

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review)
of Chapter 4901:1-38 of the Ohio) Case No. 18-1191-EL-ORD
Administrative Code.)

**COMMENTS OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

I. INTRODUCTION

In this proceeding, the Public Utilities Commission of Ohio (Commission) seeks comments from interested parties regarding proposed revisions to the rules governing reasonable arrangements, energy efficiency arrangements, and unique arrangements. In considering these rules, the Ohio Manufacturers' Association Energy Group (OMAEG) urges the Commission to adopt rules that ensure a fair process for all customers by imposing requirements on recipients of reasonable arrangements that ensure that businesses that receive special arrangements invest in Ohio to create economic development that benefits the customers who fund said arrangements, employ practices to manage energy efficiently in order to minimize the cost of the arrangements for other customers, and verify their adherence to the Commission's requirements throughout the term of the arrangement.

OMAEG represents small and large energy consumers in the state of Ohio. Many of these customers have significant electric demand and are energy intensive customers and, accordingly, devote substantial financial resources towards meeting their electricity needs. OMAEG members will also be responsible for costs associated with economic development arrangements, energy efficiency arrangements, and unique arrangements approved by the

Commission. Therefore, OMAEG has a substantial interest in ensuring that the Commission's rules governing these arrangements are fair and do not result in unjust and unreasonable charges to the customers who fund the arrangements.

OMAEG is a non-profit entity that strives to improve business conditions in Ohio and drive down the cost of doing business for Ohio manufacturers. OMAEG members and their representatives work directly with elected officials, regulatory agencies, the judiciary, and the media to provide education and information to energy consumers, regulatory boards and suppliers of energy; advance energy policies to promote an adequate, reliable, and efficient supply of energy at reasonable prices; and advocate in critical cases before the Commission. In that capacity, OMAEG has been involved in several proceedings concerning applications for reasonable arrangements before the Commission.¹

OMAEG hereby files comments on the proposed rules pursuant to the Commission's April 3, 2019 Entry soliciting comments.²

¹ See, e.g., *In the Matter of the Application for Establishment of a Reasonable Arrangement Between Presrite Corporation and The Cleveland Electric Illuminating Company*, Case No. 17-1981-EL-AEC, Entry at 1 (granting OMAEG's Motion to Intervene); *In the Matter of the Joint Application of Vadata, Inc. and Ohio Power Company for Approval of a Unique Economic Development Arrangement for Ohio Data Center Campuses*, Case No. 17-1827-EL-AEC, Motion to Intervene and Comments of the Ohio Manufacturers' Association Energy Group (September 21, 2017); *In the Matter of the Application of Globe Metallurgical, Inc. for Approval of a Unique Arrangement Between Ohio Power Company and Globe Metallurgical, Inc.*, Case No. 16-737-EL-AEC, Entry at 1 (August 4, 2016) (granting OMAEG's Motion to Intervene).

² See Entry at ¶ 15 (April 3, 2019).

II. COMMENTS

A. The Commission Should Impose Minimum Criteria that All Applicants Must Meet in Order to Receive an Economic Development Arrangement Under Rule 4901:1-38-03 in Order to Ensure Fairness and that All Customers Benefit from the Reasonable Arrangements.

a. The Commission Should Establish Minimum Standards Under Rule 4901:1-38-03.

In submitting its proposed revisions to Rule 4901:1-38-03 for comment, the Commission states that the proposed rule adds “criteria that the Commission will consider when analyzing applications for [economic development] arrangements; applicants will not be required to meet all of the criteria.”³ As articulated below, OMAEG generally supports several of the new criteria established by the proposed rules. The proposed rules, however, remove the mandatory nature of the minimum criteria set forth in the rules. The Commission should reject the deletion of the minimum criteria language and establish concrete, minimum standards, and require—not just prefer—that all applicants for economic development arrangements meet those minimum standards. This approach would ensure predictability and fairness in the process as opposed to establishing a list of factors with little instruction as to how those factors should be weighed and evaluated.

For instance, Rule 4901:1-38-03(A)(2) and Rule 4901:1-38-03(B)(2), as currently proposed, lists several criteria that the Commission will consider. Those criteria are as follows:

(a) whether a customer's business is acutely energy intensive or has a distinct energy profile; (b) whether the customer has made a commitment to investing in Ohio, either in a new investment or support of a new industry; (c) the economic impact of the project on the region will be significant and will create or retain jobs; (d) the customer has explored or taken advantage of other opportunities for operational savings, such as basic cost management, shopping for or self-generating electricity, energy efficiency, and participation in utility or regional transmission

³ Id. at ¶ 7.

organizations' conservation or reliability programs; (e) the charges paid to the utility cover all incremental costs of service and contribute to the payment of fixed costs; (f) the benefits to the community accruing from the project outweigh the costs imposed on the other retail customers because of the unique arrangement; and (g) the application is for a set term.⁴

The proposed rules, however, do not make any of these criteria mandatory and do not state whether the Commission will weigh the absence of one criterion more or less than any other. Additionally, many of the key terms (such as “significant” and “commitment”) are undefined and do not generally ensure predictability in how applications will be reviewed and analyzed by the Commission.

The lack of specificity with regard to the mode of evaluation proposed in Rule 4901:1-38-03 creates an administrability problem for the Commission and a predictability problem for customers. The Commission will be unable to use defined standards in assessing each application that it receives under this provision and will effectively have to start from scratch each time that it receives a new application as it does currently. Meanwhile, customers would not be able to make a predictable assessment of whether or not they qualify for an economic development arrangement—or whether they should support or oppose the application of others to challenge an unjust or unreasonable increase in their electric bills. With other customers funding the incentives obtained through the reasonable arrangements, the Commission should be clear about what does and does not qualify as economic development under its rules and how much of a rate discount or incentive the Commission will provide to each applicant and over what period.

In addition to ensuring customers a predictable process, an established checklist of requirements (rather than factors) would create an unambiguously fair process. The Commission now has the opportunity to set out standards that ensure that economic development

⁴ Id.

arrangements that are approved truly provide benefits to the customers who fund them and that all customers are on a level playing field when it comes to their eligibility for such arrangements. Below, OMAEG suggests some additional standards that would achieve this goal. Regardless of the specific standards adopted, it is important to note that all customers would benefit from clear standards rather than ambiguous guidelines.

b. The Commission's Standards Should Ensure that Economic Development Arrangements Under Rule 4901:1-38-03 Provide Positive Benefits to All Customers.

Even if the Commission's factors proposed under Rule 4901:1-38-03 were mandatory, they would still not sufficiently ensure that economic development arrangements are beneficial to other customers. Establishing additional requirements would protect customers against the possibility that they are forced to fund an economic development arrangement that fails to provide benefits commensurate with the costs borne by other customers, who are oftentimes competitors to the recipients of such arrangements. Below, OMAEG proposes some requirements that would advance this goal.

i. The Commission Should Require All Recipients of Economic Development Arrangements to Document Energy Management and Cost-Reduction Practices.

The benefits of energy management and cost reductions are apparent. Any customer who successfully manages their load will have lower energy costs. A recipient of an economic development arrangement that manages its load will diminish the need for other customers to subsidize the incentives provided through the economic development arrangement while simultaneously providing benefits to the system as a whole.

First, employing good energy management will reduce the need for an economic development arrangement or the magnitude of the arrangement requested. This benefits the

customers who are required to fund the economic development arrangement's incentives. Second, these practices would go a long way in rationalizing the economic development arrangements that are approved; it is easier to explain recovering costs from other customers when the direct recipient of those benefits is making efforts of its own to reduce costs. The Commission acknowledges this reality in its proposed rules by listing this issue as one factor to consider in analyzing an application,⁵ but steps to better manage energy should be required for all applicants.

Accordingly, the Commission should require applicants to document energy management practices and cost-reduction strategies in line with best practices prior to approving an economic development arrangement. Moreover, after an arrangement is approved, the recipient should be required to demonstrate, on an annual basis, continued use of energy management and cost reduction strategies. Under this umbrella, the Commission should require applicants to explain their peak load management and curtailment practices. The Commission should also require applicants to competitively shop for their electricity and/or consider self-generation options for a portion of their load if it benefits the applicant. The Commission should also consider making economic development arrangements partially incentive-based so that recipients who fail to maximize potential cost reductions do not receive full funding from other customers under the reasonable arrangements. Other possible requirements would include demanding that economic development arrangement recipients participate in demand response curtailment programs either through a curtailment service provider or through notification of system peaks and curtailment of operations during those times (thus providing an additional benefit to other customers).

Ultimately, the Commission should have a preference for achieving economic development benefits, without customer subsidization, over customers subsidizing other

⁵ See Proposed Rule 4901:1-38-03(A)(2)(d).

customers in order to generate economic benefits. Requiring definite efforts to reduce costs independent of an economic development arrangement will move the Commission away from customer-funded arrangements without sacrificing the economic development benefits that these provisions are designed to promote.

ii. The Commission Should Affirmatively Require that the Benefits of a Proposed Economic Development Arrangement Outweigh the Costs that it Imposes on Other Customers.

One of the factors proposed by the Commission is that the proposed arrangement should provide benefits that outweigh the costs to other retail customers.⁶ OMAEG supports this criterion, but, as explained previously, this condition should be a requirement and not just a mere factor in a broader analysis. The Commission's rules should provide for absolute rejection of any proposed economic development arrangement where the benefits do not outweigh the costs. Under no circumstances should customers be forced to subsidize economic development arrangements of other customers when said arrangements do not even provide net positive economic development benefits. The Commission should revise its proposed rule to make a positive cost-benefit analysis a requirement in approving an application.

iii. The Commission Should Require that the Proposed Arrangement Create Jobs that Meet Minimum Wage Requirements and Should Require Capital Investment by the Applicant.

The Commission should also require job creation before approving an economic development arrangement under Rule 4901:1-38-03(A). Job creation is a major driver of economic development and should be a given any time that the Commission allows one customer to reduce energy costs at the expense of other customers. Similarly, any applicant receiving economic development arrangement incentives should be required to invest capital in its Ohio operations as a condition of the arrangement.

⁶ See Entry at Proposed Rule 4901:1-38-03(A)(2)(g).

The purpose of these arrangements is to drive economic development. This goal is best accomplished through the recipient of the arrangement hiring more workers and investing in Ohio operations. Any arrangement that does not entail these steps would be minimally effective in ensuring economic development. OMAEG recommends that the amount of any economic development arrangement be conditioned, at least in part, on the amount of job creation and capital investment committed to under the economic development arrangement. For example, an applicant with less capital investment and job creation would be limited in the amount of cost assistance or incentives it could receive from an arrangement.

Furthermore, as explained more fully below, the Commission should specify that economic development arrangements should be either reduced or eliminated in instances where the recipient fails to meet commitments it made for capital investment and/or job creation. Such a requirement would ensure that recipients follow through on their commitments and that economic development occurs as expected to the benefit of customers who are funding the incentives obtained through economic development arrangements.

The Commission's rules should be designed to maximize the effectiveness of economic development arrangements in actually creating economic development. These requirements would achieve that goal by establishing a standard for economic development while also ensuring accountability on the part of recipients of customer-funded economic development arrangements.

iv. The Commission Should Require that Recipients of Economic Development Arrangements Be Energy-Intensive Customers.

OMAEG agrees that recipients of economic development arrangements should be those customers who devote a substantial portion of their operating costs towards procuring energy for their operations. Customers in these energy-intensive industries are more likely to consider

energy costs in making decisions regarding capital investment or increasing employment. Focusing economic development arrangements on energy-intensive industries would allow for industries who make hiring and capital investment decisions based upon their energy costs to take advantage of such assistance, which will create economic development benefits.

v. The Commission Should Limit the Period During Which a Customer May Operate Under an Economic Development Arrangement.

OMAEG appreciates the importance of economic development arrangements in attracting businesses to Ohio and encouraging additional development of existing Ohio operations. Economic development arrangements, however, should not function as endless subsidies to select customers. OMAEG supports a requirement that all customers be limited to one economic development arrangement for a defined period of up to five years unless or until the applicant can demonstrate that they are making a significant investment in the state of Ohio through expanded or new facilities and are experiencing exceptional job growth (e.g., the applicant's growth rate exceeds the statewide average job growth rate). OMAEG proposes that renewals of reasonable arrangements be prohibited. This would mean that applicants could not receive an endless stream of economic development arrangements at the expense of other customers. Such a requirement would allow the Commission to accomplish its mission of fueling economic development without elevating some customers to a perpetual favored status.

B. Rule 4901:1-38-03(B) Should Establish a Verification Process to Allow the Commission to Determine the Likelihood that a Customer Will Cease, Reduce, or Relocate Operations in Ohio.

The Commission's proposed revisions to Rule 4901:1-38-03(B) address customers applying for an economic development arrangement to prevent the ending or reducing of that customer's Ohio operations or the relocation of the Ohio operations out of state. As stated previously, OMAEG agrees with many of the additional factors, but recommends maintaining

the mandatory nature of the minimum requirements. Additionally, certain factors listed in the proposed rules in section (B)(2) do not coincide with the purpose of section (B) to retain an existing customer likely to cease or reduce its operations or relocate its operations out of state. For example, the rule refers to making new investments in Ohio and benefits accruing from a project. The criteria should be revised to be more applicable to the purpose of Rule 4901:1-38-03(B), which is the retention of an existing customer and maintaining operations in Ohio.

Moreover, while the Commission's rules appropriately place the burden of proof for any application under these provisions on the applicant, the Commission should explicitly require a verification process in order to prevent applicants from using an empty threat of ending or reducing Ohio operations to obtain a subsidy from other customers. In cases where the applicant is claiming that they could relocate to another location, the Commission should require verifiable information substantiating that claim, including information about where the applicant could possibly relocate and the feasibility of doing so. In cases where the applicant presents the possibility of reducing or ending Ohio operations, the applicant should be required to produce information substantiating that possibility as well. This addition to the rules would protect customers from unjustly and unreasonably being forced to fund a subsidy as the result of an empty threat.

C. The Commission Should Impose Minimum Criteria that All Applicants Must Meet in Order to Receive an Energy Efficiency Arrangement Under Rule 4901:1-38-04 in Order to Ensure Fairness and that All Customers Benefit from the Arrangement.

a. The Commission Should Establish Minimum Standards Under Rule 4901:1-38-04.

In submitting its proposed revisions to Rule 4901:1-38-04 for comment, the Commission states that the proposed rule adds “criteria that the Commission will consider when analyzing

applications for energy efficiency arrangements.”⁷ OMAEG generally supports the new criteria established by the proposed rule; however, the proposed rule deletes the mandatory nature of the minimum criteria set forth in the rule. As explained with regard to proposed Rule 4901:1-38-03, the Commission should reject the deletion of the mandatory language, establish concrete, minimum standards, and require that all applicants for energy efficiency arrangements meet those minimum standards. As explained previously, this approach would ensure predictability and fairness in the process as opposed to establishing a list of factors with little instruction as to how those factors should be weighed and evaluated.

Additionally, OMAEG proposes to include additional criteria to the rule similar to that included in the rule regarding economic development arrangements. 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 demonstrate, on an annual basis, continued use of energy management and cost reduction strategies. Similar to the economic development arrangements, the energy efficiency arrangements should be for a specified duration and should not be renewed. The Commission should also require applicants to demonstrate significant capital investment and job creation and should require applicants to competitively shop for their electricity and/or consider self-generation options for a portion of their load if it benefits the applicant. 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.

⁷ Id. at ¶ 9.

- b. The Commission's Standards Should Ensure that Energy Efficiency Arrangements Under Rule 4901:1-38-04 Provide Positive Benefits to All Customers.

Even with the addition of the criterion that benefits to the community accruing from the project must outweigh the costs imposed on other customers and if the Commission's factors proposed under Rule 4901:1-38-04 were mandatory, the proposed rule would still not sufficiently ensure that energy efficiency arrangements are beneficial to other customers. Similar to the rule for economic development arrangements, the Commission should add additional standards to protect customers against the possibility that they are forced to fund an energy efficiency arrangement that fails to provide benefits commensurate with the costs borne by other customers, who are oftentimes competitors to the recipients of such arrangements.

D. The Commission Should Establish Rigorous Rules Governing Ongoing Oversight of Recipients of Reasonable Arrangements.

The Commission should take steps through its rules to ensure that recipients of reasonable arrangements are actually delivering the benefits promised during the process where the arrangement was approved. The vague requirement to file an annual report in Rule 4901:1-38-06 is insufficient. The rules should more specifically delineate what information and data should be provided in the annual report and how the recipient of a reasonable arrangement is satisfying the commitments that it made to the Commission when applying for and obtaining its reasonable arrangement. It should be noted that Rule 4901:1-38-06 references compliance with eligibility criteria, but, as explained above, the proposed rules eliminate the mandatory eligibility requirements. If there are no mandatory eligibility requirements, it is unclear what exactly the recipient will be required to report and how the Commission will evaluate such report.

Furthermore, the Commission should establish a review process wherein recipients of reasonable arrangements submit reports detailing actual progress made in terms of capital investment, employment, and other commitments. This would allow the Commission to ensure that commitments are met and that the benefits promised by the reasonable arrangements are truly occurring.

E. The Commission Should Establish Stringent Penalty Provisions Under Rule 4901:1-38-09.

Similar to Rule 4901:1-38-06, the proposed elimination of the mandatory eligibility criteria cause the effectiveness of Rule 4901:1-38-09 to be questionable. OMAEG proposes that the Commission explicitly provide for the possibility of reducing or eliminating the incentives provided to a customer through an economic development arrangement in the event that the recipient of such an arrangement is not meeting its commitments. This measure would protect the customers who fund incentives obtained through reasonable arrangements from the possibility that they will be forced to subsidize another customer for the entire term of a reasonable arrangement without ever realizing any of the benefits promised at the time the arrangement was approved.

Additionally, many of the same concerns that OMAEG raised above are also implicated here. As discussed at length above, OMAEG opposes the proposed revisions to Rules 4901:1-38-03 and -04 insofar as the revisions strip those rules of the mandatory criteria that currently govern their application. In addition to establishing a less reliable process for all parties, the lack of defined standards also results in inadequate penalty provisions under Rule 4901:1-38-09.

The proposed rules do not modify Rule 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. But, given that the rules no longer contain mandatory criteria for

eligibility, it is unclear to which “criteria for eligibility” Rule 4901:1-38-09 refers. Accordingly, the proposed rules do not protect customers. The Commission should adopt OMAEG’s recommendations and make the criteria under Rules 4901:1-38-03 and -04 mandatory, which will provide meaning to the provisions of Rule 4901:1-38-09.

III. CONCLUSION

In adopting rules to govern applications for reasonable arrangements before the Commission, the Commission should ensure that those rules provide a fair process for applicants while also protecting the customers who fund incentives obtained through the reasonable arrangements once they are approved. OMAEG urges the Commission to do this by establishing mandatory, minimum requirements that provide predictability for all parties and safeguard against the possibility that customers could be left funding arrangements that purport to provide economic development or other benefits, but that fail to deliver on those promised benefits.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all parties of record via electronic mail on May 3, 2019.

/s/ Brian W. Dressel
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Summary: Comments Of The Ohio Manufacturers' Association Energy Group electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group