

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE AMENDMENT OF
THE RULES IN OHIO ADM.CODE
CHAPTER 4901:1-43 REGARDING
RECOVERY OF INFRASTRUCTURE
DEVELOPMENT COSTS.

CASE NO. 21-10-GA-ORD

FINDING AND ORDER

Entered in the Journal on July 14, 2021

I. SUMMARY

{¶ 1} The Commission adopts the proposed amendments to Ohio Adm.Code Chapter 4901:1-43 regarding the recovery of infrastructure development costs, as determined in and attached to this Finding and Order.

II. DISCUSSION

A. *Applicable Law*

{¶ 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. The Commission opened this docket to review the infrastructure development cost rules in Ohio Adm.Code Chapter 4901:1-43.

{¶ 3} R.C. 106.03(A) requires that the Commission 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- (a) Should be continued without amendment, be amended, or be rescinded, taking into consideration the purpose, scope, and intent of the statute under which the rules were adopted;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 citation accompanying the incorporation by reference would reasonably enable the Joint Committee on Agency Rule Review (JCARR) or a reasonable person to whom the rules apply to find and inspect the incorporated text or material readily and without charge and, if the rule has been exempted in whole or in part from R.C. 121.71 to 121.74 because the incorporated text or material has one or more characteristics described in R.C. 121.75(B), whether the incorporated text or material actually has any of those characteristics;
- (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} Additionally, in accordance with R.C. 121.82, in the course of developing draft rules, the Commission must evaluate the rules against the business impact analysis (BIA). If there will be an adverse impact on businesses, as defined in R.C. 107.52, the agency is to incorporate features into the draft rules to eliminate or adequately reduce any adverse

impact. Furthermore, the Commission is required, pursuant to R.C. 121.82, to provide the Common Sense Initiative office the draft rules and the BIA.

{¶ 5} Pursuant to R.C. 121.95(F), a state agency may not adopt a new regulatory restriction unless it simultaneously removes two or more other existing regulatory restrictions. In accordance with R.C. 121.95, and prior to January 1, 2020, the Commission identified rules having one or more regulatory restrictions that require or prohibit an action, prepared a base inventory of these restrictions in the existing rules, and submitted this base inventory to JCARR, as well as posted this inventory on the Commission's website at <https://puco.ohio.gov/wps/portal/gov/puco/documents-and-rules/resources/restrictions>. With regard to the amendments discussed in this Finding and Order with respect to Ohio Adm.Code Chapter 4901:1-43, the Commission has both considered and satisfied the requirements in R.C. 121.95(F).

B. Procedural History

{¶ 6} On February 1, 2021, the Commission held a workshop in this proceeding to enable interested stakeholders to propose revisions to Ohio Adm.Code Chapter 4901:1-43. Representatives of interested stakeholders attended the workshop. Two stakeholders offered verbal statements on Ohio Adm.Code Chapter 4901:1-43.

{¶ 7} The Commission and Staff evaluated the rules contained in Ohio Adm.Code Chapter 4901:1-43 and considered feedback received at the workshop. As a result of that review, Staff recommended removing Ohio Adm.Code 4901:1-43-03(A)(3)(a), which requires a natural gas company applicant to provide the estimated state and local taxable base increase for its economic development project. The remaining rules in the chapter were to remain unchanged under Staff's proposal.

{¶ 8} By Entry issued on March 10, 2021, the Commission requested comments and reply comments on Staff's proposed revisions to Ohio Adm.Code Chapter 4901:1-43,

and ordered that comments and reply comments be filed by April 19, 2021, and May 3, 2021, respectively.

{¶ 9} Consistent with the Entry issued on March 10, 2021, written comments were timely filed on April 19, 2021, by the Ohio Consumers' Counsel (OCC), and collectively by The East Ohio Gas Company d/b/a Dominion Energy Ohio (Dominion), Vectren Energy Delivery of Ohio, Inc. d/b/a CenterPoint Energy Ohio (Vectren), and Columbia Gas of Ohio, Inc. (Columbia) in response to Staff's proposed revision. Reply comments were then timely filed on May 3, 2021, by Duke Energy Ohio, Inc. (Duke), OCC, and collectively by Dominion and Vectren.

III. COMMENTS ON PROPOSED REVISIONS

{¶ 10} **Ohio Adm.Code 4901:1-43-01 (Definitions).** Staff does not recommend changes, and no changes were recommended by stakeholders.

{¶ 11} **Ohio Adm.Code 4901:1-43-02 (Purpose and Scope).** Staff does not recommend changes, and no changes were recommended by stakeholders.

{¶ 12} **Ohio Adm.Code 4901:1-43-03 (Project Information and Approval Process).** Staff recommends removing Ohio Adm.Code 4901:1-43-03(A)(3)(a), which requires a natural gas company applicant to provide the estimated state and local taxable base increase for its economic development project.

{¶ 13} In their joint comments, Columbia, Dominion, and Vectren support Staff's recommendation to remove the requirement in Ohio Adm.Code 4901:1-43-03(A)(3)(a). They explain that the natural gas companies generally have neither knowledge of, nor access to, the information necessary to reasonably estimate the state and local tax base increase. They also note that there is no statutory requirement for the information in R.C. 4929.163 and that this requirement has been waived by the Commission in previous cases.

{¶ 14} In its comments, the OCC opposes the removal of Ohio Adm.Code 4901:1-43-03(A)(3)(a). OCC explains that, although the information may not be known by a natural gas company at the time of the application, the company may seek a waiver of the rule. OCC recommends that the utilities provide this information in subsequent updated annual reports once the information becomes known.

{¶ 15} In their joint reply comments, Dominion and Vectren oppose OCC's recommendation to keep Ohio Adm.Code 4901:1-43-03(A)(3)(a). They argue that, to their knowledge, the requirement has been waived in every economic development project notice proceeding, and the process of requesting waivers is unnecessary and inefficient when the requirement should instead be eliminated. Dominion and Vectren argue that the information is not within the utilities' possession or control at any time, so OCC's recommendation that the utilities provide the information in subsequent filings is untenable. They contend that OCC has not demonstrated a need for the requirement, so eliminating the requirement is reasonable and appropriate.

{¶ 16} In its reply comments, Duke states its opposition to OCC's recommendation to keep the Ohio Adm.Code 4901:1-43-03(A)(3)(a) requirement. Duke argues that it would be inefficient to require an item that will be waived more often than not.

{¶ 17} In its reply comments, OCC argues that Ohio Adm.Code 4901:1-43-03(A)(3)(a) should not be removed because the Commission and utility customers should be able to confirm the taxable base increase benefits accruing from the economic development project. OCC suggests the following language be added to Ohio Adm.Code 4901:1-43-03(A)(3)(a): "If this information is unknown, the utility should provide it in a subsequent updated annual report."

{¶ 18} The Commission agrees with Staff's recommendation to remove the requirement and notes that this requirement is regularly waived because the natural gas companies lack the information. *See, e.g., In re The East Ohio Gas Co. d/b/a Dominion Energy*

Ohio, Case No. 21-523-GA-EDP, Entry (May 21, 2021) at ¶ 12; *In re Columbia Gas of Ohio, Inc.*, Case No. 20-1765-GA-EDP, Entry (Jan. 4, 2021) at ¶ 12. Consequently, the Commission adopts Staff's recommendation to remove the Ohio Adm.Code 4901:1-43-03(A)(3)(a) requirement. However, to the extent that a natural gas company is subsequently able to obtain information regarding the tax impacts associated with an economic development project, the company should provide the information in the infrastructure development rider (IDR) annual report required under Ohio Adm.Code 4901:1-43-04. Further, we note that nothing precludes Staff from requesting tax impact information if it is not provided or addressed by the natural gas company in the annual report.

{¶ 19} Ohio Adm.Code 4901:1-43-04 (Cost Recovery Rider Process). Staff does not recommend any changes.

{¶ 20} In its comments, OCC recommends that the 75-day automatic approval process for the infrastructure development rider rate found in Ohio Adm.Code 4901:1-43-04(D) be eliminated or the time period extended to 120 days to allow for meaningful review. OCC argues that additional time would allow interested parties time for thorough discovery to investigate whether the infrastructure development charges are reasonable. If the automatic approval timeline is not extended to 120 days, OCC recommends that the rule be amended to require utilities to provide substantive responses to discovery within seven days of receipt of the discovery, which OCC believes would keep the process fair to intervenors.

{¶ 21} OCC also recommends that the 45-day deadline to intervene and submit comments found in Ohio Adm.Code 4901:1-43-04(E)(2) be eliminated or extended to 90 days.

{¶ 22} In their joint reply comments, Dominion and Vectren oppose OCC's recommendation to extend the 75-day automatic approval deadline. They argue that Staff completes a meaningful and detailed review and issues its findings and recommendations

within the 75-day period. Dominion and Vectren point out that Staff has not recommended extending the period, which suggests that 75 days provides adequate time to review and issue recommendations. As to OCC's recommendation to extend the time for intervention, Dominion and Vectren note that OCC has never intervened in an annual IDR report proceeding.

{¶ 23} In its reply comments, Duke states its opposition to OCC's proposals to eliminate or extend the 75-day and 45-day periods in Ohio Adm.Code 4901:1-43-04(D) and 4901:1-43-04(E)(2) because it would needlessly delay rate recovery. Duke notes that the rules permit the 75-day and 45-day periods to be suspended for good cause and argues that the ability to suspend those deadlines eliminates the need for an expedited discovery schedule. Duke also notes that the rules already empower the Commission to make reconciliation adjustments after a hearing, so consumers are already protected from imprudent charges.

{¶ 24} The Commission disagrees with OCC's recommendation to eliminate or extend the 75-day and 45-day periods in Ohio Adm.Code 4901:1-43-04(D) and 4901:1-43-04(E)(2), respectively. Staff has not proposed that the 75-day automatic approval deadline be modified, and we find that it provides sufficient time to review the annual report and offer a recommendation. We also find that the 45-day deadline for intervention and comments in an annual report proceeding is reasonable. Additionally, the Commission notes that the 75-day period can be suspended for good cause shown, while the 45-day deadline could be extended under appropriate circumstances. The Commission also notes that discovery delays could present good cause to suspend or extend the deadlines. Consequently, the Commission declines to adopt OCC's recommendations for amendments to Ohio Adm.Code 4901:1-43-04(D) and 4901:1-43-04(E)(2).

IV. CONCLUSION

{¶ 25} In making its rules, an agency is required by R.C. 106.03(A) to consider the continued need for the rules, the nature of any complaints or comments received concerning the rules, and any relevant factors that have changed in the subject matter area affected by the rules. The Commission has evaluated Ohio Adm.Code Chapter 4901:1-43 and recommends amending the rules as demonstrated in the attachment to this Finding and Order.

{¶ 26} An agency must also demonstrate that it has evaluated the impact of the rule on businesses, pursuant to R.C. 106.03(A)(6) and 121.82(A). Moreover, pursuant to R.C. 121.95(F), the agency must remove two or more existing regulatory restrictions for every new regulatory restriction added. The Commission has included stakeholders in the development of these rules, has considered the impact of the rules on businesses, and has adhered to the requirement regarding the removal of regulatory restrictions.

{¶ 27} Accordingly, at this time, the Commission finds that the amendment to Ohio Adm.Code 4901:1-43-03 should be adopted and filed with JCARR, the Secretary of State, and the Legislative Service Commission (LSC). The Commission also finds that no changes should be made to Ohio Adm.Code 4901:1-43-01, -02, and -04.

{¶ 28} The rules are 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 Finding and Order only. All interested persons are directed to input case number 21-10 into the Case Lookup box to view this Finding and Order, as well as the rules, or to contact the Commission's Docketing Division to request a paper copy.

V. ORDER

{¶ 29} It is, therefore,

{¶ 30} ORDERED, That amended Ohio Adm.Code 4901:1-43-03 be adopted. It is, further,

{¶ 31} ORDERED, That Ohio Adm.Code 4901:1-43-01, -02, and -04 be adopted with no changes. It is, further,

{¶ 32} ORDERED, That the adopted rules be filed with JCARR, the Secretary of State, and LSC, in accordance with divisions (D) and (E) of R.C. 111.15. It is, further,

{¶ 33} ORDERED, That the final rules be effective on the earliest date permitted by law. Unless otherwise ordered by the Commission, the five-year review date for Ohio Adm. Code Chapter 4901:1-43 shall be in compliance with R.C. 106.03. It is, further,

{¶ 34} ORDERED, That a copy of this Finding and Order, with the rules and BIA, be served upon the Common Sense Initiative at CSIPublicComments@governor.ohio.gov. It is, further,

{¶ 35} ORDERED, That a copy of this Finding and Order be sent to the gas-pipeline list-serve. It is, further,

{¶ 36} ORDERED, That a copy of this Finding and Order be served upon all regulated gas and natural gas companies, all certified retail natural gas suppliers, the Ohio Consumers' Counsel, the Ohio Gas Association, the Ohio Petroleum Council, the Ohio Oil and Gas Association, and all other interested persons of record.

COMMISSIONERS:

Approving:

Jenifer French, Chair
M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

*****DRAFT - NOT FOR FILING*****

NO CHANGE

4901:1-43-01 Definitions.

- (A) "Annual report" means a report filed annually by any natural gas company with a commission-approved infrastructure development rider pursuant to this chapter.
- (B) "Application" means an application for a natural gas infrastructure development rider pursuant to this chapter.
- (C) "Commission" means the public utilities commission of Ohio.
- (D) "Economic development entity" shall have the meaning set forth in division (C) of section 4929.163 of the Revised Code.
- (E) "Infrastructure development" shall have the meaning set forth in division (A) of section 4929.16 of the Revised Code.
- (F) "Infrastructure development costs" shall have the meaning set forth in division (B) of section 4929.16 of the Revised Code.
- (G) "Natural gas company" means a company that meets the definition of a natural gas company set forth in section 4905.03 of the Revised Code and that also meets the definition of a public utility under section 4905.02 of the Revised Code.
- (H) "Notice" means a notice filing for a natural gas infrastructure development project pursuant to this chapter.
- (I) "Staff" means the staff of the commission or its authorized representative.

NO CHANGE

4901:1-43-02 Purpose and scope.

- (A) This chapter authorizes a natural gas company to file an application with the commission for approval of an infrastructure development rider to recover prudently incurred infrastructure development costs of one or more economic development projects approved under section 4929.163 of the Revised Code.
- (B) The commission may, upon an application or a motion filed by a party, waive any requirement

*****DRAFT - NOT FOR FILING*****

of this chapter, other than a requirement mandated by statute, for good cause shown.

AMENDED

4901:1-43-03 Project information and approval process.

- (A) Pursuant to division (A) of section 4929.163 of the Revised Code, a natural gas company may file, prior to beginning construction, for approval of an economic development project through an economic development project notice with the commission's docketing division. This notice shall contain the following information:
- (1) The name and location of the project.
 - (2) A background of the subject company of the economic development project.
 - (3) The level of total investment and capital expenditure by the subject company and the economic development impact. This description shall contain the following information:
 - ~~(a) Estimated state and local taxable base increase.~~
 - ~~(b)~~(a) Anticipated number of new jobs created and jobs retained by the project.
 - ~~(c)~~(b) Description of the community served and the benefits to that community.
 - (4) To the maximum extent practicable, a description of other potential locations that may compete with the proposed location, including the type, location, and time frame of potentially competing projects.
 - (5) The level of infrastructure investment anticipated by the natural gas company. This description shall contain the following information:
 - (a) A description of how the infrastructure development costs are projected to generate a return less than the most recently authorized rate of return.
 - (b) A description of how the utility will not exceed the one dollar and fifty cents recovery cap on a monthly basis from any single customer in this state.
 - (6) The support for the project by an economic development entity or chamber of commerce.
- (B) Following its review of the information set forth in paragraph (A) of this rule, and any other

*****DRAFT - NOT FOR FILING*****

information consistent with section 4929.163 of the Revised Code, the commission may approve a project if the infrastructure development costs for the project are projected to generate a return on the company's investment that is less than the most recently authorized rate of return.

- (C) A notice filed pursuant to division (A) of section 4929.163 of the Revised Code shall be deemed automatically approved on the thirtieth day after the date of the notice filing unless the notice filing is suspended by the commission for good cause shown. If the notice filing is suspended, the commission shall approve, deny, modify, or hold a hearing on the notice filing not later than forty-five days after the date that the suspension begins.

NO CHANGE

4901:1-43-04 Cost recovery rider process.

- (A) Each natural gas company which seeks recovery of economic development project costs shall first file an application with the commission's docketing division for an infrastructure development rider pursuant to section 4929.161 of the Revised Code. The initial application shall include all information set forth upon forms as may be prescribed by the commission.
- (B) Each natural gas company with an approved infrastructure development rider shall update the rider rate on an annual basis as set forth by commission order. Each annual report to update the infrastructure development rider shall include all information set forth upon forms as may be prescribed by the commission.
- (C) The commission may order that consultants be hired, with costs billed to the natural gas company, to conduct prudence and/or financial reviews of the costs incurred and recovered through the infrastructure development rider.
- (D) Each annual report to update the infrastructure development rider should be made not less than seventy-five days prior to the proposed effective date of the updated rider rate. Proposed rates will become effective on the seventy-sixth day, unless suspended by the commission for good cause shown, and shall be subject to reconciliation adjustments following any hearing, if necessary.
- (E) Affected parties may file a motion to intervene and submit comments on any issues within the following timelines:

*****DRAFT - NOT FOR FILING*****

- (1) A motion to intervene and submit comments concerning any notice filed under paragraph (A) of rule 4901:1-43-03 of the Administrative Code must be submitted to the commission within fifteen days of the date of the filing of the notice.
- (2) A motion to intervene and submit comments concerning an annual report to update the infrastructure development rider filed under this rule must be submitted to the commission within forty-five days of the date of the filing of the annual report.

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

7/14/2021 2:42:29 PM

in

Case No(s). 21-0010-GA-ORD

Summary: Finding & Order adopting the proposed amendments to Ohio Adm.Code Chapter 4901:1-43 regarding the recovery of infrastructure development costs, as determined in and attached to this Finding and Order electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio