

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**REPLY COMMENTS OF INDUSTRIAL ENERGY USERS-OHIO**

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**I. INTRODUCTION**

The Staff of the Public Utilities Commission of Ohio (“Commission”) has proposed changes to the Commission’s rules concerning applications for reasonable arrangements. The Commission sought comments and reply comments. Entry at 5 (Apr. 3, 2019). Several interested persons submitted comments and recommendations in response to the request for comments.<sup>1</sup> The Commission should reject the recommendations discussed below that would impose unnecessary and unreasonable conditions and penalties on reasonable arrangements.<sup>2</sup>

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<sup>1</sup> Initial Comments of Industrial Energy Users-Ohio (May 3, 2019) (“IEU-Ohio Comments”); Comments of the Ohio Manufacturers’ Association Energy Group (May 3, 2019) (“OMAEG Comments”); Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (May 3, 2019) (“FE Comments”); Comments on Rules to Protect Consumers from Paying Charges for Unreasonable Arrangements by the Office of the Ohio Consumers’ Counsel (May 3, 2019) (“OCC Comments”); Comments of the Ohio Energy Group (May 3, 2019).

<sup>2</sup> Failure to comment on a particular recommendation is not intended to indicate support.

## II. DISCUSSION

### A. **Comments Concerning Proposed Rule 4901:1-38-03, Ohio Administrative Code (“O.A.C.”)**

OMAEG urges the Commission to adopt mandatory requirements for economic development arrangements. OMAEG Comments at 3. This recommendation is related to an underlying problem discerning the Commission’s intentions regarding the new rules. The Entry suggests that satisfaction of each factor is not required while the proposed rule suggests that all criteria must be “met.” Compare Entry at 3 (“applicants will not be required to meet all of the criteria”) and Draft Rule 4901:1-38-03(A)(2), O.A.C. (“Each customer requesting to take service pursuant to an economic development arrangement with the electric utility shall submit to the electric utility and the commission verifiable information detailing how the following criteria are met.”). The difference is important. If the Commission intended the former, then applicants may demonstrate why certain requirements are being addressed while others are not relevant. If the Commission intends the latter, then applicants, particularly smaller entities, will face substantial barriers to seeking renewable arrangements. See IEU-Ohio Comments at 2 (cost of economic impact study may prevent smaller customer from making an application). The better resolution is reflected in the Commission’s Entry: Applicants should address but are not required to meet all requirements. This resolution should be clearly set out in the rule.

OCC proposes that the Commission expand the criteria in an application for an economic development arrangement that must be met to include a requirement that the customer increase employment by 25 employees. Additionally, OCC urges the Commission to include in the economic impact analysis a review of the impact of the

arrangement on small businesses. OCC Comments at 5-6 and 18. The Commission should reject both recommendations.

Given the diversity of potential applicants, OCC's recommendation that the Commission retain a requirement that an economic development arrangement applicant propose to add 25 employees does not make sense. The number itself is arbitrary, 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. The current proposal properly removes an employment commitment as a filing requirement.

The Commission should also reject OCC's recommendation that the proposed impact analysis should contain a discussion of the impact of the proposal on small business because it is premised on a series of errors. OCC Comments at 18. OCC offers initially that an economic development arrangement is a "payment" to the affected customers. *Id.* While other customers may pay delta revenue, the arrangements approved by the Commission are not payments to the customer benefiting from the arrangement. Instead, the customer typically is provided relief from certain charges or the opportunity to participate in certain rate programs. Second, OCC assumes eligibility is limited to mercantile customers. *Id.* Again that is not the case; the statute recognizes that the utility may enter an arrangement with any customer (and that a mercantile customer or group of them may seek a reasonable arrangement unilaterally). R.C. 4905.31(A). More importantly, moreover, it goes unexplained why the mercantile status of the applicant should require additional analysis. Third, OCC assumes that the current requirements would not address economic costs. The proposed rule, however, would require the applicant to address the costs and benefits of the proposal. Proposed Rule

4901:1-38-03(A)(2)(g), O.A.C. This more general discussion of economic impacts is adequate to address any concerns that OCC has raised. See IEU-Ohio Comments at 2. Moreover, if the concern is significant enough, OCC itself can raise it as an intervenor. Rule 4901:1-38-03(E), O.A.C. Thus, the current rule with more limited revisions and the existing intervention procedure more than adequately address OCC's concern.

## **B. Verification**

OMAEG recommends that the Commission adopt verification requirements. According to OMAEG, Rule 4901:1-38-06, O.A.C., is vague because it references criteria that would not be mandatory. OMAEG Comments at 12. For several reasons, the Commission should not accept this recommendation.

Initially, the rule does not suffer from vagueness. It specifically requires that the format of an annual report shall be such as to allow the Staff to determine that compliance with the eligibility criteria for the arrangement can be determined. It is hard to conceive that anything in addition to this requirement is necessary.

Moreover, parties can agree to expand the reporting requirements if a particular case presents circumstances warranting a different approach. The Commission can (and has) approved expanded requirements.<sup>3</sup>

Additionally, the Commission maintains continuing jurisdiction of reasonable arrangements and can change, alter or modify them. Thus, compliance issues can be addressed as needed. R.C. 4905.31(E). In sum, there is no reason to adopt a modification to the reporting requirements.

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<sup>3</sup> ASHTA Chemicals, for instance, agreed to file a compliance report twice a year. *In the Matter of the Application for Establishment of a Reasonable Arrangement between ASHTA Chemicals Inc. and The Cleveland Electric Illuminating Company*, Case No. 12-1494-EL-AEC, Amended Public Version of Joint Stipulation and Recommendation at 12 (Dec. 10, 2013).

### C. Penalties

OMAEG and OCC both recommend that the Commission adjust the penalties that a customer may face if it does not comply with a Commission order. OMAEG Comments at 13-14; OCC Comments at 17-18. Both appear to apply a strict liability standard. OMAEG Comments at 13 (the Commission should explicitly provide for reduction or elimination of incentives “in the event that the recipient of such an arrangement is not meeting its commitments”); OCC Comments at 17 (if a customer does not comply with the terms of the eligibility criteria, “the mercantile customer should be required to refund to consumers the money that was charged to them for the program”).

This over-eager approach is not needed and ignores the complexity of the compliance problem. As noted previously, the Commission is vested with continuing jurisdiction and may alter or modify a reasonable arrangement during its term. Under proper circumstances, it may be appropriate, as is already the case under Rule 4901:1-38-09, O.A.C., for the Commission to issue an order terminating the reasonable arrangement and directing the utility to charge the customer for all or a part of the incentives previously provided by the utility. The triggering event, however, is a failure to substantially comply. *Id.* Because reasonable arrangements arise in a complex economic environment, the application of a strict liability standard would make no sense.<sup>4</sup>

The FirstEnergy utilities further recommend that the Staff be permitted to “terminate” a reasonable arrangement for noncompliance. FE Comments at 10. Again, this goes too far. A reasonable arrangement is based on a Commission order. R.C.

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<sup>4</sup> Reasonable arrangements often contain a force majeure provision, a recognition that strict performance is inapplicable. 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, Letter and Attachment (Mar. 29, 2018).

4905.31(E) (reasonable arrangement is ineffective until approved by the Commission). As a government actor, the Staff may not act as prosecutor and judge. *State, ex rel. Bray, v. Russell*, 89 Ohio St.3d 132 (2000) (parole board decision to extend sentence for criminal violation violated separation of powers). Accordingly, it should not be vested with the ability to unilaterally overturn a Commission order approving a reasonable arrangement.

### III. CONCLUSION

In this proceeding, the Staff is seeking to codify the policy position it has recently advanced in several cases involving reasonable arrangements. As shown in IEU-Ohio's comments, that codification needs refinement so that the filing requirements conform to the goals of the various forms of arrangements and the concerns they seek to address. Those refinements, however, should not include the changes proposed by OMAEG, OCC, and the FE companies noted above.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This pleading was filed with the Docketing Division on May 20, 2019. In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document upon the interested parties.

*/s/ Frank P. Darr*

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Frank P. Darr



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Summary: Comments Reply Comments of Industrial Energy Users-Ohio electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio