



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Joseph Baker, Director

MEMORANDUM

TO: Jeffrey Jones, Public Utilities Commission of Ohio

FROM: Michael Bender, Business Advocate

DATE: January 19, 2024

RE: CSI Review – Administrative Provisions and Procedure (OAC 4901-1-01, 4901-1-02, 4901-1-03, 4901-1-04, 4901-1-05, 4901-1-06, 4901-1-07, 4901-1-08, 4901-1-09, 4901-1-10, 4901-1-11, 4901-1-12, 4901-1-13, 4901-1-14, 4901-1-15, 4901-1-16, 4901-1-17, 4901-1-18, 4901-1-19, 4901-1-20, 4901-1-21, 4901-1-22, 4901-1-23, 4901-1-24, 4901-1-25, 4901-1-26, 4901-1-27, 4901-1-28, 4901-1-29, 4901-1-30, 4901-1-31, 4901-1-32, 4901-1-33, 4901-1-34, 4901-1-35, 4901-1-36, 4901-1-37, and 4901-1-38)

On behalf of Lt. Governor Jon Husted, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Commission as provided for in ORC 107.54.

Analysis

This rule package consists of thirty-seven amended rules and one no-change rule proposed by the Public Utilities Commission of Ohio (PUCO) as part of the statutory five-year review process. This rule package was submitted to the CSI Office on December 4, 2019, and the public comment period was held open through January 27, 2020, after an extension from the original ending date of January 17, 2020. A supplemental comment period was held from June 2, 2020, through June 9, 2020. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI Office on December 4, 2019. On December 13, 2023, the PUCO moved forward with the Finding and Order containing its responses to the comments.

Ohio Administrative Code (OAC) 4901-1-01 specifies definitions related to the PUCO's administrative procedures. The rule is amended to update language. OAC 4901-1-02 specifies certain

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general provisions for the filing of cases with the PUCO via paper, facsimile, and the internet. The rule is amended to update language and the listed website link for the PUCO's docketing division, in addition to reducing the number of copies for a paper filing from twenty to two. OAC 4901-1-03 sets forth the requirements for filing pleadings and other papers with the PUCO. The rule is amended to update language. OAC 4901-1-04 requires all applications, complaints, and other pleadings filed with the PUCO to be signed by the person who files or by his or her attorney. Originally submitted as a no-change rule, the rule is amended to update language. OAC 4901-1-05 provides for the service of pleadings and other papers that are filed with the PUCO upon all parties. The rule is amended to update language and require an attorney representing a party before the PUCO to accomplish service upon other attorney-represented parties via email unless service is completed via the PUCO's e-filing system. OAC 4901-1-06 allows the PUCO, legal director, deputy legal director, or administrative law judge (ALJ) to authorize the amendment of any filed application, compliant, long-term forecast report, or other pleading upon their own motion or upon motion by any party for good cause shown. The rule is amended to update language.

OAC 4901-1-07 provides for the computation of any period of time prescribed or allowed by the PUCO. The rule is amended to update language. OAC 4901-1-08 provides for the legal representation of parties in cases before the PUCO. The rule is amended to update citations and clarify the ability of out-of-state attorneys to appear before the PUCO. OAC 4901-1-09 provides for ex parte discussions regarding the merits of a case. The rule is amended to update language and grammar. OAC 4901-1-10 specifies who is required to be party to a PUCO proceeding. The rule is amended to update language and a citation. OAC 4901-1-11 provides for intervention in a proceeding before the PUCO. The rule is amended to update language. OAC 4901-1-12 provides for the making of motions and accompanying memoranda in support as well as memoranda contra and reply memoranda. The rule is amended to update language. OAC 4901-1-13 provides for the continuances of public hearings and extensions of time to file pleadings or other papers. The rule is amended to update language. OAC 4901-1-14 permits the legal director, deputy legal director, or an ALJ to rule upon any procedural motion or other procedural matter. The rule is amended to update language. OAC 4901-1-15 specifies the process by which a party may take an immediate interlocutory appeal to the PUCO. The rule is amended to update language. OAC 4901-1-16 specifies general provisions with respect to the prehearing discovery process. Originally submitted as a no-change rule, the rule is amended to recognize the discovery limitations of OAC 4901-1. OAC 4901-1-17 specifies the time periods of discovery for different types of proceedings before the PUCO. The rule is amended to update language. OAC 4901-1-18 requires discovery requests and responses to be served upon all parties but not filed with the PUCO. The rule is amended to update language.

OAC 4901-1-19 provides for the serving of written interrogatories by any party to a PUCO proceeding in order to elicit facts, data, or other information and provides for the subsequent answers or objections by the party served. The rule is amended to update language. OAC 4901-1-20 allows

any party to serve upon another party a written request, to which the latter party shall respond with permission or objection, to produce certain items for inspection or to permit entry upon designated land or property. The rule is amended to update language. OAC 4901-1-21 provides for a party to a pending PUCO proceeding to take the testimony of any other party or person aside from PUCO staff by deposition. The rule is amended to update language and clarify that a deposition may not be used as substantive evidence in lieu of the deponent appearing in person at a hearing to give testimony unless otherwise ordered. OAC 4901-1-22 provides for a party to serve requests for the admission of the truth of any specific matter upon any other party for the purposes of the pending proceeding. The rule is amended to update language. OAC 4901-1-23 allows a party to move for an order compelling discovery after it has exhausted all other reasonable means of resolving differences with the party or person from which it seeks discovery. The rule is amended to update language and grammar.

OAC 4901-1-24 permits a party from whom discovery is sought to file a motion for protective order after it has exhausted all other reasonable means of resolving differences with the party seeking discovery. The rule is amended to update language. OAC 4901-1-25 provides for the issuing of subpoenas by the PUCO, legal director, deputy legal director, or ALJ. The rule is amended to update language. OAC 4901-1-26 allows the PUCO, legal director, deputy legal director, or ALJ to hold prehearing conferences in any proceeding. The rule is amended to update language. OAC 4901-1-27 provides for official hearings that are held by the PUCO, legal director, deputy legal director, or ALJ as well as the functions of the presiding hearing officer. The rule is amended to update language. OAC 4901-1-28 provides for written reports whenever the PUCO conducts an investigation during a rate proceeding and in all other cases where they are ordered, in addition to allowing any party the opportunity to file objections to the reports. The rule is amended to update language and grammar. OAC 4901-1-29 requires all expert testimony that is to be offered in PUCO proceedings, besides that offered by PUCO staff, to be put in writing, filed with the PUCO, and served upon all parties prior to the time it is to be offered unless ordered otherwise by the PUCO, legal director, deputy legal director, or ALJ. The rule is amended to update language. OAC 4901-1-30 allows any two or more parties to enter into a written or oral stipulation upon certain conditions. The rule is amended to update language and grammar. OAC 4901-1-31 allows the PUCO, legal director, deputy legal director, or ALJ to permit or require the filing of briefs or memoranda at any point during a proceeding. The rule is amended to update language.

OAC 4901-1-32 permits the PUCO, legal director, deputy legal director, or ALJ to hear oral arguments at any time during a proceeding subject to such time limitations or other conditions as they may provide. The rule is amended to update language and grammar. OAC 4901-1-33 provides for the ALJ's written report of his or her findings, conclusions, and recommendations following the conclusion of a hearing and provides for the exceptions to the report that any party may file. The rule is amended to update language. OAC 4901-1-34 allows the PUCO, legal director, deputy legal director, or ALJ to reopen a proceeding upon their own motion or upon motion of any person for

good cause shown prior to the issuance of a final order. The rule is amended to update language. OAC 4901-1-35 permits any party or affected person, firm, or corporation to file an application for rehearing within thirty days after the issuance of a PUCO order and permits any party to file a memorandum contra within ten days after the filing of such an application. The rule is amended to update language. OAC 4901-1-36 provides for the appeal of a PUCO order to the Ohio Supreme Court. The rule is amended to update language. OAC 4901-1-37 allows the PUCO to hold workshops for the purpose of receiving and exchanging information regarding relevant topics. The rule is amended to update language. OAC 4901-1-38 states that the procedures set forth in the chapter apply to all entities participating in a case before the PUCO.

During early stakeholder outreach, the PUCO informed interested parties that it would hold a workshop on July 12, 2018, to gather comments from stakeholders with respect to OAC 4901-1. Various stakeholders attended, and comments were offered by Columbia Gas of Ohio (Columbia), Dominion Energy Ohio (Dominion), and the Environmental Law and Policy Center (ELPC). The PUCO subsequently made some modifications to the draft rules as a result of these comments. During the CSI public comment period, the PUCO received comments from the ELPC, Columbia, Dominion, Duke Energy Ohio, Inc. (Duke), Vectren Energy Delivery of Ohio, Inc. (Vectren), the Ohio Edison company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy), the Ohio Power Company (AEP Ohio), the Dayton Power and Light Company (AES Ohio), Interstate Gas Supply, Inc. (IGS), the Ohio Consumers' Counsel (OCC), the Northwest Ohio Aggregation Coalition (NOAC), Industrial Energy Users – Ohio (IEU-Ohio), the Ohio Energy Group, the Ohio Manufacturers' Association Energy Group, and the Ohio Telecom Association. No comments were received during the supplemental comment period.

Dominion suggested the inclusion of a statutory reference to the definition of an ALJ that would empower the PUCO to appoint examiners. The PUCO incorporated this citation into the rules. IGS, IEU-Ohio, Columbia, Dominion, the OCC, and the NOAC advocated for the expansion of service by email with respect to pleadings and other papers. The PUCO responded by establishing email as the default method of service upon parties represented by an attorney. The OCC and NOAC objected to proposed new language which they said would limit a party's ability to use non-lawyer experts in settlement discussion. The PUCO stated that the provision was meant to prevent the unauthorized practice of law but ended up striking it from the rules, stating that it would cause too much confusion and noting that the Ohio Supreme Court already has a rule preventing unauthorized practice of law. The OCC and NOAC also proposed allowing motions to intervene that are filed out of time to be granted for good cause rather than under extraordinary circumstance, asserting that this would comply with ORC 4903.221. AEP Ohio disagreed with this proposal, believing that it would delay proceedings and incentivize untimely filings. The PUCO agreed with the OCC and NOAC, pointing out that the proposal better reflected statutory language which provides it discretion to grant late-filed motions for good cause. AEP Ohio proposed a change to recognize the discovery limitations

found in OAC 4901-1. The PUCO agreed that it would increase clarity and adopted the suggestion in the rules. The OCC and NOAC urged the PUCO to require parties answering requests for admission to sign objections and answers separately. The PUCO incorporated this request into the rules, believing that it would provide additional clarity to discovery responses without causing an undue burden.

Columbia and Duke wished for motions to extend a protective order to be automatically approved if the PUCO does not act on it before the protective order expires. The OCC and NOAC opposed this, arguing that automatic approval would not be transparent. The PUCO agreed with the recommendation and revised the rules accordingly, noting that it did not conflict with the goal of transparency because this provision would only apply to already-approved protective orders and because it would still retain the ability to deny a motion. FirstEnergy suggested including a statutory citation to clarify a provision regarding subpoenaed persons receiving witness fees and mileage expenses. The PUCO agreed that this would provide more clarity and adopted the change. Dominion asked the PUCO to remove certain requirements pertaining to prehearing conferences that were duplicative of requirements applicable to complaint cases, asserting that non-complaint cases are more complex and that the decision to settle should rest with the parties involved. The PUCO agreed and removed these requirements. Columbia and Dominion called for rebuttal testimony in a rate proceeding to be at the option of the PUCO, a suggestion which the PUCO incorporated. The OCC and NOAC advocated allowing parties to raise new objections to a PUCO staff report in a rate case proceeding if the report is modified after objections are filed. The PUCO considered this to be fair and revised the rules to reflect this. Lastly, the PUCO made further revisions to the rules to update language. The OCC and NOAC proposed a new rule to require utilities to file all documentation supporting the calculation of tariff rates in the docket. This proposal was opposed by AEP Ohio, Columbia, Dominion, Duke, Vectren, and AES Ohio. The PUCO declined to adopt this change on the grounds that interested parties already have the means to intervene and discover such information. Several other recommendations were rejected by the PUCO due to being unnecessary or conflicting with statute.

The business community impacted by the rules includes public utilities and other entities who participate in a proceeding before the PUCO. The adverse impacts created by the rules include the time and costs needed to compile documents such as applications or motions to be filed with the PUCO and served upon the other parties, hire attorneys who may represent the party before the PUCO, inspect documents or properties, produce documents and other items upon a motion for discovery, perform questioning of witnesses and experts, participate in hearings or conferences before the PUCO, reimburse witnesses subpoenaed by the party to appear at a hearing, and appeal a PUCO order to the Ohio Supreme Court. The PUCO states that the adverse impacts are necessary to establish standards which govern proceedings before the PUCO.

Recommendations

Based on the information above, the CSI Office has no recommendations on this rule package.

Conclusion

The CSI Office concludes that the Commission should proceed in filing the proposed rules with the Joint Committee on Agency Rule Review.