

**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.)

**APPLICATION FOR REHEARING
BY
THE OHIO MANUFACTURERS’ ASSOCIATION ENERGY GROUP**

Pursuant to the Public Utilities Commission of Ohio’s (Commission) issuance of the proposed rules governing economic development arrangements, energy efficiency arrangements, and unique arrangements for comment,¹ the Ohio Manufacturers’ Association Energy Group (OMAEG) submitted comments,² and reply comments,³ urging 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 expressed concern with several of the proposed revisions to the rules, including the removal of mandatory minimum standards for economic development arrangements and energy efficiency arrangements, the need for ongoing oversight of compliance in

¹ See Entry (April 3, 2019).

² See Comments of the Ohio Manufacturers’ Association Energy Group (May 3, 2019) (OMAEG Comments).

³ See Reply Comments of the Ohio Manufacturers’ Association Energy Group (May 20, 2019) (OMAEG’s Reply Comments).

arrangements, and the lack of penalty provisions.⁴ In their own reply comments, the FirstEnergy Companies and the Office of the Ohio Consumers' Counsel echoed some of OMAEG's concerns.⁵

The Commission issued its order adopting proposed revisions to the rules governing economic development arrangements, energy efficiency arrangements, and unique arrangements on May 6, 2020.⁶ Despite valid concerns raised by OMAEG and others, the Commission failed to ensure predictability and fairness for all consumers, and instead adopted the rule amendments largely as proposed by Staff. The Order adopting these amendments is unlawful and unreasonable in the following respects:

ASSIGNMENT OF ERROR NO. 1: The Commission erred by failing to adopt mandatory minimum criteria that all applicants must meet to receive an economic development arrangement under Rule 4901:1-38-03.

ASSIGNMENT OF ERROR NO. 2: The Commission erred by failing to establish a verification process under Rule 4901:1-38-03 to determine the likelihood a customer will cease, reduce, or relocate operations in Ohio.

ASSIGNMENT OF ERROR NO. 3: The Commission erred by failing to adopt mandatory minimum criteria that all applicants must meet to receive an energy efficiency arrangement under Rule 4901:1-38-04.

ASSIGNMENT OF ERROR NO. 4: The Commission erred by failing to establish rules governing oversight of recipients of reasonable arrangements.

ASSIGNMENT OF ERROR NO. 5: The Commission erred by failing to establish stringent penalty provisions under Rule 4901:1-38-09.

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, OMAEG hereby respectfully requests rehearing of the Commission's May 6, 2020 Order adopting amendments to the rules

⁴ See OMAEG Comments.

⁵ See Reply Comments of the Ohio Edison Company and the Cleveland Electric Company and the Toledo Edison Company (May 20, 2019) (FirstEnergy Comments); Reply Comments on Rules to Protect Consumers From Paying Charges for Unreasonable Arrangements by the Office of the Ohio Consumers' Counsel (May 20, 2019) (OCC Comments).

⁶ See Finding and Order (May 6, 2020) (Order).

governing economic development arrangements, energy efficiency arrangements, and unique arrangements. The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The Commission should grant rehearing and abrogate or modify its May 6, 2020 Order as requested herein by OMAEG.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Ohio statutory law allows public utilities and customers to enter into special arrangements with Commission approval.⁷ Commission rules govern the criteria surrounding approval of economic development arrangements, energy efficiency arrangements, and unique arrangements under this chapter.⁸ These rules seek to promote job growth, ensure the availability of reasonably priced electric service, promote energy efficiency, and allow appropriate incentives for environmentally friendly technologies.⁹ Under a special arrangement, a customer may receive reduced charges or other incentives, funded by other consumers.

OMAEG represents small and large energy consumers in the state of Ohio that 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

⁷ See R.C. 4905.31.

⁸ See Ohio Adm. Code 4901:1-38.

⁹ Ohio Adm. Code 4901:1-38-02.

arrangements are fair and do not result in unjust and unreasonable charges to the customers who fund the arrangements.

Since reasonable arrangements benefit one customer at the expense of other customers, Commission rules should ensure that special arrangements are awarded in a fair manner, and that special arrangements provide benefits to consumers as a whole. These benefits can include economic growth, environmentally friendly technologies, and energy saving policies.¹⁰ The adopted rules governing reasonable arrangements, however, do not go far enough to protect consumers who fund these special arrangements from unjust and unreasonable charges. The adopted rules remove mandatory minimum criteria for economic development arrangements and energy efficiency arrangements, which would have ensured fairness and that all customers benefit from reasonable arrangements. The adopted rules also lack a verification process regarding alleged relocations, a stringent penalty provision, and robust ongoing oversight rules, all of which would have ensured that promised benefits actually materialize, and would have revoked arrangements from customers who fail to deliver on their commitments made to secure the special arrangement.

Despite these issues, the Commission unreasonably adopted rules without addressing the concerns raised by OMAEG and other interested parties. The Commission should instead adopt the amendments proposed in OMAEG's Comments and Reply Comments in order to protect consumers who fund reasonable arrangements from unjust and unreasonable charges. To fail to do so is unlawful, unjust, and unreasonable, and constitutes reversible error.

¹⁰ See, e.g., Ohio Adm. Code 4901:1-38-02.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The Commission erred by failing to adopt mandatory minimum criteria that all applicants must meet to receive an economic development arrangement under Rule 4901:1-38-03.

In adopting the proposed revisions to Rule 4901:1-38-03, 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.”¹¹ As articulated previously, OMAEG generally supports several of the new criteria established by the proposed rules.¹² The proposed rules, however, remove the mandatory nature of the minimum criteria set forth in the rules. In its comments, OMAEG noted that the Commission should retain the minimum criteria language and establish concrete, minimum standards, and require—not just suggest—that all applicants for economic development arrangements meet those minimum standards.¹³ 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, amended Rules 4901:1-38-03(A)(2) and 4901:1-38-03(B)(2), as adopted by the Commission, list several criteria that the Commission will consider. Those criteria are as follows:

- (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 will be for non-retail purposes;
- (d) the economic impact of the project on the region is expected to be significant and will create or retain jobs;
- (e) the customer has explored or taken advantage of other opportunities for both non-

¹¹ Order at ¶ 18; Entry at ¶ 7 (April 3, 2019).

¹² See OMAEG Comments at 3-9.

¹³ See *id.*

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 application is for a set term; (i) the customer demonstrates financial viability; (j) the customer identifies local (city, county), state, or federal support in the form of tax abatements or credits, jobs programs, or other incentives; (k) the customer 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; and (l) the customer agrees to maintain operations at the project site for the term of the incentives.¹⁴

The amended 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”) remain undefined and do not generally ensure predictability in how applications will be reviewed and analyzed by the Commission.

In its Order adopting the amended rules, the Commission summarily states that the “proposed language for the rule will provide Staff, intervenors, and the Commission with relevant information needed.”¹⁵ However, the Commission makes no mention as to how that “relevant information” will be weighed or the relative importance assigned to each criterion. Instead of a definitive checklist, applicants, intervenors, and the Commission are left with a vague suggestion as to what information they should focus on. Although the Commission notes that “an applicant

¹⁴ Order at Attachment A, 2-3.

¹⁵ Id. at ¶ 45.

has the burden of proving that a proposed arrangement is indeed reasonable,”¹⁶ this provides no more clarity. Instead of having mandatory minimum criteria to define precisely what the burden is, parties are left to argue over a vague standard of reasonableness, without knowing where that standard actually lies.

The lack of specificity with regard to the mode of evaluation proposed in Rule 4901:1-38-03 creates a predictability problem for customers. Also, the Commission will be without defined standards in assessing each application that it receives under this provision. 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 making the provisions in Rule 4901:1-38-03 mandatory, OMAEG proposed additional requirements that would protect customers from being 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.¹⁷ The Commission unreasonably and unjustly failed to incorporate the additional requirements.

First, OMAEG suggested that the Commission require all recipients of economic development arrangements to document energy management and cost-reduction practices to diminish the need for special arrangements while also providing benefits to the system as a

¹⁶ Id.

¹⁷ See OMAEG Comments at 5-9.

whole.¹⁸ By requiring these practices, special arrangements would require less funding from other customers, and would be easier to justify to cost-bearing customers. The Commission, however, declined to adopt this recommendation without discussion in violation of R.C. 4903.09.

Second, pursuant to amended Rule 4901:1-38-03(A)(2)(g), OMAEG requested that the Commission require any potential reasonable arrangement to demonstrate that the benefits of such an arrangement outweigh the costs, so that customers are not forced to subsidize economic development arrangements of other customers when said arrangements do not even provide net positive economic development benefits.¹⁹ The Commission, however, not only failed to make this criterion mandatory, but did not require applicants to even submit a cost-benefit analysis, even though the burden of meeting these criteria lies with the applicant.²⁰ The Order does not explain how the amended rules will provide information necessary for an informed decision by the Commission when the applicant is not required to provide the information.

Third, OMAEG recommended that the Commission require any proposed arrangement to meet minimum wage and capital investment requirements.²¹ The purpose of these arrangements is to drive economic development.²² Despite this, the adopted amendments limit the ability of the Commission to ensure economic development. Although the Commission claims the adopted rules address job growth and wages,²³ the rule does not have any set requirement for adding jobs,²⁴ and

¹⁸ Id. at 5.

¹⁹ Id. at 7.

²⁰ Order at ¶ 45.

²¹ OMAEG Comments at 7.

²² See, e.g. Ohio Adm. Code 4901:1-38-02.

²³ Order at ¶ 45.

²⁴ Entry (April 3, 2019) at Attachment A, page 3.

was further watered down. The Commission stated that arrangements are “expected” to create jobs, instead of requiring that the arrangements actually create jobs.²⁵ Once again, the Commission relies on optional criteria to provide the necessary information for the Commission to make an informed decision, but does not even require the applicant to provide specific information or deliver on its promises.

Finally, OMAEG requested that the Commission limit the period in which a customer may operate under an economic development agreement, unless the applicant can demonstrate a new investment was made through expanded or new facilities or jobs. The Commission declined this request, noting that a customer could still decide to make new investments.²⁶ This observation strengthens, rather than detracts from, OMAEG’s concerns. Rather than perpetually benefitting from a one-time investment, customers should apply for a new special arrangement when they decide to make new investments. This prevents other customers from permanently funding an arrangement in exchange for temporary benefits. Limiting the original arrangement to a defined term, such as five years, reinforces this rule.

To protect customers who fund the economic development arrangements, in addition to making the provisions in Rule 4901:1-38-03 mandatory, the Commission should amend the rule to incorporate additional requirements to ensure that customers receive the stated benefits of the arrangement.

²⁵ Order at Attachment A, page 3.

²⁶ Order at ¶ 45.

ASSIGNMENT OF ERROR NO. 2: The Commission erred by failing to establish a verification process under Rule 4901:1-38-03 to determine the likelihood a customer will cease, reduce, or relocate operations in Ohio.

The Commission's adopted amendments 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.²⁷ 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 section (B)(2) do not seem to 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. 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 amended rules appropriately place the burden of proof for any application under these provisions on the applicant,²⁸ 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 its Order, however, the Commission states "the criteria need not require submission of information by an applicant that indicates it might relocate."²⁹ But without any information indicating whether or not an applicant plans on relocating, it is unclear how a special arrangement can meet the defined goal of keeping an applicant's operations in the state.

²⁷ See Ohio Adm. Code 4901:1-38-02(A).

²⁸ See Order at ¶ 45.

²⁹ Id.

ASSIGNMENT OF ERROR NO. 3: The Commission erred by failing to adopt mandatory minimum criteria that all applicants must meet to receive an energy efficiency arrangement 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.”³⁰ In its comments, OMAEG generally supported the new criteria established by the proposed rule.³¹ However, as explained previously, the Commission unreasonably removed the mandatory nature of the minimum criteria set forth in this rule as well.³² As explained with regard to amended Rule 4901:1-38-03, the Commission should retain 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.

OMAEG also proposed including additional criteria to the rule similar to that included in the rule regarding economic development arrangements. A manufacturer of energy efficiency products that promotes 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 also should be for a specified duration and should not be renewed. The Commission should also require applicants to demonstrate significant capital

³⁰ Id. at ¶ 9.

³¹ See OMAEG Comments at 10-12.

³² Order at ¶ 57.

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.

The Commission dismissed these valid concerns and constructive suggestions for Rule 4901:1-38-04, summarily stating in its Order that the proposed language provides the Commission with relevant information to make an informed and reasonable decision.³³ However, it is not clear how the rules provide that information without requiring the applicant to submit it. Furthermore, the Commission stated that other criteria are unnecessary, as they would limit the Commission's authority.³⁴ However, the Commission, in defining its own rules, would not be limiting its authority, but merely applying its authority in a consistent manner. The Commission should reconsider the comments set forth herein and amend its adopted rules regarding energy efficiency arrangements accordingly.

ASSIGNMENT OF ERROR NO. 4: The Commission erred by failing to establish rules governing oversight of recipients of reasonable arrangements.

OMAEG asked the Commission to take steps throughout its rules to ensure that recipients of reasonable arrangements are actually delivering the benefits promised during the process where the arrangement was approved.³⁵ 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

³³ Id.

³⁴ Id.

³⁵ OMAEG Comments at 12.

satisfying the commitments that it made to the Commission when applying for and obtaining its reasonable arrangement. It should be noted that adopted Rule 4901:1-38-06 references compliance with eligibility criteria, but, as explained above, the adopted 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, OMAEG asked the Commission to establish a review process wherein recipients of reasonable arrangements file 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.

The Commission declined to address OMAEG's valid concerns in its Order in violation of R.C. 4903.09.³⁶ While the adopted rules require an applicant to report how it has complied, the rules do not designate what information an applicant is required to submit, or what level of compliance will be sufficient to meet its burden. This creates uncertainty for applicants submitting reports, intervenors objecting to continued arrangements, and the Commission itself in rendering decisions.

ASSIGNMENT OF ERROR NO. 5: The Commission erred by failing to establish stringent penalty provisions under Rule 4901:1-38-09.

Lastly, OMAEG noted its concern with the weakening of Rule 4901:1-38-09, and asked the Commission to explicitly provide for the possibility of reducing or eliminating the incentives provided to a customer through a reasonable arrangement in the event that the recipient of such an arrangement is not meeting its commitments.³⁷ This measure would protect the customers who

³⁶ Order at ¶ 70.

³⁷ OMAEG Comments at 13.

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. Since the adopted Rules 4901:1-38-03 and 04 lack mandatory minimum criteria, it is unclear when a customer actually substantially fails to comply with any of the criteria for eligibility.

In declining to establish stringent penalty provisions,³⁸ the Commission noted that Rule 4901:1-38-09 remains unchanged, and will therefore adequately address noncompliance issues.³⁹ However, Rule 4901:1-38-09 relied on the mandatory minimum criteria previously included in Rules 4901:1-38-03 and 04. Since the Order removes these criteria, there is no longer a guideline in the rule that adequately defines compliance. Accordingly, the Commission should reinstate the mandatory minimum criteria in adopted Rules 4901:1-38-03 and 04 in order to give meaning to Rule 4901:1-38-09.

³⁸ See Order at ¶ 89.

³⁹ Id.

III. CONCLUSION

The Commission unreasonably and unlawfully erred by failing to adopt mandatory minimum criteria that all applicants must meet to receive an economic development arrangement or energy efficiency arrangement, by failing to establish a verification process that a customer will cease, reduce, or relocate operations in Ohio, by failing to establish rules governing oversight of recipients of reasonable arrangements, and by failing to establish stringent penalty provisions under Rule 4901:1-38-09. The Commission's Order unreasonably fails to address these issues, creating difficulties for applicants, intervenors, and the Commission itself. In order to fully protect the interests of consumers, the Commission should grant rehearing and reverse the errors specified herein.

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CERTIFICATE OF SERVICE

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/s/ Kimberly W. Bojko

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This foregoing document was electronically filed with the Public Utilities

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6/5/2020 12:30:21 PM

in

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

Summary: Application for Rehearing and Memorandum in Support by The Ohio Manufacturers' Association Energy Group electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group