PUCO noted, "The acceleration of the CBP blending schedule will benefit consumers through a more rapid move to full market-based rates * * *." (OCC Appx. 86).

DP&L claims that the new blending schedule will cause substantial financial harm to it. DP&L Brief at 49. It asks the Court to reverse the PUCO because the basis for the PUCO's decision on rehearing "is not accurate." *Id.*

DP&L wants to ignore the fact that DP&L has had some of the highest returns on equity of any utility in recent years. From 2004 through 2013, DP&L's return on equity was 18% or greater, 20% or more four of those seven years. (OCC Supp. 100). While DP&L's returns on equity may be declining, it is premature to conclude that the floor will fall out on DP&L's financial condition any time soon.

Moreover, had DP&L separated its generation operations from its other operations earlier, it would not face the claimed financial threat that operation of its generation assets presents today. DP&L bears responsibility for its "predicament," if indeed there is one. Under the law, DP&L—and not customers—was to be "wholly responsible" for the success of its

competitive generation operations since its market development period ended in 2005. *See* R.C. 4928.38 (OCC Appx. 148). The Court should not further delay flowing through the benefits of the competitive market to DP&L's customers in order to prop up DP&L's competitive generation business.

DP&L has not shown that the PUCO should be overturned on a finding of fact. It has not shown that the PUCO's decision is against the manifest weight of the evidence. The Court should affirm the PUCO.

III. CONCLUSION

Customers of DP&L, through the unlawful orders of the PUCO, must pay, inter alia, $330 million (plus financing charges) in increased rates for a "service stability rider" charge. This charge is a competitive generation subsidy. The PUCO sanctioned the subsidy and allowed DP&L to offset its declining generation prices with revenues funded by captive customers.

But these price declines that DP&L was protected from are precisely the sort of benefit from the restructured market that the General Assembly anticipated would provide for customers. The Court should reverse the PUCO to give customers the benefit of the market that they are losing.

Respectfully submitted,

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4909.15 Fixation of reasonable rate.

(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (C)(8) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (C)(8) of section 4909.05 of the Revised Code.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress

from rates, except that the commission may extend the expiration date up to twelve months for good cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section, less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate-making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under section 5727.391 of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(b) of this section, "compliance facility" has the same meaning as in section 5727.391 of the Revised Code.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost, for the test period used for the determination under division (C)(1) of this section, of rendering the public utility service under division (A)(4) of this section.

(C)

(1) Except as provided in division (D) of this section, the revenues and expenses of the utility shall be determined during a test period. The utility may propose a test period for this determination that is any twelve-month period beginning not more than six months prior to the date the application is filed and ending not more than nine months subsequent to that date. The test period for determining revenues and expenses of the utility shall be the test period proposed by the utility, unless otherwise ordered by the commission.

(2) The date certain shall be not later than the date of filing, except that it shall be, for a natural gas, water-works, or sewage disposal system company, not later than the end of the test period.

(D) A natural gas, water-works, or sewage disposal system company may propose adjustments to the revenues and expenses to be determined under division (C)(1) of this section for any changes that are, during the test period or the twelve-month period immediately following the test period, reasonably expected to occur. The natural gas, water-works, or sewage disposal system company shall identify and quantify, individually, any proposed adjustments. The commission shall incorporate the proposed adjustments into the determination if the adjustments are just and reasonable.

(E) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (C)(4) and (5) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service

to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(F) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

Amended by 129th General AssemblyFile No.199, HB 379, §1, eff. 3/27/2013.

Amended by 129th General AssemblyFile No.20, HB 95, §1, eff. 9/9/2011.

Effective Date: 11-24-1999

4909.16 Power to amend, alter, or suspend schedule of rates.

When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes.

Effective Date: 10-01-1953

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of Chapters 4901-1, Rules of Practice and Procedure; 4901-3, Commission Meetings; 4901-9, Complaint Proceedings; and 4901:1-1, Utility Tariffs and Underground Protection, of the Ohio Administrative Code.	)))))))	Case No. 11-776-AU-ORD

FINDING AND ORDER

The Commission finds:

(1) R.C. 119.032 requires all state agencies to conduct a review, every five years, of their rules and to determine whether to continue their rules without change, amend their rules, or rescind their rules. Ohio Adm.Code chapters 4901-1, rules of practice and procedure; 4901-3, commission meetings; 4901-9, complaint proceedings; and 4901:1-1, utility tariffs and underground protection are now scheduled to be reviewed.

(2) Additionally, beginning January 1, 2012, in accordance with R.C. 121.82, in the course of developing draft rules, the Commission must evaluate the rules against the business impact analysis. If there will be an adverse impact on businesses, as defined in R.C. 107.52, the agency is to incorporate into the draft rules proposals to eliminate or adequately reduce any adverse impact. Furthermore, the Commission is required, pursuant to R.C. 121.82, to provide the Common Sense Initiative (CSI) office the draft rules and the business impact analysis. This initial and reply comment period for this rule review, proceeded the CSI process described above. Nevertheless, the Commission has consulted with CSI on these four Ohio Adm.Code chapters and CSI has only recommended the submission of a business impact analysis (BIA) for one chapter of rules. That BIA is attached to this Finding and Order as Attachment E.

(3) By entry issued March 2, 2011, the Commission issued Staff-proposed changes to the rules at issue for comment. Initial comments were filed by: Columbus Southern Power Company and Ohio Power Company (AEP); The Ohio Bell Telephone

Company d/b/a AT&T Ohio, AT&T Communications of Ohio, Inc., TCG Ohio, SBC Long Distance d/b/a AT&T Long Distance, SNET America, Inc. d/b/a AT&T Long Distance East, AT&T Corp. d/b/a AT&T Advanced Solutions, BellSouth Long Distance, Inc. d/b/a AT&T Long Distance Service, Cincinnati SMSA, L.P., and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T); Ohio Consumers' Counsel, Advocates for Basic Legal Equality, Inc., Citizen Power, and the Ohio Poverty Center (Customer Parties); Dayton Power and Light Company (DP&L); Duke Energy Company (Duke); Ohio Edison Company, The Cleveland Electric Illuminating Company, and Ohio Edison Company (FirstEnergy); Columbia Gas of Ohio, Inc., The East Ohio Gas Company dba Dominion East Ohio, and Vectren Energy Delivery of Ohio, Inc. (Gas Companies); Norfolk Southern Railway Company (Norfolk Southern); OMA Energy Group (OMA); and Ohio Partners for Affordable Energy (OPAE). Reply comments were filed by AT&T, Customer Parties, Duke, FirstEnergy, Gas Companies, Industrial Energy Users-Ohio (IEU), and OPAE.

(4) Mindful of the requirements expressed in Findings (2) and (3), the Commission has carefully reviewed the existing rules, the proposed Staff changes, and the comments filed by interested parties in reaching its decisions regarding the rules at issue. The Commission will address the more relevant comments below. References or cites to comments will be designated as "initial" for initial comments and "reply" for reply comments. The Commission will initially discuss the rules in Ohio Adm.Code 4901-1. References to those rules will be by rule number, *e.g.*, 01. Some minor, noncontroversial changes have been incorporated into the new proposed rules without Commission comment. Any recommended change that is not discussed below or incorporated into the proposed rules should be considered denied.

Rule 01 - Definitions

(5) Customer Parties recommended modifying the definition of "business day" to clarify that a business day does not include a day where the docketing division closed before 5:30 p.m. (Customer Parties initial at 2). The clarification sought by Customer Parties is already included in Rule 07(D) wherein it is stated that, if the Commission office closes before its usual

closing time on a day that is the last day for doing an act, the act may be performed on the next succeeding day that is not a Saturday, Sunday, or legal holiday. The recommendation will be denied.

Rule 02 –Filing of pleadings and other documents

(6) In proposed Rule 02(A)(5), notice was given that the Commission reserves the right to redact any material from a filed document prior to posting the document on the Docketing Information System (DIS) if the material is confidential personal information, a trade secret, or inappropriate for posting to the website. Customer Parties question how the filer of the document or interested persons would be notified of the action, how the redaction would be consistent with Rule 02(B)(2) that requires the filing of a request for a protective order to keep the document from being publicly available, and what standard would be used to determine what is inappropriate for posting on the Commission's website (Customer Parties initial at 3). The Gas Companies support allowing the Commission to redact information prior to posting on DIS because there have been occasions where customer filings contain account numbers, libelous statements, and profanities, but they contend that the Commission should give notice of the redaction to the parties in the case (Gas Companies initial at 3, reply at 2). Customer Parties agree that notice should be given to the parties (Customer Parties reply at 4).

(7) The Commission is mindful of its statutory requirements with regard to this issue. For example, if a document includes the social security number of someone, that information should be redacted by Staff as soon as it is observed. In addition, if it is clear that information that is a trade secret has been mistakenly filed in the public record, by statute the Commission should not be revealing that information and we believe that it is highly unlikely that our Docketing Division or Legal Department would not be in contact with the filer concerning the filing of an appropriate motion. Given the Commission's proclivity for making its records available to the public, the material being redacted would undoubtedly have to be considered a trade secret. (To the extent that a party has hard copied a filing and already served copies upon other parties or

if a document has been electronically filed and accepted by the Docketing Division and posted to the Commission's website before someone observes that the information is a trade secret, the Commission would be less likely to take any extraordinary action because the party making the filing has failed to maintain its secrecy.) With regard to material deemed inappropriate, it is a fact that some complainants have included language in their filings that the Commission does not wish to display on its website, which is available for general viewing. In these situations, we would prefer to offend the filer as opposed to some readers. The Commission sees the proposed rule as nothing more than stating current Commission practice. With regard to Gas Companies' proposal that the Commission provide notice to the parties, interested persons following the case will observe the redactions as the information is posted. Proposed Rule 02(A)(5) shall be adopted.

(8) Proposed Rule 02(A)(6) requires that a party seeking to consolidate a new case with a previously filed case or with a case being concurrently filed shall file a motion to consolidate the cases. Duke does not oppose the proposed rule to the extent that a party seeks consolidation of a new case with a previously filed case. Duke considers the proposed rule to be a waste of resources to require the filing of a motion to consolidate when a single application includes multiple requests under different case purpose codes. (Duke initial at 1.) FirstEnergy states that its three Ohio electric distribution companies operate very similarly and often file concurrent pleadings and the Commission often handles the proceedings together and allows joint pleadings, briefs, etc. FirstEnergy states that the Commission's procedural handling of such cases has not presented any issues or concerns of which it is aware. FirstEnergy agrees with Duke that a motion to consolidate should only be required when the cases are not filed at the same time. (FirstEnergy initial at 2.) Customer Parties agree with Staff that a party filing multiple cases should always give notice of its intent to have the cases considered together (Customer Parties reply at 4).

(9) Upon consideration of the comments, the Commission will adopt in part proposed Rule 02(A)(6). It is not our intent to change current pleading practice and, therefore, we will adopt that part of the rule that requires a party seeking to consolidate

a new case with a previously filed case to file a motion to consolidate. However, we are not adopting that part of the proposed rule that would have required multiple, related cases filed consecutively to be accompanied by a motion to consolidate.

(10) Proposed Rules 02(B), 02(C), and 02(D) address the filing of documents by paper or hard copy, fax filing, and electronic filing (e-filing), respectively. Proposed Rule 02(B)(1) provides that, when making a paper filing, the failure to submit the required number of copies may result in the document being stricken from the case file. FirstEnergy notes that existing Ohio Adm.Code 4901-1-02(D) provides that the "failure to submit the number of copies required * * * shall not invalidate or delay the effective date of a filing if the person making the filing submits the number of copies needed to correct any deficiency within two business days after notification of such deficiency by the docketing division." FirstEnergy contends that the proposed rule is too harsh, especially if a party has not intentionally or habitually filed the wrong number of copies. (FirstEnergy initial at 3.) Although not clear, the intent of the proposed change was not to eliminate a notification by the Docketing Division of the deficiency and an opportunity to correct. The Commission has modified the proposed rule to make this clarification.

(11) Proposed Rule 02(B)(2) provides that, unless a request for a protective order is made in accordance with Ohio Adm.Code 4901-1-24 concurrent with or prior to the filing of a document, the document will be made available on DIS. Customer Parties contend that "request" should be changed to "motion" to be consistent with Ohio Adm.Code 4901-1-24 that requires the filing of a motion. (Customer Parties initial at 3.) The clarification has been made.

(12) Duke requests that the proposed rule needs to be modified to address certain specific situations. Duke states that an attorney examiner may seal a transcript due to confidential testimony or issue a ruling that certain documents should be treated as confidential. Duke believes that when parties make subsequent filings involving the same material, *e.g.*, post hearing briefs, they should be allowed to rely upon those rulings and, at most, be required only to submit a cover letter that indicates that the

redacted and confidential versions of their briefs are based upon the prior rulings of the attorney examiner (Duke initial at 2). The Commission finds that clarification is in order. We agree that parties should be permitted to rely on and reference at the time of filing prior Commission or attorney examiner rulings on confidentiality when making a filing with docketing containing previously protected information. It is not our intent to require a motion each time previously protected information is subsequently filed in the same proceeding. Duke also suggests that, if a party files a document that includes certain information that another person considers to be confidential, the filing party should only be required to file a cover letter that requests that the Commission treat the document as confidential until the person who considers the material to be confidential files a motion for a protective order (Duke initial at 3). The Commission agrees that the initial obligation of protecting the document is on the person who files the document. Obviously, the party filing the document must have obtained the document from the other person and agreed to protect its contents. However, the ultimate burden for demonstrating that information in a document warrants protective treatment is on the party who owns the allegedly confidential material.

(13) Proposed Rule 02(C) addresses the requirements for filing documents by fax transmission. Duke contends that various requirements placed on fax filers are burdensome and unnecessary. Duke opposes a 30-page limit on fax filings, the requirement that fax filers must call the Docketing Division prior to fax filing, that the notification call must be made prior to 5:00 p.m., and that the filer must include a brief description of the document in the transmission cover sheet. (Duke initial at 3.) Duke merely contends that these requirements are unnecessary and add a variety of burdens to the filer. The Commission would note that these requirements are in the existing rules, and they have been there for over ten years, except that currently the notification call must be made by 4:00 p.m. instead of 5:00 p.m. There is a purpose for each of the provisions. The 30-page limit prevents one party from monopolizing the fax process, to the detriment of other filers, for a substantial period of time by fax filing an extremely large document. Requiring the filer to call prior to filing helps to ensure that the Docketing Division knows that a document is

coming (no one is assigned to constantly watch the fax machine all day for filings) and can get it date and time stamped as soon as it arrives. The caller could also be informed if there are any existing technical problems or if there are several parties currently attempting to make fax filings. If there is a localized technical problem, the caller could be directed to transmit his or her filing to another Commission fax machine. The 5:00 p.m. cutoff is to eliminate log jams at the end of the day and to enable Docketing Division personnel to complete their daily tasks before the Docketing Division closes at 5:30 p.m. The information on the transmission sheet, including a brief description of the document, provides identifying information for the Docketing Division in case documents get separated before they are properly secured. The Commission finds that the provisions are necessary and are not a burden to those filers who choose this optional filing service.

(14) FirstEnergy opposes the provision in proposed Rule 02(C)(6) that states that any document sent by fax that is received in whole or in part after 5:30 p.m. will be considered the next business day. FirstEnergy argues that, as long as a fax is initiated before 5:30 p.m., it should be considered filed on that day, no matter when the transmission is completed (FirstEnergy initial at 4). The Commission disagrees. The Docketing Division closes at 5:30 p.m. Documents that are not in its possession at that time are not filed until the next business day. In addition, FirstEnergy's proposal would be impossible for the Commission to enforce. A fax could be "initiated" in Cleveland by someone placing a document on its fax machine and commence dialing of the Commission's fax number. The document then has to be scanned into the caller's fax machine, the number of the Commission's fax machine dialed, and the Commission's fax machine must answer the call before transmission ever starts, a process that could take several minutes. It could be several more minutes before the document is totally received by the Commission. Commission personnel would have no idea when a fax is initiated. They only know when the fax is received. FirstEnergy also does not believe that a party should have to submit the required number of paper copies of its fax documents by the next business day. FirstEnergy contends that the copies require unnecessary paperwork, increase the cost of compliance, and are unnecessarily burdensome. (FirstEnergy initial at 4-5.) The

copies, which are also required when a party makes a paper filing, assist Staff in completing their work assignments. There is an alternative however; if a party wishes to avoid making and sending paper copies, then it should consider the paperless electronic filing of documents. FirstEnergy's proposals are denied.

(15) Customer Parties believe that proposed Rule 02(C) should be revised to inform a fax filer that he or she may request that a fax document be considered timely filed if an equipment failure or electric outage occurs and the document is not able to be faxed until the next business day (Customer Parties initial at 3). A similar advisement is included in proposed Rule 02(D)(7) for electronic filers. Upon review, the Commission finds that Staff's proposed language in proposed Rule 02(D)(7) and Customer Parties' similar proposed language in proposed Rule 2(C) are unnecessary. The rules do not inform a filer of his or her options if a flat tire occurs while in route to make a paper filing. A filer should be wise enough to determine the available options when adversity occurs. Customer Parties' request is denied.

(16) Proposed Rule 02(D) addresses the requirements for electronically filing documents. The Commission has experimented with electronic filings for several years, gradually increasing the number and types of cases for which electronic filing is acceptable. Staff has proposed making it an available option for all cases. Gas Companies advocate that the Commission should require all parties represented by counsel, including Staff, to file electronically. Gas Companies contend that, by allowing a party to choose whether to file by paper, fax, or electronically, some parties will file documents late on Friday by paper, knowing that the document will not get posted to DIS until Monday and the copy served by mail will not be received until later on Monday, thus, unfairly shortening response time. (Gas Companies initial at 4). The Commission cannot agree that response time is shortened. The response time, which is determined from date of filing, would be neither lengthened nor shortened. What would vary, based upon whether a document is filed by paper, fax, or electronically, is a party's knowledge that a filing has occurred and, thus, the opportunity to prepare a response. But that is no different than what occurs today. The Commission recognizes that for some

documents that have strict filing requirements, such as objections to a staff report or an application for rehearing, a party may want the assurance that its document has been timely filed, which occurs when it files a paper copy, in person, and receives a date-stamped copy. While we do not find it necessary to impose today such a requirement on all counsel, this rule is subject to another R.C. 119.032 review in 2015. During this next review, we will further investigate and explore mandating electronic filing by persons represented by counsel.

(17) Proposed Rule 02(D)(2) provides that a party may not file electronically any document for which protective treatment is requested or a notice of appeal of a Commission order to the Ohio Supreme Court. AT&T contends that the Commission should allow a notice of appeal to be electronically filed. AT&T's only rationale is that R.C. 4903.13 requires only that a notice of appeal be "filed" with the Commission and that there is no statutory prohibition against e-filing the notice. (AT&T initial at 2.) R.C. 4903.13 also requires that a copy of the notice of appeal be served upon the chairman of the Commission. The Commission wishes to ensure that its counsel in the appeal, timely receives service of the notice of appeal. This goal is accomplished by requiring service of the notice of appeal on the Chairman or a Commissioner. However, we agree with AT&T that the notice of appeal can be fax filed or e-filed. The rule has been modified accordingly.

(18) Proposed Rule 02(D)(4) provides, among other things, that the Docketing Division may reject an electronic filing that does not comply with the electronic filing manual and technical requirements, is unreadable, includes material that is inappropriate for inclusion on the Commission's website, or is submitted for filing in a closed or archived case. Without being specific, AT&T states that, in some of these circumstances, the filer should be given an opportunity to cure the defect and refile and still have the filing considered timely (AT&T initial at 3). In proposed Rule 2(D)(6), persons who file electronically are encouraged to file early enough in the day to allow for review and acceptance of e-filings. A party whose filing is rejected who files early in the day should have no difficulty properly refiling the document the same day. If the document is not

refiled until the next day, then the document should not be considered timely filed. AT&T's request is denied.

(19) Proposed Rule 02(D)(5) provides that, when an e-filed document is accepted, notice will be sent via e-mail by the Commission's e-filing system to all who have electronically subscribed to the case. This notice will constitute service of the document. The filer will then be responsible for serving copies of the document upon all parties who are not electronically subscribed to the case. AEP advocates that any party who is willing to accept service of documents by fax or e-mail shall be considered electronically subscribed to the case (AEP initial at 2). AEP's proposal is without merit because a party who agrees to accept service by fax or e-mail has not electronically subscribed to the case and, thus, would not receive e-mail notice by the Commission's e-filing system when a document is e-filed.

(20) OMA suggests that proposed Rule 02(D)(5) be modified to make service of filed documents by e-mail the default option unless the party/attorney affirmatively opts out of e-mail service in the first written filing made by the attorney or party. OMA states that service by e-mail is the trend in larger Commission proceedings in which there are numerous parties represented by counsel. (OMA initial at 3.) FirstEnergy argues that service by e-mail should be the rule, not the exception, and that a specific Commission order should be required for service by any other means (FirstEnergy initial at 5-6). The Commission agrees that service by e-mail does occur in most of the larger cases due to agreement of the parties and we would expect that practice to continue. A party may also request that the attorney examiner, in a large case where the parties are all represented by counsel, require service of documents by e-mail. (See proposed Rule 05(F).) The Commission is somewhat reluctant at this time to impose a service by e-mail default requirement on infrequent filers or participants in Commission proceedings. However, nothing prevents a party in a smaller case from contacting the other party to seek agreement on service of documents by e-mail or raising the issue at a settlement conference.

(21) Customer Parties state that, while proposed Rule 02(D)(5) addresses the service of electronically filed documents, it fails

to address those situations where filers are required to serve specific entities with documents when a case is originated. Customer Parties request that the proposed rule be modified to state that, if a filer is required by statute or rule to serve specific entities when a case is originated, the filer must make such service as is required by the statute or rule. (Customer Parties initial at 4.) Nothing in Staff's proposed rule eliminates the requirement that a party e-filing a document must still comply with any relevant statute or rule. The Commission sees no reason to modify the proposed rule.

(22) Proposed Rule 02(D)(6) states that "The Commission's docketing division closes at five-thirty p.m. To allow time for same-day review and acceptance of e-filings, persons making e-filings are encouraged to make their filings by no later than four p.m." Duke requests clarification that filing by 4:00 p.m. is not a requirement and that a filing made after 4:00 p.m. would not be invalidated (Duke initial at 4). The Commission is merely trying to discourage end of day filings, especially if a party wants to ensure that there was no technical difficulty with an electronic filing. Gas Companies argue that, if e-filing is going to be a success, the Commission should ensure that any document electronically filed by 5:30 p.m. will be reviewed and, if proper, accepted by the Docketing Division that same day. The Commission's resources are not unlimited. The Commission created e-filing as a convenience so parties do not have to travel to the office of the Commission to make a filing. E-filing was not created to encourage parties to make last minute filings. The Commission finds that the language of Staff's proposed rule is reasonable and that it should be adopted.

(23) Proposed Rule 02(D)(7) states that the "person making an e-filing shall bear all risk of transmitting a document including, but not limited to, all risk of equipment, electric, or internet failure." OPAE contends that the rule may be too harsh and that the Commission should not absolve itself of any responsibility or to seek, in advance, to blame the e-filer for the failure. OPAE recommends that the language be deleted. (OPAE initial at 3.) The Commission is not absolving itself of any responsibility nor is it placing blame for the failure on the e-filer. The Commission is merely stating that, if a party chooses the e-filing option, and it is not available because of

technical issues, it is the responsibility of the e-filer to plan ahead and have alternatives available to make a filing on time. See the discussion above where the proposed rules encourage an e-filer to act by 4:00 p.m.

(24) Proposed Rule 02(E) discusses the closing and archiving of cases. OPAE contends that the proposed rule could be problematic when a stipulation in a case is in effect for many years. OPAE suggests that, if the Commission adopts the proposed rule, it should not close or archive any case where the Commission has issued an order approving a stipulation until all the years affected by the stipulation have passed. (OPAE initial at 3.) The Commission disagrees. There is a method provided for quickly reopening a closed case and nothing in the proposed rule forbids a party from filing a new case to seek enforcement of a stipulation made in a prior case.

(25) Proposed Rule 03(A) states, in part, that an attorney or party willing to accept service of documents by e-mail shall provide an e-mail address and a statement that it is willing to accept service by e-mail. AEP suggests that the proposed rule be amended to require that such person ensure his or her e-mail account is active and appropriately set to accept messages from foreign senders (AEP initial at 3). The Commission believes that such conditions are obvious and need not be stated in a rule. If a serving party ever experiences a situation where a notice is received that an e-mail was undelivered and, thus, service of the document was not achieved, the party would have a responsibility to serve the document by other means or to contact the other party to determine the reason for the delivery failure.

(26) Gas Companies recommend that proposed Rule 03(A) be revised to require that all attorneys representing a party be required to electronically subscribe to cases and, thus, receive notice of filings via the Commission's e-filing system (Gas Companies initial at 3). OPAE suggests strengthening the proposed rule by changing "willing to accept" language to "serve by fax" or "serve by e-mail" (OPAE initial at 4). FirstEnergy submits that the Commission should make service via e-mail the rule, and not the exception. Thus, FirstEnergy recommends deleting the last two sentences of proposed Rule 03(A), as proposed by Staff and replacing Staff's proposal with

language making service by e-mail compulsory unless otherwise ordered by the Commission. (FirstEnergy initial at 5.) As noted above in finding (20), while the Commission recognizes that electronic correspondence by fax and by e-mail is becoming the preferred option, we remain reluctant at this time to impose an electronic service requirement on infrequent filers or participants in Commission proceedings. Nothing forecloses attorneys in a particular case from agreeing to service by electronic means or from requesting that the attorney examiner in a large case require service of documents electronically [See proposed Rule 05(F)].

(27) Proposed Rule 04 discusses the signing of documents filed with the Commission whether by hard-copy or in electronic form. FirstEnergy recommends modifying the rule to reflect that a party can directly fax an electronic document without necessarily printing the document (FirstEnergy initial at 6). The Commission acknowledges the possibility of directly faxing an electronic document and has modified the proposed rule accordingly.

(28) In proposed Rule 05, Staff added paragraph (B), to address service via e-mail notice from the Commission's docketing system when a document is e-filed. Generally, FirstEnergy agrees with the inclusion of paragraph (B) as it allows for an efficient and cost-saving measure to serve parties in a case with pleadings and other documents. However, consistent with earlier comments, FirstEnergy recommends modifying the rule to require e-mail service as the rule and not the exception. Further, FirstEnergy proposes modifying paragraph (B) so that the serving party has the option of serving all parties to a case without including the proposed language in the certificate of service and listing parties who have electronically subscribed. (FirstEnergy initial at 7.) Gas Companies note that all parties represented by counsel should be required to subscribe to the case for e-filing notices as it is not burdensome to require sophisticated intervenors served by counsel, who already electronically file in other courts, to subscribe to Commission cases. Regardless, Gas Companies aver that the Commission must ensure that the notice sent by the docketing system is sent the same day the filing is accepted by the Commission. (Gas Companies initial at 8.) AT&T submits that the Commission should consider eliminating all requirements to serve hard

copies of any filing, unless ordered for just cause in a particular case due to the ubiquity of internet access (AT&T initial at 4).

The Commission will adopt Rule 05, including paragraph (B), as proposed without modification. Where possible, we have attempted to modify our procedures to accommodate electronic filing through our docketing system including adding provisions where the docketing system generates notice to parties electing to be served electronically. However, we are also aware that a significant number of documents filed with the Commission annually are paper filings made by persons who do not regularly participate in Commission proceedings. To expect those infrequent filers to appreciate the nuances of electronically filing and serving documents is unreasonable and could negatively impact those persons ability to protect their interests. Ultimately, the focus of this rule is to put the responsibility for serving pleadings and other documents on the party making the filing. We find that the rule as proposed appropriately accomplishes this purpose.

(29) Customer Parties recommend adding a sentence in paragraph (C) of proposed Rule 05 to the effect that where counsel of record has not been designated for a party with multiple counsel then service on the first-listed counsel in the initial proceeding is sufficient (Customer Parties initial at 5). The Commission agrees and has modified paragraph (C) of proposed Rule 05 accordingly.

(30) Paragraph (D) of proposed Rule 05 sets forth the methods of service of pleadings and other papers upon an attorney or party. In order to encourage communication between the parties, Gas Companies propose that any represented party e-mail a same-day courtesy copy to all parties in the proceeding (Gas Companies initial at 9). Duke recommends amending paragraph (D)(4) to delete the requirement that an electronic confirmation of service be retained because today's e-mail software does not generally produce a confirmation that e-mail has been sent. Like the Ohio Rules of Civil Procedure, Duke suggests that, if called upon to do so, the attorney serving the pleading has the burden to prove that service was completed on time by an acceptable method. (Duke initial at 5-6.)

While the Commission agrees that communications among the parties would be enhanced by serving same-day courtesy

copies on all counsel of record, especially in the context of electronic service of documents such as by e-mail, the Commission does not find it necessary to adopt a rule mandating this practice. The Commission does, however, concur with the comments submitted by Duke. Accordingly, paragraphs (D)(3) and (D)(4) have been modified to reflect, like the Rules of Civil Procedure, that service by electronic means (*i.e.*, by fax or by e-mail) is complete upon transmission unless the serving party learns that it did not reach the person served electronically.

(31) Paragraph (E) of proposed Rule 05 defines "party" for purposes of this rule, to include persons who have filed a motion to intervene. Customer Parties recommend adding language citing to proposed Rule 10 which also defines those entities deemed to be parties to a Commission proceeding (Customer Parties initial at 5). Duke proposes language to address the scenario when a party serving a pleading may not yet have notice that another entity has filed a motion to intervene (Duke initial at 6). In order to eliminate unnecessary paperwork, FirstEnergy offers language clarifying that service is no longer necessary on a person whose motion to intervene has been denied (FirstEnergy initial at 9).

The Commission agrees that Customer Parties' proposal offers needed clarification; therefore, language has been added to paragraph (E) accordingly. The Commission does not find it necessary, however, to adopt the proposals offered by Duke and by FirstEnergy as both scenarios are addressed adequately by the current rules.

(32) Proposed Rule 06 addresses amendments of any application, complaint, long-term forecast report, or other pleading filed with the Commission. Duke recommends that the rule be modified to provide that, where an applicant files an amendment or modifications to a prior filing without a motion requesting authorization, such amendment or modification be deemed accepted for filing unless the Legal Department rules otherwise within three days after filing (Duke initial at 6-7).

Duke's proposal is problematic on a number of levels and will not, therefore, be adopted. Initially, Duke's proposal does not account for the significance of the modification. While some amendments may be quite minor, other amendments are often

substantial. Duke's proposal places a significant burden on the Commission's legal department to review and rule on an amendment filed in a proceeding within three days of filing. Intervening parties would have even less time to make the Commission known of any concerns with an amendment. If adopted into the proposed rule, the Commission could even envision some party using this mechanism to gain a strategic advantage by filing an amendment without a motion in order to trigger the three-day acceptance of the filing.

(33) Proposed Rule 07 addresses computation of time. In paragraph (A), Staff proposed language clarifying the start and end dates when computing time both forward and backward. Staff also proposed deleting paragraph (B) which currently gives parties three additional days to respond to a pleading when service is made by mail and paragraph (C) which permitted parties one additional day to respond to a pleading when service is made by personal, facsimile transmission, or e-mail and service is completed after five-thirty p.m. AT&T comments that the backward computation of time would cut short the opportunity of opposing parties to review expert testimony and prepare for the hearing. AT&T recommends moving the due date backward, as opposed to forward, to remedy this dilemma. (AT&T initial at 6.) FirstEnergy suggests removing the backward example offered in paragraph (A) as the example is inconsistent with the expert testimony provision, Ohio Adm.Code 4901-1-29. FirstEnergy also objects to Staff's proposal to eliminate the three-day and one-day grace periods in paragraphs (B) and (C). FirstEnergy claims that, since Staff has not proposed service by e-mail as the rule, opposing parties should not be penalized because a party chooses to send documents through the mail. FirstEnergy notes that an analogous situation exists in the federal judiciary however, the Federal Rules of Civil Procedure still afford parties a three-day grace period when served with a pleading by mail. (FirstEnergy initial at 9-11.) Customer Parties submit that the three-day rule is consistent with Ohio Rules of Civil Procedure 6(E). Additionally, Customer Parties aver that Staff's proposed elimination would cause difficulties for stakeholders who lack electronic capability or who do not review the DIS on a regular basis. Further, there are occasions when the DIS is not accessible. At the very least, Customer Parties submit that the rule should be maintained for a transitional period of

adjustment during the implementation and greater perfection of electronic service. (Customer Parties at 5-6.)

Having reviewed the comments filed on proposed Rule 07, the Commission determines that the rule should be maintained as currently enacted without any of the proposed edits being made at this time. The proposed modifications to paragraph (A) have engendered more confusion than clarity to this rule and overcomplicates this provision without changing the result. Regarding the elimination of paragraphs (B) and (C), at present, we are in a transitional state whereby electronic documents and electronic filing are not universally available to all participants. Therefore, in the Commission's view, paragraphs (B) and (C) are still necessary at this time.

(34) Proposed Rule 08 addresses practice by attorneys before the Commission, representation of corporations, and designation of counsel of record. Staff-proposed revisions included aligning Commission policies with the Ohio Supreme Court's rules concerning pro hac vice practice in Ohio and eliminating the paragraph on designating a spokesperson where there are numerous complainants in a complaint brought pursuant to R.C. 4905.26. Duke applauds the addition of standardized requirements, conforming to those of the Supreme Court of Ohio, for requesting permission to appear pro hac vice. However, Duke recommends modifying paragraph (B) to specify that such motions will be granted or denied on the same basis as the Ohio rules. (Duke initial at 8.)

FirstEnergy supports the Staff-proposed revisions to division (B); however, FirstEnergy recommends that the Commission eliminate division (D) that provides that any person with the requisite authority to settle the issues in the case may represent a party at a settlement conference. FirstEnergy maintains that allowing corporate parties to represent themselves at a settlement conference may constitute the unauthorized practice of law. (FirstEnergy initial at 11-12.) OPAE takes the opposite position and recommends that the Commission expand the authority of non-attorneys to represent an organization, including corporations, before the Commission in matters involving the filings of pleadings and participation in prehearing conferences, settlement conferences, or other meetings related to a case (OPAE initial at 5-6).

Regarding the designation of counsel of record set forth in division (E), Duke recommends that this requirement be discretionary as not all counsel may choose to operate in this fashion and where service of filings are now accomplished electronically (Duke initial at 8). Conversely, Customer Parties suggest that the Commission adopt language similar to the applicable rule (*i.e.*, S.Ct.Prac.R. 1.3) contained in the Rules of Practice for the Supreme Court of Ohio to address instances where a party is represented by more than one attorney and the counsel of record is not identified (Customer Parties initial at 7).

Having reviewed all of the comments filed concerning this rule, we determine that the proposed rule as modified by Staff is appropriate and will be adopted. Duke's recommendation regarding pro hac vice motions infers that the Commission consider, independent of the Supreme Court's determination, whether to permit out-of-state counsel to participate in an Ohio proceeding. This would, in our view, circumvent the authority of the Ohio Supreme Court to regulate the practice of law and is beyond the authority afforded us by the Ohio General Assembly. FirstEnergy and OPAE's comments concerning representation of corporations and organization by non-attorneys are likewise without merit and will not be adopted. The Commission's long-standing practice is reflected in the proposed rule. As written, the proposed rule balances the interests of utilities and consumers of utility products and neither commenter has provided sufficient justification for amending this delicate balance. As for designation of counsel of record set forth in division (E), we note that there is no need to adopt language here as we already adopted language requiring designation in Rule 05 paragraph (C) above. Adopting additional language requiring designation in Rule 08 is not, therefore, necessary.

(35) Proposed Rule 09 addresses ex parte discussion of cases and how notice of such communications are documented. Customer Parties note that the rule infers that an ex parte filing may be modified before it is filed. Customer Parties recommend clarifying the rule to make this review and modification explicit. (Customer Parties initial at 7-8.) The Commission has clarified the proposed rule by specifying that

the final document with any necessary changes will be docketed to document an ex parte communication.

(36) In proposed Rule 10 listing those entities considered parties in a Commission proceeding, Staff recommended adding language making a carrier, shipper, or driver requesting an administrative hearing in a transportation civil forfeiture a party. There were no comments on the Staff-proposed modification. Gas Companies, however, comment that Staff should be considered a party for all Commission proceedings and that division (C) should be deleted in its entirety. Gas Companies maintain that exempting Staff from discovery violates R.C. 4903.082 which requires that "all parties and interveners shall be granted ample rights of discovery." Finally, Gas Companies acknowledge that the Commission has dismissed prior requests to subject Staff to the procedural rules but they assert that just because the Commission has permitted this unfair practice to exist for almost three decades does not justify perpetuating the practice. (Gas Companies initial at 12-14.)

Gas Companies primary concern is that Staff is not subject to the same discovery rules that other parties are subject to. Gas Companies' concern is misplaced. Gas Companies fail to acknowledge that, in many proceedings in which Staff participates, Staff has an obligation that other parties do not have, to file in the docket a report of investigation and that any Staff person contributing to the report may be subpoenaed to testify at the hearing. Moreover, Gas Companies fail to acknowledge that parties may file a motion that all or part of such report may be stricken upon motion of any party for good cause shown. Additionally, while R.C. 4903.082 grants all parties and interveners ample rights of discovery, that section does not require that all parties to a Commission proceeding have the same discovery rights and obligations. In fact, as noted above, Staff has a unique burden that no other party shares. Gas Companies' recommendation to delete paragraph (C) is, therefore, denied. Since no commenter objected to Staff's proposed addition as discussed above, the Commission will adopt Staff's proposal and have modified the rule accordingly.

(37) Staff proposed no changes to the Commission's intervention rule (Rule 11). Duke commented that paragraph (D) only

addresses limited intervention and consolidation. To be fully accurate, Duke asserts that the rule should reflect that an entity can be granted full intervention or that intervention could be denied entirely. (Duke initial at 9.) Customer Parties maintain that, in order to be valid, Rule 11 must mirror the criteria mandated by the Ohio General Assembly in R.C. 4903.221. Specifically, Customer Parties assert that any allowance for consideration of whether a person's interest is adequately represented by existing parties should be omitted from paragraphs (A)(2), (B)(5), and (D)(1). (Customer Parties initial at 9-10.) AT&T, FirstEnergy, and Duke oppose Customer Parties' recommendation (AT&T reply at 15; FirstEnergy reply at 3; Duke reply at 10).

The Commission will adopt Rule 11 without any changes. Read together, we believe that the rule is clear that full intervention is being considered by the Commission unless one of the exceptions set forth in paragraph (D) applies. We also disagree with Customer Parties' assertion that the intervention rule must mirror the statutory language set forth in R.C. 4903.221 in order to be valid. In fact, we note that the Ohio Supreme Court, in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶16, specifically referenced Ohio Adm.Code 4901-1-11 and the phrase "unless the person's interest is adequately represented by existing parties" in its decision. The court further noted that similar language exists in Rule 24 of the Ohio Rules of Civil Procedure. Thus, the Commission concludes that it is appropriate to consider this one factor, along with all the other enumerated factors, when ruling on motions to intervene.

(38) Staff proposed no changes to the Commission's motion rule (Rule 12). Duke recommends an automatic approval process for motions involving extensions of time of five days or less provided no ruling denying the request is issued within 48 hours of the filing of the request. Duke also recommends that the Commission amend Rule 12 by adopting a standardized set of requirements for expedited cases. Duke asserts that such requirements should address the issues normally covered by attorney examiners' procedural entries, including motion practice, discovery rules, and service rules. (Duke initial at 9-10.)

The Commission does not find it necessary to adopt either of Duke's proposed modifications to Rule 12. The responsibility to rule on motions for extensions of time of five days or less falls on the Commission's attorney examiners and presents no burden on a moving party. Additionally, Duke's proposal does not work in those circumstances where the request for an extension of time is for two days or less. Like the first issue, Duke's second issue will not work in all circumstances as each case is procedurally different and presents various procedural obstacles that must be addressed, thus, making it difficult to establish a standardized set of time lines that work in all instances.

(39) Continuances of public hearings and extensions of time to file pleadings or other papers are covered in Rule 13. Staff offered no proposed modifications to this rule. FirstEnergy recommends that the Commission modify subparagraph (D) of this rule to allow for oral motions and rulings regarding continuances and extensions of time during all prehearing conferences and during telephone conferences, provided the parties agree on the extension of time or continuance, which would be followed up with a written entry (FirstEnergy initial at 12-13). AT&T concurs with FirstEnergy's recommendation (AT&T reply at 16). Customer Parties represent, in comments on Rule 14 addressing procedural rulings, that the issuance of oral rulings in non-transcribed prehearing conferences is problematic (Customer Parties initial at 10).

The Commission must base our decisions on information found in the record before us. Adopting FirstEnergy's position as proposed in its comments would have us rendering decisions with no basis in the record. FirstEnergy's proposal will not be adopted.

(40) Staff proposed language to the interlocutory appeals process, Rule 15, requiring a party filing an interlocutory appeal on a day before the Commission offices are closed to notify all other parties of the intent to file the interlocutory appeal by three p.m. on the day of filing. As proposed by Staff, such notice could be made by personal notice, telephone, or e-mail. Duke and FirstEnergy generally concur with the Staff's proposal (Duke initial at 10; FirstEnergy initial at 13). Duke continues that the rule should make clear, however, that the

unavailability of a party does not impact the appealing party's right to file an interlocutory appeal. Duke also recommends that the Commission include a new provision in this rule, to require that interlocutory appeals be handled within the Legal Department, only by the legal director or deputy legal director. (Duke initial at 10.) AT&T concurs with Duke's proposal that an interlocutory appeal be handled by someone other than the examiner who made the ruling that is being appealed (AT&T reply at 17).

Customer Parties do not support Staff's proposed notice provision set forth in subparagraph (D). Customer Parties note that parties to a Commission proceeding already have notice of the date an interlocutory appeal can be filed. A requirement to give notice beyond the notice inherent in the filing imposes unnecessary burdens. Additionally, Customer Parties point out that parties signed up for electronic docketing will receive an automatic notice of the filing. As such, Staff's proposal is unnecessary. (Customer Parties initial at 11.) On reply, FirstEnergy states that, given the short time period in which a party has to respond and given the meager effort it takes for a party to send notice by e-mail, the Commission should reject Customer Parties' suggestion and adopt the Staff-proposed modification to this rule (FirstEnergy reply at 4).

Upon thorough review of the comments filed on this matter, the Commission determines that there is no need to modify the rule as proposed by Staff. In making this determination, we note that Commission rules already require notice to be delivered to all parties of an interlocutory appeal and further the rules, as currently written, provide for an additional day for responses if the notice is delivered after 5:30 p.m. Accordingly, Staff's proposal for subparagraph (D) will not be adopted.

(41) Several stakeholders offered comments on Rule 16 which addresses general provisions and scope of discovery in Commission proceedings. AEP recommends language limiting discovery to those proceedings in which a hearing has been scheduled, or, in the alternative, require that a party obtain approval from the Commission, legal director, deputy legal director, or attorney examiner to conduct discovery in those proceedings in which there is no hearing. AEP submits that, as currently written, the rule facilitates fishing expeditions even in

cases where only a notice and comment process is used to decide the case. Moreover, pointing to several other procedural rules, AEP asserts that the value of written discovery is inherently tied to a hearing. (AEP initial at 4.) Gas Companies and Duke concur with AEP's comments (Gas Companies reply at 7; Duke reply at 11). On a similar note, Gas Companies propose that, upon a party's motion, the parties should be required to meet at one prehearing conference to discuss procedural matters, including limits on discovery. If the parties agree to limit discovery, then it should be included in a Commission procedural order. (Gas Companies initial at 15.) In another discovery-related recommendation, Gas Companies recommend a modification to Rule 16(H) closing a claimed loophole by staying discovery in those instances where a motion to intervene is being challenged and before the Commission rules on intervention (Gas Companies initial at 15).

The Commission notes that parties to a Commission proceeding already have adequate means to protect themselves from improper discovery requests without further limiting the opportunities to conduct discovery as proposed by AEP and by Gas Companies. AEP's concern with a party conducting a fishing expedition is overblown as the receiving party would have to comb through irrelevant, likely inadmissible information for purposes of preparing for hearing or to otherwise comment in a Commission proceeding. Additionally, should a requesting party engage in such a practice, that party is likely defending its actions through responding to a motion for stay or a motion to quash discovery. On balance, the Commission finds that the better course is to permit the party upon whom discovery has been sought to file in opposition should the party find themselves subject to perceived, unreasonable discovery requests. The Commission also notes that not all proceedings result in a hearing. Thus, discovery is sometimes necessary to obtain sufficient information regarding an application or other pleading in order to provide substantive comments. As for Gas Companies' proposals, Ohio Adm.Code 4901-1-16(F) already affords parties the opportunity to conduct informal discovery by mutually agreeable methods. Additionally, as acknowledged by Gas Companies in their comments, a party challenging intervention has the opportunity to, and the Commission has in fact

granted, a stay of discovery under certain circumstances involving intervention. Accordingly, the proposals by AEP and Gas Companies are denied.

(42) Customer Parties propose that the reference in Rule 16(C) to expert witnesses expected to "testify at the hearing" be replaced with expert witnesses expected to "submit testimony" (Customer Parties initial at 11). The current rule is consistent with Civil Procedure Rule 26(B)(5) and Customer Parties do not give any reasonable basis to modify the rule. Accordingly, Customer Parties' proposal will not be adopted.

(43) Gas Companies next claim that Staff should be subject to discovery and that Rule 16(I) thus should be modified. In the alternative, Gas Companies encourage the Commission to at least require Staff to serve written discovery through the Attorney General, Staff's statutory counsel, rather than permitting individual Staff to send out data requests with often arbitrary and unreasonable deadlines. (Gas Companies initial at 17.) Gas Companies fail to recognize that, when Staff submits data requests on a utility, Staff is exercising a statutory right to fully investigate a utility proposal. Staff data requests are not akin to discovery in that instance. When Staff does conduct discovery in the same sense that a party conducts discovery, such discovery is done through Staff counsel. Thus, what Gas Companies are requesting is already the norm in Commission proceedings. No further modification to the Commission's procedural rules is necessary.

(44) Staff offered no revisions to Rule 18 which addresses the filing and service of discovery requests and responses. AEP suggests that the rule be amended to specify that discovery requests and responses can be served by fax and e-mail (AEP initial at 6). FirstEnergy recommends that all parties should be required to serve discovery requests and responses by e-mail (FirstEnergy initial at 19). Given the widespread use of electronic means to convey information and acknowledging that Ohio Rules of Civil Procedure 33, 34, and 36 contemplate electronic transmission of discovery, the Commission agrees that the rule should be modified to encourage the use of electronic means of communication when possible. Accordingly, the rule has been modified to provide for the electronic transfer of discovery requests and responses unless otherwise ordered by the

Commission, legal director, deputy legal director, or attorney examiner.

(45) Gas Companies propose that Rule 19(A) be modified to reflect that a corporation need only designate an employee to certify that, to the best of the affiant's knowledge, interrogatory answers given are accurate and those of the corporation. The current language, claims Gas Companies, requires the designated corporate representative to have actual personal knowledge of the particular issue and is contrary to Ohio and Federal Rules of Civil Procedure. (Gas Companies initial at 18.) Customer Parties oppose this proposal (Customer Parties reply at 13). The Commission determines that, as drafted, the rule 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. Gas Companies proposal shall not be adopted.

(46) Staff offered no changes for Rule 20 which addresses production of documents and things as well as entry upon land or other property. FirstEnergy suggests that the Commission clarify that the party responding to a request for the production of documents under this rule need only respond or make available the documents and things to the party that requested the information (FirstEnergy initial at 14-15). FirstEnergy, joined by Duke, AT&T, and Customer Parties, claims that the existing language has caused confusion in proceedings and is interpreted differently by different parties as presently written (FirstEnergy initial at 14-15; Duke reply at 12; AT&T reply at 20; Customer Parties reply at 14). As currently written, Rule 20 generally mirrors the requirements of Rule 34 of the Ohio Rules of Civil Procedure. Notably, those stakeholders commenting on this rule offered no language changes to clarify this rule. Accordingly, the Commission will adopt the rule as proposed. However, to the extent any clarification is in order, we would interpret the rule as FirstEnergy and the other stakeholders have interpreted the rule.

(47) Staff recommended two substantive modifications to the depositions rule, Rule 21. The first modification, in subpart (B), is the addition of a sentence noting that, "[A]bsent unusual circumstances, depositions should be completed prior to the commencement of the hearing." The second recommended

modification offered by Staff is the addition of a sentence to subpart (N) stating that "[A] deposition need not be prefiled if used to impeach the testimony of a witness at hearing."

Customer Parties propose changes to Rule 21(A) acknowledging the distinction between party and non-party deponents, as recognized in Rule 30 of the Ohio Rules of Civil Procedure (Customer Parties initial at 12). The Commission determines that the Customer Parties recommendation is generally covered by subpart (B) and, therefore, there is no need to insert additional language into subpart (A).

(48) Duke submits that the Staff-proposed language to subpart (B) is unclear. Duke recommends modifying the language to provide that, unless the party requesting the deposition and the party from whom the deposition is requested agree otherwise, depositions are to be completed prior to the commencement of the hearing. (Duke initial at 11.) AEP and FirstEnergy propose language changes making subpart (B) more definitive and stronger in order to make proceedings more efficient and not allow a party to delay a hearing to take depositions (AEP initial at 6-7; FirstEnergy initial at 15-16). The Commission agrees that the Staff-proposed language is unclear. Further, we are unaware of any concern with current practice. Accordingly, we are striking the Staff-proposed language from subpart (B) of adopted Rule 21.

(49) In regard to Rule 21(E), Gas Companies are concerned by a trend of some parties circumventing the twenty-day response time afforded by Rule 20(C) by requesting production of documents in conjunction with depositions (Gas Companies initial at 19-20). Customer Parties strongly oppose this recommendation pointing out that it is often not known whether depositions will be taken, or when those depositions will take place (Customer Parties reply at 15). The Commission is not aware of any instances where the party deponents have been unable to work this issue out without Commission intervention. Therefore, we see no reason to modify or adopt new language addressing this issue.

(50) Several stakeholders offered comments concerning the use of depositions in Commission hearings, Rule 21(N). AEP proposes adding language to clarify that a deposition transcript can be used to refresh the recollection of a witness even if the

transcript was not prefiled (AEP initial at 7). Pointing to Civil Rule 32(a)(3), Norfolk Southern maintains that Rule 21(N) should be amended to clarify that a deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness resides outside the county in which the action is pending (Norfolk Southern initial at 2). Customer Parties assert that, due to the length of deposition transcripts and the number of potential transcript filings, if a paper filing is made, parties need not file more than one complete copy of each deposition with the Commission and that service of the filed deposition transcript need only be made upon the party against whom the deposition is to be used (Customer Parties initial at 12-13). AT&T recommends modifying Staff's proposed language by inserting the word "solely" so as to clarify that if a deposition is to be used for any other purpose besides impeachment, the deposition must be prefiled (AT&T initial at 7). Rule 21(N) already generally references the concept that depositions may be used to the same extent permitted in civil actions and affords a party the opportunity to obtain a variance from the rule for good cause shown. Rather than attempt to capture every conceivable instance when a deposition needs to be prefiled with the Commission, we believe the better course is to adopt the rule as proposed by Staff and consider other deposition issues on a case-by-case basis.

(51) Staff proposed no changes to Rule 23 which addresses motions to compel discovery. Duke submits that subpart (E) of Rule 23 conflicts with the more appropriate provision of the interlocutory appeal rule. In support, Duke states that subpart (E) provides that if an aggrieved party does not file an interlocutory appeal, an order to compel discovery "becomes the order of the commission" whereas Rule 15(F) provides that a party adversely affected by a procedural ruling and elects not to appeal may still raise the issue on brief. Duke claims that there is no reason why a motion to compel should not be treated in the same manner. (Duke initial at 11.) Customer Parties oppose Duke's recommendation (Customer Parties reply at 16). The Commission finds that Duke's recommendation should not be adopted. Rule 16(A) sets forth the general provisions and scope of discovery in Commission proceedings. Rule 16(A) states, in part, that the Commission's discovery rules are intended to "encourage the prompt and

expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings." It would not be appropriate, therefore, to permit a party to argue after a hearing and without having made an interlocutory appeal that the party should not have been required to produce the information that was the subject of the motion to compel. Accordingly, Duke's recommendation is denied.

(52) Motions for protective orders are addressed in Rule 24. Staff-proposed changes to Rule 24 included: a) reducing the number of unredacted copies filed along with motions for protective treatment from three to two; b) eliminating the provisions for automatic approval of certain utility contracts subject to an automatic approval process; c) extending the length of time for which protective treatment is granted from eighteen months to twenty-four months; and d) inserting a provision clarifying that nothing precludes the Commission from reexamining the need for protection de novo during the twenty-four month time frame.

Customer Parties oppose extending protective treatment from eighteen to twenty-four months. Customer Parties also observe that since Rule 24 addresses both protective orders concerning discovery and the confidentiality of documents filed with the Commission, the rule should be split and the provisions dealing with protective treatment of documents filed with the Commission moved to Rule 2 pertaining to documents filed with the Commission. (Customer Parties initial at 13-16.) Duke strongly opposes the proposal to reexamine de novo the need for continued confidentiality of documents (Duke initial at 12). FirstEnergy maintains that protective orders should not have any designated expiration date consistent with Ohio Rule of Civil Procedure 26(C) (FirstEnergy initial at 16). FirstEnergy would also add language to the reexamination provision requiring that notice and an opportunity to be heard prior to any Commission determination on confidentiality be given to the party who sought confidential treatment (FirstEnergy initial at 17). Arguing that trade secrets are not public records and, therefore, trade secrets can never be released to the public, AT&T points to the law and Ohio Supreme Court precedent to support its position (AT&T initial at 7-10).

The conflict among the various stakeholder positions is illustrative of the competing interests that the Commission must weigh when considering motions seeking protective treatment. On balance, we determine that the proposals offered by Staff are principally the only modifications necessary to this rule. Regarding Customer Parties' opposition to extending the protective treatment to twenty-four months, we highlight that the majority of motions seeking protective treatment filed today involve information docketed in support of applications seeking certifications filed by competitive gas and competitive retail electric entities. Since these certifications must be renewed every two years it makes sense to have protective treatment coincide with the expiration of the certificates. We also disagree with the proposal to spin-off provisions concerning protective treatment of documents filed with the Commission into another rule. We find that it makes more sense and leads to less confusion to address protective treatment in one rule rather than scattering discussion of protective treatment throughout various procedural rules.

We also disagree with the comments of FirstEnergy and AT&T that, essentially, protective treatment of trade secrets may never end. Adoption of FirstEnergy and AT&T's positions is contrary to Ohio law and past Commission precedent. With only limited exception, the Ohio General Assembly, through adoption of R.C. 4901.12 and R.C. 4905.07, has determined that all proceedings, documents, records, and information in the possession of the Commission are public records and are open to inspection by interested persons. Trade secrets are one of those limited exceptions to the Commission's open records policy. Under R.C. 1331.61(D), a trade secret must qualify as one of the forms of information listed in the subparagraph and must then satisfy both of the following criteria: the information must have "independent economic value" and must have been kept under circumstances that maintain its secrecy. Further, the Ohio Supreme Court has adopted and this Commission has repeatedly recognized a six-part test in analyzing a trade secret claim. Thus, while information may at one time satisfy the criteria necessary to be deemed a trade secret, at a future time the information may lose its trade secret status. Accordingly, we determine that protective orders issued regarding information that is a trade secret cannot be permanent under Ohio law.

Duke's concern with the reexamination de novo provision is misplaced as the current rule has similar language in it. Specifically, current Ohio Adm.Code 4901-1-24(D)(4) has language pointing out that nothing precludes the Commission from examining the confidentiality issue de novo if there is an application for rehearing on confidentiality or a public records request for the redacted information. We do recognize, however, that the primary reasons why the Commission would reexamine the confidentiality issue would be due to an application for rehearing on the confidentiality issue or a public records request. Therefore, we are modifying Staff's proposal to add these qualifying principles back into the rule.

(53) Staff-proposed changes to the subpoena rule, Rule 25, include adding language permitting a party to file a motion for a subpoena along with the subpoena for the attorney examiner or legal director to consider. Previously, the only method available to a party to seek a subpoena was to appear at the offices of the Commission in person and submit a motion for a subpoena as well as the subpoena itself to an attorney examiner or the legal director for consideration. Another new provision permits the service of a subpoena on a party at his or her business address or mailing the subpoena via United States mail as certified or express mail, return receipt requested. Finally, Staff proposed changes adjusting the timing of when a subpoena had to be sought before the start of the hearing.

To be consistent with Rule 45(B) of the Rules of Civil Procedure and past Commission precedent, Customer Parties recommend that the Commission retain the right to serve a copy of the subpoena rather than the original upon the party being served (Customer Parties initial at 17). Gas Companies propose modifying subpoena time frames to accommodate motions to quash in subparts (C) and (E) of the proposed rule (Gas Companies initial at 21-22). Further, Gas Companies recommend that the Commission permit Staff to be subpoenaed in Commission proceedings (Gas Companies initial at 23). Duke submits that the Staff-proposed limitation on who may serve subpoenas should be clarified to permit counsel for a party to serve their own subpoenas (Duke initial at 12). AEP encourages the Commission to clarify this rule to limit the use of subpoenas to compelling factual testimony only as opposed to policy or opinion testimony (AEP initial at 7-8).

AT&T notes that while the subpoena rule has generally been improved, it does need to make provision for possible schedule conflicts. To this end, AT&T states that the person requesting the subpoena should have the obligation to work with the subpoenaed party or their representative on mutually acceptable dates for the subpoenaed party's appearance at a deposition or at a Commission hearing. (AT&T initial at 10.)

Regarding Customer Parties' comment, we do not agree that the Staff-proposed modifications changed the long-standing Commission precedent that a copy of the subpoena, and not the original, is to be served upon the parties. However, in order to bring finality to this matter, the Commission has retained some of the language in the third sentence of subpart (B) which discusses service of a signed subpoena. The Commission is unaware of any problems that require modifying the time frames in order to accommodate motions to quash and shall, therefore, not adopt Gas Companies' proposal. Likewise, the Commission sees no reason to adopt Gas Companies' proposal for subjecting Staff to be subpoenaed in Commission proceedings. Regarding Duke's concern that Staff has prohibited counsel for a party to serve a subpoena, the Commission does not read the same limitation into the rule. In fact, the Staff-proposed language appears to expand the pool of persons who can serve a subpoena rather than narrow the pool.

We also disagree with the proposals offered by AEP to limit subpoenas to compelling factual testimony only and AT&T's proposal to place the obligation to find a mutually agreeable date for testimony by a subpoenaed witness on the party requesting the subpoena. AEP's proposal is overly broad and contravenes Ohio Rule of Civil Procedure Rule 45(C) which provides for the use of subpoenas to require disclosure of expert opinion under certain circumstances. Similarly, AT&T's proposal would place a burden on the party requesting a subpoena. AT&T's proposal is counter to the Ohio and Federal Rules of Civil Procedure. More importantly, AT&T is seeking for us to insert ourselves into an area that is generally worked out among the parties and never brought to the Commission's attention. In light of this, we see no reason to address an area that has not been an issue previously.

(54) Staff proposed no changes to Rule 26 which addresses prehearing conferences. Gas Companies submit that making a prehearing conference mandatory upon motion of a party to address procedural issues would aid greatly in the efficient administration of cases before the Commission (Gas Companies initial at 23). Claiming that there are legitimate reasons why persons attending a prehearing settlement conference may not have the authority to settle particular issues, Customer Parties offered language to subpart (F) noting that "to the extent practicable" all parties shall have the requisite authority to settle the matter (Customer Parties initial at 18).

Regarding Gas Companies' proposal, the Commission points out the rule as drafted already affords parties the opportunity to request a prehearing conference to discuss procedural matters. However, the discretion to determine the best method for efficiently processing a case should ultimately lie with the Commission. Additionally, Gas Companies proposal would require a prehearing conference upon the motion of one party even if multiple other parties to the proceeding disagree. We find that the better procedure for ensuring the efficient administration of matters before us is to leave such decisions to the Commission. As for Customer Parties' recommendation, we find that the recommendation should be rejected. There is little reason to schedule a conference and discuss settlement of known issues unless the parties to the proceeding come prepared and with the requisite authority to settle the matter. Accordingly, Customer Parties' recommendation will not be adopted.

(55) In Rule 27(C), Staff proposed striking the concept of permitting unsworn testimony at a session of the hearing designated for the taking of public testimony. Gas Companies profess to being confused by Staff's proposal to only allow sworn testimony at public hearings. These commenters assert that by requiring individuals to be sworn before speaking at a public hearing, the hearing will be converted from informal public feedback sessions to an extension of the evidentiary hearing and that, in such an event, counsel will be forced to cross-examine consumers who offer comments at a public hearing. Gas Companies recommendation is to remove the concept of sworn and unsworn testimony and replace it with the word

"comments." (Gas Companies initial at 24-25.) FirstEnergy agrees with Gas Companies comments and, in addition, FirstEnergy also requests that the Commission determine and advise all stakeholders as to how the Commission will use unsworn testimony at public hearings in the decision making process (FirstEnergy initial at 17-19). Customer Parties assert that the proposed rule change should not be adopted and, further, that a section be added to the rule stating that the Commission will give thirty days notice of public hearings whenever practicable (Customer Parties initial at 19).

After thoroughly reviewing the comments on this rule and the Staff-proposed revision to the rule, the Commission determines that Staff's proposal should be adopted as proposed and that the commenters' suggestions should be rejected. The Commission has conducted public hearings involving sworn public testimony for many years without the need to conduct discovery or cross-examine those consumers offering such statements. It is, in fact, quite a leap to argue that sworn public testimony must be subject to discovery and cross-examination. However, in those rare instances where some form of discovery is necessary, some accommodations can be arranged. Importantly, testimony provided by public witnesses at public hearings is vital to the Commission's function and once taken is given the weight that the Commission determines such testimony deserves. Accordingly, the proposals by Gas Companies and FirstEnergy will not be adopted.

Likewise, Customer Parties recommendation that the Commission require at least thirty days notice of public hearings whenever practicable will not be adopted. The Customer Parties provided no rationale for adoption of this position nor identified any reasons why the Commission's current practice is ineffective. Because Customer Parties proposal would delay the regulatory process without any proven benefit to the public, we determine that the Customer Parties' proposal should be rejected.

(56) Other than minor grammatical modifications in subparagraphs (B), (C), and (D) to make the rule more clear, Staff offered just one modification to subparagraph (E) of Rule 28, which deals with reports of investigation and objections thereto. Staff's modification involved inserting the words "or comments" into

the last sentence of the subparagraph. Customer Parties reiterated comments offered by the Ohio Consumers' Counsel the last time these rules were reviewed in Case No. 06-685-AU-ORD. Essentially, Customer Parties object to a Staff Report of Investigation being admitted into evidence especially in cases where the Commission otherwise takes no evidence. If the Staff Report is evidence, then the parties need to be able to cross-examine or present evidence of their own according to Customer Parties. (Customer Parties initial at 19-21.)

The Commission determines that, to the extent we direct Staff to conduct an investigation and file a report following an investigation, as discussed in subparagraph (E), the proper procedure would be for the Commission to make the report public and to inform interested persons that the Commission would be considering the contents of the report in rendering its decision. At that point, it is appropriate to provide interested persons the opportunity to either present testimony and to cross-examine the authors of the report if the Commission schedules a hearing or to file comments if the Commission determines that no hearing is required in the case. The purpose of subparagraph (E) is not to deny any interested person an opportunity to counter the contents of a Staff Report. In fact, the Commission agrees that to not provide any opportunity for interested persons to address the contents of the Staff Report would be a denial of due process. The Commission also notes that the one case cited by Customer Parties in support of their comments in this matter occurred prior to adoption of subparagraph (E) in 06-685.

(57) Staff offered one addition to Rule 29 pertaining to the filing of expert testimony in Commission proceedings. Staff's proposal adds a new subparagraph (A)(1)(i) which clarifies that the expert testimony filing requirements of this rule do not apply to a witness who is subpoenaed to testify on behalf of a party. FirstEnergy argues that Staff's proposal is unclear and may cause confusion in that, by the placement of this proposal in the expert testimony rule, one may argue that, by issuing a subpoena for the party's own witness, the party is relieved of meeting the requirements for expert testimony. FirstEnergy also recommends that the Commission add a provision that gives the presiding hearing officer the discretion to require parties to prefile lay testimony either sua sponte or upon

motion of a party. According to FirstEnergy, the presiding hearing officer would exercise such discretion when, in the judgment of the presiding hearing officer, the prefiling of lay testimony would aid the Commission in its decision making, improve the quality of the record, make for more efficient proceedings at the Commission, or for other similar reasoning. (FirstEnergy initial at 19-20.) Norfolk Southern was generally uncertain with the Commission's preferred practice regarding expert testimony and, like FirstEnergy, was confused by the Staff-proposed language (Norfolk Southern initial at 2-4). Gas Companies argue Staff should not be exempt from prefiling testimony prior to a hearing under the same requirements and schedule that applies to all other parties to a proceeding (Gas Companies initial at 25).

Commission proceedings often involve the presentation of complex technical positions by experts representing competing viewpoints. The Commission has found that the best manner in which to present such competing positions for Commission consideration is through requiring expert witnesses presenting testimony in a Commission proceeding to prefile such testimony in question and answer form. This is one area where the Commission's rules vary from the Rules of Civil Procedure. As for any confusion regarding the provision that permits, at the hearing examiner's discretion, the presentation of additional testimony by an expert that was not prefiled before the hearing, this provision is principally intended to permit the expert to make corrections or updates to the prefiled testimony on the stand at the hearing. This provision is not generally intended to authorize the submission of additional expert testimony that should have been prefiled with reasonable due diligence.

Additionally, we see no reason to adopt a rule regarding the prefiling of lay testimony. As acknowledged by AT&T in its reply comments (AT&T reply at 24), the practice of requiring the prefiling of lay testimony has been followed in appropriate circumstances. However, the number of occurrences of when lay testimony has been required to be prefiled is still rare and not worthy of a rule at this point in time. Rather, the Commission will continue to evaluate the need for the prefiling of lay testimony on a case-by-case basis in appropriate circumstances. Likewise, we see no need to adopt a rule

requiring Staff to prefile its testimony in all instances prior to the commencement of a hearing. As currently enacted, Rule 29 affords the presiding hearing examiner the discretion to determine under the appropriate circumstances to require the prefiling of Staff testimony. We see no reason to modify this long-standing position. As for Staff's proposed addition of new language in subparagraph (A)(1)(i), we agree with FirstEnergy and Norfolk Southern that such language causes more confusion than clarity; therefore, we will not adopt the Staff-proposed language and Rule 29 will remain unchanged.

(58) Staff's principal revision to the rule addressing stipulations (Rule 30) is the addition of subparagraph (D) which proposes language clarifying that parties who file a full or partial stipulation must file or provide testimony that supports the stipulation. Additionally, Staff's proposal establishes that any party that does not join the stipulation may offer evidence or argument in opposition to the stipulation. OPAE, Duke, FirstEnergy, and IEU recommend clarifying subparagraph (D) by only requiring one party to the stipulation to provide supportive testimony as the current language is unclear as to whether this requirement only applies to the party who actually dockets the stipulation or to all parties who have signed the stipulation (OPAE initial at 6-7; Duke initial at 12; FirstEnergy initial at 20; IEU reply at 3). DP&L, AT&T, and Norfolk Southern submit that the proposal is backward and should be reversed. That is, the Commission should rely on the parties' stipulation and testimony supporting the stipulation should only be required when the necessity for such testimony is established and ordered. (DP&L initial at 1-2; AT&T initial at 11; Norfolk Southern initial 4-5.)

The Commission has routinely determined that, in considering the reasonableness of a stipulation, the Commission will apply a three-part analysis. The Supreme Court of Ohio endorsed the Commission's analysis in *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561, 629 N.E.2d 423 (1994), citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992). In order to satisfy the three-part analysis endorsed by the Ohio Supreme Court, new subparagraph (D) has been proposed to clarify that a stipulation being presented to the Commission as resolving issues in the case have testimony from at least one signatory

party. Therefore, we determine that it is appropriate to adopt additional language similar to the language proposed by Staff and contrary to the comments offered by DP&L, AT&T, and Norfolk Southern. However, we also agree that clarification of subparagraph (D) is in order. Specifically, the Commission determines that the first sentence of subparagraph (D) should be clarified to make clear that only one signatory party to a stipulation in a proceeding before the Commission need file testimony in support of the stipulation. The language of the rule has been modified accordingly.

(59) Regarding attorney examiner reports and exceptions thereto, Rule 33, Customer Parties, while recognizing that the Commission rejected in 06-685 reinstating attorney examiner reports in all cases, recommend returning to attorney examiner reports as a standard practice to increase the transparency of the Commission decision process (Customer Parties initial at 21-22). AT&T, like it did in 06-685, argues that Customer Parties' position is overkill and that the Commission still has the authority to direct the preparation and filing of an attorney examiner's report when it is appropriate to do so. However, to adopt Customer Parties' suggestion adds unnecessary delay to all proceedings. (AT&T reply at 25.)

As we did in the 06-685 rulemaking proceeding, we decline to adopt Customer Parties' recommendation. As pointed out by AT&T, the Commission retains the authority to require the submission of an attorney examiner's report when appropriate to do so. However, routinely requiring the submission of an attorney examiner's report and allowing for the filing of exceptions thereto is not necessary in the majority of cases and will merely lead to a delay in the final Commission decision. Accordingly, Customer Parties' recommendation is rejected.

(60) Rule 35 addresses applications for rehearing. Staff proposed language clarifying that applications for rehearing must set forth in numbered or lettered paragraphs the ground or grounds upon which the applicant considers the Commission order to be unreasonable or unlawful. Gas Companies submit that Staff appears to be suggesting by this modification that applications for rehearing should be presented in one document, similar to a complaint, with numbered paragraphs. If that is the intent, it is not clear, Gas Companies claim, why

this change is necessary rather than the current practice of filing a brief application for rehearing accompanied by a separate and much longer memorandum in support. (Gas Companies initial at 25-26.)

The Ohio General Assembly has established with substantial specificity in R.C. 4903.10 the process for filing an application for rehearing of a Commission order. R.C. 4903.10 states, in relevant part, that an application for rehearing "shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the (Commission) order to be unreasonable or unlawful." The section continues by stating that "[N]o party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application." Thus, the General Assembly has very clearly delineated the rehearing process. Rather than introduce confusion, we find that the Staff-proposed modification adds clarity to the rehearing process. An applicant seeking rehearing must file an application and must set forth with specificity in the application the ground or grounds on which the applicant believes the Commission order is unreasonable or unlawful. While rehearing applicant's are free to expound upon their assignments of error in a memorandum, the Commission legally can not consider any grounds for rehearing not contained within the application itself. Staff's proposed revisions to Rule 35 will be adopted.

(61) The only Staff-proposed modification to the Commission's complaint rule, Rule 4901-9-01, was to add a reference to a new complaint statute, R.C. 4927.21, to the first sentence of subparagraph (B). There were no comments on Staff's proposed modification. However, Gas Companies and FirstEnergy offered additional language in two areas. Citing a growing trend among consumer complaint cases, Gas Companies recommend putting complainants on notice that failing to appear at a prehearing conference or at a hearing without providing the assigned hearing examiner prior notice would be cause for dismissal of the complaint without prejudice for failure to prosecute. Gas Companies maintain that complainant's failure to appear wastes both the Commission's and public utilities' time and resources to continually accommodate a party that would otherwise had his or her case dismissed in a court of law. (Gas Companies initial

at 26-27.) FirstEnergy proposed adding a new rule, Ohio Adm.Code 4901-9-02, that would set up a procedure that permits either the public utility or the customer or both to file a motion for judgment on the pleadings or a motion for summary judgment. This process will, according to FirstEnergy, greatly eliminate the need for unnecessary hearings in complaint cases, eliminate unnecessary paperwork, fulfill the purposes of Executive Order 2011-01K, and be consistent with other rules such as Ohio Rule of Civil Procedure 56. (FirstEnergy initial at 21-22.)

We find Staff's proposed modification to subparagraph (B) to be well-made and will, therefore, adopt that revision to the rule. Regarding Gas Companies proposal, we are cognizant of the fact that a complainant's failure to attend a prehearing conference or hearing without notification causes increased costs to the Commission and to the involved utility. However, we also recognize that the vast majority of such instances involve pro se complainants who are unfamiliar navigating the quasi-judicial administrative hearing process. In balancing these competing interests, we believe the better course at this point is for the Commission to investigate additional methods of outreach and communication with pro se complainants in an effort to avoid instances where there is a failure to appear at a conference or hearing rather than the more draconian approach of dismissal. Accordingly, at this time, we will not adopt Gas Companies' proposal.

Regarding FirstEnergy's summary judgment proposal, the Commission notes that this rule already affords parties in a complaint proceeding the opportunity to file a motion to dismiss at any time. While not technically identical, a motion to dismiss and motion for summary judgment both may result in a similar outcome, the cessation of a complaint proceeding. Since there is already a process for dismissal of a complaint case built into the complaint proceeding rule, we fail to see any additional value in adopting FirstEnergy's proposal. Accordingly, FirstEnergy's proposal will not be adopted.

(62) Ohio Adm.Code 4901:1-1-01 directs a public utility to provide a copy of the company's applicable tariffed rules and regulations in the format requested upon customer request. Customer Parties note that many telecommunication-related services

have been detariffed. Therefore, Customer Parties recommend modifying the language to clarify that utilities should also be required to provide customers with copies of their contracts applicable to non-tariffed but still-regulated services upon request. (Customer Parties initial at 22.) AT&T submits that it is unreasonable to subject telephone companies to a burdensome paper compilation and distribution process in light of the availability of ready internet access that all Ohioans have either at the office, at home, or at a nearby public library to applicable tariff provisions (AT&T initial at 11). Gas Companies have no problem giving a customer a copy of the customer's particular contract or applicable tariff, however, they object to providing a customer a copy of any contract the utility has with any other customer (Gas Companies reply at 11).

We agree with those commenters who suggest that a customer should always be able to obtain from a public utility in the format requested a copy of the customer's contract, tariff provisions, and terms and conditions applicable to the service(s) purchased from the public utility by the customer. Should a customer request paper copies, such copies should be provided by the public utility at the public utility's cost. It is not the Commission's intent, however, that a public utility is obligated to provide a customer with a copy of any contract the utility has with any other customer. The rule has been modified in order to better clarify the Commission's position on this issue.

(63) The Commission finds that certain proposed modifications to Ohio Adm.Code Chapters 4901-1, 4901-3, 4901-9, and 4901:1-1 as discussed herein are appropriate and the Commission has adopted the modifications accordingly. In order to avoid needless production of paper copies, the Commission will serve a paper copy of this finding and order only and will post the adopted rules and appendices online at: www.puco.ohio.gov/puco/rules. All interested persons may download the adopted rules and appendices from the above website, or contact the Commission's Docketing Division to be sent a paper copy.

It is, therefore,

ORDERED, That attached amended rules 4901-1-01 through 4901-1-05, 4901-1-08 through 4901-1-10, 4901-1-15, 4901-1-18, 4901-1-21, 4901-1-24 through 4901-1-25, 4901-1-27 through 4901-1-28, 4901-1-30, 4901-1-35 through 4901-1-36, 4901-1-38, 4901-3-01 through 4901-3-02, 4901-9-01, 4901:1-1-01, and 4901:1-1-03 are adopted, and should be filed with the Joint Committee on Agency Rule Review, the Secretary of State, and the Legislative Service Commission in accordance with divisions (D) and (E) of R.C. 111.15. It is, further,

ORDERED, That existing rules 4901-1-06 through 4901-1-7, 4901-1-11 through 4901-1-14, 4901-1-16 through 4901-1-17, 4901-1-19 through 4901-1-20, 4901-1-22 through 4901-1-23, 4901-1-26, 4901-1-29, 4901-1-31 through 4901-1-34, 4901-1-37, and 4901:1-1-02 should be filed with the Joint Committee on Agency Rule Review, the Secretary of State, and the Legislative Service Commission in accordance with divisions (D) and (E) of R.C. 111.15. It is, further,

ORDERED, That the final rules be effective on the earliest day permitted by law. It is, further,

ORDERED, That notice of the issuance of this Finding and Order be served upon all public utilities subject to the jurisdiction of this Commission via the industry electronic mail listserves. It is, further,

ORDERED, That a copy of this Finding and Order be served upon Ohio Consumers' Counsel; Ohio Telecom Association; Ohio Trucking Association; Ohio Railroad Association; Ohio Gas Association; Ohio Electric Institute; Ohio Cable Television Association; Ohio Manufacturers Association; Ohio Municipal League; the cities of Cleveland, Columbus, Cincinnati, Dayton, and Toledo; the chair of the Ohio State Bar Association Public Utilities Committee; Ohio Environmental Council; Legal Aid Societies of Cleveland, Columbus, Cincinnati, Dayton, and Toledo; Ohio Chamber of Commerce; Industrial Energy Users-Ohio; Ohio Partners for Affordable Energy; Ohio Gas Marketers Group; and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Lynn Slaby

M. Beth Trombold

Asim Z. Haque

JRJ/dah

Entered in the Journal

JAN 22 2014

Barcy F. McNeal

Barcy F. McNeal
Secretary

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4901-1-01 Definitions.

As used in this chapter:

(A) "Business day" means any day that ~~which~~ is not a Saturday, Sunday, or legal holiday.

(B) "Commission" means the public utilities commission.

(C) "Docketing information system" means the commission's system for electronically storing documents filed in a case. The internet address of the docketing information system is http://dis.puc.state.oh.us.

~~(C)~~ (D) "Electric utility" means an electric light company as defined in section 4905.03 of the Revised Code and an electric services company as defined in section 4928.01 of the Revised Code.

(E) "Electronic filing" (e-filing) means the submission of digitized electronic files to the commission's docketing information system.

(F) "Electronic mail" (e-mail) means the exchange of digital messages across the internet or other computer network.

~~(D)~~ (G) "Emergency rate proceeding" means any case involving an application for an emergency rate adjustment filed under section 4909.16 of the Revised Code.

~~(E)~~ (H) "Facsimile transmission" (fax) means the transmission of a source document by a facsimile machine or other electronic device that encodes a document into signals and transmits and reconstructs the signals to print a duplicate of the source document at the commission's docketing division or a party's location.

~~(F)~~ (I) "Gas utility" means a gas or natural gas company as defined in section 4905.03 of the Revised Code.

~~(G)~~ (J) "General rate proceeding" means any case involving an application for an increase in rates filed under section 4909.18 of the Revised Code, a complaint or petition filed under section 4909.34 or 4909.35 of the Revised Code, or an investigation into the reasonableness of a public utility's rates initiated by the commission under section 4905.26 of the Revised Code.

~~(H)~~ (K) "Long-term forecast report" has the meaning set forth in section 4935.04 of the Revised Code.

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~~(I)~~ (L) "Motor carrier proceeding" means any proceeding involving the regulation of one or more motor transportation companies or private motor carriers.

~~(J)~~ (M) "Motor transportation company" has the meaning set forth in section 4921.02 of the Revised Code.

~~(K)~~ (N) "Person" means a person, firm, corporation, unincorporated association, government agency, the United States, the state of Ohio or one of its political subdivisions, or any other legally cognizable entity including any entity defined as a "person" in division (A) of section 4906.01 of the Revised Code.

~~(L)~~ (O) "Presiding hearing officer" means the commissioner or attorney examiner presiding at a public hearing or prehearing conference.

~~(M)~~ (P) "Private motor carrier" has the meaning set forth in section 4923.02 of the Revised Code.

~~(N)~~ (Q) "Public utility" has the meaning set forth in section 4905.02 of the Revised Code.

~~(O)~~ (R) "Purchased gas adjustment proceeding" means any proceeding heard under section 4905.302 of the Revised Code and rule 4901:1-14-08 of the Administrative Code.

~~(P)~~ (S) "Railroad" has the meaning set forth in section 4907.02 of the Revised Code.

~~(Q)~~ (T) "Reporting person" means any person required to file a long-term forecast report under section 4935.04 of the Revised Code.

4901-1-02 Filing of pleadings and other documents.

(A) General provisions

(1) The official address of the commission's docketing division is: "Public Utilities Commission of Ohio, Docketing Division, 180 East Broad Street, Columbus, Ohio 43215-3793."

(2) The internet address of the commission's docketing division (DIS) is http://dis.puc.state.oh.us.

(3) The docketing division is open from seven-thirty a.m. to five-thirty p.m., Monday through Friday, except on state holidays.

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(4) Except as discussed in paragraph (D) of this rule, no document shall be considered filed with the commission until it is received and date-stamped by the docketing division. An application for an increase in rates filed under section 4909.18 of the Revised Code, a complaint concerning an ordinance rate filed by a public utility under section 4909.34 of the Revised Code, and a petition filed by a public utility under section 4909.35 of the Revised Code shall not be considered filed until the commission determines that the application, complaint, or petition complies with the requirements of rule 4901-7-01 of the Administrative Code.

(5) The commission reserves the right to redact any material from a filed document prior to posting the document on the docketing information system if the commission finds the material to be confidential personal information, a trade secret, or inappropriate for posting to its website.

(6) A party seeking to consolidate a new case with one or more previously filed cases shall file a motion to consolidate the cases.

(B) Paper filing

(1) All applications, complaints, reports, pleadings, or other documents to be paper filed with the commission shall be mailed or delivered to the commission's docketing division at the address shown in paragraph (A) of this rule. In addition to the original, any person paper filing a document for inclusion in a case file must submit the required number of copies of the document. Information regarding the number of copies required by the commission is available under procedural filing requirements on the docketing information system website, by calling the docketing division at 614-466-4095, or by visiting the docketing division at the offices of the commission. As an alternative, a filer may submit twenty copies of the filing. Failure to submit the required number of copies upon notice by the docketing division may result in the document being stricken from the case file. An attorney examiner may require a party to provide additional paper copies of any filed document.

(2) Unless a motion for a protective order is made in accordance with rule 4901-1-24 of the Administrative Code, concurrent with or prior to receipt of the document by the docketing division, any document filed with the docketing division will be made publicly available on the docketing information system.

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(C) Facsimile transmission (fax) filing

A person may file documents with the commission via fax under the following conditions:

(1) The following documents may not be delivered via fax:

(a) The application, complaint, or other initial pleading that is responsible for the opening of a case.

(b) Any document for which protective or confidential treatment is requested under rule 4901-1-24 of the Administrative Code.

(c) A notice of appeal of a commission order to the Ohio supreme court filed pursuant to section 4903.13 of the Revised Code or service of that notice upon the chairman or a commissioner.

(2) All documents sent via fax must include a transmission sheet that states the case number, case title, date of transmission, number of pages, brief description of the document, and the name and telephone number of the sender.

(3) The originator of a fax document must contact the commission's docketing division at (614) 466-4095 prior to sending a fax. A person must notify the docketing division of its intent to send a document by fax by five p.m. on the date the document is to be sent. The person must be prepared to commence transmission at the time the docketing division is notified.

(4) All documents must be sent to the facsimile machine in the commission's docketing division at (614) 466-0313. If that machine is inoperable, directions for alternative arrangements will be given when the originator calls to commence a fax. Unrequested documents sent to any of the commission's other facsimile machines will not be relayed to the docketing division by commission employees.

(5) Excluding the transmission sheet, all documents transmitted by fax must be thirty pages or less.

(6) All documents must be legible when received. Illegible documents received via fax will not be filed. If the document is illegible, docketing division may attempt to contact the sender to resolve the problem. The person making a fax filing shall bear all risk of transmission, including all risk of equipment, electric, or telephonic failure or equipment overload or backup. Any document

sent by fax that is received in whole or in part after five-thirty p.m. will be considered filed the next business day.

(7) No document received via fax will be given confidential treatment by the commission.

(8) If a document is delivered via fax, the party must make arrangements for the original signed document and the required number of copies of the pleading to be delivered to the commission no later than the next business day. Failure to comply with this requirement may result in the document being stricken from the case file.

(9) Because a document sent to the commission by fax will be date-stamped, and thus filed, the day it is received by the docketing division, the originator of the document shall serve copies of the document upon other parties to the case no later than the date of filing.

(D) Electronic filing (e-file)

A person may e-file documents with the commission under the following conditions:

(1) All filings must comply with the electronic filing manual and technical requirements located under electronic filing information and links at the docketing information system website.

(2) The following documents shall not be delivered via e-filing:

(a) Any document for which protective or confidential treatment is requested under rule 4901-1-24 of this chapter.

(b) The service of a notice of appeal of a commission order pursuant to sections 4903.13 and 4923.99 of the Revised Code upon the chairman or a commissioner.

(3) A public utility may electronically file an application to increase rates pursuant to section 4909.18 of the Revised Code except that a public utility filing an application pursuant to chapter II of the standard filing requirements in rule 4901-7-01 of the Administrative Code shall submit one complete paper copy of the application to the commission's docketing division on the same day that an e-filing of the application is made and shall contact the rate case manager of the commission's utilities department prior to the e-filing of the application to

determine the number of paper copies of the application that will be required by the commission's staff.

(4) Provided that a document is not subsequently rejected by the docketing division, an e-filed document will be considered filed as of the date and time recorded on the confirmation page that is electronically inserted as the last page of the filing upon receipt by the commission, except that any e-filed document received after five-thirty p.m. shall be considered filed at seven-thirty a.m. the next business day. The docketing division may reject any filing that does not comply with the electronic filing manual and technical requirements, is unreadable, includes anything deemed inappropriate for inclusion on the commission's web site, or is submitted for filing in a closed or archived case. If an e-filing is rejected by the docketing division, an e-mail message will be sent to inform the filer of the rejection and the reason for the rejection.

(5) If an e-filing is accepted, notice of the filing will be sent via electronic mail (e-mail) to all persons who have electronically subscribed to the case, including the filer. This e-mail notice will constitute service of the e-filed document upon those persons electronically subscribed to the case. Upon receiving the e-mail notice that the e-filed document has been accepted by the commission's docketing division, the filer shall serve copies of the document in accordance with rule 4901-1-05 of this chapter upon parties to the case who are not electronically subscribed to the case.

(6) The commission's docketing division closes at five-thirty p.m. To allow time for same-day review and acceptance of e-filings, persons making e-filings are encouraged to make their filings by no later than four p.m.

(7) The person making an e-filing shall bear all risk of transmitting a document including, but not limited to, all risk of equipment, electric, or internet failure.

(8) E-filed documents must be complete documents. Appendices or attachments to an e-filed document may not be filed by other methods without prior approval.

(9) Except as otherwise provided by this rule or directed by an attorney examiner, a person filing a document electronically need not submit any paper copy of an e-filed document to the commission's docketing division.

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(E) The commission's docketing information system designates the status of each case under the case number and case name on the docket card. As discussed below, attempts to make filings in certain designated cases will be denied.

(1) An open case is an active case in which filings may be made.

(2) A closed case is one in which no further filings may be made without the consent of the commission's legal department. When a case is closed, any person seeking to make a filing in a case must first contact the attorney examiner assigned to the case or the commission's legal director. If the attorney examiner or legal director agrees to permit the filing, the docketing division will be notified to reopen the case. If an additional filing is permitted, the case status will be changed to open and service of the filing must be made by the filer upon the parties to the case in accordance with rule 4901-1-05 of this chapter.

(3) An archived case is a closed case that will not be reopened and in which no further filings will be permitted. If additional activity is thereafter required on any matter addressed in an archived case, the commission will open a new case and designate the new case as a related case. The commission's docketing information system displays for each case a related cases tab to provide a link to related cases.

(4) A reserved case is one set aside for future use. No filings should be made in the case until the party for who it was reserved makes an initial filing.

(5) A void case is one that was opened in error and no documents may be filed in it.

4901-1-03 Form of pleadings and other papers.

(A) All pleadings or other papers to be filed with the commission shall contain a caption or cover sheet setting forth the name of the commission, the title of the proceeding, and the nature of the pleading or paper. All pleadings or papers filed subsequently to the original filing or commission entry initiating the proceeding shall contain the case name and docket number of the proceeding. Such pleadings or other papers shall also contain the name, address, and telephone number of the person filing the paper, or the name, address, ~~and~~ telephone number, and attorney registration number of his or her attorney, if such person is represented by counsel. The party making a filing should include a ~~facsimile transmission~~ fax number

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and/or an ~~electronic message (e-mail)~~ address if the party is willing to accept service of pleadings by fax ~~facsimile transmission~~ or e-mail. An attorney or party who is willing to accept service of filed documents by fax shall include the following phrase next to or below its fax number: (willing to accept service by fax). An attorney or party who is willing to accept service of filed documents by e-mail shall include the following phrase next to or below its e-mail address: (willing to accept service by e-mail).

(B) All pleadings or other papers to be filed with the commission shall be printed, typewritten, or legibly handwritten on eight and one-half by eleven-inch paper. This requirement does not apply to:

(1) Original documents to be offered as exhibits.

(2) Copies of original documents to be offered as exhibits, where compliance with this requirement would be impracticable.

(3) Forms approved or supplied by the commission.

(C) Nothing in paragraph (B) of this rule prohibits the filing of photocopies of documents that ~~which~~ otherwise meet the requirements of that paragraph.

4901-1-04 Signing of pleadings.

All applications, complaints, or other pleadings filed by any person shall be signed by that person or by his or her attorney, but need not be verified unless specifically required by law or by the commission. Persons who e-file or fax file documents shall use "/s/" followed by their name to indicate a signature or an electronic signature where applicable.

4901-1-05 Service of pleadings and other papers.

(A) Unless otherwise ordered by the commission, the legal director, the deputy legal director, or an attorney examiner, all pleadings or papers filed with the commission subsequent to the original filing or commission entry initiating the proceeding shall be served upon all parties, no later than the date of filing. Such pleadings or other papers shall contain a certificate of service. The certificate of service shall state the date and manner of service, identify the names of the persons served, and be signed by the attorney or the party who files the document. The

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certificate of service for a document served by mail or personal service shall also include the address of the person served. The certificate of service for a document served by ~~facsimile transmission.~~ fax shall also include the fax ~~facsimile~~ number of the person to whom the document was transmitted. The certificate of service for a document served by ~~electronic message~~ e-mail shall also include the e-mail address of the person to whom the document was sent.

(B) If an e-filing is accepted by the docketing division, an e-mail notice of the filing will be sent by the commission's e-filing system to all persons who have electronically subscribed to the case. The e-mail notice will constitute service of the document upon the recipient. Upon receiving notice that an e-filing has been accepted by the docketing division, the filer shall serve copies of the document in accordance with this rule upon all other parties to the case who are not served via the e-mail notice. A person making an e-filing shall list in the certificate of service included with the e-filing the parties who will be served by e-mail notice by the commission's e-filing system and the parties who will be served by traditional methods by the person making the filing. The certificate of service for an e-filed document shall include the following notice: The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties: (list the names of the parties referenced on the service list of the docket card who have electronically subscribed to the case).

~~(B)~~ (C) 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 need be made only upon the "counsel of record" designated under rule 4901-1-08 of the Administrative Code. ~~If a spokesperson has been designated under rule 4901-1-08 of the Administrative Code, service upon the spokesperson constitutes service upon all of the complainants or petitioners.~~ 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.

~~(C)~~ (D) Service upon an attorney or party may be personal or ~~,~~ by mail, ~~by facsimile transmission~~ fax, or ~~by electronic message (e-mail)~~ under the following conditions:

(1) Personal service is complete by delivery of the copy to the attorney or to a responsible person at the office of the attorney. Personal service to a party not represented by an attorney is complete by delivery to the party or to a responsible person at the address provided by the party in its pleadings.

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(2) Service by mail to an attorney or party is complete by mailing a copy to his or her last known address. If the attorney or party to be served has previously filed and served one or more pleadings or ~~other papers~~ documents in the proceeding, the term "last known address" means the address set forth in the most recent such pleading or ~~other paper~~ document.

(3) Service of a document to an attorney or party by ~~facsimile transmission~~ fax may be made only if the person to be served has consented to receive service of the document by ~~facsimile transmission~~ fax. Service by ~~facsimile transmission~~ fax is complete upon transmission, but is not effective if the serving party learns that it did not reach the person served. ~~the sender receiving a confirmation generated by the sender's facsimile equipment that the facsimile transmission has been sent. The sender shall retain the confirmation as proof of service until the final disposition of the case and through any appeal period.~~

(4) Service of a document by e-mail ~~electronic message~~ to an attorney or party may be made only if the person to be served has consented to receive service of the document by ~~electronic message~~ e-mail. Service by e-mail ~~electronic message~~ is complete upon transmission, but is not effective if the serving party learns that it did not reach the person served. ~~the sender receiving a confirmation generated by the sender's computer that the electronic message has been sent. The sender shall retain the confirmation as proof of service until the final disposition of the case and through any appeal period~~.

~~(D)~~ (E) For purposes of this rule, the term "party" includes, in addition to those identified in rule 4901-1-10 of the Administrative Code, all persons who have filed motions to intervene that ~~which~~ are pending at the time a pleading or document ~~paper~~ is to be served, provided that the person serving the pleading or ~~other paper~~ document has been served with a copy of the motion to intervene.

(F) The commission or the legal director, deputy legal director, or attorney examiner may order in certain cases that pleadings or documents be served in a specific manner to expedite the exchange of information.

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"No Change"

4901-1-06 Amendments.

Unless otherwise provided by law, the commission, the legal director, the deputy legal director, or an attorney examiner may, upon their own motion or upon motion of any party for good cause shown, authorize the amendment of any application, complaint, long-term forecast report, or other pleading filed with the commission.

"No Change"

4901-1-07 Computation of time.

Unless otherwise provided by law or by the commission:

(A) In computing any period of time prescribed or allowed by the commission, the date of the event from which the period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it falls on a Saturday, Sunday, or legal holiday, in which case the period of time shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday. Unless otherwise noted, time is measured in calendar, not business, days.

(B) Whenever a party is permitted or required to take some action within a prescribed period of time after a pleading or other paper is served upon him or her and service is made by mail, three days shall be added to the prescribed period of time.

(C) Whenever a party is permitted or required to take some action within a prescribed period of time after a pleading or other paper is served upon him or her and service is made by personal, facsimile transmission, or electronic message (e-mail) service and is completed after five thirty p.m., one day shall be added to the prescribed period of time. The applicable time zone is the time zone where the recipient is located, but it may not be earlier than the actual close of the commission offices.

(D) If the commission office is closed to the public for the entire day that constitutes the last day for doing an act or closes before its usual closing time on that day, the act may be performed on the next succeeding day that is not a Saturday, Sunday, or legal holiday.

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4901-1-08 Practice before the commission, representation of corporations, and designation of counsel of record.

(A) Except as otherwise provided in section 4901.14 of the Revised Code and paragraphs (B), (C), and (D), ~~and (E)~~ of this rule, each party not appearing in propria persona shall be represented by an attorney-at-law authorized to practice before the courts of this state. Corporations must be represented by an attorney-at-law.

(B) An out-of-state attorney may seek permission to appear pro hac vice before the commission in any activity of a case upon the filing of a motion. The motion shall include all the information and documents required by paragraph (A)(6) of section 2 of rule XII of the Rules for the Government of the Bar of Ohio. ~~Persons authorized to practice law in other jurisdictions may be permitted to appear before the commission in a particular proceeding, upon motion of an attorney of this state.~~

(C) Certified legal interns may appear before the commission under the direction of a supervising attorney, in accordance with rule II of the "Supreme Court Rules for the Government of the Bar" of Ohio. No legal intern shall participate in a commission hearing in the absence of the supervising attorney without the written consent of the supervising attorney and the approval of the commission or the presiding hearing officer.

(D) If a prehearing conference is scheduled to discuss settlement of the issues in a complaint case, any person, except an out-of-state attorney not in compliance with paragraph (B) of this rule, with the requisite authority to settle the issues in the case may represent a party at the conference.

~~(E) In cases involving complaints filed under section 4905.26 of the Revised Code, where there are numerous complainants who are not represented by counsel and whose interests are substantially similar, the commission, the legal director, the deputy legal director, or the attorney examiner assigned to the case may permit or require the designation of a spokesperson who shall examine witnesses, enter objections, and file all pleadings or papers on behalf of the complainants or petitioners.~~

~~(F)~~ (E) Where a party is represented by more than one attorney, one of the attorneys shall be designated as the "counsel of record," who shall have principal responsibility for the party's participation in the proceeding. The designation

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"counsel of record" shall appear following the name of that attorney on all pleadings or papers submitted on behalf of the party.

~~(G)~~ (F) No attorney shall withdraw from a commission proceeding without prior written notice to the commission and serving a copy of the notice upon the parties to the proceeding.

4901-1-09 Ex parte discussion of cases.

After a case has been assigned a formal docket number, no commissioner or attorney examiner assigned to the case shall discuss the merits of the case with any party to the proceeding or a representative of a party, unless all parties have been notified and given the opportunity to be present or to participate by telephone, or a full disclosure of the communication insofar as it pertains to the subject matter of the case is made. When an ex parte discussion occurs, a representative of the party or parties participating in the discussion shall prepare a document identifying all the participants and the location of the discussion, and fully disclosing the communications made. Within two business days of the occurrence of the ex parte discussion, the document shall be provided to the commission's legal director or his designee or to an attorney examiner present at the discussion for review. Upon completion of the review, the final document with any necessary changes shall be filed with the commission's docketing division within two business days and the filer shall serve a copy upon the parties to the case and to each participant in the discussion. The document filed and served shall include the following language: Any participant in the discussion who believes that any representation made in this document is inaccurate or that the communications made during the discussion have not been fully disclosed shall prepare a letter explaining the participant's disagreement with the document and shall file the letter with the commission and serve the letter upon all parties and participants in the discussion within two business days of receipt of this document.

4901-1-10 Parties.

(A) The parties to a commission proceeding shall include:

(1) Any person who files an application, petition, long-term forecast report, or complaint.

(2) Any public utility, railroad, or private motor carrier against whom a complaint is filed.

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(3) Any public utility, railroad, or private motor carrier whose rates, charges, practices, policies, or actions are designated as the subject of a commission investigation.

(4) Any person granted leave to intervene under rule 4901-1-11 of the Administrative Code.

(5) Any municipal corporation which has enacted an ordinance which is subsequently challenged in a complaint filed under section 4909.34 of the Revised Code.

(6) Any person cited for failure to maintain liability insurance as required by section 4921.11 or 4923.08 of the Revised Code.

(7) Any person who files a request for an administrative hearing in a transportation civil forfeiture case.

~~(7)~~ (8) Any other person expressly made a party by order of the commission.

(B) If any public utility, railroad, or private motor carrier referred to in paragraph (A)(2) or (A)(3) of this rule is operated by a receiver or trustee, the receiver or trustee shall also be made a party.

(C) Except for purposes of rules 4901-1-02, 4901-1-03, 4901-1-04, 4901-1-05, 4901-1-06, 4901-1-07, 4901-1-12, 4901-1-13, 4901-1-15, 4901-1-18, 4901-1-26, 4901-1-30, 4901-1-31, 4901-1-32, 4901-1-33, and 4901-1-34 of the Administrative Code, the commission staff shall not be considered a party to any proceeding.

"No Change"

4901-1-11 Intervention.

(A) Upon timely motion, any person shall be permitted to intervene in a proceeding upon a showing that:

(1) A statute of this state or the United States confers a right to intervene.

(2) The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties.

(B) In deciding whether to permit intervention under paragraph (A)(2) of this rule, the commission, the legal director, the deputy legal director, or an attorney examiner shall consider:

(1) The nature and extent of the prospective intervenor's interest.

(2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case.

(3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings.

(4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

(5) The extent to which the person's interest is represented by existing parties.

(C) Any person desiring to intervene in a proceeding shall file a motion to intervene with the commission, and shall serve it upon all parties in accordance with rule 4901-1-05 of the Administrative Code. The motion shall be accompanied by a memorandum in support, setting forth the person's interest in the proceeding. The same procedure shall be followed where a statute of this state or the United States confers a right to intervene.

(D) Unless otherwise provided by law, the commission, the legal director, the deputy legal director, or the attorney examiner may:

(1) Grant limited intervention, which permits a person to participate with respect to one or more specific issues, if the person has no real and substantial interest with respect to the remaining issues or the person's interest with respect to the remaining issues is adequately represented by existing parties.

(2) Require parties with substantially similar interests to consolidate their examination of witnesses or presentation of testimony.

(E) A motion to intervene will not be considered timely if it is filed later than five days prior to the scheduled date of hearing or any specific deadline established by order of the commission for purposes of a particular proceeding.

(F) A motion to intervene which is not timely will be granted only under extraordinary circumstances.

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"No Change"

4901-1-12 Motions.

(A) All motions, unless made at a public hearing or transcribed prehearing conference, or unless otherwise ordered for good cause shown, shall be in writing and shall be accompanied by a memorandum in support. The memorandum in support shall contain a brief statement of the grounds for the motion and citations of any authorities relied upon.

(B) Except as otherwise provided in paragraphs (C) and (F) of this rule:

(1) Any party may file a memorandum contra within fifteen days after the service of a motion, or such other period as the commission, the legal director, the deputy legal director, or the attorney examiner requires.

(2) Any party may file a reply memorandum within seven days after the service of a memorandum contra, or such other period as the commission, the legal director, the deputy legal director, or the attorney examiner requires.

(C) Any motion may include a specific request for an expedited ruling. The grounds for such a request shall be set forth in the memorandum in support. If the motion requests an extension of time to file pleadings or other papers of five days or less, an immediate ruling may be issued without the filing of memoranda. In all other situations, the party requesting an expedited ruling may first contact all other parties to determine whether any party objects to the issuance of such a ruling without the filing of memoranda. If the moving party certifies that no party objects to the issuance of such a ruling, an immediate ruling may be issued. If any party objects to the issuance of such a ruling, or if the moving party fails to certify that no party has any objection, any party may file a memorandum contra within seven days after the service of the motion, or such other period as the commission, the legal director, the deputy legal director, or the attorney examiner requires. No reply memoranda shall be filed in such cases unless specifically requested by the commission, the legal director, the deputy legal director, or the attorney examiner.

(D) All written motions and memoranda shall be filed with the commission and served upon all parties in accordance with rule 4901-1-05 of the Administrative Code.

(E) For purposes of this rule, the term "party" includes all persons who have filed motions to intervene which are pending at the time a motion or memorandum is to be filed or served.

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(F) Notwithstanding paragraphs (B) and (C) of this rule, the commission, the legal director, the deputy legal director, or the attorney examiner may, upon their own motion, issue an expedited ruling on any motion, with or without the filing of memoranda, where the issuance of such a ruling will not adversely affect a substantial right of any party.

(G) The presiding hearing officer may direct that any motion made at a public hearing or transcribed prehearing conference be reduced to writing and filed and served in accordance with this rule.

(H) A motion for a hearing on a long-term forecast report under division (D)(3) of section 4935.04 of the Revised Code shall be filed within forty-five days of the filing of the report.

"No Change"

4901-1-13 Continuances and extensions of time.

(A) Except as otherwise provided by law, and notwithstanding any other provision in this chapter, continuances of public hearings and extensions of time to file pleadings or other papers may be granted upon motion of any party for good cause shown, or upon motion of the commission, the legal director, the deputy legal director, or an attorney examiner.

(B) A motion for an extension of time to file a document must be timely filed so as to permit the commission, legal director, deputy legal director, or attorney examiner sufficient time to consider the request and to make a ruling prior to the established filing date. If two or more parties have similar documents due the same day and a party intends to seek an extension of the filing date, the moving party must file its motion for an extension sufficiently in advance of the existing filing date so that other parties who might be disadvantaged by submitting their filing prior to the movant submitting its filing will not be disadvantaged. If two or more parties have similar documents due the same day and the motion for an extension is filed fewer than five business days before the document is scheduled to be filed, then the moving party, in addition to regular service of the motion for an extension, must provide a brief summary of the request to all other parties orally, by facsimile transmission, or by electronic message by no later than five-thirty p.m. on the day the motion is filed.

(C) A copy of any written ruling granting or denying a request for a continuance or extension of time shall be served upon all parties to the proceeding.

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(D) Nothing in this rule restricts or limits the authority of the presiding hearing officer to issue oral rulings during public hearings or transcribed prehearing conferences.

"No Change"

4901-1-14 Procedural rulings.

The legal director, the deputy legal director, or an attorney examiner may rule, in writing, upon any procedural motion or other procedural matter. A copy of any such ruling shall be served upon all parties to the proceeding.

4901-1-15 Interlocutory appeals.

(A) Any party who is adversely affected thereby may take an immediate interlocutory appeal to the commission from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference that does any of the following:

(1) Grants a motion to compel discovery or denies a motion for a protective order.

(2) Denies a motion to intervene, terminates a party's right to participate in a proceeding, or requires intervenors to consolidate their examination of witnesses or presentation of testimony.

(3) Refuses to quash a subpoena.

(4) Requires the production of documents or testimony over an objection based on privilege.

(B) Except as provided in paragraph (A) of this rule, no party may take an interlocutory appeal from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference unless the appeal is certified to the commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer. The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless he or she finds that the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue

prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

(C) Any party wishing to take an interlocutory appeal from any ruling must file ~~an application for review~~ the interlocutory appeal with the commission within five days after the ruling is issued. An extension of time for the filing of an interlocutory appeal may be granted only under extraordinary circumstances. The ~~application for review~~ interlocutory appeal shall set forth the basis of the appeal and citations of any authorities relied upon. A copy of the ruling or the portion of the record that ~~which~~ contains the ruling shall be attached to the ~~application for review~~ interlocutory appeal. If the record is unavailable, the ~~application for review~~ interlocutory appeal must set forth the date the ruling was issued and must describe the ruling with reasonable particularity.

(D) Unless otherwise ordered by the commission, any party may file a memorandum contra within five days after the filing of an ~~application for review~~ interlocutory appeal.

(E) Upon consideration of an interlocutory appeal, the commission may, in its discretion either:

(1) Affirm, reverse, or modify the ruling.

(2) Dismiss the appeal, if the commission is of the opinion that the issues presented are moot, the party taking the appeal lacks the requisite standing to raise the issues presented or has failed to show prejudice as a result of the ruling in question, or the issues presented should be deferred and raised at some later point in the proceeding.

(F) Any party that is adversely affected by a ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference and that (1) elects not to take an interlocutory appeal from the ruling or (2) files an interlocutory appeal that is not certified by the attorney examiner may still raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief or in any other appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case.

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"No Change"

4901-1-16 General provisions and scope of discovery.

(A) The purpose of rules 4901-1-16 to 4901-1-24 of the Administrative Code is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings. These rules are also intended to minimize commission intervention in the discovery process.

(B) Except as otherwise provided in paragraphs (G) and (I) of this rule, any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions, and requests for admission. The frequency of using these discovery methods is not limited unless the commission orders otherwise under rule 4901-1-24 of the Administrative Code.

(C) Any party may, through interrogatories, require any other party to identify each expert witness expected to testify at the hearing and to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or other party facts or data known or opinions held by the expert which are relevant to the stated subject matter. A party who has retained or specially employed an expert may, with the approval of the commission, require the party conducting discovery to pay the expert a reasonable fee for the time spent responding to discovery requests.

(D) Discovery responses which are complete when made need not be supplemented with subsequently acquired information except in the following situations:

(1) The response identified each expert witness expected to testify at the hearing or stated the subject matter upon which each expert was expected to testify.

(2) The responding party later learned that the response was incorrect or otherwise materially deficient.

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(3) The response indicated that the information sought was unknown or nonexistent and such information subsequently became known or existent.

(4) An order of the commission or agreement of the parties provides for the supplementation of responses.

(5) Requests for the supplementation of responses are submitted prior to the commencement of the hearing.

(6) The response addressed the identity and location of persons having knowledge of discoverable matters.

(E) The supplementation of responses required under paragraphs (D)(1) to (D)(3) and (D)(6) of this rule shall be provided within five business days of discovery of the new information.

(F) Nothing in rules 4901-1-16 to 4901-1-24 of the Administrative Code precludes parties from conducting informal discovery by mutually agreeable methods or by stipulation.

(G) A discovery request under rules 4901-1-19 to 4901-1-22 of the Administrative Code may not seek information from any party which is available in prefiled testimony, prehearing data submissions, or other documents which that party has filed with the commission in the pending proceeding. Before serving any discovery request, a party must first make a reasonable effort to determine whether the information sought is available from such sources.

(H) For purposes of rules 4901-1-16 to 4901-1-24 of the Administrative Code, the term "party" includes any person who has filed a motion to intervene which is pending at the time a discovery request or motion is to be served or filed.

(I) Rules 4901-1-16 to 4901-1-24 of the Administrative Code do not apply to the commission staff.

"No Change"

4901-1-17 Time periods for discovery.

(A) Except as provided in paragraph (E) of this rule, discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible. Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of the hearing.

(B) In general rate proceedings, no party may serve a discovery request later than fourteen days after the filing and mailing of the staff report of investigation required by section 4909.19 of the Revised Code.

(C) In emergency rate proceedings, no party may serve a discovery request later than twenty days prior to the commencement of the hearing.

(D) In purchased gas adjustment proceedings, no party may serve a discovery request later than thirty days after the filing of the audit report required by rule 4901:1-14-07 of the Administrative Code.

(E) In long-term forecast report proceedings, no party may serve a discovery request later than twenty-five days prior to the commencement of the evidentiary hearing. Discovery may begin in long-term forecast report proceedings:

(1) Immediately after the filing with the commission of a long-term forecast report which contains a substantial change from the preceding report as defined by section 4935.04 of the Revised Code.

(2) Immediately after the filing with the commission of a long-term forecast report when the most recent hearing on a forecast report by the reporting person has been more than four years prior.

(3) Immediately after good cause to conduct a hearing on a long-term forecast report has been determined by order of the commission.

(4) Immediately after a reporting person files its first long-term forecast report under section 4935.04 of the Revised Code.

(F) The restrictions set forth in paragraphs (B), (C), (D), and (E) of this rule do not apply to requests for the supplementation of prior responses served under paragraph (D)(5) of rule 4901-1-16 of the Administrative Code.

(G) Notwithstanding the provisions of paragraphs (B), (C), (D), and (E) of this rule, the commission, the legal director, the deputy legal director, or an attorney examiner may shorten or enlarge the time periods for discovery, upon their own motion or upon motion of any party for good cause shown.

4901-1-18 Filing and service of discovery requests and responses.

Except as otherwise provided in rules 4901-1-23 and 4901-1-24 of the Administrative Code, and unless otherwise ordered for good cause shown,

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discovery requests and responses shall be served upon all parties but shall not be filed with the commission. Discovery requests and responses shall be served upon staff counsel if staff is participating in the proceeding. For purposes of this rule, the term "response" includes written responses or objections to interrogatories served under rule 4901-1-19 of the Administrative Code, written responses or objections to requests for the production of documents or tangible things or requests for permission to enter upon land or other property served under rule 4901-1-20 of the Administrative Code, and written responses or objections to requests for admission served under rule 4901-1-22 of the Administrative Code. It does not include any documents or tangible things produced for inspection or copying under rule 4901-1-20 of the Administrative Code. Discovery requests and responses shall be served upon all parties to the proceeding by e-mail, unless otherwise ordered by the commission, legal director, deputy legal director, or attorney examiner. The electronic copy of the discovery requests shall be reasonably useable for word processing and provided by electronic mail, unless other means are agreed to by the parties.

"No Change"

4901-1-19 Interrogatories and response time.

(A) Any party may serve upon any other party written interrogatories, to be answered by the party served. If the party served is a corporation, partnership, association, government agency, or municipal corporation, it shall designate one or more of its officers, agents, or employees to answer the interrogatories, who shall furnish such information as is available to the party. Each interrogatory shall be answered separately and fully, in writing and under oath, unless it is objected to, in which case the reason for the objection shall be stated in lieu of an answer. The answers shall be signed by the person making them, and the objections shall be signed by the attorney or other person making them. The party upon whom the interrogatories have been served shall serve a copy of the answers or objections upon the party submitting the interrogatories and all other parties within twenty days after the service thereof, or within such shorter or longer time as the commission, the legal director, the deputy legal director, or an attorney examiner may allow. The party submitting the interrogatories may move for an order under rule 4901-1-23 of the Administrative Code with respect to any objection or other failure to answer an interrogatory.

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(B) Subject to the scope of discovery set forth in rule 4901-1-16 of the Administrative Code, interrogatories may elicit facts, data, or other information known or readily available to the party upon whom the interrogatories are served. An interrogatory which is otherwise proper is not objectionable merely because it calls for an opinion, contention, or legal conclusion, but the commission, the legal director, the deputy legal director, or the attorney examiner may direct that such interrogatory need not be answered until certain designated discovery has been completed, or until some other designated time. The answers to interrogatories may be used to the extent permitted by the rules of evidence, but such answers are not conclusive and may be rebutted or explained by other evidence.

(C) Where the answer to an interrogatory may be derived or ascertained from public documents on file in this state, or from documents which the party served with the interrogatory has furnished to the party submitting the interrogatory within the preceding twelve months, it is a sufficient answer to such interrogatory to specify the title of the document, the location of the document or the circumstances under which it was furnished to the party submitting the interrogatory, and the page or pages from which the answer may be derived or ascertained.

(D) Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, and the burden of deriving the answer is substantially the same for the party submitting the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford the party submitting the interrogatory a reasonable opportunity to examine, audit, or inspect such records.

"No Change"

4901-1-20 Production of documents and things; entry upon land or other property.

(A) Subject to the scope of discovery set forth in rule 4901-1-16 of the Administrative Code, any party may serve upon any other party a written request to:

(1) Produce and permit the party making the request, or someone acting on his or her behalf, to inspect and copy any designated documents, including writings, drawings, graphs, charts, photographs, or data compilations, which are in the possession, custody, or control of the party upon whom the request is served.

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(2) Produce for inspection, copying, sampling, or testing any tangible things which are in the possession, control, or custody of the party upon whom the request is served.

(3) Permit entry upon designated land or other property for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.

(B) The request shall set forth the items to be inspected either by individual item or by category, and shall describe each category with reasonable particularity. The request shall also specify a reasonable time, place, and manner for conducting the inspection and performing the related acts.

(C) The party upon whom the request is served shall serve a written response within twenty days after the service of the request, or within such shorter or longer time as the commission, the legal director, the deputy legal director, or an attorney examiner may allow. The response shall state, with respect to each item or category, that the inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reason for the objection shall be stated. If an objection is made to part of an item or category, that part shall be specified. The party submitting the request may move for an order under rule 4901-1-23 of the Administrative Code with respect to any objection or other failure to respond to a request or any part thereof, or any failure to permit inspection as requested.

(D) Where a request calls for the production of a public document on file in this state, or a document which the party upon whom the request is served has furnished to the party submitting the request within the preceding twelve months, it is a sufficient response to such request to specify the location of the document or the circumstances under which the document was furnished to the party submitting the request.

4901-1-21 Depositions.

(A) Any party to a pending commission proceeding may take the testimony of any other party or person, other than a member of the commission staff, by deposition upon oral examination with respect to any matter within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code. The attendance of witnesses and production of documents may be compelled by subpoena as provided in rule 4901-1-25 of the Administrative Code.

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(B) Any party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to the deponent, to all parties, and to the commission. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, or if the name is not known, a general description sufficient for identification. If a subpoena duces tecum is to be served upon the person to be examined, a designation of the materials to be produced thereunder shall be attached to or included in the notice. Notice to the commission is made by filing a copy of the notice of deposition provided to the person to be deposed or a copy of the subpoena in the case file.

(C) If any party shows that he or she was unable with the exercise of diligence to obtain counsel to represent him or her at the taking of a deposition, the deposition may not be used against such party.

(D) The commission, the legal director, the deputy legal director, or an attorney examiner ~~may~~, ~~upon~~ in response to the filing of a motion, may order that a deposition be recorded by other than stenographic means, in which case the order shall designate the manner of recording the deposition, and may include provisions to assure that the recorded testimony will be accurate and trustworthy. If such an order is made, any party may arrange to have a stenographic transcription made at his or her own expense.

(E) The notice to a party deponent may be accompanied by 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.

(F) A party may in the notice and in a subpoena name a corporation, partnership, association, government agency, or municipal corporation and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its officers, agents, employees, or other persons duly authorized to testify on its behalf, and shall set forth, for each person designated, the matters on which he or she will testify. The persons so designated shall testify as to matters known or reasonably available to the organization.

(G) Depositions may be taken before any person authorized to administer oaths under the laws of the jurisdiction in which the deposition is taken, or before any person appointed by the commission. Unless all of the parties expressly agree otherwise,

no deposition shall be taken before any person who is a relative, employee, or attorney of any party, or a relative or employee of such attorney.

(H) The person before whom the deposition is to be taken shall put the witness on oath or affirmation, and shall personally or by someone acting under his direction and in his presence record the testimony of the witness. Examination and cross-examination may proceed as permitted in commission hearings. The testimony shall be recorded stenographically or by any other means ordered under paragraph (D) of this rule. If requested by any of the parties, the testimony shall be transcribed at the expense of the party making the request.

(I) All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope upon the party taking the deposition, who shall transmit them to the officer, who in turn shall propound them to the witness and record the answers verbatim.

(J) At any time during the taking of a deposition, the commission, the legal director, the deputy legal director, or the attorney examiner ~~may~~, ~~upon~~ in response to a motion of any party or the deponent and upon a showing that the examination is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the deponent or party, may order the person conducting the examination to cease taking the deposition, or may limit the scope and manner of taking the deposition as provided in rule 4901-1-24 of the Administrative Code. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for such an order.

(K) If and when the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him or her, unless such examination and reading are expressly waived by the witness and the parties. Any changes in form or substance that ~~which~~ the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making the changes. The deposition shall then be signed by the witness unless the signing is expressly waived by the parties or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within ten days after its submission to him or her, the officer shall sign it and state

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on the record the fact of the waiver or the illness or absence of the witness, or the fact of the refusal to sign together with the reasons, if any, given for such refusal. The deposition may then be used as fully as though signed, unless the commission, the legal director, the deputy legal director, or the attorney examiner, upon motion to suppress, holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(L) The officer shall certify on the deposition that the witness was duly sworn by him or her and that the deposition is a true record of the testimony given by the witness. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(M) Documents and things produced for inspection during the examination of the witness shall, upon request of any party, be marked for identification and annexed to the deposition, except that:

(1) The person producing the materials may substitute copies to be marked for identification, if all parties are afforded a fair opportunity to verify the copies by comparison with the originals,

(2) If the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to the deposition.

(N) Depositions may be used in commission hearings to the same extent permitted in civil actions in courts of record. Unless otherwise ordered for good cause shown, any depositions to be used as evidence must be filed with the commission at least three days prior to the commencement of the hearing. A deposition need not be prefiled if used to impeach the testimony of a witness at hearing.

"No Change"

4901-1-22 Requests for admission.

(A) Any party may serve upon any other party a written request for the admission, for purposes of the pending proceeding only, of the truth of any specific matter within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code, including the genuineness of any documents described in the request. Copies of

any such documents shall be served with the request unless they are or have been otherwise furnished for inspection or copying.

(B) Each matter of which an admission is requested shall be separately set forth. The party to whom a request for admission has been directed shall quote each request for admission immediately preceding the corresponding answer or objection. The matter is admitted unless, within twenty days after the service of the request, or within such shorter or longer time as the commission, the legal director, the deputy legal director, or an attorney examiner may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection, signed by the party or by his or her attorney. If an objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully make an admission or denial. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer or deny only part of the matter of which an admission is requested, the party shall specify that portion which is true and qualify or deny the remainder. An answering party may not give lack of information as a reason for failure to admit or deny a matter unless the party states that he or she has made reasonable inquiry and that information known or readily obtainable is insufficient to enable him or her to make an admission or denial. A party who considers the truth of a matter of which an admission has been requested to be a genuine issue for the hearing may not, on that basis alone, object to the request, but may deny the matter or set forth the reasons why an admission or denial cannot be made.

(C) Any party who has requested an admission may move for an order under rule 4901-1-23 of the Administrative Code with respect to any answer or objection. Unless it appears that an objection is justified, the commission, the legal director, the deputy legal director, or the attorney examiner shall order that answer be served. If an answer fails to comply with the requirements of this rule, the commission, the legal director, the deputy legal director, or the attorney examiner may:

(1) Order that the matter be admitted for purposes of the pending proceeding.

(2) Order that an amended answer be served.

(3) Determine that final disposition of the matter should be deferred until a prehearing conference or some other designated time prior to the commencement of the hearing.

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(D) Unless otherwise ordered by the commission, the legal director, the deputy legal director, or the attorney examiner, any matter admitted under this rule is conclusively established against the party making the admission, but such admission may be rebutted by evidence offered by any other party. An admission under this rule is an admission for purposes of the pending proceeding only and may not be used for any other purpose.

(E) If any party refuses to admit the truth of a matter which is subsequently proved at the hearing, and the commission determines that the party's refusal to admit the truth of the matter was not justified, the commission may impose a portion of the costs of the proceeding upon such party, in accordance with the second division of section 4903.24 of the Revised Code.

"No Change"

4901-1-23 Motions to compel discovery.

(A) Any party, upon reasonable notice to all other parties and any persons affected thereby, may move for an order compelling discovery, with respect to:

(1) Any failure of a party to answer an interrogatory served under rule 4901-1-19 of the Administrative Code.

(2) Any failure of a party to produce a document or tangible thing or permit entry upon land or other property as requested under rule 4901-1-20 of the Administrative Code.

(3) Any failure of a deponent to appear or to answer a question propounded under rule 4901-1-21 of the Administrative Code.

(4) Any other failure to answer or respond to a discovery request made under rules 4901-1-19 to 4901-1-22 of the Administrative Code.

(B) For purposes of this rule, an evasive or incomplete answer shall be treated as a failure to answer.

(C) No motion to compel discovery shall be filed under this rule until the party seeking discovery has exhausted all other reasonable means of resolving any differences with the party or person from whom discovery is sought. A motion to compel discovery shall be accompanied by:

(1) A memorandum in support, setting forth:

(a) The specific basis of the motion, and citations of any authorities relied upon.

(b) A brief explanation of how the information sought is relevant to the pending proceeding.

(c) Responses to any objections raised by the party or person from whom discovery is sought.

(2) Copies of any specific discovery requests which are the subject of the motion to compel, and copies of any responses or objections thereto.

(3) An affidavit of counsel, or of the party seeking to compel discovery if such party is not represented by counsel, setting forth the efforts which have been made to resolve any differences with the party or person from whom discovery is sought.

(D) The commission, the legal director, the deputy legal director, or an attorney examiner may grant or deny the motion in whole or in part. If the motion is denied in whole or in part, the commission, the legal director, the deputy legal director, or the attorney examiner may issue such protective order as would be appropriate under rule 4901-1-24 of the Administrative Code.

(E) Any order of the legal director, the deputy legal director, or an attorney examiner granting a motion to compel discovery in whole or in part may be appealed to the commission in accordance with rule 4901-1-15 of the Administrative Code. If no application for review is filed within the time limit set forth in that rule, the order of the legal director, the deputy legal director, or the attorney examiner becomes the order of the commission.

(F) If any party or person disobeys an order of the commission compelling discovery, the commission may:

(1) Seek appropriate judicial relief against the disobedient person or party under section 4903.04 or 4905.60 of the Revised Code.

(2) Prohibit the disobedient party from further participating in the pending proceeding.

(3) Prohibit the disobedient party from supporting or opposing designated claims or defenses, or from introducing evidence or conducting cross-examination on designated matters.

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(4) Dismiss the pending proceeding, if such proceeding was initiated by an application, petition, or complaint filed by the disobedient party, unless such a dismissal would unjustly prejudice any other party.

(5) Take such other action as the commission considers appropriate.

4901-1-24 ***Motions for protective orders.***

(A) Upon motion of any party or person from whom discovery is sought, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order that ~~which~~ is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that:

(1) Discovery not be had.

(2) Discovery may be had only on specified terms and conditions.

(3) Discovery may be had only by a method of discovery other than that selected by the party seeking discovery.

(4) Certain matters not be inquired into.

(5) The scope of discovery be limited to certain matters.

(6) Discovery be conducted with no one present except persons designated by the commission, the legal director, the deputy legal director, or the attorney examiner.

(7) A trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way.

(8) Information acquired through discovery be used only for purposes of the pending proceeding, or that such information be disclosed only to designated persons or classes of persons.

(B) No motion for a protective order shall be filed under paragraph (A) of this rule until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery. A motion for a protective order filed pursuant to paragraph (A) of this rule shall be accompanied by:

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(1) A memorandum in support, setting forth the specific basis of the motion and citations of any authorities relied upon.

(2) Copies of any specific discovery requests that ~~which~~ are the subject of the request for a protective order.

(3) An affidavit of counsel, or of the person seeking a protective order if such person is not represented by counsel, setting forth the efforts that ~~which~~ have been made to resolve any differences with the party seeking discovery.

(C) If a motion for a protective order filed pursuant to paragraph (A) of this rule is denied in whole or in part, the commission, the legal director, the deputy legal director, or the attorney examiner may require that the party or person seeking the order provide or permit discovery, on such terms and conditions as are just.

(D) Upon motion of any party or person with regard to the filing of a document with the commission's docketing division relative to a case before the commission, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information, including where the information is deemed by the commission, the legal director, the deputy legal director, or the attorney examiner to constitute a trade secret under Ohio law, and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. Any order issued under this paragraph shall minimize the amount of information protected from public disclosure. The following requirements apply to a motion filed under this paragraph:

(1) All documents submitted pursuant to paragraph (D) of this rule should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information. Such redacted documents should be filed with the otherwise required number of copies for inclusion in the public case file.

(2) Two ~~Three~~ unredacted copies of the allegedly confidential information shall be filed under seal, along with a motion for protection of the information, with the secretary of the commission, the chief of the docketing division, or the chief's designee. Each page of the allegedly confidential material filed under seal must be marked as "confidential," "proprietary," or "trade secret."

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(3) The motion for protection of allegedly confidential information shall be accompanied by a memorandum in support setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure, and citations of any authorities relied upon. The motion and memorandum in support shall be made part of the public record of the proceeding.

~~(4) If a motion for a protective order is filed in a case involving a request for approval of a contract between a telecommunications carrier and a customer, and the contract has an automatic approval process, unless the commission suspends the automatic approval process or otherwise rules on the motion for a protective order, the motion for a protective order will be automatically approved for an eighteen month period beginning on the date that the contract is automatically approved. Nothing prohibits the commission from rescinding the protective order during the eighteen month period. If a motion for a protective order for information included in a gas marketer's renewal certification application case filed pursuant to Section 2928.09, Revised Code, or a competitive retail electric service provider's renewal certification application case filed pursuant to Section 4928.09, Revised Code, is granted, the motion will be automatically approved for a twenty four month period beginning with the date of the renewed certificate. Nothing prohibits the commission from rescinding the protective order during the twenty four month period. Automatic approval of confidentiality under this provision shall not preclude the commission from examining the confidentiality issue de novo if there is an application for rehearing on confidentiality or a public records request for the redacted information.~~

(E) Pending a ruling on a motion filed in accordance with paragraph (D) of this rule, the information filed under seal will not be included in the public record of the proceeding or disclosed to the public until otherwise ordered. The commission and its employees will undertake reasonable efforts to maintain the confidentiality of the information pending a ruling on the motion. A document or portion of a document filed with the docketing division that is marked "confidential," "proprietary," or "trade secret," or with any other such marking will not be afforded confidential treatment and protected from disclosure unless it is filed in accordance with paragraph (D) of this rule.

(F) Unless otherwise ordered, any order prohibiting public disclosure pursuant to paragraph (D) of this rule shall automatically expire twenty-four ~~eighteen~~ months after the date of its issuance, and such information may then be included in the

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public record of the proceeding. A party wishing to extend a protective order beyond twenty-four ~~eighteen~~ months shall file an appropriate motion at least forty-five days in advance of the expiration date of the existing order. The motion shall include a detailed discussion of the need for continued protection from disclosure. Nothing precludes the commission from reexamining the need for protection issue de novo during the twenty-four month period if there is an application for rehearing on confidentiality or a public records request for the redacted information.

(G) The requirements of this rule do not apply to information submitted to the commission staff. However, information submitted directly to the legal director, the deputy legal director, or the attorney examiner that is not filed in accordance with the requirements of paragraph (D) of this rule may be filed with the docketing division as part of the public record. No document received via fax or e-filing ~~facsimile transmission~~ will be given confidential treatment by the commission.

4901-1-25 Subpoenas.

(A) The commission, any commissioner, the legal director, the deputy legal director, or an attorney examiner may issue subpoenas, upon their own motion or upon motion of any party. A subpoena shall command the person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command such person to produce the books, papers, documents, or other tangible things described therein. A party may request a subpoena by either of the following methods: ~~A copy of the motion for a subpoena and the subpoena itself should first be submitted to the attorney examiner assigned to the case, or to the legal director or deputy legal director, for signature of the subpoena. After the subpoena is signed, a copy of the motion for a subpoena and a copy of the signed subpoena shall then be docketed and served upon the parties to the case. The person seeking the subpoena shall retain the original signed subpoena and make arrangements for its service.~~

(1) A party may file a motion for a subpoena with the docketing division. A completed subpoena form, ready for signature, shall accompany the motion. The attorney examiner assigned to the case, or the legal director or deputy legal director or their designee, will review the filing and, if appropriate, sign the subpoena. The attorney examiner, legal director, deputy legal director, or designee will return via United States mail the signed subpoena, with a cover

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letter, to the party that filed the motion. A copy of the cover letter will be docketed in the case file.

(2) To receive expedited treatment, a motion for a subpoena and the subpoena itself should first be submitted in person to the attorney examiner assigned to the case, or to the legal director or a designee, for signature of the subpoena. After the subpoena is signed, a copy of the motion for a subpoena and a copy of the signed subpoena shall then be filed with the docketing division by the requesting party and served upon the parties to the case. The person seeking the subpoena shall retain the original signed subpoena and make arrangements for its service.

(B) Arranging for service of a signed subpoena is the responsibility of the person requesting the subpoena. A subpoena may be served by ~~a sheriff, deputy sheriff, or~~ any ~~other~~ person who is not a party and who is not less than eighteen years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy to such person, ~~or by~~ reading it to him or her in person, ~~or by~~ leaving ~~it~~ a copy at his or her place of residence, leaving a copy at his or her business address if the person is a party or employee of a party to the case, or mailing a copy via United States mail as certified or express mail, return receipt requested, with instructions to the delivering postal authority to show to whom delivered, date of delivery, and address where delivered. A subpoena may be served at any place within this state. The person serving the subpoena shall file a return thereof with the docketing division. When the subpoena is served by mail, the person filing the return shall include the signed receipt with the return.

(C) The commission, the legal director, the deputy legal director, or an attorney examiner ~~may~~, upon their own motion or upon motion of any party, may quash a subpoena if it is unreasonable or oppressive, or condition the denial of such a motion upon the advancement by the party on whose behalf the subpoena was issued of the reasonable costs of producing the books, papers, documents, or other tangible things described therein.

(D) A subpoena may require a person, other than a member of the commission staff, to attend and give testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code. Such a subpoena is subject to the provisions of rule 4901-1-24 of the Administrative Code as well as paragraph (C) of this rule.

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(E) Unless otherwise ordered for good cause shown, all motions for subpoenas requiring the attendance of witnesses at a hearing must be filed with the commission no later than ten ~~five~~ days prior to the commencement of the hearing or, if expedited treatment is requested, no later than five days prior to the commencement of the hearing.

(F) Any persons subpoenaed to appear at a commission hearing, other than a party or an officer, agent, or employee of a party, shall receive the same witness fees and mileage expenses provided in civil actions in courts of record. For purposes of this paragraph, the term "employee" includes consultants and other persons retained or specially employed by a party for purposes of the proceeding. If the witness is subpoenaed at the request of one or more parties, the witness fees and mileage expenses shall be paid by such party or parties. If the witness is subpoenaed upon motion of the commission, a commissioner, the legal director, the deputy legal director, or an attorney examiner, the witness fees and mileage expenses shall be paid by the state, in accordance with section 4903.05 of the Revised Code. Unless otherwise ordered, a motion for a subpoena requiring the attendance of a witness at a hearing shall be accompanied by a deposit in the form of a check made payable to the person subpoenaed sufficient to cover the required witness fees and mileage expenses for one day's attendance. A separate deposit shall be required for each witness. The deposit shall be tendered to the fiscal officer of the commission, who shall retain it until the hearing is completed, at which time the officer shall tender the check to the witness. The fiscal officer shall attempt to resolve any payment controversies between the parties. The fiscal officer shall bring any unresolved controversies to the attention of the commission, the legal director, the deputy legal director, or the attorney examiner for resolution.

(G) If any person fails to obey a subpoena issued by the commission, a commissioner, the legal director, the deputy legal director, or an attorney examiner, the commission may seek appropriate judicial relief against such person under section 4903.02 or 4903.04 of the Revised Code.

(H) A sample subpoena is provided in the appendix to this rule.

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4901-1-26 Prehearing conferences.

(A) In any proceeding, the commission, the legal director, the deputy legal director, or an attorney examiner may, upon motion of any party or upon their own motion, hold one or more prehearing conferences for the purpose of:

(1) Resolving outstanding discovery matters, including:

(a) Ruling on pending motions to compel discovery or motions for protective orders.

(b) Establishing a schedule for the completion of discovery.

(2) Ruling on any other pending procedural motions.

(3) Identifying the witnesses to be presented in the proceeding and the subject matter of their testimony.

(4) Identifying and marking exhibits to be offered in the proceeding.

(5) Discussing possible admissions or stipulations regarding issues of fact or the authenticity of documents.

(6) Clarifying and/or settling the issues involved in the proceeding.

(7) Discussing or ruling on any other procedural matter which the commission or the presiding hearing officer considers appropriate.

(B) Reasonable notice of any prehearing conference shall be provided to all parties. Unless otherwise ordered for good cause shown, the failure of a party to attend a prehearing conference constitutes a waiver of any objection to the agreements reached or rulings made at such conference.

(C) Prior to a prehearing conference, the commission, the legal director, the deputy legal director, or the attorney examiner assigned to the case may, upon motion of any party or upon their own motion, require that all parties to the proceeding file with the commission and serve upon all other parties a list of the issues the party intends to raise at the hearing. Issues must be specifically identified and described and the presiding hearing officer may, upon motion of any party or upon his or her own motion, strike issues which do not meet this requirement. In any proceeding

in which lists of issues are required, no party shall be permitted to raise an issue at hearing that was not set forth in its list, except for good cause shown.

(D) Following the conclusion of a prehearing conference, the commission, the legal director, the deputy legal director, or the attorney examiner may issue an appropriate prehearing order, reciting or summarizing any agreements reached or rulings made at such conference. Unless otherwise ordered for good cause shown, such order shall be binding upon all persons who are or subsequently become parties, and shall control the subsequent course of the proceeding.

(E) Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a disputed matter in a commission proceeding is not admissible to prove liability for or invalidity of the dispute. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another valid purpose.

(F) If a conference is scheduled to discuss settlement of the issues in a complaint case, the representatives of the public utility shall investigate prior to the settlement conference the issues raised in the complaint and all parties attending the conference shall be prepared to discuss settlement of the issues raised and shall have the requisite authority to settle those issues.

4901-1-27 Hearings.

(A) The commission, the legal director, the deputy legal director, or an attorney examiner shall assign the time and place for each hearing. Unless otherwise ordered, all hearings shall be held at the offices of the commission in Columbus, Ohio. Reasonable notice of each hearing shall be provided to all parties.

(B) The presiding hearing officer shall regulate the course of the hearing and the conduct of the participants. Unless otherwise provided by law, the presiding hearing officer may, without limitation:

(1) Administer oaths and affirmations.

(2) Determine the order in which the parties shall present testimony and the order in which witnesses shall be examined.

(3) Issue subpoenas.

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(4) Rule on objections, procedural motions, and other procedural matters.

(5) Examine witnesses.

(6) Grant continuances.

(7) Take such actions as are necessary to:

(a) Avoid unnecessary delay.

(b) Prevent the presentation of irrelevant or cumulative evidence.

(c) Prevent argumentative, repetitious, cumulative, or irrelevant cross-examination.

(d) Assure that the hearing proceeds in an orderly and expeditious manner.

(e) Prevent public disclosure of trade secrets, proprietary business information, or confidential research, development, or commercial materials and information. The presiding hearing officer may, upon motion of any party, direct that a portion of the hearing be conducted in camera and that the corresponding portion of the record be sealed to prevent public disclosure of trade secrets, proprietary business information, or confidential research, development, or commercial materials and information. The party requesting such protection shall have the burden of establishing that such protection is required. The commission or the presiding hearing officer shall issue a ruling prior to the closing of the case regarding the amount of time that any sealed portion of the hearing record shall remain sealed.

(C) The presiding hearing officer shall permit members of the public to offer sworn ~~or unsworn~~ testimony at the portion or session of the hearing designated for the taking of public testimony.

(D) Formal exceptions to rulings or orders of the presiding hearing officer are unnecessary if, at the time the ruling or order is made, the party makes known the action which he or she desires the presiding hearing officer to take, or his or her objection to action which has been taken and the basis for that objection.

4901-1-28 Reports of investigation and objections thereto.

(A) In all rate proceedings in which the commission is required by section 4909.19 of the Revised Code to conduct an investigation, a written report of such

investigation shall be filed with the commission and shall be served upon all parties. The report shall be deemed to be admitted into evidence as of the time it is filed with the commission, but all or part of such report may subsequently be stricken, upon motion of the commission, the legal director, the deputy legal director, or the attorney examiner assigned to the case, or upon motion of any party for good cause shown. Any person making or contributing to the report may be subpoenaed to testify at the hearing in accordance with rule 4901-1-25 of the Administrative Code, but the unavailability of such persons shall not affect the admissibility of the report.

(B) Any party may file objections to a report of investigation described in paragraph (A) of this rule, within thirty days after such report is filed with the commission. Such objections may relate to the findings, conclusions, or recommendations contained in the report, or to the failure of the report to address one or more specific items. All objections must be specific. Any objections that ~~which~~ fail to meet this requirement may be stricken upon motion of any party or the commission staff or upon motion of the commission, the legal director, the deputy legal director, or the attorney examiner.

(C) The objections to the report described in paragraph (A) of this rule~~,~~ shall frame the issues in the proceeding, although the commission, the legal director, the deputy legal director, or the attorney examiner may designate additional issues or areas of inquiry. Unless otherwise ordered by the commission, the legal director, the deputy legal director, or the attorney examiner, all material findings and conclusions set forth in the report to which no objection has been filed shall be deemed admitted for purposes of the proceeding. At the hearing, any party who has filed objections may present evidence in support of those objections. The commission or the presiding hearing officer may, in their discretion, permit the parties to present evidence or conduct cross-examination concerning additional issues. Any party may present rebuttal testimony in response to direct testimony or other evidence presented by any other party or by the commission staff.

(D) In a rate case proceeding, an objection to a staff report will be deemed withdrawn if a party fails to address the objection ~~it~~ in its initial brief.

(E) Unless otherwise ordered by the commission, in all other cases in which the commission orders an investigation to be performed by staff and the filing of a report, the report shall be deemed admitted into evidence at the time it is filed with

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the commission, but all or part of such report may subsequently be stricken upon motion of the commission, the legal director, the deputy legal director, or an attorney examiner, or upon motion of any party for good cause shown. If a staff report described in this paragraph is admitted into evidence, interested persons shall have some opportunity, to be determined by the commission, to submit testimony, file comments, or file objections to the report. If a hearing is scheduled in the case in which the report is filed, any person making or contributing to the report may be subpoenaed to testify at the hearing in accordance with paragraph (A) of rule 4901-1-25 of the Administrative Code, but the unavailability of such persons shall not affect the admissibility of the report. Objections or comments to a report described in this paragraph shall not be filed unless directed by the commission, the legal director, the deputy legal director, or the attorney examiner.

"No Change"

4901-1-29 Expert testimony.

(A) Except as otherwise provided in this rule, all expert testimony to be offered in commission proceedings, except testimony to be offered by the commission staff, shall be reduced to writing, filed with the commission, and served upon all parties prior to the time such testimony is to be offered. The commission, the legal director, the deputy legal director, or an attorney examiner may establish a schedule in any proceeding for the filing of testimony to be presented by staff.

(1) Unless otherwise ordered by the commission, the legal director, the deputy legal director, or an attorney examiner:

(a) All direct expert testimony to be offered by the applicant, complainant, or petitioner in a general rate proceeding shall be filed and served no later than ten days prior to the commencement of the hearing or the deadline for filing objections to the staff report of investigation, whichever occurs earlier.

(b) All direct expert testimony to be offered by any other party in a general rate proceeding shall be filed and served no later than the deadline for filing objections to the staff report of investigation.

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(c) All direct expert testimony to be offered by the applicant in an emergency rate proceeding shall be filed and served no later than sixteen days prior to the commencement of the hearing.

(d) All direct expert testimony to be offered by any other party in an emergency rate proceeding shall be filed and served no later than seven days prior to the commencement of the hearing.

(e) All direct expert testimony to be offered by the gas utility in a purchased gas adjustment proceeding shall be filed and served no later than sixteen days prior to the commencement of the hearing.

(f) All direct expert testimony to be offered by any other party in a purchased gas adjustment proceeding shall be filed and served no later than seven days prior to the commencement of the hearing.

(g) All direct expert testimony to be offered by any party in a long-term forecast report proceeding shall be filed and served no later than sixteen days prior to the commencement of the hearing.

(h) All direct expert testimony to be offered in any other commission proceeding shall be filed and served no later than seven days prior to the commencement of the hearing.

(2) All expert testimony to be offered in rebuttal shall be filed and served within the time limits established by the commission or the presiding hearing officer, unless the commission or the presiding hearing officer determines that such testimony need not be reduced to writing.

(B) For purposes of this rule, "commencement of the hearing" means the scheduled date for beginning the hearing at which expert testimony is to be offered.

(C) Notwithstanding paragraph (A) of this rule, the presiding hearing officer may, in his or her discretion, permit an expert witness to present additional oral testimony at the hearing, provided that such testimony could not, with reasonable diligence, have been filed and served within the time limits established by the commission or the presiding hearing officer or the presentation of such testimony will not unduly delay the proceeding or unjustly prejudice any other party.

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4901-1-30 Stipulations.

(A) Any two or more parties may enter into a written or oral stipulation concerning issues of fact, ~~or~~ the authenticity of documents, or the proposed resolution of some or all of the issues in a proceeding.

(B) A written stipulation must be signed by all of the parties joining therein, and must be filed with the commission and served upon all parties to the proceeding.

(C) An oral stipulation may be made only during a public hearing or record prehearing conference, and all parties joining in such a stipulation must acknowledge their agreement thereto on the record. The commission or the presiding hearing officer may require that an oral stipulation be reduced to writing and filed and served in accordance with paragraph (B) of this rule.

(D) Unless otherwise ordered, parties who file a full or partial written stipulation or make an oral stipulation must file or provide the testimony of at least one signatory party that supports the stipulation. Parties that do not join the stipulation may offer evidence and/or argument in opposition.

~~(D)~~(E) No stipulation shall be considered binding upon the commission.

"No Change"

4901-1-31 Briefs and memoranda.

(A) In addition to those instances in which this chapter specifically allows the filing of memoranda, the commission, the legal director, the deputy legal director, or an attorney examiner may, upon motion of any party or upon their own motion, permit or require the filing of briefs or memoranda at any time during a proceeding. Such briefs or memoranda may, in the discretion of the commission, the legal director, the deputy legal director, or the attorney examiner, be limited to one or more specific issues.

(B) All briefs and memoranda which are greater than ten pages and which address more than one proposition or issue shall contain a table of contents which shall include the propositions or issues discussed within the brief or memorandum. If requested by the commission, the legal director, the deputy legal director, or an attorney examiner, all parties shall include within their initial brief a section entitled "statement of issues." This section shall list all issues that the party requests that the commission address in its opinion and order. The commission, the legal

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director, the deputy legal director, or the attorney examiner may impose other requirements or limitations concerning the length or form of briefs or memoranda.

(C) If unreported decisions, other than decisions of the commission, are cited, copies of such decisions shall be attached to the brief or memorandum and shall be furnished to all parties. Failure to comply with this requirement may be grounds for striking the brief or memorandum.

(D) In long-term forecast report proceedings, the record shall be considered closed for purposes of division (F) of section 4935.04 of the Revised Code upon the filing of the final round of briefs.

"No Change"

4901-1-32 Oral arguments.

The commission, the legal director, the deputy legal director, or an attorney examiner may, upon motion of any party or upon their own motion, hear oral arguments at any time during a proceeding. Such arguments may, in the discretion of the commission, the legal director, the deputy legal director, or the attorney examiner, be limited to one or more specific issues, and are subject to such time limitations and other conditions as the commission, the legal director, the deputy legal director, or the attorney examiner may prescribe.

"No Change"

4901-1-33 Attorney examiner's reports and exceptions thereto.

(A) If ordered by the commission, the attorney examiner shall prepare a written report of his or her findings, conclusions, and recommendations, following the conclusion of a hearing. Such report shall be filed with the commission and served upon all parties.

(B) Any party may file exceptions to an attorney examiner's report within twenty days after such report is filed with the commission. Exceptions shall be stated and numbered separately, and shall be accompanied by a memorandum in support, setting forth the basis of the exceptions and citations of any authorities relied upon. If an exception relates to one or more findings of fact, the memorandum in support should, where practicable, include specific citations to any portions of the record relied upon in support of the exception.

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(C) Any party may file a reply to another party's exceptions within fifteen days after the service of those exceptions.

"No Change"

4901-1-34 Reopening of proceedings.

(A) The commission, the legal director, the deputy legal director, or an attorney examiner may, upon their own motion or upon motion of any person for good cause shown, reopen a proceeding at any time prior to the issuance of a final order.

(B) A motion to reopen a proceeding shall specifically set forth the purpose of the requested reopening. If the purpose is to permit the presentation of additional evidence, the motion shall specifically describe the nature and purpose of such evidence, and shall set forth facts showing why such evidence could not, with reasonable diligence, have been presented earlier in the proceeding.

4901-1-35 Applications for rehearing.

(A) Any party or any affected person, firm, or corporation may file an application for rehearing, within thirty days after the issuance of a commission order, in the form and manner and under the circumstances set forth in section 4903.10 of the Revised Code. An application for rehearing must set forth, in numbered or lettered paragraphs, the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful. An application for rehearing must be accompanied by a memorandum in support, which sets forth an explanation of the basis for each ground for rehearing identified in the application for rehearing and which shall be filed no later than the application for rehearing.

(B) Any party may file a memorandum contra within ten days after the filing of an application for rehearing.

(C) As provided in section 4903.10 of the Revised Code, all applications for rehearing must be submitted within thirty days after an order has been journalized by the secretary of the commission, or, in the case of an application that ~~which~~ is subject to automatic approval under the commission's procedures, an application for rehearing must be submitted within thirty days after the date on which the automatic timeframe has expired, unless the application has been suspended by the commission.

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(D) A party or any affected person, firm, or corporation may only file one application for rehearing to a commission order within thirty days following the entry of the order upon the journal of the commission.

~~(E) An application for rehearing filed under section 4903.10 of the Revised Code, or a memorandum contra an application for rehearing filed pursuant to rule 4901-1-35 of the Administrative Code may not be delivered via facsimile transmission.~~

4901-1-36 Supreme court appeals.

Consistent with the requirements of section 4903.13 of the Revised Code, a notice of appeal of a commission order to the Ohio supreme court must be filed with the commission's docketing division within the time period prescribed by the court and served, unless waived, upon the chairman of the commission, or, in his absence, upon any public utilities commissioner, or by leaving a copy at the offices of the commission at Columbus. ~~A notice of appeal of a commission order to the Ohio supreme court~~ Service of the notice of appeal of a commission order to the Ohio supreme court may not be delivered via ~~facsimile transmission~~fax or e-filing upon the chairman or a commissioner.

"No Change"

4901-1-37 Commission workshops.

The commission may, from time to time, schedule informational workshops for the purpose of receiving information and exchanging ideas regarding relevant topics. Such workshops shall be listed on the commission's regular meeting agenda or on the weekly hearing calendar and shall be open to all interested persons. The workshops shall not be transcribed and participants need not be represented by counsel. Certain individuals may be designated by the commission as spokespersons or chairpersons for purposes of presenting information or conducting such workshops. Requests by persons interested in scheduling a workshop shall be made in writing to the director of the relevant staff department, with a copy of the request submitted to the chairman of the commission. The commission, in its discretion, reserves the right to postpone or reject requests for workshops.

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4901-1-38 General provisions.

(A) This chapter sets forth the procedural standards that ~~which~~ apply to all entities participating in cases before the commission.

(B) The commission may, upon its own motion or upon a motion filed by a party, ~~or for good cause shown,~~ waive any requirement of~~, standard, or rule set forth in~~ this chapter for good cause shown, other than a requirement mandated by statute from which no waiver is permitted ~~or prescribe different practices or procedures to be followed in a case~~.

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4901-3-01 Commission meetings.

(A) Open meetings.

(1) All meetings of the public utilities commission at which official action is taken and formal deliberation upon official business is conducted shall be opened to the public. All resolutions, rules, or formal action of any kind shall be adopted in an open meeting of the public utilities commission. A majority of the ~~members of the~~ public utilities commission shall constitute a quorum for the purpose of conducting business.

(2) The public utilities commission may hold an executive session for the purpose of the consideration of a matter contained in division (G) of section 121.22 of the Revised Code. An executive session may be held only at a meeting for which notice has been given in accordance with paragraph (C) of this rule and only after a majority of a quorum of the public utilities commission determines, by a roll call vote, to hold such a session.

(B) Types of meetings.

(1) The public utilities commission regularly meets on Wednesday to discuss issues in individual cases and to vote on orders and entries to be issued in cases. The commission may, in its discretion, schedule meetings on other days to discuss and vote on entries and orders in pending cases. Unless otherwise noticed by the commission, meetings are held at the offices of the public utilities commission, 180 East Broad street, Columbus, Ohio. The time of the meetings will be shown on the agenda issued for the meetings.

(2) An emergency meeting is one ~~which~~ that is noticed to the public less than twenty-four hours prior to the start of the meeting.

(C) Notice of meetings.

(1) Any person may determine the time, place, and matters on the agenda for a commission meeting scheduled to consider cases or a specific or general topic by calling the commission's legal department at 614-466-6843 during normal business hours or by ~~consulting the information rack located within~~ visiting the commission's docketing division ~~located on the thirteenth floor of the commission's offices~~. The meeting agendas are also available on the commission's web site ~~(www.puco.ohio.gov)~~(http://www.puco.ohio.gov). ~~Upon request to the commission's legal department, the~~ The commission will distribute agendas, as they become available, via e-mail. Any person wishing to

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receive notices or agendas of commission meetings via e-mail may subscribe to the "agendas list" at http://www.puco.ohio.gov/PUCO/Legal, or by calling the commission's legal department at 614-466-6843, or by sending a request to legal department, public utilities commission of Ohio, 180 East Broad street, Columbus, Ohio 43215. The agendas for the ~~a~~ regular weekly meetings ~~meeting scheduled for the~~ are generally ~~following week will usually be~~ available by close of business on the preceding Thursday. Notice of agenda updates are posted to the web site and distributed by e-mail as early as possible prior to the meeting.

(2) Copies of the agenda for an emergency meeting, if time permits for the preparation of an agenda, will be available ~~in the information racks and~~ on the commission's web site and distributed by e-mail as early as possible prior to ~~the start of~~ the meeting.

(3) The agenda for commission meetings in which specific cases are to be considered shall include the case number and a brief description of the case name. If a meeting is scheduled to consider a specific or general topic or subject matter, the agenda will only give the topic or subject matter to be discussed.

~~(3) Requests to receive commission meeting agendas by e-mail should be directed to the legal department, public utilities commission of Ohio, 180 East Broad street, Columbus, Ohio 43215-3793, or by calling the legal department at 614-466-4843 or by subscribing at the commission's web site.~~

~~(D) Agendas~~

~~(1) The agenda for commission meetings in which specific cases are to be considered shall include the case number and a brief description of the case name. If a meeting is scheduled to consider a specific or general topic or subject matter, the agenda will only give the topic or subject matter to be discussed.~~

~~(2) If a case, topic, or subject matter needs to be added to an agenda after the agenda has been issued, the additions shall be noticed in the same manner as if an emergency meeting were scheduled, i.e., if time permits, the additions will be available in the information racks and on the commission's web site and distributed by e-mail as early as possible prior to the start of the meeting.~~

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~~(E)~~ (D) Minutes.

(1) Minutes of the ~~commission's~~ commission meetings ~~during a week~~ shall be considered and adopted at the next regularly scheduled meeting at which the commission votes on orders and entries to be issued in cases.

(2) Upon adoption, the secretary of the commission shall be responsible for maintaining the minutes.

4901-3-02 Photographing, filming, and recording.

Persons may videotape, photograph, film, or record commission meetings and public hearings in accordance with the following procedures, which are promulgated to assure decorum and fairness to all parties, consistent with the goal that the public be fully informed.

(A) Any person may videotape, film, record, or photograph commission meetings and public hearings.

(B) The person in charge of a meeting or hearing may, if deemed necessary, designate an ~~the~~ area for the location of ~~where~~ stationary cameras, lighting, or other auxiliary equipment ~~is to be located~~.

(C) A person operating a portable or hand-held camera shall remain seated while filming or stand in the back or along the sides of the room. The person shall not block the view of those seated in the room.

(D) Unless preauthorized approval is obtained from the person in charge of the meeting or hearing, tape recorders and other audio equipment (e.g., microphones) shall be located at the operator's seat during the meeting or hearing. A mult box is available in the commission meeting room for use in recording events that occur in that room.

(E) During a hearing or meeting, reporters or commentators orally describing the events shall not be located within the room where the meeting or hearing is being conducted.

(F) The use of cellular phones or other voice-related devices in a room where a meeting or hearing is being conducted is prohibited. Cellular phones and pagers ~~beepers~~ shall not transmit an audio notification after the start of a meeting or hearing.

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(G) A commissioner, hearing examiner, or the commission employee responsible for conducting a meeting or hearing has the authority to enforce, waive, or modify any of the above procedures when deemed necessary to preserve the decorum or fairness of a commission proceeding and to exclude from the meeting or hearing any person who violates any of the procedures set forth in this rule or fails to follow a directive.

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4901-9-01 Complaint proceedings.

(A) Except in unusual circumstances, any customer or consumer with a service or billing problem should first contact the public utility to attempt to resolve the problem. If that attempt is unsuccessful, the customer or consumer is encouraged to contact the commission's call center prior to the filing of a formal complaint. If a customer or consumer bypasses the commission's call center and files a formal complaint, the commission's legal department may refer the complaint to the commission's call center for an opportunity to resolve the issue before formally proceeding with the complaint.

(B) All complaints filed under section 4905.26 and section 4927.21 of the Revised Code, except complaints filed by a public utility concerning a matter affecting its own product or service, shall be in writing and shall contain the name of the public utility complained against, a statement which clearly explains the facts which constitute the basis of the complaint, and a statement of the relief sought. Sample complaint forms may be obtained by contacting the commission's service monitoring and enforcement department. If discrimination is alleged, the facts that allegedly constitute discrimination must be stated with particularity. Upon receipt of such a complaint, the docketing division shall serve a copy of the complaint upon the public utility complained against, together with instructions to file an answer with the commission in accordance with the provisions of this rule. The public utility complained against shall file its answer with the commission within twenty days after the mailing of the complaint, or such period of time as directed by the commission, the legal director, the deputy legal director, or an attorney examiner, and shall serve a copy upon all parties in accordance with rule 4901-1-05 of the Administrative Code. An answer must be filed in accordance with this paragraph, whether or not the public utility files a motion to dismiss the complaint or any other motion in response to the complaint.

(C) Each defense to a complaint shall be asserted in an answer. In addition, the following defenses or assertions may, at the option of the public utility complained against, also be raised by motion:

(1) Lack of jurisdiction over the subject matter.

(2) Lack of jurisdiction over the person.

(3) Failure to set forth reasonable grounds for complaint.

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(4) Satisfaction of the complaint or settlement of the case.

(D) The public utility shall state in its answer, in short and plain terms, its defenses to each claim asserted, and shall admit or deny the allegations upon which the complainant relies. If the public utility is without sufficient knowledge or information to form a belief as to the truth of an allegation, it shall so state and this has the effect of a denial. If the public utility intends in good faith to deny all of the allegations in the complaint, it may do so by general denial. If it does not intend to deny all of the allegations in the complaint, it shall either make specific denials of designated allegations or paragraphs, or generally deny all allegations except those allegations or paragraphs that it expressly admits. Unless otherwise ordered by the commission, the legal director, the deputy legal director, or an attorney examiner, all material allegations in the complaint which are not denied in the answer shall be deemed admitted for purposes of the proceeding.

(E) If a person filing a complaint against a public utility is facing termination of service by the public utility, the person may request, in writing, that the commission provide assistance to prevent the termination of service during the pendency of the complaint. The person must explain why he or she believes that service is about to be terminated and why the person believes that the service should not be terminated. A person making a request for assistance must agree to pay during the pendency of the complaint all amounts to the utility that are not in dispute. The commission, legal director, deputy legal director, or an attorney examiner will issue a ruling on the request.

(F) If the public utility complained against files an answer or motion which asserts that the complaint has been satisfied or that the case has been settled, the complainant shall file a written response within twenty days after the service of the answer or motion, indicating whether the complainant agrees or disagrees with the utility's assertions, and whether he or she wishes to pursue the complaint. If no response is filed within the prescribed period of time, the commission may presume that satisfaction or settlement has occurred and dismiss the complaint. Any filing by a utility that asserts that a complaint has been satisfied or that the case has been settled shall include a statement or be accompanied by another document that states that, pursuant to a commission rule, the complainant has twenty days to file a written response agreeing or disagreeing with the utility's assertions and that, if no response is filed, the commission may presume that satisfaction or settlement has occurred and dismiss the complaint.

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(G) The legal director, deputy legal director, or an attorney examiner assigned to a complaint case shall schedule a settlement conference to attempt to resolve the issues in the case prior to hearing. The settlement conference will be conducted pursuant to the Uniform Mediation Act found in Chapter 2710. of the Revised Code. The settlement conference may be waived at the request or agreement of all the parties or if the attorney examiner is informed that prior formal attempts to resolve the dispute were made and were unsuccessful. Unless good cause is shown, settlement conferences shall be held at the offices of the commission.

(H) If a conference is scheduled to discuss settlement of the issues in a complaint case, the representatives of the public utility shall investigate prior to the settlement conference the issues raised in the complaint and all parties attending the conference shall be prepared to discuss settlement of the issues raised and shall have the requisite authority to settle those issues.

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4901:1-1-01 Consumer information.

Upon a consumer's request, a public utility shall provide a copy of the consumer's contract or of the company's applicable tariffed rules and regulations. ~~In the event that the public utility does not maintain a copy of the tariffed rules and regulations within the county where the customer is served, the public utility must provide the information~~ in the format requested by the consumer, i.e., via e-mail, internet website, fax, or first class mail. Unless the consumer agrees to another date, the public utility shall provide the information within five business days. Paper copies of any items requested shall be provided at cost. This rule does not apply to any industry for which the commission has prescribed a more specific rule regarding the requirement to make available a company's tariff~~, e.g., rule 4901:1-5-06 of the Administrative Code~~.

"No Change"

4901:1-1-02 Underground utility protection service registration.

Each underground utility protection service, as defined by division (A)(4) of section 153.64 of the Revised Code, shall register with the public utilities commission by supplying the information in the form set forth in "Appendix A" to this rule and filing such form with the docketing division of the public utilities commission. Public authorities, as defined by division (A)(2) of section 153.64 of the Revised Code, desiring information about a registered underground utility protection service, can obtain such information by contacting the docketing division of the public utilities commission.

4901:1-1-03 Duty to disclose tariffs.

(A) Definitions. For purposes of this rule, and this rule only, the following shall apply:

(1) "A utility" is:

(a) An electric light company as defined by division (A)(43) of section 4905.03 of the Revised Code;

(b) A gas company or a natural gas company as defined by divisions (A)(~~5~~4) and (A)(65) of section 4905.03 of the Revised Code having more than five thousand customers; or

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(c) A water-works company or sewage disposal system as defined by divisions (A)(87) and (A)(1413) of section 4905.03 of the Revised Code having more than five thousand customers.

(2) "An applicant" is a person, partnership, corporation, association, or organization which makes application or requests electric, gas, water, or sewage service from a utility. An applicant includes those persons or entities who are currently a customer and are seeking to receive service at another or a new location and those persons or entities who already receive one type of utility service (e.g., electric or water) and want to receive another type of utility service (e.g., gas or sewer) at the same or a different location.

(3) "An eligible customer" is a customer who, based on the information available to the utility, may meet or may become able to meet the criteria or terms and conditions of service of a particular tariff offering or rate schedule. For example, if an electrical residential load management schedule were open to electric residential customers with a monthly minimum demand of four kilowatt hours, an eligible customer would be any residential customer regardless of his or her historical monthly level of demand. Likewise, if a rate schedule were available to any residential electric customer with an electric water heater, all residential customers would be eligible customers. In these two examples, all residential customers are eligible customers (although many of these eligible customers may not actually qualify to receive service under these tariffs) because they may meet or may become able to meet the criteria or terms and conditions of service. However, if an industrial or commercial rate schedule were changed or modified, residential customers would not be considered as eligible customers.

(4) "Disclose" means to inform by use of a brief, one-to-four-sentence (more if necessary) message contained on a bill, on a bill insert, or in a special mailing. A utility may supplement the disclosure by a notice published in a newspaper or newspapers of general circulation in the service territory of the utility. The disclosure must state:

(a) That a new rate is available or that the criteria or terms and conditions of an existing rate schedule have been modified;

(b) The nature of the new rate schedule or the modification of the existing rate schedule;

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(c) That further information can be obtained by calling or writing a specific telephone number or address.

(5) "Changes in the criteria or terms and conditions of service" includes all authorized modifications in a particular tariff schedule or offering except for increases and decreases in the base rate, emergency or excise tax surcharge, or the gas cost recovery ("GCR") rate.

(6) "Explanation of the rates, charges, and provisions applicable to the service furnished or available" means a brief summary of the effective rates and the distinctive character of service which distinguish this rate schedule from an alternative one. The explanation may:

(a) Include a typical bill summary and a brief listing of the characteristics of the service or criteria which must be met in order to qualify to receive service under this schedule;

(b) Be oral or written, however, if the customer or applicant specifically requests a written explanation, the utility must provide a written explanation.

(B) Duty to disclose.

(1) Within ninety days after a new rate schedule becomes effective, or within ninety days after modifications or changes in the criteria or terms and conditions of service of an existing tariff schedule or offering become effective, the utility shall disclose to the eligible customers the availability of the new tariff schedule or the fact that the criteria or terms and conditions of service of such an existing tariff have changed. A copy of such notice shall be filed with the public utilities commission prior to its distribution to customers.

(2) Upon the request of any customer or applicant, the utility shall provide an explanation of the rates, charges, and provisions applicable to the service furnished or available to such customers or applicant, and shall provide any information and assistance, such as the availability of alternative tariff schedules, necessary to enable the customer to obtain the most economical utility service conforming to his or her stated needs. Nothing in this rule shall be construed so as to delay the prompt initiation of service if requested by an applicant.

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Public Utilities Commission of Ohio (PUCO)
Attention: Angela Hawkins, Legal Director
Phone: 614-466-0122 Fax: 614-728-8373
angela.hawkins@puc.state.oh.us
or Jeffrey R. Jones, Chief, Telecommunications and Water Sections, Legal Department
Phone: 614-466-0463 Fax: 614-728-8373
jeff.jones@puc.state.oh.us

Regulation/Package Title: Utility Tariffs; Underground Utility Protection Service Registration

Rule Number(s):

4901:1-1-01 Consumer Information
4901:1-1-02 Underground Utility Protection Service Registration
4901:1-1-03 *Duty to Disclose Tariffs*

Date: December 18, 2013

Rule Type:

- ☐ New
- ☒ Amended
- ☒ 5-Year Review
- ☒ No Change
- ☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. **Please briefly describe the draft regulation in plain language.** *Please include the key provisions of the regulation as well as any proposed amendments.*

   Chapter 4901:1-1, Ohio Administrative Code (O.A.C.), establishes a regulated utility's obligation to provide consumers information on the services that the consumer purchases from the utility and requires underground utility protection services to register with the PUCO. Specifically, the rules address consumer information (Rule 4901:1-01, O.A.C.), underground utility protection service registration (Rule 4901:1-02, O.A.C.), and definitions and the duty to disclose tariffs (Rule 4901:1-1-03, O.A.C.).

   Proposed rule amendments include: Rule 4901:1-01, O.A.C., requiring utility's to provide a copy of the company's applicable tariff or customer contract to the customer in the format the customer requests; and Rule 4901:1-1-03, O.A.C., updating statutory references.

2. **Please list the Ohio statute authorizing the Agency to adopt this regulation.**

   Rule 4901:1-01, O.A.C. – Sections 4905.30 and 4927.06, Revised Code

   Rule 4901:1-02, O.A.C. – Section 4905.30, Revised Code

   Rule 4901:1-03, O.A.C. – Section 4905.30, Revised Code

3. **Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?** *If yes, please briefly explain the source and substance of the federal requirement.*

   No rule in this chapter implements a federal requirement or is being adopted or amended to enable Ohio to obtain or maintain approval to administer or enforce federal law.

4. **If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

   Not applicable.

5. **What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

   The public purpose of Rules 4901:1-01 and 4901:1-03, O.A.C., is so that consumers are informed of the rates, terms, and conditions of service that the consumer obtains from a public utility. The public purpose of Rule 4901:1-02, O.A.C., is so that public authorities can

obtain information on registered underground utility protection services operating within the public authorities' area.

6. **How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

   The success of these regulations will be gauged by the number of informal or formal complaints, or lack thereof, registered with the PUCO by consumers and public authorities.

Development of the Regulation

7. **Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.** *If applicable, please include the date and medium by which the stakeholders were initially contacted.*

   The PUCO opened the investigation of this chapter on March 2, 2011, in Case No. 11-776-AU-ORD and invited a wide variety of stakeholders to file initial and reply comments to the rules as drafted and of the minor non-substantive change proposed to Rule 4901:1-01, O.A.C. Those stakeholders specifically served a copy of the entry seeking comment included: Ohio Consumers' Counsel; Ohio Telecom Association; Ohio Trucking Association; Ohio Railroad Association; Ohio Gas Association; Ohio Electric Institute; Ohio Cable Television Association; Ohio Manufacturers Association; Ohio Municipal League; the cities of Cleveland, Columbus, Cincinnati, Dayton, and Toledo; the chair of the Ohio State Bar Association Public Utilities Committee; Ohio Environmental Council; Legal Aid Societies of Cleveland, Columbus, Cincinnati, Dayton, and Toledo; Ohio Chamber of Commerce; Industrial Energy Users-Ohio; Ohio Partners for Affordable Energy; and Ohio Gas Marketers Group.

8. **What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?**

   Comments were provided by a broad spectrum of interest groups. Those stakeholders specifically offering comments and which resulted in modifications to the draft rules in some instances included: Norfolk Southern Railway Company; Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company; Columbia Gas of Ohio, Inc., The East Ohio Gas Company d/b/a Dominion East Ohio, and Vectren Energy Delivery of Ohio, Inc.; Ohio Partners for Affordable Energy; Dayton Power and Light Company; Duke Energy Ohio, Inc.; OMA Energy Group; Columbus Southern Power Company and Ohio Power Company; AT&T Entities; Ohio Consumers' Counsel, Advocates

for Basic Legal Equality, Inc., Citizen Power, and the Ohio Poverty Law Center; and Industrial Energy Users-Ohio.

9. **What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?**

No scientific data was used to develop Chapter 4901:1-1, O.A.C. This chapter is, however, specifically contemplated by Section 4905.30, Revised Code, and two of the three rules in this chapter have been in effect since the early to mid-1980's. In adopting changes to Chapter 4901:1-1, O.A.C., the PUCO has taken into account all feedback from stakeholders and the general public regarding the rules.

10. **What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate?** *If none, why didn't the Agency consider regulatory alternatives?*

Chapter 4901:1-1 is specifically contemplated by Section 4905.30, Revised Code. Thus, regulatory alternatives were not available.

11. **Did the Agency specifically consider a performance-based regulation? Please explain.** *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

Chapter 4901:1-1 is specifically contemplated by Section 4905.30, Revised Code. Thus, performance-based regulations were not considered. The rules in this chapter are regulatory in nature as required by the Revised Code.

12. **What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

Chapter 4901:1-1 is specifically contemplated by Section 4905.30, Revised Code, and no concerns of duplicate regulation have been raised by any of the stakeholders. Thus, as the PUCO is the state agency responsible for regulation of utility service and no concerns of duplicate regulation have been raised by the stakeholders who are principally utility providers, it is highly unlikely that there are any existing duplicate regulations in Ohio.

13. **Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

Chapter 4901:1-1 is specifically contemplated by Section 4905.30, Revised Code, and has been in effect since the 1980's without complaints regarding inconsistent application of the

chapter. The opportunity for continued feedback and input from the regulated community always exists through interaction with the PUCO Staff and better ensures that implementation of the rules in this chapter occurs consistently and predictably.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

a. Identify the scope of the impacted business community;

Rule 4901:1-1-01, O.A.C., applies to all electric, gas, natural gas, waterworks, sewage disposal, and telephone companies providing service to consumers. Rule 4901:1-1-02, O.A.C., requires underground utility protection service providers to register with the PUCO while Rule 4901:1-1-03, O.A.C., applies only to electric, gas, natural gas, waterworks, and sewage disposal companies.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

This chapter focuses on ensuring that consumers receive all pertinent information regarding the rates, terms, and conditions of the utility product consumers receive from public utilities. Compliance with the rules in this chapter does involve the associated time cost of providing this information to consumers upon request and including this information with customer bills. However, since the substantive provisions of these three rules have been in place since the 1980's, the affected utilities have already instituted the necessary programing functionalities to comply with the rules. Therefore, as a result of the continuation of these rules without significant substantive amendment, the nature of any adverse impact is minimalized. Additionally, any expenses associated with providing paper copies to customers by public utilities may be recovered by providing the paper copies "at cost."

c. **Quantify the expected adverse impact from the regulation.** *The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a "representative business." Please include the source for your information/estimated impact.*

The impact in terms of time will be minimal, as utility companies already adhere to Chapter 4901:1-1, O.A.C., and the proposed revisions are unlikely to add any additional burden on business.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

The need for clear and consistent disclosure of information to consumers regarding the utility product they purchase outweighs any potential time that may be associated with compliance with the rules in Chapter 4901:1-1, O.A.C. Compliance with these rules represents "best practices" in the utility world and is no more onerous than the requirements that non-public utility businesses have with their own customers under the Consumer Sales Practices Act, Chapter 1345, Revised Code.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

The regulations provide small businesses with a variety of methods to supply the requested information to the consumer. Those methods include, but are not limited to, e-mail, internet website, facsimile, or first class mail.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

There are no fines or penalties imposed under this chapter; therefore, Section 119.14, Revised Code, is inapplicable.

18. What resources are available to assist small businesses with compliance of the regulation?

The PUCO works with small businesses to ensure compliance with the rules. Recognizing that small public utilities have more limited resources than large investor-owned public utilities, the PUCO's Staff reaches out to small businesses to make those businesses aware of and invite them to participate in the formulation and examination of these regulations primarily through industry groups such as the Ohio Small Local Exchange Carriers Association.

DRAFT - NOT FOR FILING

Appendix to 4901:1-1-02

Underground Utility Protection Service Registration

Name of Service:_____

Address:_____

_____

Telephone Number:_____

Membership List:

_____ _____

_____ _____

_____ _____

_____ _____

(Attach additional sheets if necessary)

_____
Signature

_____
Name

_____
Title

_____
Date

APPENDIX 4901-1-25

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

SUBPOENA

TO:

_____

_____

_____

Upon application of _____ you are hereby required to appear before the Public Utilities Commission of Ohio as a witness for _____ in the following proceeding:

Case No. _____

Case Title_____

_____

_____

You are to appear at the offices of the Commission, 180 East Broad Street, Columbus, Ohio, on the _____ day of _____, 20 _____, at _____ _____.m. in hearing room _____.

You shall bring with you the following:_____

_____

_____

Dated at Columbus, Ohio, this _____ day of _____, 20_____.

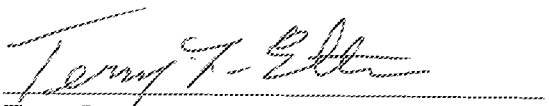
_____

Attorney Examiner

Notice: If you are not a party or an officer, agent, or employee of a party to this proceeding, then witness fees for attending under this subpoena are to be paid by the party at whose request the witness is summoned. Every copy of this subpoena for the witness must contain this notice.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Third Merit Brief and Appendix by the Office of the Ohio Consumers' Counsel was served upon all parties of record via electronic transmission this 11th day of March, 2015.



Terry L. Etter
Assistant Consumers' Counsel

COMMISSION REPRESENTATIVES AND PARTIES OF RECORD

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