

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S
REVIEW OF CHAPTER 4901:1-38 OF THE
OHIO ADMINISTRATIVE CODE.

CASE NO. 18-1191-EL-ORD

FINDING AND ORDER

Entered in the Journal on May 6, 2020

I. SUMMARY

{¶ 1} The Commission adopts the proposed amendments to Ohio Adm.Code 4901:1-38-03, 4901:1-38-04, 4901:1-38-05, 4901:1-38-06, and 4901:1-36-07, as no change rules Ohio Adm.Code 4901:1-38-01, 4901:1-38-02, 4901:1-38-08, and 4901:1-38-09.

II. DISCUSSION

A. *Procedural Background*

{¶ 2} R.C. 111.15(B) and R.C. 106.03(A) require 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 Chapter 4901:1-38 concerns reasonable arrangements for electric utility customers.¹

{¶ 3} R.C. 106.03(A) requires the Commission to determine whether:

- (a) The rules should be continued without amendment, be amended, or be rescinded, taking into consideration the purpose, scope, and intent of the statute(s) under which the rules were adopted;
- (b) The rules need amendment or rescission to give more flexibility at the local level;
- (c) The rules need amendment or rescission to eliminate unnecessary paperwork;

¹ Reasonable arrangements include economic development arrangements, energy efficiency arrangements, and unique arrangements.

- (d) The rules incorporate a text or other material by reference and, if so, whether the text or other material incorporated by reference is deposited or displayed as required by R.C. 121.74, and whether the incorporation by reference meets the standards stated in R.C. 121.71, 121.75, and 121.76;
- (e) The rules duplicate, overlap with, or conflict with other rules;
- (f) The rules have an adverse impact on businesses, as determined under R.C. 107.52;
- (g) The rules contain words or phrases having meanings that in contemporary usage are understood as being derogatory or offensive; and
- (h) The rules require liability insurance, a bond, or any other financial responsibility instrument as a condition of licensure.

{¶ 4} Among other things, the Commission must review its rules to determine the impact that a rule has on small businesses; attempt to balance properly the critical objectives of regulation and the cost of compliance by the regulated parties; and amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, needlessly burdensome, have had negative unintended consequences, or unnecessarily impede business growth.

{¶ 5} Also, in accordance with R.C. 121.82, in the course of developing draft rules, the Commission must conduct a business impact analysis (BIA) regarding the rules. If there will be an adverse impact on business, as defined in R.C. 107.52, the agency is to incorporate features into the draft rules 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 office the draft rules and the BIA.

{¶ 6} By Entry issued on October 24, 2018, the Commission scheduled a workshop at the Commission offices on November 8, 2018, to elicit feedback on the rules and to permit stakeholders to propose their own revisions to the rules for Staff's consideration. The workshop was conducted as scheduled, with changes proposed by four stakeholders.

{¶ 7} Staff evaluated the rules contained in Ohio Adm.Code Chapter 4901:1-38 and, following its review, proposed amendments to Ohio Adm.Code 4901:1-38-03, 4901:1-38-04, and 4901:1-38-05. The remaining rules in the chapter were, under Staff's proposal, to remain unchanged.

{¶ 8} By Entry issued on April 3, 2019, the Commission ordered all interested parties to file comments and reply comments concerning the proposed amendments. Initial and reply comments were due by May 3, 2019, and May 20, 2019, respectively.

{¶ 9} Consistent with the April 3, 2019 Entry, written comments and reply comments were filed in this proceeding on May 3, 2019, and May 20, 2019, by The Ohio Manufacturers' Association Energy Group (OMAEG), The Office of the Ohio Consumers' Counsel (OCC), FirstEnergy Service Company (FirstEnergy), Ohio Energy Group (OEG), and Industrial Energy Users – Ohio (IEU).

B. Consideration of the Comments

{¶ 10} **Ohio Adm.Code 4901:1-38-01 Definitions:** The Commission notes that current Ohio Adm.Code 4901:1-41-01(C) defines "delta revenue" as "the deviation resulting from the difference in rate levels between the otherwise applicable rate schedule and the result of any reasonable arrangement approved by the Commission."

{¶ 11} FirstEnergy proposes amending the definition of "delta revenue" so that it is defined as "the deviation resulting from the difference between the otherwise applicable charges for electric service and the result of any reasonable arrangement approved by the Commission." First Energy explains that it makes such a proposal because Staff has recommended amending Ohio Adm.Code 4901:1-38-03 to add more criteria for analyzing

reasonable arrangements applications.² Included among the criteria is whether a customer has explored or taken advantage of other opportunities for operations savings, including shopping for or self-generating electricity. FirstEnergy makes its proposal “to account for circumstances where a reasonable arrangement customer takes advantage of other opportunities for savings that result in differences from the customer’s otherwise applicable rate schedule.”

{¶ 12} The Commission notes that the proposed criteria in Ohio Adm.Code 4901:1-38-03 for economic development applications are standards that the Commission “will consider,” not standards that an applicant must comply with. Thus, FirstEnergy’s proposed amendment to the definition of “delta revenue” in Ohio Adm.Code 4901:1-38-01 is unnecessary.

{¶ 13} OCC contends that while R.C. 4905.31 does not prohibit a public utility from establishing or entering into any reasonable arrangement, there is no mention of a unique arrangement in the Revised Code. Consequently, asserts OCC, rules concerning unique arrangements should be rescinded from the Ohio Administrative Code. In addition, OCC proposes that a definition be created for a “reasonable arrangement,” so that a “reasonable arrangement” is defined as “an economic development arrangement or energy efficiency arrangement pursuant to R.C. 4905.31.” OCC suggests that this would align the Ohio Administrative Code with terminology for the Ohio Revised Code, and clarify any confusion between a reasonable arrangement and a unique arrangement.

{¶ 14} The Commission finds that R.C. 4905.31 does not prohibit a unique arrangement. Therefore, we disagree with OCC’s contention that rules concerning unique arrangements should be rescinded, and that a “reasonable arrangement” be defined to include only economic development arrangements and energy efficiency arrangements.

² The Commission notes that, while Ohio Adm.Code 4901:1-38-03 concerns only economic development applications, Staff has also proposed additional criteria for energy efficiency arrangements in Ohio Adm.Code 4901:1-38-04 and unique arrangements in Ohio Adm.Code 4901:1-38-05.

{¶ 15} Ohio Adm.Code 4901:1-38-02 Purpose and Scope: OCC contends that current Ohio Adm.Code 4901:1-38-03(E), 4901:1-38-04(D), 4901:1-38-05(F), and 4901:1-38-08(C) allow parties just 20 days to file comments after an application for a reasonable arrangement is filed. OCC contends that this time period is unreasonably short and does not allow for discovery, particularly given the 20-day turnaround for discovery under Commission rules. OCC urges the Commission to delete each of the aforementioned 20-day requirements and amend Ohio Adm.Code 4901:1-38-02 so that parties may file a motion to intervene, and unless otherwise ordered by the Commission, file comments and objections to an application within 60 days of its filing. OCC also contends that Ohio Adm.Code 4901:1-38-02 should be amended to specify that discovery may begin immediately after a reasonable arrangement application is filed, and to state that, unless otherwise ordered by the Commission, discovery responses must be provided within seven calendar days.

{¶ 16} In reply comments, OEG disagrees with OCC's 60-day proposal for filing comments and objections to an application. In OEG's opinion, many reasonable arrangement cases need to be resolved expeditiously in order to facilitate the capital investments contemplated by the proposed arrangement. Therefore, states OEG, the Commission should either retain the current 20-day deadline for intervention and comments or establish a deadline no more than 30 days after the filing of the application.

{¶ 17} The Commission finds that the discovery response time is adequate and should remain at 20 days. We also find that the deadline for filing motions to intervene and submitting comments for economic development, energy efficiency, unique arrangement, and revenue recovery applications should remain at the current 20 days after the filing of such applications as currently specified in Ohio Adm.Code 4901:1-38-03(E), 4901:1-38-04(D), 4901:1-38-05(F), and 4901:1-38-08(C). If an applicant needs more time to file a motion to intervene or comments, a request can be made, which the Commission will consider on a case-by-case basis.

{¶ 18} Ohio Adm.Code 4901:1-38-03 Economic Development Arrangements: Ohio Adm.Code 4901:1-38-03(A)(2) specifies criteria that the Commission “will consider” regarding an application for economic development arrangement between an “electric utility and a new or expanding customer or group of customers.” Ohio Adm.Code 4901:1-38-03(B)(2) specifies criteria that the Commission “will consider” regarding such an application between “the electric utility and its customer or group of customers for the retention of an existing customer(s) likely to cease, reduce, or relocate out of state.”

{¶ 19} IEU observes that Staff’s proposed criteria include that a customer’s business is “acutely energy intensive or has a distinct energy profile.” IEU contends that “acutely energy intensive” and “distinct energy profile” are not defined terms in statutes or in rules and do not have a standard business meaning. IEU urges the Commission to remove these criteria and instead require the applicant to address whether its energy profile provides a basis for approving an application.

{¶ 20} IEU next focuses on the proposed criterion that the applicant “must provide evidence that the economic impact of the customer’s project on the region will be significant and will create or retain jobs.” In IEU’s opinion, this is too expensive and burdensome for smaller customers.

{¶ 21} IEU contends that proposed criterion requiring that “charges paid to the utility cover all incremental costs of service and contribute to the payment of fixed costs” does not define the incremental and fixed costs that are to be considered. More importantly, states IEU, the cost information is not held by the applicant customer. IEU asserts that the proposed requirement should be deleted, as it may be difficult to attain for a mercantile customer filing without utility support under R.C. 4905.31.

{¶ 22} Regarding proposed criteria in Ohio Adm.Code 4901:1-38-03(B)(2) for retention of existing customers, IEU notes that the language mirrors requirements for reviewing an application filed for a new investment by a new or an existing customer. Accordingly, IEU urges that the proposed rule should remove provisions that require

commitments to new investment or support of a new industry, because if “a customer’s decision has been reduced to whether it will stay in business or move, requiring a commitment to a new investment will signal that Ohio is not open to retaining this customer and the jobs that customer provides.”

{¶ 23} In reply comments, OMAEG supports IEU’s request to clearly define key terms in the rules. OMAEG contends that the “incremental costs” and “fixed costs” referred to in Ohio Adm.Code 4901:1-38-03(A)(2)(f) must be defined to provide clarity for parties. OMAEG urges that the Commission, in addition to making mandatory the criteria that is considered necessary, should provide definitions of key terms underlying the criteria so that all parties can ascertain exactly what requirements must be met.

{¶ 24} Further, OMAEG opposes IEU’s proposal to remove the criteria in Ohio Adm.Code 4901:1-38-03(A)(2)(d) requiring that customers seeking economic development arrangements must show that the project that is the subject of the arrangement will have a significant economic impact on the region and create or retain jobs. OMAEG disagrees with IEU that the proposed rule requires an economic impact study; rather, the proposed rule does not foreclose other means of demonstrating compliance with the requirement. Also, asserts OMAEG, IEU’s proposed alternative does not ensure sufficient benefits to justify approval of an economic development arrangement.

{¶ 25} In reply comments, FirstEnergy addresses IEU’s concern that the Commission does not define “fixed costs” and “incremental costs” referred to in Ohio Adm.Code 4901:1-38-03(A)(2)(f) and 4901:1-38-03(B)(2)(f). FirstEnergy asserts that any definition of “incremental costs” and “fixed costs” must include 100 per cent of the base distribution charges and all distribution-related riders that are otherwise applicable to the reasonable arrangements customer.

{¶ 26} In reply comments, OCC contends that the Commission should reject IEU’s proposal to eliminate an applicant’s showing of economic impact before the applicant receives approval for an economic development arrangement. In OCC’s opinion, if a

customer wants a subsidy, that customer should be willing to pay the cost of an economic impact study. OCC adds that there must be some showing that the costs of the agreement are exceeded by the economic development benefits of the agreement.

{¶ 27} The Commission does not find that the terms “acutely energy intensive” and “distinct energy profile” are ambiguous or unclear. Regarding the economic impact of a customer’s project, the Commission emphasizes that this criterion does not require that an applicant must conduct an economic impact study; rather, a short description of the economic impact will be sufficient. Concerning the proposed criterion that an applicant must provide information demonstrating that “charges paid to the utility to cover all incremental costs of service and contribute to the payment of fixed costs,” we reemphasize that this criterion is not mandatory, and that an applicant can request a waiver from the criteria pursuant to Ohio Adm.Code 4901:1-38-02(B).

{¶ 28} In its comments, FirstEnergy observes that the criteria in Ohio Adm.Code 4901:1-38-03(A)(2)(f) and 4901:1-38-03(B)(2)(f) state that “the charges paid to the utility cover all incremental costs of service and contribute to the payment of fixed costs.” In FirstEnergy’s opinion, the Commission must ensure that the charges include 100 per cent of the base distribution charges and all distribution-related riders that are otherwise applicable to the applicant, i.e., the customer. FirstEnergy adds that electric utilities must be made financially whole for any economic development arrangement through a combination of charges to the applicant customer and full recovery of delta revenue.

{¶ 29} FirstEnergy further notes that the use of the word “emergency” in 4901:1-38-03(B)(2)(e) is a typographical error. FirstEnergy proposes changing the word “emergency” to “energy.” Similarly, First Energy notes that language in Ohio Adm.Code 4901:1-38-02(B)(2) should state that information should be submitted to the utility and the Commission, instead of only the Commission, so that the language is consistent with Ohio Adm.Code 4901:1-38-03(A)(2).

{¶ 30} In reply comments, OEG opposes FirstEnergy's proposal that all reasonable arrangement customers, as well as energy efficiency arrangement customers and unique arrangement customers, should be required to pay 100 percent of their utility's base distribution charges and distribution-related rider charges. OEG observes that R.C. 4905.31 gives the Commission broad discretion in structuring reasonable arrangement rates that can work under a variety of circumstances.

{¶ 31} The Commission disagrees with FirstEnergy that the reasonable arrangements rules should be amended so that electric utilities should always be made whole. The Commission has broad discretion in structuring, approving, and altering reasonable arrangements if necessary; that authority includes ordering utilities to bear some of the costs, if and when appropriate. We agree with FirstEnergy, however, that the word "emergency" should be changed to "energy" in Ohio Adm.Code 4901:1-38-03(B)(2)(e). We also agree that Ohio Adm.Code 4901:1-38-02(B)(2) should be amended to state that information should be submitted to the Commission and the utility, instead of only the Commission, thereby making the language consistent with Ohio Adm.Code 4901:1-38-03(A)(2).

{¶ 32} OCC contends that the criteria for an economic development arrangement application should be mandatory. More specifically, OCC focuses on the criteria in Ohio Adm.Code 4901:1-38-03(A)(2)(g), which requires that the "benefits to the community accruing from the project outweigh the cost imposed on the other retail customers." In OCC's opinion, the words "quantitative" or "monetary" should be added before the words "benefits" and "costs," in order to give meaning to the cost/benefit test proposed under this particular criteria. Otherwise, contends OCC, the test will not protect customers from having to unreasonably fund arrangements whose costs exceed the benefits. OCC adds that the same modification should be made to similar criteria in Ohio Adm.Code 4901:1-38-03(B)(2)(g) and Ohio Adm.Code 4901:1-38-04(A)(2)f).

{¶ 33} OCC next focuses on current language in Ohio Adm.Code 4901:1-38-03(B)(2)(k), which states that that “the customer shall identify any other local, state, or federal assistance sought and/or received in order to maintain its current operations.” In OCC’s opinion, the customer should also be required to demonstrate that it attempted to take advantage of similar other opportunities before filing an application for a reasonable arrangement. OCC adds that the same modification should be made to Ohio Adm.Code 4901:1-38-04(A)(2)(d), which concerns energy efficiency arrangements.

{¶ 34} OCC also focuses on proposed language in Ohio Adm.Code 4901:1-38-03(A)(2)(h) and OhioAdm.Code 4901:1-38-03(B)(2)(h), which require that the arrangement be for a “set term.” OCC recommends a five-year term to avoid situations where the economic development arrangement becomes a long-term charge to consumers to subsidize an individual mercantile customer’s operations. OCC also proposes that renewal of an economic development arrangement must be done by a separate application to prevent an applicant filing for an initial term of three years, to be renewed for an additional three years by consent of the customer and the utility. OCC asserts that the same recommendation and reasoning applies to energy efficiency arrangements addressed by Ohio Adm.Code 4901:1-38-04(A)(2)(g).

{¶ 35} OCC objects to Staff’s proposal to delete the requirement in current Ohio Adm.Code 4901:1-38-03(A)(2)(b) that at least 25 jobs be created. OCC contends that the mercantile customer and the utility should be required to demonstrate that the arrangement promotes job growth and retention in Ohio; thus, creating a minimum of 25 new jobs is not unreasonable.

{¶ 36} In reply comments, IEU opposes criteria requiring that an application for an economic development arrangement must include that the applicant increases employment by 25 employees. In IEU’s opinion, the potential applicants are too diverse and the number 25 is arbitrary. IEU contends that a smaller or larger employment change may be sufficient

to justify an application, and new employment is one of many different benefits that might be realized from an economic development arrangement.

{¶ 37} In addition, IEU urges the Commission to reject OCC's recommendation that the proposed impact analysis must contain a discussion of the impact of the proposal on small business. IEU notes that OCC initially states that an economic development arrangement is a "payment" to the affected customers. While other customers may pay delta revenue, IEU observes, the arrangements approved by the Commission are not payments to the customer benefiting from the arrangement; rather, the customer typically is provided relief from certain charges or the opportunity to participate in certain rate programs. Second, contends IEU, OCC incorrectly assumes that eligibility is limited to mercantile customers; in IEU's opinion, the statute recognizes that the utility may enter an arrangement with any customer, and a mercantile customer or group of them may seek a reasonable arrangement unilaterally. Third, asserts IEU, OCC assumes that the current requirements would not address economic costs. IEU notes that the proposed rule, however, would require the applicant to address the costs and benefits of the proposal.

{¶ 38} In reply comments, OEG asserts that the Commission should reject OCC's proposal to restrict reasonable arrangements to five-year terms with limited exceptions. OEG states that such unnecessary and arbitrary limitations constrict the broad flexibility granted by R.C. 4905.31 and may discourage capital investment in Ohio by companies that need arrangements exceeding five years to justify the investment. Further, asserts OEG, such limitations conflict with the terms of currently effective reasonable arrangements.

{¶ 39} The Commission does not find that OCC's proposed changes to Ohio Adm.Code 4901:1-38-03(A)(2)(g), 4901:1-38-03(B)(2)(g), and 4901:1-38-04A)(2)(f) are necessary. Language proposed by Staff provides the Commission with relevant and adequate information that it needs to make informed and reasonable decisions. Regarding OCC's recommended language for Ohio Adm.Code 4901:1-38-03(B)(2)(k), the Commission finds that OCC's concern is already addressed in Staff's proposed language, which requests

information concerning the benefits from an economic development arrangement. Further, we do not find that economic development arrangements should be limited to a five-year term as OCC recommends. Rather, the Commission should retain authority to determine the length of time for a contract that is just and reasonable, as well as the authority to continuously monitor reasonable arrangements and alter them when appropriate.

{¶ 40} In its comments, OMAEG states that the Commission should establish “minimum, mandatory standards” for economic development arrangements. With Ohio Adm.Code 4901:1-38-03(A) and (B) in mind, OMAEG states that the Commission should require all recipients of economic development arrangements to document energy management and cost-reduction practices. OMAEG also urges the Commission to require that the benefits of a proposed economic development arrangement outweigh the costs that it imposes on other customers. Further, OMAEG urges the Commission to require that the proposed arrangement require capital investment and create jobs that meet minimum wage requirements, and require that recipients of economic development arrangements be energy-intensive customers. OMAEG contends that all customers should be limited to one economic development arrangement of a maximum five years, unless or until the applicant can demonstrate it is making a significant investment in Ohio through expanded or new facilities and is experiencing exceptional job growth. Finally, OMAEG asserts, renewals of reasonable arrangements should be prohibited, so that applicants can not receive an endless stream of economic development arrangements at the expense of other customers.

{¶ 41} OMAEG contends that criteria in Ohio Adm.Code 4901:1-38-03(B)(2), such as making new investments in Ohio, are inconsistent with retaining existing customers. Also, states OMAEG, when the applicant claims that it could relocate to another location, the Commission should require verifiable information substantiating that claim, including information concerning where the applicant might possibly relocate and the feasibility of doing so. If the applicant presents the possibility of reducing or ending Ohio operations, OMAEG asserts that the applicant should be required to produce information substantiating that possibility as well.

{¶ 42} In reply comments, OCC contends that the Commission should make mandatory the criteria for applicants to receive an economic development arrangement under Rule 4901:1-38-03 or an energy efficiency arrangement under Rule 4901:1-38-04.

{¶ 43} In reply comments, IEU supports the position that applicants not be required to comply with all criteria for an economic development arrangement.

{¶ 44} In reply comments, OEG urges the Commission to reject OCC's and OMAEG's proposal to restrict economic development arrangements to five-year terms with limited exceptions. In OEG's opinion, such unnecessary and arbitrary limitations constrict the broad flexibility granted by R.C. 4905.31 and may discourage capital investment in Ohio by companies that need arrangements longer than five years to justify that investment.

{¶ 45} The Commission finds that it is not necessary that criteria for an economic development application be mandatory, or that an applicant submit a cost/benefit analysis. Staff's proposed language for the rule will provide Staff, intervenors, and the Commission with relevant information needed for an informed and reasoned decision. As for OMAEG's proposal that the Commission require an economic development arrangement to meet minimum wage requirements and that applicants be energy-intensive customers, we note that Staff's proposed Ohio Adm.Code 4901:1-38-03(A)(2)(a), 4901:1-38-03(A)(2)(d), 4901:1-38-03(B)(2)(a), and 4901:1-38-03(B)(2)(d) address job growth and minimum wage, while also stating that the customer's business is acutely energy-intensive. Further, because the Commission's authority to approve and alter contractual arrangements should not be limited, we disagree with OMAEG that an economic development arrangement should not extend beyond five years and renewals of such arrangements are prohibited. In addition, we note that an existing customer could still decide to make new investments; such criteria should not be deleted from the rule, as new investments are not necessarily inconsistent with retaining existing customers. Finally, the criteria need not require submission of information by an applicant that indicates it might relocate. Staff's proposed criteria provides information necessary for an informed decision by the Commission; in responding

to the criteria, an applicant has the burden of proving that a proposed arrangement is indeed reasonable.

{¶ 46} OEG supports Staff's proposed changes to 4901:1-38-03 addressing economic development arrangements.

{¶ 47} In reply comments, OMAEG agrees with OEG that the criteria proposed by Staff will ensure that any approved arrangements are in the public interest. OMAEG adds, however that the criteria should be mandatory for applicants to comply with, not simply criteria that the Commission will consider.

{¶ 48} The Commission finds that the criteria specified in Ohio Adm.Code 4901:1-38-03 does not need to be mandatory. As proposed by Staff, an applicant's responses to the criteria will provide Staff, intervenors, and the Commission with relevant and adequate information to make an informed and reasoned decision.

{¶ 49} Ohio Adm.Code 4901:1-38-04 Energy Efficiency Arrangements: OEG supports Staff's proposed changes to Ohio Adm.Code 4901:1-38-04 addressing energy efficiency arrangements.

{¶ 50} FirstEnergy recommends that Ohio Adm.Code 4901:1-38-04(A)(2) should include language stating that "the charges paid to the utility cover all incremental costs of service and contribute to the payment of fixed costs." FirstEnergy asserts that energy efficiency arrangement customers should be responsible for certain utility charges, and the Commission must ensure that those charges include 100 percent of the base distribution charges and all distribution-related riders that are otherwise applicable to the energy efficiency arrangement customer. FirstEnergy contends that electric utilities must be made financially whole for any energy efficiency arrangement through a combination of charges to the energy efficiency arrangement customer and full recovery of delta revenue.

{¶ 51} FirstEnergy further urges the rule to require that information submitted for an energy efficiency application must be provided to the utility and the Commission, instead of just the utility, as Staff's proposed language states.

{¶ 52} The Commission disagrees with FirstEnergy's contention that Ohio Adm.Code 4901:1-38-04 should contain language ensuring that electric utilities must be made financially whole for any energy efficiency arrangement. Such language is unnecessary, as the Commission is given broad discretion in structuring, approving, and altering, if necessary, reasonable arrangements. However, we agree with FirstEnergy's proposal to amend the rule so that information submitted in conjunction with an energy efficiency arrangement application must be submitted to the utility and the Commission, not just to the utility.

{¶ 53} OCC generally supports Staff's proposed amendments and makes the same recommendations for Ohio Adm.Code 4901:1-38-04 as in Ohio Adm.Code 4901:1-38-03. In addition, OCC proposes the addition of criteria in Ohio Adm.Code 4901:1-38-04(A)(2)(h) stating that "the energy efficiency arrangement is for a set term not exceeding sixty months."

{¶ 54} In reply comments, OEG asserts that the Commission should reject OCC's proposal to restrict such arrangements to five year terms, with limited exceptions. In OEG's opinion, such unnecessary and arbitrary limitations constrict the broad flexibility granted by R.C. 4905.31 and may discourage capital investment in Ohio by companies that need arrangements longer than five years to justify that investment.

{¶ 55} As with our conclusions concerning OCC's proposals for Ohio Adm.Code 4901:1-38-03, we find that OCC's proposed amendments to Ohio Adm.Code 4901:1-38-04 should not be adopted. Language proposed by Staff provides the Commission with relevant information that it needs to make informed and reasonable decisions. Specifically regarding OCC's proposal that an energy efficiency arrangement not exceed 60 months, we emphasize that such language in the rule is unnecessary, as the Commission has authority to continuously monitor reasonable arrangements and alter them if and when it sees fit.

{¶ 56} OMAEG asserts that the criteria for an energy efficiency arrangement should be mandatory. OMAEG further contends that a manufacturer of energy efficiency products that promote the more efficient use of energy or the production of clean renewable energy should also be required to annually demonstrate continued use of energy management and cost reduction strategies. In OMAEG's opinion, energy efficiency arrangements should be for a specified duration and should not be renewed. OMAEG would also require applicants to demonstrate significant capital investment, and to competitively shop for their electricity or consider self-generation options for a portion of their load if it benefits the applicant. OMAEG states that energy efficiency arrangements should also be partially incentive-based, so that recipients who fail to maximize potential cost reductions do not receive full funding from other customers under the arrangement.

{¶ 57} As stated above, the Commission finds that it is unnecessary for energy efficiency criteria to be mandatory, because Staff's proposed language provides the Commission with relevant information to make an informed and reasoned decision. We also find that the ability to renew a contract should not be restricted, as the Commission has authority to continuously monitor and amend reasonable arrangements. Finally, we find that OMAEG's other proposals for mandatory criteria, such as requiring applicants to demonstrate significant capital investment and requiring that energy efficiency arrangements be partially incentive-based, are unnecessary, as those requirements would limit the Commission's authority.

{¶ 58} Ohio Adm.Code 4901:1-38-05 Unique Arrangements: OEG supports Staff's proposed changes to Ohio Adm.Code 4901:1-38-05 concerning unique arrangements.

{¶ 59} OCC contends that while R.C. 4905.31(E) contemplates reasonable arrangements for "economic development and job retention" or the "development and implementation of peak demand reduction and energy efficiency programs," there is no unique arrangement statute. OCC adds that because any unique arrangement requires, or should require, a demonstration of the same criteria as an economic development

arrangement or energy efficiency arrangement, Ohio Adm.Code 4901:1-38-05 is superfluous. OCC urges the Commission to rescind Ohio Adm.Code 4901:1-18-05 to “protect consumers from overpaying for arrangements that do not provide system-wide benefits and align the Ohio Administrative Code with the plain language, meaning, and intent of the Ohio Revised Code.”

{¶ 60} The Commission disagrees with OCC’s statutory interpretation and finds that the language in R.C. 4905.31(E) allows for unique arrangements.

{¶ 61} FirstEnergy proposes that Ohio Adm.Code 4901:1-38-05(A)(2) should also require that “the charges paid to the utility cover all incremental costs of service and contribute to the payment of fixed costs.” In FirstEnergy’s opinion, unique arrangement customers should be responsible for certain utility charges, and the Commission must ensure that those charges include 100 per cent of the base distribution charges and all distribution-related riders that are otherwise applicable to the unique arrangement customer. Therefore, states FirstEnergy, electric utilities must be made financially whole for any unique arrangement through a combination of charges to the unique arrangement customer and full recovery of delta revenue. FirstEnergy urges that language should be added to Ohio Adm.Code 4901:1-38-05(B)(1) clarifying that applicants for a unique arrangement must submit required information to the utility and the Commission, not just the utility.

{¶ 62} The Commission does not find that FirstEnergy’s proposed language is necessary. The Commission is given broad discretion in structuring, approving, and altering, if necessary, reasonable arrangements; the power of the Commission should not be restricted. We do, however, agree with FirstEnergy that applicants for a unique arrangement should submit required information for an application to the utility and the Commission, instead of just to the utility.

{¶ 63} **Ohio Adm.Code 4901:1-38-06 Reporting Requirements:** FirstEnergy requests that Ohio Adm.Code 4901:1-38-06(B) be amended to delete current language requiring that

a utility must summarize customers' annual reports required by Ohio Adm.Code 4901:1-38-06(A). FirstEnergy notes that a reasonable arrangement customer is already required to submit an annual report to Staff in accordance with Ohio Adm.Code 4901:1-38-06(A).

{¶ 64} In reply comments, OMAEG opposes First Energy's proposal. OMAEG asserts that Ohio Adm.Code 4901:1-38-06(B) provides Staff with additional information from the utility's perspective in reviewing ongoing compliance with arrangements that the Commission has already approved.

{¶ 65} The Commission is not persuaded by FirstEnergy's arguments. We find that a utility should continue to summarize the annual reports, which provide information from the utility's perspective that may be useful to the Commission.

{¶ 66} OCC asserts that the Commission should amend Ohio Adm.Code 4901:1-38-06 to require additional reporting requirements protecting consumers from paying charges to subsidize arrangements that become unreasonable. OCC contends that an annual report should be filed by the mercantile customer in the docket in which its arrangement was approved by the Commission. OCC states that any notion that a mercantile customer does not fall under the Commission's jurisdiction is without merit, because a mercantile customer submits to Commission jurisdiction when it agrees to accept money from the public for a discount on its service. OCC adds that any concern about confidential or proprietary information is resolved by Commission rules for filing of protective orders. In OCC's opinion, a mercantile customer should be required to publicly demonstrate compliance with the Revised Code and the Ohio Administrative Code when accepting public money for a discount or subsidy for its public utility service.

{¶ 67} The Commission agrees with OCC that a utility should require reasonable arrangement customers to submit an annual report to the Commission, in addition to the utility and Staff. Therefore, we find that the language in Ohio Adm.Code 4901:1-38-06(A) should be amended accordingly. We further find that other proposals made by OCC are not necessary.

{¶ 68} OMAEG asserts that the requirement in Ohio Adm.Code 4901:1-38-06 to file an annual report should more clearly specify what information should be provided in the report, as well as how the recipient of a reasonable arrangement is satisfying the commitments that it made to the Commission when applying for and obtaining the arrangement. OMAEG urges the Commission to establish a review process, under which recipients of economic reasonable arrangements submit reports detailing actual progress made in terms of capital investment, employment, and other commitments. In OMAEG's opinion, such a review process would allow the Commission to ensure that commitments are met and that the benefits promised by such arrangements are actually occurring.

{¶ 69} In reply comments, IEU asserts that the Commission should reject OMAEG's recommendation. IEU observes that the rule specifically requires that the format of an annual report must allow Staff to determine whether compliance with eligibility criteria for the arrangement can be confirmed. IEU adds that parties can agree to expand the reporting requirements if a particular case presents circumstances warranting a different approach. IEU further states that, pursuant to R.C. 4905.31(E), the Commission maintains continuing jurisdiction of reasonable arrangements and can change, alter, or modify them; therefore, compliance issues can be addressed as needed.

{¶ 70} The Commission observes that Ohio Adm.Code 4901:1-38-06(A) already requires the annual report to indicate how an applicant has complied with eligibility criteria, in addition to identifying the value of any incentives and the potential impact on other customers. We find that the Staff's proposed language in the rule is adequate and will provide Staff, intervenors, and the Commission with relevant information necessary to make informed and reasoned decisions.

{¶ 71} **Ohio Adm.Code 4901:1-38-07 Level of Incentives:** FirstEnergy contends that, to calculate the delta revenue for a reasonable arrangement that affects a customer's generation charges, the utility needs access to the charges. Therefore, according to FirstEnergy, a customer with such a reasonable arrangement must be on utility-consolidated

billing. In addition, any operational savings or credits achieved by the reasonable arrangement customer should be considered in the determination of delta revenue. For example, explains FirstEnergy, the incentives associated with a reasonable arrangement for a net metering customer should be reduced by the level of operational savings or credits achieved by the customer through reduced consumption and/or compensation for net excess generation. FirstEnergy proposes inserting language requiring reasonable arrangement customers to use utility-consolidated billing, and requiring that operational savings or credit must be deducted from the level of incentive received under such an arrangement.

{¶ 72} The Commission agrees that, where the calculation of delta revenue under any reasonable arrangement requires consideration of a customer's generation charges, the customer should be required to be billed using utility-consolidated billing. We find that this is reasonable because the utility would need access to the generation charge. However, we do not find that operational savings or credits should be required to be deducted from the level of incentive received under the reasonable arrangement. We find that FirstEnergy's proposal is not consistent with the intent of a reasonable arrangement, and given the Commission's wide discretion in determining how reasonable arrangements should be structured, FirstEnergy's proposal is unnecessary.

{¶ 73} **Ohio Adm.Code 4901:1-38-08 Revenue Recovery:** FirstEnergy asserts that this rule must allow electric utilities to be made financially whole through delta revenue recovery. FirstEnergy contends that a utility should recover 100 per cent of the base distribution charges and all distribution-related rider charges that are otherwise applicable to the reasonable arrangement customer, with the customer responsible for these charges. However, FirstEnergy adds, if the Commission determines that a reasonable arrangement customer should receive a discount on base distribution or distribution-related charges, any resulting discounts must be fully recoverable under Ohio Adm.Code 4901:1-38-08 as delta revenue. Otherwise, FirstEnergy contends, the utility is not being compensated for its fixed costs of providing distribution service to customers. FirstEnergy also urges that the rule

should allow the utility to fully recover all costs associated with transmission and generation, because the associated riders are pass-through riders, which are revenue-neutral.

{¶ 74} In reply comments, OCC urges the Commission to reject FirstEnergy's proposal, because the utility also benefits from a reasonable arrangement. OCC contends that if an applicant has fulfilled the mandatory minimum requirements for a maximum five-year reasonable arrangement, the Commission should require the utility to share equally with its customers the costs of the reasonable arrangement. OCC notes that R.C. 4905.31 authorizes the Commission to determine whether the utility should be authorized to collect costs from customers, and if so, how much. In OCC's opinion, cost sharing between the utility and its customers is consistent with the law governing these kinds of mercantile arrangements.

{¶ 75} The Commission does not find that Ohio Adm.Code 4901:1-38-08 should be amended as proposed by FirstEnergy, nor do we agree with FirstEnergy that electric utilities should always be made whole after entering into reasonable arrangements. The Commission is given broad discretion in structuring and approving, and altering if necessary, reasonable arrangements. The Commission's power to do so should not be restricted by amendments to this rule.

{¶ 76} OCC argues that there is no statutory basis for the Commission to allow a utility to charge customers for delta revenues resulting from a unique arrangement, as opposed to an economic development or energy efficiency arrangement. OCC also asserts that, when a mercantile customer receives a reasonable arrangement, the electric utility should share the costs with customers. Under R.C. 4905.31, OCC notes, an arrangement "may include a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program." In OCC's opinion, this permissive statutory language means that the Commission has the authority to determine

whether the utility should be authorized to collect costs from customers, and if so, how much.

{¶ 77} In reply comments, FirstEnergy urges the Commission to reject OCC's opinion that when a mercantile customer receives a reasonable arrangement, the electric utility should share the costs with customers, and reject OCC's recommendation of an equal 50 per cent split of delta revenue between a utility and its consumers. FirstEnergy asserts that utilities must be made financially whole through a combination of charges to the reasonable arrangement customers and full recovery of delta revenue from its other customers.

{¶ 78} The Commission observes that, pursuant to R.C. 4905.31(E), "every such schedule or reasonable arrangement shall be under the supervision and regulation of the Commission, and is subject to charge, alteration, or modification by the Commission." We also observe that Ohio Adm.Code 4901:1-38-08(A)(1), which states that "the approval of the request for revenue recovery, including the level of such recovery, shall be at the Commission's discretion," reflects the authority given to the Commission by R.C. 4901.31(E). In addition, Ohio Adm.Code 4901:1-38-07(A) and 4901:1-38-09(B) specify the Commission's authority to amend reasonable arrangements. Thus, Staff's proposal to make no changes to Ohio Adm.Code 4901:1-38-08 is reasonable, given that the rule's current language, as well as current language in Ohio Adm.Code 4901:1-38-07 and 4901:1-38-09, already provides the Commission adequate discretion to approve and alter a reasonable arrangement as appropriate.

{¶ 79} **Ohio Adm.Code 4901:1-38-09 Failure to Comply:** FirstEnergy asserts that Ohio Adm.Code 4901:1-38-09(B) should be amended to ensure that utilities are able to recover 100 per cent of the Commission-approved delta revenue. Because both the electric distribution utility (EDU) and Staff receive the annual reports required by Ohio Adm.Code 4901:1-38-06(A), FirstEnergy recommends that the EDU and Staff should be permitted to terminate a reasonable arrangement in compliance with Ohio Adm.Code 4901:1-38-09(A).

{¶ 80} In reply comments, IEU opposes FirstEnergy's proposal to extend the power to terminate a reasonable arrangement to Staff. IEU contends that Staff may not act as prosecutor and judge, and should not be vested with the ability to unilaterally overturn a Commission order approving a reasonable arrangement.

{¶ 81} The Commission disagrees with FirstEnergy's proposal that utilities should be able to recover 100 percent of the Commission-approved delta revenue. Current Ohio Adm.Code 4901:1-38-09(B), which Staff recommends remain unchanged, provides that the Commission "may direct the electric utility to charge the customer for all or part of the incentives previously provided by the electric utility." We also do not agree with FirstEnergy's proposal that the rule should include language allowing the electric distribution utility and Staff to terminate a reasonable arrangement. Given the Commission's jurisdiction over reasonable arrangements, Staff can recommend to the Commission the appropriate amendments to a reasonable arrangement, or recommend termination of the arrangement if necessary.

{¶ 82} OCC contends that the Commission should amend Ohio Adm.Code 4901:1-38-09(B) to require that if a mercantile customer fails to comply with the Revised Code, Ohio Administrative Code, or a Commission order, the failure will result in the money charged to consumers being returned to the consumers.

{¶ 83} In reply comments, OEG states that the Commission should reject OCC's proposal, because many reasonable arrangements already provide for the possibility of refunds under circumstances of fraud or misrepresentation, or if there are violations of the law. OEG further considers OCC's suggestion punitive, because it would require a refund even when a customer could demonstrate good cause for not complying with a particular reasonable arrangement requirement.

{¶ 84} In reply comments, FirstEnergy observes that a mercantile customer who fails to comply with eligibility criteria or reporting obligations may be struggling financially and unable to refund the benefits received from a reasonable arrangement. FirstEnergy states

that if the Commission adopts OCC's proposal, the Commission should ensure that, before a utility must provide such a refund, the customer has first repaid those funds to the utility.

{¶ 85} The Commission finds that Staff's proposed rules adequately address noncompliance issues and need no further modification. As we have already stated, given the Commission's ongoing jurisdiction over reasonable arrangements, the Commission can take appropriate action if a customer fails to comply with terms of a reasonable arrangement.

{¶ 86} OMAEG asserts that incentives of economic development arrangements should be reduced or eliminated in the event that the recipient of such an arrangement is not meeting its commitments. OMAEG observes that the proposed rule does not modify Ohio Adm.Code 4901:1-38-09; therefore, the rule still applies to customers who fail to "substantially comply with any of the criteria for eligibility" or with reporting requirements. However, OMAEG adds, because Staff proposes that the criteria for reasonable arrangements no longer be mandatory, it is unclear which criteria for eligibility proposed Ohio Adm.Code 4901:1-38-09 refers to.

{¶ 87} In reply comments, FirstEnergy contends that OMAEG's objective will be achieved if the Commission adopts FirstEnergy's proposed language for Ohio Adm.Code 4901:1-38-09. FirstEnergy states that its proposal will allow Staff to terminate reasonable arrangements when a customer fails to substantially comply with eligibility criteria and reporting requirements in Ohio Adm.Code Chapter 4901:1-38.

{¶ 88} In reply comments, IEU opposes amending Ohio Adm.Code 4901:1-38-09. IEU contends that the Commission is vested with the authority to alter or modify a reasonable arrangement during the term of the arrangement. Under proper circumstances, states IEU, it may be appropriate, pursuant to Ohio Adm.Code 4901:1-38-09, for the Commission to issue an order terminating a reasonable arrangement and directing the utility to charge the customer for all or a part of the incentives previously provided by the utility. IEU notes that the triggering event is a failure to substantially comply.

{¶ 89} The Commission finds that current Ohio Adm.Code 4901:1-38-09, which Staff proposes remain unchanged, adequately addresses noncompliance issues and does not need further modification, given the Commission's ongoing jurisdiction to amend reasonable arrangements.

C. Conclusion

{¶ 90} The Commission has considered the matters set forth in R.C. 121.82. With these factors in mind, and upon consideration of Staff's recommendations and the written comments, the Commission finds that Ohio Adm.Code 4901:1-38-03, 4901:1-38-04, 4901:1-38-05, 4901:1-38-06, and 4901:1-38-07 should be amended, as set forth in Attachment A. The Commission also finds that no change should be made to Ohio Adm.Code 4901:1-38-01, 4901:1-38-02, , 4901:1-38-08, and 4901:1-38-09.

{¶ 91} The rules are posted on the Commission's Docketing Information System website at <http://dis.puc.state.oh.us/>. To minimize the expense of this proceeding, the Commission will serve a paper copy of this Finding and Order only. All interested persons are directed to input Case Number 18-1191 in the Case Lookup box to view the rules, as well as this Finding and Order, or to contact the Commission's Docketing Division to request a paper copy.

III. ORDER

{¶ 92} It is, therefore,

{¶ 93} ORDERED, That amended Ohio Adm.Code 4901:1-38-03, 4901:1-38-04, 4901:1-38-05, 4901:1-38-06, and 4901:1-38-07 be adopted. It is, further,

{¶ 94} ORDERED, That Ohio Adm.Code 4901:1-38-01, 4901:1-38-02, 4901:1-38-08, and 4901:1-38-09 be adopted with no changes. It is, further,

{¶ 95} ORDERED, That the adopted rules be filed with the Joint Committee on Agency Rule Review, the Secretary of State, and the Legislative Service Commission, in accordance with R.C. Chapter 111.15. It is, further,

{¶ 96} ORDERED, That the final rules be effective on the earliest date permitted by law. Unless otherwise ordered by the Commission, the five-year review date for Ohio Adm.Code Chapter 4901:1-38 shall be in compliance with R.C. 106.03. It is, further,

{¶ 97} ORDERED, That a copy of this Finding and Order be served upon all investor-owned electric utilities in the state of Ohio, all certified competitive retail electric service providers in the state of Ohio, the Electric-Energy list-serve, FirstEnergy, OMAEG, OCC, OEG, and IEU, and all other interested persons of record.

COMMISSIONERS:

Approving:

Sam Randazzo, Chairman
M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

JML/hac

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NO CHANGE

4901:1-38-01 Definitions.

- (A) "Affidavit" means a written declaration made under oath before a notary public or other authorized officer.
- (B) "Commission" means the public utilities commission of Ohio.
- (C) "Delta revenue" means the deviation resulting from the difference in rate levels between the otherwise applicable rate schedule and the result of any reasonable arrangement approved by the commission.
- (D) "Electric utility" shall have the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.
- (E) "Energy efficiency production facilities" means any customer that manufactures or assembles products that promote the more efficient use of energy (i.e., increase the ratio of energy end use services (i.e., heat, light, and drive power) derived from a device or process to energy inputs necessary to derive such end use services as compared with other devices or processes that are commonly installed to derive the same energy use services); or, any customer that manufactures, assembles or distributes products that are used in the production of clean, renewable energy.
- (F) "Mercantile customer" shall have the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.
- (G) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 or 4928.141 of the Revised Code, or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by the electric utility.
- (H) "Staff" means the staff of the commission or its authorized representative.

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NO CHANGE

4901:1-38-02 Purpose and scope.

- (A) The purpose of this chapter is to facilitate the state's effectiveness in the global economy, to promote job growth and retention in the state, to ensure the availability of reasonably priced electric service, to promote energy efficiency and to provide a means of giving appropriate incentives to technologies that can adapt successfully to environmental mandates in furtherance of the policy of the state of Ohio embodied in section 4928.02 of the Revised Code.
- (B) The commission may, upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.

AMENDED

4901:1-38-03 Economic development arrangements.

- (A) An electric utility, mercantile customer, or group of mercantile customers of an electric utility may file an application for commission approval for an economic development arrangement between the electric utility and a new or expanding customer or group of customers. The application shall include a copy of the proposed arrangement and provide information on all associated incentives, estimated annual electric billings without incentives for the term of the incentives, and annual estimated delta revenues for the term of the incentives.
 - (1) Each customer requesting to take service pursuant to an economic development arrangement with the electric utility shall describe the general status of the customer in the community and how such arrangement furthers the policy of the state of Ohio embodied in section 4928.02 of the Revised Code.
 - (2) The commission will consider the following verifiable information, submitted by each customer to the electric utility and the Commission, when analyzing an application under this section. Each customer requesting to take service pursuant to an economic development arrangement with the electric utility shall, at a minimum, meet the following criteria, submit to the electric utility and the commission verifiable information detailing how the criteria are met, and provide an affidavit from a company official as to the veracity of the information provided
 - (a) The customer's business is acutely energy intensive or has a distinct energy profile.

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(b) The customer has made a commitment to investing in Ohio either in a new investment or support of a new industry.

(a)(c) Eligible projects ~~shall~~will be for non-retail purposes.

~~(b) At least twenty-five new, full-time or full-time equivalent jobs shall be created within three years of initial operations.~~

(e)(d) The economic impact of the customer's project on the region is expected to be significant and create or retain jobs. The average hourly base wage rate of the new, full-time or full-time equivalent jobs ~~shall~~will be at least one hundred fifty per cent of the federal minimum wage.

(e) The customer has explored or taken advantage of other opportunities for both non-energy related operational savings such as basic cost management and energy related operational savings such as shopping for or self-generating electricity, energy efficiency, and participation in utility or regional transmission organizations' conservation or reliability programs.

(f) The charges paid to the utility cover all incremental costs of service and contribute to the payment of fixed costs.

(g) The benefits to the community accruing from the project outweigh the costs imposed on the other retail customers because of the reasonable arrangement.

(h) The arrangement is for a set term.

~~(d)(i)~~ The customer ~~shall~~demonstrates financial viability.

(e)(j) The customer ~~shall identify~~identifies local (city, county), state, or federal support in the form of tax abatements or credits, jobs programs, or other incentives.

~~(f)(k)~~ The customer ~~shall identify~~identifies potential secondary and tertiary benefits resulting from its project including, but not limited to, local/state tax dollars and related employment or business opportunities resulting from the location of the facility.

~~(g)(l)~~ The customer ~~shall~~agrees to maintain operations at the project site for the term of the incentives.

(3) An electric utility and/or mercantile customer or group of mercantile customers filing an application for commission approval of an economic development arrangement bears the burden of proof that the proposed arrangement is reasonable and does not violate the provisions of sections 4905.33 and 4905.35 of the Revised Code, and shall submit to the commission verifiable information detailing the rationale for the arrangement and an affidavit from a company official as to the veracity of the information provided in the application.

(B) An electric utility, mercantile customer, or group of mercantile customers of an electric utility may file an application for an economic development arrangement between the electric utility

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and its customer or group of customers for the retention of an existing customer(s) likely to cease, ~~or~~ reduce, ~~or relocate~~ its operations, or relocate them out of state. The application shall include a copy of the proposed arrangement and provide information on all associated incentives, estimated annual electric billings without incentives for the term of the incentives, and annual estimated delta revenues for the term of the incentives.

- (1) ~~Each customer requesting to take service pursuant to an economic development arrangement with the electric utility shall describe the general status of the customer in the community and how such arrangement furthers the policy of the state of Ohio embodied in section 4928.02 of the Revised Code.~~
- (2) The commission will consider the following verifiable information, submitted by each customer to the electric utility and the Commission, when analyzing an application under this section.~~Each customer requesting to take service pursuant to an economic development arrangement with the electric utility shall, at a minimum, meet the following criteria, submit to the electric utility verifiable information detailing how the criteria are met, and provide an affidavit from a company official as to the veracity of the information provided:~~
 - (a) The customer's business is acutely energy intensive or has a distinct energy profile.
 - (b) The customer has made a commitment to investing in Ohio either in a new investment or support of a new industry.
 - (c) Eligible projects shall will be for non-retail purposes.
 - (d) The economic impact of the customer's project on the region is expected to be significant and will create or retain jobs. The average hourly base wage rate of the new, full-time or full-time equivalent jobs will be at least one hundred fifty percent of the federal minimum wage.
 - (e) The customer has explored or taken advantage of other opportunities for both non-energy related operational savings such as basic cost management and energy related operational savings such as shopping for or self-generating electricity, energy efficiency, and participation in utility or regional transmission organizations' conservation or reliability programs.
 - (f) The charges paid to the utility cover all incremental costs of service and contribute to the payment of fixed costs.
 - (g) The benefits to the community accruing from the project outweigh the costs imposed on the other retail customers because of the reasonable arrangement.
 - (h) The arrangement is for a set term.
 - ~~(b) The number of full-time or full-time equivalent jobs to be retained shall be at least twenty-five.~~

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- ~~(e)~~(i) The average billing load (in kilowatts to be retained) ~~shall~~will be at least two hundred fifty kilowatts.
- ~~(d)~~(j) The customer ~~shall~~demonstrates that the cost of electricity is a major factor in its decision to cease, reduce, or relocate its operations to an out-of-state site. In-state relocations are not eligible. If the customer has the potential to relocate to an out-of-state site, the site(s) ~~shall~~will be identified, along with the expected costs of electricity at the site(s) and the expected costs of other significant expenses including, but not limited to, labor and taxes.
- ~~(e)~~(k) The customer ~~shall identify~~identifies any other local, state, or federal assistance sought and/or received in order to maintain its current operations.
- ~~(f)~~(l) The customer ~~shall~~agrees to maintain its current operations for the term of the incentives.

(3) An electric utility and/or mercantile customer or group of mercantile customers filing an application for commission approval of an economic development arrangement bears the burden of proof that the proposed arrangement is reasonable and does not violate the provisions of sections 4905.33 and 4905.35 of the Revised Code, and shall submit to the commission verifiable information detailing the rationale for the arrangement and an affidavit from a company official as to the veracity of the information provided in the application.

- (C) Upon the filing of an economic development application, the commission may fix a time and place for a hearing if the application appears to be unjust or unreasonable.
- (1) The economic development arrangement shall be subject to change, alteration, or modification by the commission.
 - (2) The staff shall have access to all customer and electric utility information related to service provided pursuant to the economic development arrangements.
- (D) Customer information provided to demonstrate eligibility under paragraphs (A) and (B) of this rule shall be treated by the electric utility as confidential. The electric utility shall request confidential treatment of customer-specific information that is filed with the commission, with the exception of customer names and addresses.
- (E) Affected parties may file a motion to intervene and file comments and objections to any application filed under this rule within twenty days of the date of the filing of the application.

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AMENDED

4901:1-38-04 Energy efficiency arrangements.

- (A) An electric utility, mercantile customer, or group of mercantile customers of an electric utility may file an application for commission approval for an energy efficiency arrangement between the electric utility and its customer or group of customers that have new or expanded energy efficiency production facilities. The application shall include a copy of the proposed arrangement and provide information on all associated incentives, estimated annual electric billings without incentives for the term of the incentives, and annual estimated delta revenues for the term of the incentives.
- (1) Each customer requesting to take service pursuant to an energy efficiency arrangement with the electric utility shall describe the general status of the customer in the community and how such arrangement furthers the policy of the state of Ohio embodied in section 4928.02 of the Revised Code.
- (2) The commission will consider the following verifiable information, submitted by each customer to the electric utility and the Commission, when analyzing an application under this section. Each customer requesting to take service pursuant to an energy efficiency arrangement with the electric utility shall meet the following criteria, submit to the electric utility verifiable information detailing how the criteria are met, and provide an affidavit from a company official as to the veracity of the information provided:
- (a) The definition of customer shall be an energy efficiency production facility, as defined specified in this chapter applies to the customer.
 - ~~(b) At least ten new, full-time or full-time equivalent jobs shall be created within three years of initial operations.~~
 - ~~(e)~~(b) The average hourly base wage rate of the new, full-time, or full-time equivalent jobs shall will be at least one hundred fifty per cent of federal minimum wage.
 - ~~(d)~~(c) The customer ~~shall demonstrate~~ financial viability.
 - ~~(e)~~(d) The customer ~~shall identify~~ identifies local (city, county), state, or federal support in the form of tax abatements or credits, jobs programs, or other incentives.
 - (e) The customer ~~shall agree~~ s to maintain operations at the project site for the term of the incentives.
 - (f) The benefits to the community accruing from the project outweigh the costs imposed on the other retail customers because of the reasonable arrangement.
 - ~~(f)~~(g) The arrangement is for a set term.

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- (3) An electric utility and/or mercantile customer or group of mercantile customers filing an application for commission approval of an energy efficiency arrangement bears the burden of proof that the proposed arrangement is reasonable and does not violate the provisions of sections 4905.33 and 4905.35 of the Revised Code, and shall submit to the commission verifiable information detailing the rationale for the arrangement and an affidavit from a company official as to the veracity of the information provided in the application.
- (B) Upon the filing of an energy efficiency application, the commission may fix a time and place for a hearing if the application appears to be unjust or unreasonable.
- (1) The energy efficiency arrangement shall be subject to change, alteration, or modification by the commission.
- (2) The staff shall have access to all customer and electric utility information related to service provided pursuant to the energy efficiency arrangements.
- (C) Customer information provided to the utility to demonstrate eligibility under paragraph (A) of this rule shall be treated by the electric utility as confidential. The electric utility shall request confidential treatment of customer-specific information that is filed with the commission, with the exception of customer names and addresses.
- (D) Affected parties may file a motion to intervene and file comments and objections to any application filed under this rule within twenty days of the date of the filing of the application.

AMENDED

4901:1-38-05 Unique arrangements.

- (A) Notwithstanding rules 4901:1-38-03 and 4901:1-38-04 of the Administrative Code, an electric utility may file an application pursuant to section 4905.31 of the Revised Code for commission approval of a unique arrangement with one or more of its non-mercantile customers, consumers, or employees.
- (1) An electric utility filing an application for commission approval of a unique arrangement with one or more of its customers, consumers, or employees bears the burden of proof that the proposed arrangement is reasonable and does not violate the provisions of sections 4905.33 and 4905.35 of the Revised Code, and shall submit to the commission verifiable information detailing the rationale for the arrangement.

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- (2) Upon the filing of an application for a unique arrangement, the commission may fix a time and place for a hearing if the application appears to be unjust or unreasonable.
- (3) The unique arrangement shall be subject to change, alteration, or modification by the commission.

(B) ~~If a~~ mercantile customer, or a group of mercantile customers, of an electric utility is not eligible for an arrangement under rule 4901:1-38-03 or 4901:1-38-04, the customer may file an application for Commission approval ~~apply to the commission for of~~ a unique arrangement with the electric utility.

- (1) Each customer requesting to take service pursuant to a unique arrangement with the electric utility has the burden of proof that, at a minimum:
 - (a) the customer and/or electric utility is not eligible for an economic development arrangement under rule 4901:1-38-03.
 - (b) the customer and/or electric utility is not eligible for an energy efficiency arrangement under rule 4901:1-38-04.
 - (c) the arrangement is in the public interest.

Further, the customer will submit to the electric utility and the Commission verifiable information detailing how the criteria are met, and provide an affidavit from a company official as to the veracity of the information provided.~~Each customer applying for a unique arrangement bears the burden of proof that the proposed arrangement is reasonable and does not violate the provisions of sections 4905.33 and 4905.35 of the Revised Code, and shall submit to the commission and the electric utility verifiable information detailing the rationale for the arrangement.~~

~~(a) _~~

- (2) A mercantile customer filing an application for commission approval of a unique arrangement has the burden of proof that the proposed arrangement is reasonable and does not violate the provisions of sections 4905.33 and 4905.35 of the Revised Code, and shall submit to the commission and the electric utility verifiable information detailing the rationale for the arrangement.~~The customer shall provide an affidavit from a company official as to the veracity of the information provided.~~
- (3) Upon the filing of an application for a unique arrangement, the commission may fix a time and place for a hearing if the application appears to be unjust or unreasonable.

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- (4) The unique arrangement shall be subject to change, alteration, or modification by the commission.
- (C) Each applicant applying for approval of a unique arrangement ~~between an electric utility and one or more of its customers, consumers, or employees~~ shall describe how such arrangement furthers the policy of the state of Ohio embodied in section 4928.02 of the Revised Code.
- (D) Unique arrangements shall reflect terms and conditions for circumstances for which the electric utility's tariffs have not already provided.
- (E) Customer information provided to the electric utility to obtain a unique arrangement shall be treated by the electric utility as confidential. The electric utility shall request confidential treatment of customer-specific information that is filed with the commission, with the exception of customer names and addresses.
- (F) Affected parties may file a motion to intervene and file comments and objections to any application filed under this rule within twenty days of the date of the filing of the application.

AMENDED

4901:1-38-06 Reporting requirements.

- (A) Each electric utility shall require each of its customers served under any reasonable arrangement established pursuant to this chapter to submit an annual report to the electric utility and staff and file an annual report with the Commission no later than April thirtieth of each year. The format of that report shall be determined by staff such that a determination of the compliance with the eligibility criteria can be determined, the value of any incentives received by the customer(s) is identified, and the potential impact on other customers can be calculated.
- (B) The burden of proof to demonstrate ongoing compliance with the reasonable arrangement lies with the customer(s). The electric utility shall summarize the reports provided by customers under paragraph (A) of this rule and submit such summary to staff for review and audit no later than June fifteenth of each year.

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AMENDED

4901:1-38-07 Level of incentives.

- (A) The level of the incentives associated with any reasonable arrangement established pursuant to this chapter shall be determined as part of the commission's review and approval of the applications filed pursuant to this chapter. Incentives shall only be applicable to the service(s) taken from the electric utility by the customer receiving the incentives.
- (B) Incentives may be based on, but not limited to:
- (1) Demand discounts.
 - (2) Percentages of total bills, or portions of bills.
 - (3) Direct contributions.
 - (4) Reflections of cost savings to the electric utility.
 - (5) Shared savings.
 - (6) Some combination of the required criteria.
- (C) Where the calculation of delta revenue under any economic development arrangement under section 4901:1-38-03, energy efficiency arrangement under section 4901:1-38-04, or unique arrangement under section 4901:1-38-05 requires consideration of a customer's generation charges, the customer shall be billed using utility-consolidated billing.
- (D) Upon commission approval of an application, the reasonable arrangement, as approved, shall be:
- (1) Posted on the commission's docketing information system.
 - (2) Accessible through the commission's web site.
 - (3) Under the supervision and regulation of the commission, and subject to change, alteration, or modification by the commission.

*****DRAFT - NOT FOR FILING*****

NO CHANGE

4901:1-38-08 Revenue recovery.

- (A) Each electric utility that is serving customers pursuant to approved reasonable arrangements, may apply for a rider for the recovery of certain costs associated with its delta revenue for serving those customers pursuant to reasonable arrangements in accordance with the following:
- (1) The approval of the request for revenue recovery, including the level of such recovery, shall be at the commission's discretion.
 - (2) The electric utility may request recovery of direct incremental administrative costs related to the programs as part of the rider. Such cost recovery shall be subject to audit, review, and approval by the commission.
 - (3) For reasonable arrangements in which incentives are given based upon cost savings to the electric utility (including, but not limited to, nonfirm arrangements, on/off peak pricing, seasonal rates, time-of-day rates, real-time-pricing rates), the cost savings shall be an offset to the recovery of the delta revenues.
 - (4) The amount of the revenue recovery rider shall be spread to all customers in proportion to the current revenue distribution between and among classes, subject to change, alteration, or modification by the commission. The electric utility shall file the projected impact of the proposed rider on all customers, by customer class.
 - (5) The rider shall be updated and reconciled, by application to the commission, semiannually. All data submitted in support of the rider update is subject to commission review and audit.
- (B) If it appears to the commission that the proposals in the application may be unjust and unreasonable, the commission shall set the matter for hearing.
- (1) At such hearing, the burden of proof to show that the revenue recovery rider proposal in the application is just and reasonable shall be upon the electric utility.
 - (2) The revenue recovery rider shall be subject to change, alteration, or modification by the commission.
 - (3) The staff shall have access to all customer and electric utility information related to service provided pursuant to the reasonable arrangements that created the delta revenue triggering the electric utility's application to recover the costs associated with said delta revenue.

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- (C) Affected parties may file a motion to intervene and file comments and objections to any application filed under this rule within twenty days of the date of the filing of the application.

NO CHANGE

4901:1-38-09 Failure to comply.

- (A) If the customer being provided with service pursuant to a reasonable arrangement established pursuant to this chapter fails to substantially comply with any of the criteria for eligibility or fails to substantially comply with reporting requirements, the electric utility, after reasonable notice to the customer, shall terminate the arrangement unless otherwise ordered by the commission.
- (B) The commission may also direct the electric utility to charge the customer for all or part of the incentives previously provided by the electric utility.
- (C) If the customer is required to pay for all or part of the incentives previously provided, the recovered amounts shall be reflected in the calculation of the revenue recovery rider established pursuant to rule 4901:1-38-08 of the Administrative Code.

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Case No(s). 18-1191-EL-ORD

Summary: Finding & Order adopting the proposed amendments to Ohio Adm.Code 4901:1-38-03, 4901:1-38-04, 4901:1-38-05, 4901:1-38-06, and 4901:1-36-07, as no change rules Ohio Adm.Code 4901:1-38-01, 4901:1-38-02, 4901:1-38-08, and 4901:1-38-09 electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio