

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S
REVIEW OF CHAPTER 4901:1-26 OF THE
OHIO ADMINISTRATIVE CODE,
REGARDING ALTERNATIVE DISPUTE
RESOLUTION.

CASE No. 18-1187-EL-ORD

ENTRY

Entered in the Journal on November 28, 2018

I. SUMMARY

{¶ 1} The Commission directs all interested persons or entities to file comments no later than December 7, 2018, and reply comments no later than December 14, 2018, with the Commission regarding the Commission's review of Ohio Adm.Code Chapter 4901:1-26.

II. DISCUSSION

{¶ 2} R.C. 111.15(B) and R.C. 106.03(A) require all state agencies to conduct a review of their rules every five years to determine whether those rules should be continued without change, be amended, or be rescinded. The Commission has opened this docket to review Ohio Adm.Code Chapters 4901:1-26, which concerns alternative dispute resolution.

{¶ 3} In performing this review, R.C. 106.03(A) requires the Commission to determine whether the rules:

- (a) Should be continued without amendment, be amended, or be rescinded, taking into consideration the purpose, scope, and intent of the statute under which the rules were adopted;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

- (d) 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) Duplicate, overlap with, or conflict with other rules;
- (f) Have an adverse impact on businesses, as determined under R.C. 107.52;
- (g) Contain words or phrases having meanings that in contemporary usage are understood as being derogatory or offensive; and
- (h) Require liability insurance, a bond, or any other financial responsibility instrument as a condition of licensure.

{¶ 4} The Commission must also consider several factors set forth in Executive Order 2011-01K, entitled "Establishing the Common Sense Initiative" and issued by Governor Kasich on January 10, 2011. Under the Common Sense Initiative, the Commission must review its rules to determine the impact a rule has on small businesses; attempt to balance the critical objectives of regulation with the cost of compliance by regulated parties; and amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, or needlessly burdensome. The Commission must also assess whether a rule has had negative, unintended consequences or has unnecessarily impeded business growth.

{¶ 5} Also, under R.C. 121.82, in the course of developing draft rules, the Commission must evaluate whether those rules will have an adverse effect on businesses and prepare a business impact analysis (BIA). If there will be an adverse impact on businesses, as defined in R.C. 107.52, the Commission is tasked to incorporate features into the draft rules to eliminate or adequately reduce the adverse business impact. R.C. 121.82

also requires the Commission to provide a copy of the draft rules and BIA to the Common Sense Initiative office for comment.

{¶ 6} On August 27, 2018, the Commission held a workshop in this proceeding to enable interested stakeholders opportunity to propose any changes to Ohio Adm.Code Chapters 4901:1-26. No stakeholders attended the workshop.

{¶ 7} The Commission and Staff have evaluated the rules contained in Ohio Adm.Code Chapter 4901:1-26. No changes are recommended for Ohio Adm.Code Chapter 4901:1-26.

{¶ 8} Attached to this Entry are the rules in current Ohio Adm.Code 4901:1-26 (Attachment A) and the BIA (Attachment B), which are also 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 Entry only. All interested persons are directed to input case number 18-1187 into the Case Lookup box to view this Entry, as well as the proposed rules, or to contact the Commission's Docketing Division to request paper copy.

{¶ 9} The Commission requests comments from interested persons to assist in the review required by R.C. 111.15, R.C. 106.03, and Executive Order 2011-01K. Comments should be filed, via electronic filing or in hard copy, by December 7, 2018. Reply comments should be filed by December 14, 2018.

{¶ 10} It is, therefore,

{¶ 11} ORDERED, That all interested persons or entities wishing to file comments or reply comments with the Commission regarding the proposed rules do so no later than December 7, 2018, and December 14, 2018, respectively. It is, further,

{¶ 12} ORDERED, That a copy of this Entry, with the rules and the BIA, be submitted to CSI, in accordance with R.C. 121.82. It is, further,

{¶ 13} ORDERED, That a copy of this Entry 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, and the Electric-Energy industry list-serve.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

JML/hac

Entered in the Journal



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Barcy F. McNeal
Secretary

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4901:1-26-01 Purpose and scope.

The alternative dispute resolution procedures in this chapter are available for pending formal complaints between nonmercantile, nonresidential customers, on the one hand, and electric utilities, electric service companies, electric cooperatives, or governmental aggregators, on the other hand. The purpose of this chapter is to facilitate efficient resolution of pending formal complaints between nonmercantile, nonresidential customers, on the one hand, and electric utilities, electric service companies, electric cooperatives, or governmental aggregators, on the other hand. This chapter is not intended to alter or diminish the commission's (or its staff's) authority to conduct investigations and to take remedial action when deemed necessary. This chapter is not intended to alter or diminish the commission's (or its staff's) dispute resolution procedures for informal disputes.

4901:1-26-02 Definitions.

- (A) "Mediation" is a voluntary, alternative dispute resolution process available to resolve formal complaints pending at the commission that are between nonmercantile, nonresidential customers, on the one hand, and electric utilities, electric service companies, electric cooperatives, or governmental aggregators, on the other hand. Under this mediation process, a neutral third party, who is independent of the parties, assists the parties in reaching their own settlement. The mediator does not have the power to impose a resolution. The role of the mediator and the goal of the process are to help the parties achieve their own resolution.
- (B) "Arbitration" is a voluntary, alternative dispute resolution process available to resolve formal complaints pending at the commission that are between nonmercantile, nonresidential customers, on the one hand, and electric utilities, electric service companies, electric cooperatives, or governmental aggregators, on the other hand. Under this arbitration process, the parties present evidence and legal arguments to a neutral third party, called an arbitrator or an arbitration panel, who renders a decision. The parties are required to accept the arbitration decision when commission personnel acts as the arbitrator, except to the limited extent set forth in this chapter.
- (C) "Commission" means the public utilities commission of Ohio.
- (D) "Certified arbitration process" means a commercial arbitration process, the use of which has been approved by the commission pursuant to paragraphs (B) and (J) of rule 4901:1-26-04 of the

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Administrative Code for resolving disputes arising under formal complaints filed with the commission.

4901:1-26-03 Mediation.

- (A) Any party to a pending formal complaint may ask the commission to mediate that matter.
- (B) To request mediation, a party to the pending formal complaint shall notify the chief of the electric section of the commission's legal department in writing. The party seeking mediation shall simultaneously serve a copy of the mediation request on the other party in the case. The request shall contain the following information:
 - (1) The name, address, telephone number, and fax number of the party in the case making the request.
 - (2) The name, address, telephone number, and fax number of the other party in the case.
 - (3) If different from paragraphs (B)(1) and (B)(2) of this rule, the name, address, telephone number, and fax number of the party representatives to whom inquiries should be made.
 - (4) The dispute resolution history, including meeting times and locations.
 - (5) A statement concerning the differences existing between the parties, including relevant documentation and arguments concerning matters to be mediated.
- (C) The other party to the pending formal complaint may provide a response within seven business days of service of the request for mediation. The response to a request for mediation shall be simultaneously served upon the party requesting the mediation.
- (D) The commission will appoint a mediator, who is independent of the parties, to conduct the mediation. The mediator may be commission personnel. The mediator will promptly contact the parties in the case and establish a time to commence mediation. The mediator will work with the parties to establish an appropriate schedule and procedure for the mediation. The mediator may receive technical assistance from commission staff.
- (E) The mediator's function is to impartially encourage voluntary settlement by the parties. the mediator may not compel a settlement. The mediator may schedule meetings of the parties, direct the parties to prepare for those meetings, hold private caucuses with each party, request

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that the parties share information, attempt to achieve a mediated resolution, and, if successful, assist the parties in preparing a written agreement.

- (F) To ensure a full and frank discussion of the issues, the parties shall agree to provide, on an expedited basis, information requested by the other party relevant to the mediated issues. Where appropriate, such information shall be provided pursuant to appropriate protective agreements.
- (G) Parties submitting to mediation under this rule agree to participate, in good faith, in the mediation process for a minimum of thirty calendar days after initiation of the mediation process by the mediator and for a maximum of forty-five calendar days, unless the mediator extends that time frame. Participants in the mediation sessions shall attend those sessions and shall have the actual authority to enter into a settlement of the matters at issue.
- (H) Mediations conducted under this rule shall be subject to Ohio confidentiality statutes (e.g., Chapter 2710 of the Revised Code).
- (I) Parties to the mediation shall reduce to writing the mediated resolution of all or any portion of the mediated issues and submit it to the mediator.
- (J) A member of the commission or a commission employee who serves as mediator shall, by virtue of having served in such capacity, be precluded from serving in a decision-making role or as a witness on matters subject to mediation in a formal commission case involving the same parties and the same issues.

4901:1-26-04 Arbitration.

- (A) All parties to a pending formal complaint must agree that the dispute (or a portion thereof) should be resolved through arbitration.
- (B) If all parties to the pending formal complaint agree that the dispute (or a portion thereof) should be resolved through arbitration, the parties shall jointly file a request with the commission to stay the proceeding pending the arbitration. The parties shall outline with sufficient specificity the issues for which arbitration is being sought. In the joint request, the parties may seek to have the commission assign its personnel to be the arbitrator or the parties may request that the issues to be arbitrated be assigned to a commission-approved, certified arbitration process approved pursuant to paragraph (J) of this rule.

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- (C) The commission will consider a request to stay the formal complaint proceeding pending an arbitration and grant it within fifteen calendar days, if the issues to be arbitrated do not involve a policy matter that the commission itself wishes to consider or if the commission does not have concerns with the commercial arbitration process proposed. If granted, the formal commission docket shall be suspended pending completion of the arbitration process.
- (D) If commission personnel is not the arbitrator, the parties shall notify the commission once they have engaged the arbitrator.
- (E) The arbitrator shall have the authority allowed by law. The arbitrator shall issue the arbitration award in writing and serve it upon the parties.
- (F) By electing arbitration under this rule, the parties shall not disclose communications made in the course of and relating to the subject matter of the arbitration, except as permitted in this chapter or under circumstances consistent with those applicable to mediation communications under Chapter 2710. of the Revised Code. By electing arbitration under this rule, the parties shall not appeal (to the commission or any court) any intermediary rulings made by the arbitrator.
- (G) Where the parties request to have commission personnel act as arbitrator and such request is granted by the commission, the parties shall, within one hundred and twenty calendar days from the date upon which the commission approves their case for arbitration, complete the arbitration and receive an arbitration award. The parties may jointly apply or the arbitrator may apply to the commission for an extension of this deadline for good cause shown.
- (H) If the parties accept the arbitration award, a copy of the arbitration award need not be filed with the commission but, at a minimum, an executive summary of the award (including the issues decided, the facts as determined, who prevailed, and the type of award granted) shall be filed (within thirty calendar days of the issuance of an arbitration award) in the commission's docket, along with the parties' joint motion to dismiss the complaint (or involved portion thereof) in light of their acceptance of the award.
- (I) When commission personnel acts as the arbitrator, the arbitration award shall be final and binding upon the parties, except as described in this provision. Within thirty calendar days of the issuance of an arbitration award, any party to the arbitration may seek commission review of the arbitration award, but such request for review shall not seek de novo review of the legal and factual conclusions made by the arbitrator. The commission will review the record of the arbitration proceeding to ascertain only the existence of any grounds identified in Chapter 2711. of the Revised Code, such as fraud, corruption, misconduct, impropriety, or mistake by the arbitrator. Requests for commission review shall include the arbitration record as needed and a

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brief or supporting memorandum. Any opposing brief/memorandum shall be filed within fifteen calendar days of filing of the request for review (or eighteen calendar days, if the other party's filing was served by mail). The commission will endeavor to issue its ruling on the review request within forty-five calendar days after any opposing brief/memorandum is filed. Upon consideration of the review request, the commission may confirm, vacate, modify or enforce the arbitration award. If the commission vacates the arbitration award (in whole or in part), the commission shall specify whether the matter should be remanded to the same arbitrator. Any commission decision to confirm, vacate, modify or enforce the arbitration award under this provision is subject to rehearing pursuant to section 4903.10 of the Revised Code, and any final commission decision is subject to appeal pursuant to section 4903.13 of the Revised Code.

- (J) Electric utilities, electric service companies, electric cooperatives, and governmental aggregators may file an application with the commission seeking certification to use a proposed commercial arbitration process for any class of formal complaints or for all potential formal complaints. Such an application shall contain the terms and conditions under which potential complaints may be referred to a particular commercial arbitration process pursuant to this rule. Such terms and conditions may include, but are not limited to, which parties shall bear the cost of the arbitration process, what class of potential complaints may be referred to commercial arbitration, and whether such arbitration shall be binding on either or both of the parties. The commission staff shall review such an application seeking certification to use a commercial arbitration process and recommend to the commission whether the application should be approved. The commission may approve such an application if the commission is satisfied that the commercial arbitration process is fair, cost-effective, and does not result in prejudice against any potential future parties. By approving an application pursuant to this provision, the commission retains the right to evaluate, in each individual formal complaint proceeding, whether to grant a request to stay the formal complaint proceeding pending arbitration.

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: <u>Public Utilities Commission of Ohio (PUCO)</u>
<u>Attention: Angela Hawkins, Legal Director</u>
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Regulation/Package Title: <u>Chapter 4901:1-26 / Alternative Dispute Resolution</u>
Rule Number(s): <u>4901:1-26-01 Purpose and Scope; 4901:1-26-02</u>
Definitions: <u>4901:1-26-03 Mediation; 4901:1-26-04 Arbitration</u>
Date: <u>November 21, 2018</u>
Rule Type:
<input type="checkbox"/> New <input checked="" type="checkbox"/> 5-Year Review <input checked="" type="checkbox"/> No Change
<input type="checkbox"/> Amended <input type="checkbox"/> Rescinded

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

Regulatory Intent

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

Ohio Adm.Code 4901:1-26 establishes alternative dispute resolution procedures for pending formal complaints between non-mercantile, non-residential customers and electric utilities, electric service companies, electric cooperatives, or governmental aggregators.

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

Rule	Statutory Authority – Ohio Revised Code
4901:1-26-01	4928.06
4901:1-26-02	4928.06
4901:1-26-03	4928.06, 4928.16
4901:1-26-04	4928.06, 4928.16

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

This rule does not implement a federal requirement, nor is it being amended to enable Ohio to obtain or maintain approval to administer or enforce a federal law.

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

Not applicable.

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

R.C. 4928.16(A)(4) directed the Commission to adopt rules establishing alternative dispute resolution procedures to facilitate efficient resolution of pending formal complaints between non-mercantile, non-residential customers and electric utilities, electric service companies, electric cooperatives, or governmental aggregators.

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

The Commission was statutorily mandated to establish these rules. To date, they have not been used in any proceeding.

Development of the Regulation

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

On August 14, 2018, in Case No. 18-1187-EL-ORD, the Commission issued an Entry by U.S. Mail and e-mail, indicating that a workshop would be conducted on August 27, 2018, to take notice of any rules changes proposed by stakeholders for Ohio Adm.Code Chapter 4901:1-26. The Entry was served upon all investor-owned electric utilities and certified competitive retail electric service providers in Ohio, and served upon the Electric-Energy industry list-serve. The workshop was conducted as scheduled on August 27, 2018.

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

None of the stakeholders present at the workshop provided any input on the rules in this chapter.

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

Not applicable.

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

R.C. 4928.06 and 4928.16 directed the Commission to establish these rules.

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

As noted above, these rules were promulgated in response to a statutory directive, but have not been used to date.

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

As noted above, these rules were promulgated in response to a statutory directive, but have not been used to date. It is unlikely that these rules are duplicated in the rules of other state agencies or commissions, because of the Commission's statutory role in supervising and regulating public utilities.

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

As noted above, these rules were promulgated in response to a statutory directive, and became effective in 2000, but have not been used in any Commission proceeding to date. No parties or Staff recommended any changes.

Adverse Impact to Business

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

- a. Identify the scope of the impacted business community;**

Ohio Adm.Code Chapter 4901:1-26 provides alternative dispute resolution procedures to facilitate efficient resolution of formal complaints between non-mercantile, non-residential customers and electric utilities, electric service companies, electric cooperatives, or governmental aggregators.

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

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There are no fees, costs, or compliance reporting requirements, as these rules only provide for alternative dispute resolution procedures.

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

The cost of Ohio Adm.Code 4901:1-26-03 consists of time needed for parties that ask the Commission to mediate a matter. In particular, the rule specifies the information that must be included in such a request, and that the request must be made in writing. In addition, the rule specifies (a) that the other party to a formal pending complaint must respond to the request for mediation within seven days, (b) the minimum and maximum days during which parties must participate in mediation if they have agreed to do so, and (c) that parties to mediation must reduce to writing the mediated resolution.

Ohio Adm.Code 4901:1-26-04 states that all parties to a pending formal complaint must agree that the dispute, or a portion of the dispute, must be resolved through arbitration. The cost of this rule consists of time involved in complying with the rule. For example, the rule specifies that the parties must jointly file a request with the Commission to stay the proceeding during the arbitration, and shall outline with the issues for which arbitration is sought. The rule also specifies the maximum time allowed for parties to complete the arbitration and ultimately receive an arbitration award, and requires an executive summary of the award to be filed at the Commission, along with the parties’ joint motion to dismiss the complaint. Finally, the rule states that, within 30 calendar days of the issuance of an arbitration award, any party may seek Commission review of the award by filing the award and a brief memorandum; any opposing memorandum must be filed no more than 15 calendar days after the request for review is made. The rule also allows a party of file an application with the Commission seeking certification to use a proposed commercial arbitration process for any class of formal complaints.

The other rules in this chapter complement Ohio Adm.Code 4901:1-26-03 and 4901:1-26-04 and do not, by themselves, create a burden upon businesses.

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

As noted above, the rules were established pursuant to statutory mandate, and there are no fees, costs, or compliance reporting requirements, as these rules only provide for alternative dispute resolution procedures.

Regulatory Flexibility

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

Not applicable, because the rules do not require parties to participate in mediation; similarly, the rules specify that arbitration is not available unless all parties to a pending formal complaint agree to such a procedure.

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

Given the Commission's goal of resolving formal complaints without a hearing, the Commission's focus is not on seeking penalties for first-time paperwork offenses. To that end, the Commission will fully comply with R.C. 119.14 and would not seek to recover administrative fines or civil penalties for a first-time paperwork violation against parties involved in mediation or arbitration, unless such violation falls within one of the exceptions set forth in paragraph (C) of that section, and without providing due process to a party that is defined as small, pursuant to 13 C.F.R. Chapter 1, Part 121.

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

Commission Staff works with parties who elect to pursue mediation or arbitration.