

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

CASE NO. 18-1191-EL-ORD

ENTRY ON REHEARING

Entered in the Journal on July 1, 2020

I. SUMMARY

{¶ 1} The Commission denies the application for rehearing filed by the Ohio Manufacturers' Association Energy Group.

II. DISCUSSION

A. *Procedural Background*

{¶ 2} R.C. 111.15(B) and R.C. 106.03(A) require all state agencies to conduct a review, every five years, of their rules and to determine whether to continue their rules without change, amend their rules, or rescind their rules. Ohio Adm.Code Chapter 4901:1-38 concerns reasonable arrangements for electric utility customers.¹

{¶ 3} On October 28, 2018, the Commission conducted a workshop to solicit stakeholder comments concerning Ohio Adm.Code Chapter 4901:1-38. Following the issuance of proposed rules on April 3, 2019, stakeholders filed written comments and reply comments on May 3, 2019, and May 20, 2019, respectively.

{¶ 4} On May 6, 2020, the Commission issued a Finding and Order (the Order) in which it amended Ohio Adm.Code 4901:1-38-03, 4901:1-38-04, 4901:1-38-05, 4901:1-38-06, and 4901:1-36-07, and made no change to Ohio Adm.Code 4901:1-38-01, 4901:1-38-02, 4901:1-38-08, and 4901:1-38-09.

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

{¶ 5} R.C. 4903.10 states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days after the Commission's order is journalized.

{¶ 6} On June 5, 2020, the Ohio Manufacturers Association Energy Group (OMAEG) filed an application for rehearing, asserting that five errors are present in the May 6, 2020 Finding and Order, as follows. First, the Commission did not adopt mandatory minimum criteria that new or expanding customers must meet to receive approval for an economic development arrangement under Ohio Adm.Code 4901:1-38-03. Second, the Commission did not establish a verification process under Ohio Adm.Code 4901:1-38-03 to determine the likelihood that customers having an economic development arrangement will cease, reduce, or relocate operations in Ohio. Third, the Commission did not adopt mandatory minimum criteria that all applicants must meet to receive an energy efficiency arrangement under Ohio Adm.Code 4901:1-38-04. Fourth, the Commission did not establish rules governing oversight of recipients of reasonable arrangements. Fifth, the Commission did not establish stringent penalty provisions under Ohio Adm.Code 4901:1-38-09.

{¶ 7} On June 15, 2020, Ohio Energy Group (OEG) filed a memorandum contra, asserting OMAEG simply reiterates its arguments that were rejected by the Commission in its May 6, 2020 Order. OEG urges the Commission to deny the application for rehearing.

B. Summary of the Application for Rehearing and Memorandum Contra; Commission Conclusions

1. WHETHER THE COMMISSION ERRED BY NOT ADOPTING MANDATORY MINIMUM CRITERIA FOR NEW OR EXPANDING CUSTOMERS TO RECEIVE APPROVAL FOR AN ECONOMIC DEVELOPMENT ARRANGEMENT

{¶ 8} OMAEG observes that Commission amendments to Ohio Adm.Code 4901:1-38-03(A) changed criteria that currently are mandatory for Commission approval of an economic development arrangement to criteria that the Commission "will consider" for approval of such an application. OMAEG asserts that, while it generally supports some

additional criteria that the Commission has added, all such criteria should continue to be mandatory, so that there will be “predictability and fairness” when the Commission evaluates applications. (App. for Rehearing at 6.) Further, contends OMAEG, the Commission’s proposed language does not indicate whether the Commission will weigh the absence of one criterion more or less than any other. In OMAEG’s opinion, the Commission’s proposed language would not allow customers to predictably determine whether or not they qualify for an economic development arrangement, or whether they should support or oppose the applications of others so as to challenge an unreasonable increase in their electric bills. (App. for Rehearing at 8.)

{¶ 9} In addition, OMAEG notes that it had “*** proposed requirements that would protect customers from being forced to fund an economic development arrangement that fails to provide benefits commensurate with costs borne by other customers, who are sometimes competitors to the recipients of such arrangements” (App. for Rehearing at 8). First, OMAEG explains, it had suggested that recipients of economic development arrangements be required to document energy management and cost-reduction practices to diminish the need for special arrangements, while also providing benefits to the system as a whole. OMAEG contends that the Commission provided no explanation for not adopting this recommendation, in violation of R.C. 4903.09. (App. for Rehearing at 8-9.)

{¶ 10} Second, OMAEG asserts that it had requested that any potential reasonable arrangement must demonstrate that the benefits of the arrangement outweigh the costs, so that customers are not forced to subsidize economic development arrangements of other customers when such arrangements do not provide net positive economic development benefits. OMAEG states that the Commission did not make this proposal mandatory and did not explain how the amended rules will provide information needed for an informed decision by the Commission, when the applicant is not required to provide the information. (App. for Rehearing at 9.)

{¶ 11} Third, OMAEG had proposed that the Commission require any proposed arrangement to meet minimum wage and capital investment requirements. OMAEG asserts that the Commission’s language “* * * does not have any set requirement for adding jobs,” even though the purpose of a reasonable arrangement is to drive economic development. (App. for Rehearing at 9-10.) In OMAEG’s opinion, the optional criteria proposed by the Commission “does not even require an applicant to provide specific information or deliver on its promises.” (App. for Rehearing at 10.)

{¶ 12} Finally, states OMAEG, the Commission did not adopt OMAEG’s proposal to limit the period in which a customer may operate under an economic development agreement, unless the applicant can demonstrate that a new investment was made through expanded or new facilities or jobs. OMAEG notes that the Commission declined this request by stating that a customer could still decide to make new investments. In OMAEG’s opinion, the Commission’s reasoning strengthens OMAEG’s concerns, because customers should apply for a new special arrangement when they decide to make new investments; such a requirement would prevent other customers from permanently funding an arrangement in exchange for temporary benefits. OMAEG asserts that limiting the original arrangement to a specific length of time reinforces the rule. (App. for Rehearing at 10).

{¶ 13} The issues raised by OMAEG in this assignment of error were thoroughly addressed in the Order and require no further response at this time, as OMAEG has raised no new arguments in support of its grounds for rehearing. Order at ¶45. Therefore, the Commission finds that this assignment of error should be denied.

2. WHETHER THE COMMISSION ERRED BY NOT ESTABLISHING A VERIFICATION PROCESS TO DETERMINE THE LIKELIHOOD AN EXISTING CUSTOMER WILL CEASE, REDUCE, OR RELOCATE OPERATIONS IN OHIO

{¶ 14} OMAEG agrees with many of the new criteria added by the Commission to Ohio Adm.Code 4901:1-38-03(B) but recommends keeping the current mandatory nature of such criteria, which concerns an application for an economic development arrangement to retain existing customers. OMAEG also contends that some of the criteria proposed by the

Commission do not seem consistent with retention of an existing customer likely to end or reduce its operations in Ohio. (App. for Rehearing at 11.)

{¶ 15} OMAEG adds that, while the amended rule correctly places the burden of proof for any such application upon the applicant, the Commission should explicitly require a verification process to prevent applicants from using an empty threat of ending or reducing Ohio operations to obtain a subsidy from other customers. Without information concerning whether an applicant plans on relocating, emphasizes OMAEG, it is unclear how such a reasonable arrangement can meet its goal of keeping an applicant's operations in Ohio. (App. for Rehearing at 11.)

{¶ 16} The issues raised by OMAEG were addressed in the Order. Order at ¶45. As such, OMAEG has failed to present new arguments upon rehearing. Therefore, this assignment of error should be denied.

3. WHETHER THE COMMISSION ERRED BY NOT ADOPTING MANDATORY MINIMUM CRITERIA THAT ALL APPLICANTS MUST MEET TO RECEIVE AN ENERGY EFFICIENCY ARRANGEMENT

{¶ 17} OMAEG states that it generally supports the new criteria proposed by the Commission in Ohio Adm.Code 4901:1-38-04 but disagrees with eliminating the current mandatory nature of the criteria. OMAEG reemphasizes that mandatory criteria ensure predictability and fairness in the process. (App. for Rehearing at 12). OMAEG notes that it had proposed additional criteria similar to its proposal for economic development arrangements, specifically, that a manufacturer of energy efficiency products should be required to annually demonstrate continued use of energy management and cost reduction strategies, and that energy efficiency arrangements should be for a specified period of time and not renewable (App. for Rehearing at 12). OMAEG also urges that applicants be required to demonstrate significant capital investment and job creation, and that applicants must competitively shop for, or consider, self-generation options for their load if it benefits the applicant. (App. for Rehearing at 13). OMAEG contends that energy efficiency arrangements should 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. OMAEG observes that the Commission dismissed such suggestions in its Order, stating that the Commission's proposed language will provide relevant information to make an informed and reasonable decision. OMAEG disagrees, asserting that it is unclear how the rules provide such information without requiring an applicant to submit it. (App. for Rehearing at 13.)

{¶ 18} The issues raised by OMAEG in this assignment of error were thoroughly addressed in the Order and require no further response at this time, because OMAEG has raised no new arguments in support of its grounds for rehearing. Order at ¶57. Therefore, the Commission finds that this assignment of error should be denied.

4. WHETHER THE COMMISSION ERRED BY NOT ESTABLISHING RULES GOVERNING OVERSIGHT OF RECIPIENTS OF REASONABLE ARRANGEMENTS.

{¶ 19} OMAEG notes that it asked the Commission to ensure that recipients of reasonable arrangements are actually delivering the benefits promised when the reasonable arrangement was approved. In OMAEG's opinion, the requirement in Ohio Adm.Code 4901:1-38-06 that customers served under a reasonable arrangement must submit an annual report to the electric utility, Staff, and the Commission is vague and insufficient; the rule should specify 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 when applying for the arrangement. (App. for Rehearing at 13-14.) OMAEG adds that, although Ohio Adm.Code 4901:1-38-06 requires compliance with eligibility criteria, the Commission's proposal to eliminate mandatory eligibility criteria makes unclear what reasonable arrangement recipients should report to the Commission, and how the Commission will evaluate the report. OMAEG also states that it urged the Commission to establish a review process under which recipients of reasonable arrangements file reports detailing actual progress concerning capital investment, employment, and other commitments. OMAEG contends that the Commission did not address OMAEG's concerns and thus violated R.C. 4903.09. (App. for Rehearing at 14.)

{¶ 20} The issues raised by OMAEG were addressed in the Order. Order at ¶70. As such, OMAEG has failed to present new arguments upon rehearing. Therefore, this assignment of error should be denied.

5. WHETHER THE COMMISSION ERRED BY NOT ESTABLISHING STRINGENT PENALTY PROVISIONS UNDER OHIO ADM.CODE 4901:1-38-09

{¶ 21} OMAEG emphasizes that it had urged 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. OMAEG contends that such a measure would protect customers who fund incentives through reasonable arrangements from the possibility that they will be forced to subsidize another customer for the entire term of the arrangement without realizing any of the benefits promised when the arrangement was approved. (App. for Rehearing at 14-15.) OMAEG asserts that, because the Commission proposes to eliminate mandatory eligibility criteria in Ohio Adm.Code 4901:1-38-03 and 4901:1-38-04, it is unclear when a customer has failed to substantially comply with any criteria for eligibility (App. for Rehearing at 15).

{¶ 22} In addition, notes OMAEG, although the Commission has not proposed any amendments to Ohio Adm.Code 4901:1-38-09, current language in the rule will not adequately address noncompliance issues. OMAEG reemphasizes that Ohio Adm.Code 4901:1-38-09 relies on Ohio Adm.Code 4901:1-38-03 and 4901:1-38-04, which under the Commission's proposed language no longer specify mandatory minimum criteria; consequently, there is no longer a guideline to adequately define compliance. OMAEG urges the Commission to reinstate the mandatory minimum criteria in Ohio Adm.Code 4901:1-38-03 and 4901:1-38-04 to give meaning to Ohio Adm.Code 4901:1-38-09. (App. for Rehearing at 15.)

{¶ 23} These issues were discussed and addressed in the Order and OMAEG has offered no new arguments to persuade us otherwise. Order at ¶89. OMAEG has failed to

present any new arguments for the Commission's consideration. This assignment of error should, thus, be denied.

{¶ 24} Having found that all five of OMAEG's assignments of error to be without merit, OMAEG's application for rehearing should be denied.

III. ORDER

{¶ 25} It is, therefore,

{¶ 26} ORDERED, That the application for rehearing filed by OMAEG on June 5, 2020, be denied. It is, therefore,

{¶ 27} ORDERED, That a copy of this Entry on Rehearing be served upon each party of record.

COMMISSIONERS:

Approving:

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

JML/hac

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Summary: Entry denying the application for rehearing filed by the Ohio Manufacturers' Association Energy Group electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio