IN THE SUPREME COURT OF OHIO

Ohio Partners for Affordable Energy,	
Appellant,	**Case No. 06-1633**
v.	**On Appeal From The Public Utilities Commission of Ohio, Case No. 05-474-GA-ATA**
The Public Utilities Commission of Ohio,	
Appellee.	

MERIT BRIEF AND APPENDIX OF INTERVENING APPELLEE, THE EAST OHIO GAS COMPANY d/b/a DOMINION EAST OHIO

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INTRODUCTION

This case is about the authority of the Public Utilities Commission of Ohio to grant exemptions to natural gas companies from certain provisions of Ohio Revised Code Title 49, including provisions that regulate how natural gas companies must price "commodity service." "Commodity service" refers to the purchase of natural gas commodity that customers use as fuel; it is a distinct service from the production, transportation or distribution of gas. *See* R.C. 4929.01(C). For many years, R.C. 4905.302 required natural gas companies to use a formula called the "gas cost recovery" ("GCR") to bill customers for commodity service. A statute enacted in 1996, codified as R.C. 4929.04, now allows gas companies to apply to the Commission for exemptions from regulation so that gas companies can price commodity service based on market prices instead of a regulated GCR price. In the proceeding below, the Commission, under R.C. 4929.04, granted an exemption to The East Ohio Gas Company d/b/a Dominion East Ohio ("Dominion") to allow the company to price commodity service at market-based prices determined by an auction. It is from that order that Ohio Partners for Affordable Energy ("OPAE") appeals.

OPAE challenges the Commission's authority to approve Dominion's application under R.C. 4929.04. R.C. Chapter 4929 was enacted to promote retail competition for natural gas commodity service. Since 1997, customers electing to participate in Dominion's "Energy Choice" program have been able to purchase gas from suppliers at prices determined by competition among participating gas suppliers. Customers electing not to participate in the Energy Choice program continued to obtain and be billed for gas at the regulated GCR rate. The GCR rate is based on a multifactored formula composed of before-the-fact gas cost estimates and after-the-fact adjustments (to account for the differences between the prior estimated gas cost and actual gas cost). The GCR resulted in rates for commodity service that almost always were above or below current market prices for natural gas. Effective retail competition for natural gas commodity, however, requires the ability to compare comparable prices—specifically, prices based solely on the market for natural gas. As the evidence below demonstrated, because the GCR is not a market-based price, it interferes with programs that allow gas suppliers to compete for retail customers.

To address this problem, Dominion developed a plan to allow it to eliminate the GCR and, ultimately, Dominion's role in purchasing natural gas for its customers. Under "Phase 1" of the plan, Dominion sought approval from the Commission to eliminate the GCR and replace it with a competitive, auction-based pricing method that establishes the cost of gas commodity at market prices. During Phase 1, Dominion will continue to obtain gas commodity for customers. If Phase 1 successfully sets the stage for further changes, Dominion will file an application for "Phase 2" of the plan which would have it "exit the merchant function," *i.e.*, withdraw from its role as a provider of natural gas commodity and focus instead exclusively on its role as a distribution service provider. Under Phase 2, customers would obtain commodity service directly from retail suppliers instead of through Dominion. The Commission approved Dominion's Phase 1 application.

The Commission acted well within its authority in approving Dominion's application. Under R.C. 4929.04, the Commission is authorized to exempt any natural gas commodity service from numerous provisions of the Revised Code, including any obligation to provide commodity service under R.C. 4905.22, and the requirement to price commodity service under a purchased gas adjustment clause (using the GCR) required by R.C. 4905.302. Under R.C. 4929.04(A), to grant an exemption, the Commission must first find that one of two conditions exists, *i.e.*, either: (a) "[t]he natural gas company is subject to effective competition with respect to the commodity sales service or ancillary service," R.C. 4929.04(A)(1); *or* (b) "[t]he customers of the commodity sales service or ancillary service have reasonably available alternatives," R.C. 4929.04(A)(2). R.C. 4929.04 also lists a number of factors to aid the determination whether the applicant has satisfied sections R.C. 4929.04(A)(1) or (2). *See* R.C. 4929.04(B)(1)–(4). The Commission must also find that "the natural gas company is in substantial compliance with the policy of this state specified in section 4929.02." R.C. 4929.04(A). The statute enumerates eleven policy goals of the state, most of which concern promoting competition and customer choice for natural gas supply. If all of these statutory criteria are met, the Commission has no discretion in determining whether to approve an application under R.C. 4929.04; the Commission "shall" approve it. R.C. 4929.04(A).

The proceeding below concerned Dominion's application for approval of Phase 1 of its plan. Dominion and other participants in the proceeding submitted evidence to support all of the statutory criteria for an R.C. 4929.04 exemption. This evidence was unrebutted at hearing. Rather, the thrust of OPAE's position below was that the Commission could approve Dominion's application *only* if it conditioned that approval on Dominion's agreement to increase funding for low-income and weatherization programs. The Commission, however, did not err by refusing to attach strings to Dominion's application that are not provided for by statute and, in fact, which are contrary to the legislative goal of reducing subsidies for gas commodity service. *See* R.C. 4929.02(A)(8).

In this appeal, OPAE's three proposed propositions of law provide no reason to reverse the Commission's order. As an initial matter, OPAE failed to preserve its objections to the form of the application filed in this case and the Commission's decision to review Dominion's plan to exit the merchant function in two phases. Even if the arguments had been preserved, the

Commission's decisions concerning the form of applications and the conduct of hearings deserve great deference. Second, OPAE questions the sufficiency of the evidence. But, as demonstrated below, extensive evidence justified the Commission's decision. Lastly, OPAE asserts that the Commission should have required Dominion's application to provide weatherization funding. This request simply lacks any legal support. Nothing in Title 49 of the Revised Code requires an exemption application under R.C. 4929 to include proposals for weatherization or similar programs. For these reasons, the Court should affirm the Commission's order.

STATEMENT OF FACTS

A. Commodity Service Pricing Under the GCR

Dominion filed its Phase 1 application to replace the GCR with a market-based "standard service offer" ("SSO") price. This application was filed to deal with the problems caused by the GCR that impede the development of more effective competitive markets for natural gas commodity service.

As Jeffrey Murphy, Dominion's Director of Pricing and Regulatory Affairs, explained, natural gas distribution companies like Dominion may not earn a profit by providing gas commodity service. Gas companies must pass the cost of gas purchased on behalf of consumers directly to those consumers through a "purchased gas adjustment" mechanism governed by R.C. 4905.302. (Direct Testimony of Jeffrey Murphy ("Murphy") at 2–3; OPAE Supp. 31–32.) Customers, however, do not simply pay Dominion what Dominion paid its supplier; they pay the price calculated under the GCR. The purpose of the GCR is to regulate natural gas retail commodity prices so that the price gas companies pay to procure gas is "passed through" to consumers, with no profit to the gas company. Gas prices, however, fluctuate between the time a gas company sets its monthly GCR rate and the time it purchases the gas that is sold to its customers that month. To account for this fluctuation, the GCR price is calculated under a formula with three basic components: (1) the expected gas cost; (2) the actual adjustment; and (3) the refund and reconciliation adjustment. *See* Ohio Admin. Code 4901:1-14-05. Scott White, president of a competitive gas supply company, explained how the formula works: "The main component of the GCR is the expected gas cost," which is "'projected'" by Dominion on a monthly basis. (Direct Testimony of Scott White ("White") at 3; Dom. Supp. 54.) Thus, it does not represent "what [Dominion] actually paid for the natural gas" at the time it was purchased for delivery to customers. (*Id.*) To make up the difference between the cost Dominion estimated and the cost Dominion actually paid, customers are subsequently debited or credited the difference through the actual adjustment component. (*Id.*) As Mr. White stated, the adjustments "are often very significant," and "adjustments to gas delivered and initially paid for up to a year ago [are] still the subject of GCR debits or credits." (*Id.* at 3–4; Dom. Supp. 54–55.)

Because the GCR is based entirely on estimates and adjustments, it is almost always either above or below actual market prices. (Murphy at 5; OPAE Supp. 34.) Nobody at the hearing disputed this. As an expert economist testified, the discrepancy between the GCR and market prices posed no problem when consumers continuously paid the GCR rate and had no choice concerning who supplied their gas—any discrepancy between the GCR and market price balanced out over time. (Direct Testimony of Dr. Robert Lawson ("Lawson") at 4; Dom. Supp. 23.) But in a deregulated market, the GCR is a problem.

Under programs like Dominion's Energy Choice, consumers can opt to purchase gas directly from a supplier at a price subject to competition. (Murphy at 9; OPAE Supp. 38.) Gas provided by those suppliers is then delivered to customers through Dominion's distribution network. (*See* Direct Testimony of Stephen Puican ("Puican") at 3–4; Dom. Supp. 68–69.) Customers who elect not to participate in this program continue to purchase gas from Dominion, except the price that the customer pays is set using the GCR and not by the market. Thus, customers have a choice between apples and an orange—purchase gas from one of the many suppliers participating in Energy Choice at market prices, or purchase gas from Dominion at the GCR rate.

It is this "apples-and-oranges" comparison that makes the GCR most troublesome. It limits the availability of choices and inhibits the ability of customers to select among market-based gas supply and GCR service. Under certain conditions, suppliers have a disincentive to participate and thus make fewer offers to potential Energy Choice customers. For example, even if supply conditions are favorable (with relatively plentiful supply and lower market prices), a GCR that is lower than market price due to a negative actual adjustment may beat an otherwise-competitive price. Because a customer would choose the GCR (as the lower gas cost), suppliers would be (and are) less willing to participate in the Energy Choice program. (White at 8; Dom. Supp. 59.)

The "apples-and-oranges" comparison caused by the GCR also makes informed choice more difficult. For example, a GCR that is higher than market price may induce consumers to accept a less-than-competitive supplier offer. (Murphy at 5; OPAE Supp. 34.) As discussed further below, Dominion's Phase 1 application eliminates this problem by doing away with the GCR and replacing it with gas-supply pricing that is entirely market-based.

B. Dominion's Application to Replace the Regulated GCR Price with a Market-Based SSO Price

On April 8, 2005, Dominion filed an application with the Commission outlining a two-phase plan ultimately to cease selling natural gas under the GCR (*i.e.*, to "exit the merchant function") and to focus on its role as distribution company. (OPAE Supp. 1.) As Commission Staff witness Stephen Puican explained, Phase 1 of that plan would (a) eliminate the GCR, (b) create a new price set through a competitive auction (the standard service offer, or "SSO"), and (c) thereby enhance the competitive supply market and consumer choice. (Puican at 3–4; Dom. Supp. 68–69.) Under Phase 1, the SSO would be established as a fixed adjustment—called the "retail price adjustment"—to the "monthly settlement price" for natural gas traded on the New York Mercantile Exchange ("NYMEX"), the nation's primary commodity exchange for natural gas futures. More specifically, under Phase 1, Dominion would hold an auction to establish the "retail price adjustment." The retail price adjustment is the amount paid to competitive suppliers to arrange for deliveries of gas through Dominion's system. Although the NYMEX price would change monthly, the retail price adjustment would remain fixed for the entirety of Phase 1. The monthly NYMEX commodity price plus the retail price adjustment would equal the SSO price, which would be the price paid for commodity service by customers not participating in Dominion's Energy Choice program. (*Id.*) Energy Choice customers would continue to pay whatever price they agreed to pay to a competitive supplier.

As explained by supplier Scott White, the main benefit of a market-based SSO price is that it results in a pricing structure that allows consumers to compare "apples to apples." (White at 6; Dom. Supp. 57.)

Dominion filed its application under R.C. 4909.18, as an application "not for an increase in any rate," which would enable the Commission to act on the application without a hearing. *See* R.C. 4909.18 ("If the commission determines that such application is not for an increase in any rate . . . the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect."). Numerous parties, including OPAE, intervened. (Comm. Entry at 5–6 (Aug. 3, 2005); OPAE Appx. 54–55.)

On August 3, 2005, the Commission announced that it would evaluate the application under R.C. 4929.04, which provides for exemptions from certain rate provisions of Title 49 of the Revised Code, including the purchased gas adjustment provisions of R.C. 4905.302. (Comm. Entry at 5 (Aug. 3, 2005); OPAE Appx. 54.) Dominion objected, stating that an exemption under R.C. 4905.302 was unnecessary because the company was not seeking to make unregulated sales of natural gas. Dominion merely sought approval to change the way it procures and prices gas that it would sell subject to Commission regulation. (Dom. App. for Rehearing at 2 (Aug. 19, 2005); OPAE Supp. 25.) OPAE, on the other hand, did not object to the use of R.C. 4929, and other consumer groups approved of it. (OCC Memo. Contra Dominion's App. for Rehearing at 2 (Aug. 29, 2005) ("Review of [Dominion]'s application is appropriate under R.C. 4929."); Dom. Supp. 11.) The Commission denied Dominion's application for rehearing regarding the applicability of R.C. 4929. Dominion did not appeal this order, and OPAE again manifested no objection.

C. The Hearing and Commission Findings Concerning Dominion's Application

Following a period for discovery among the parties, the Commission held an evidentiary hearing on December 6 and 7, 2005. On May 26, 2006, the Commission approved Phase 1 of the application.

In its order approving Dominion's application, the Commission found that Dominion was subject to effective competition, as provided by R.C. 4929.04(A)(1), *and* that consumers had reasonably available alternatives, as provided by R.C. 4929.04(A)(2). These findings were supported by ample evidence. According to Dominion witness Jeffrey Murphy, "16 suppliers provid[ed] commodity service in [Dominion's] Energy Choice program." (Comm. Opin. & Order at 25–26 (May 26, 2006); Appx. 42–43.) He also stated that Dominion had "the highest total number of customers and participation rates of any gas choice program in the country except for Atlanta Gas Light Company, which has already exited the merchant function." (*Id.* at 26; OPAE Appx. 43.) In addition, according to Mr. Murphy, "two of the competitive suppliers have each attained at least a 25 percent market share, and five more have market shares in excess of five percent." (*Id.*) Similarly, gas supplier Scott White testified that under Phase 1, "suppliers will be able to extend longer-term fixed price contracts at lower risks than they currently face." (*Id.*) OPAE offered no evidence to rebut this or any other evidence offered to support the conclusion that Dominion was subject to effective competition and that customers had reasonably available alternatives.

The Commission also found that retiring the GCR would advance the Ohio policy objectives enumerated in R.C. 4929.02. Among other things, the Commission determined that the GCR "represent[ed] a significant impediment to competition," because it "frustrate[d] the ability of customers to make meaningful, apples-to-apples comparisons in deciding whether to switch from [Dominion's] sales service to a competitive retail supplier." (*Id.* at 17–18; OPAE Appx. 34–35.) The elimination of the non-market-based GCR (which artificially raised or lowered the GCR rate relative to market prices), the Commission noted, would "encourage more competitive entry and lead to additional choices for customers." (*Id.* at 18; OPAE Appx. 35.) It further stated, "[T]he record demonstrates that non-choice consumers would benefit from the purer market pricing of commodity service, thereby promoting more informed shopping, consumption and conservation choices . . . ." (*Id.* at 19; OPAE Appx. 36.) As explained below, there was also ample, unrebutted evidence in support of these findings.[1]

In explaining its decision, the Commission observed that "Phase 1 is a pilot program that can be easily discontinued if experience dictates it is not in customers' interests to move forward beyond the pilot phase." (*Id.* (quoting Staff witness Stephen Puican).) Given this, and the fact

[1] *See* pp. 25–33, *infra.*

that it would "maintain oversight over all aspects of Phase 1," (*Id.* at 8; OPAE Appx. 25), the Commission agreed with its staff that "[t]here is minimal risk to ratepayers during Phase 1 while exploring whether to expand into Phase 2." (*Id.* at 18; OPAE Appx. 35 (quoting Mr. Puican).)

D. The SSO Auction and Its Success

In accordance with the Commission's order, an auction was held on August 29, 2006, to establish the price that would replace the GCR. (Comm. Entry at 2 (Aug. 30, 2006); Comm. Supp. 62.) As noted above, the auction was designed to arrive at a "retail price adjustment" that would be added to the monthly NYMEX settlement price to arrive at the SSO. (Comm. Opin. & Order at 5 (May 26, 2006); OPAE Appx. 22.)

The mechanics of the auction are discussed extensively in the Commission's final order as well as the post-auction report. Basically, the auction was designed so that Dominion's GCR customers' usage (*i.e.*, the commodity usage of customers who purchased gas from Dominion instead of from a competitive supplier) was divided into twelve equal slices or "tranches." (*Id.*) The number of tranches that any supplier could be awarded was limited to four. (*Id.*) The auction was held in a "descending clock" format similar to other energy auctions previously held in Ohio. (*Id.* at 20; OPAE Appx. 37.) Using this format, the twelve bidders that participated in the auction indicated how many tranches they would be willing to supply at an initial going price. (*Id.*). The going price was adjusted downward in specific decrements until just enough tranches were bid to supply the market requirements for those customers taking gas under Dominion's GCR. (*Id.* at 19–20; OPAE Appx. 36–37.) Commission Staff as well as the OCC oversaw the auction. (*Id.* at 5; OPAE Appx. 22.) The post-auction report indicates that the auction went smoothly and that there was no evidence of collusion or manipulation. (*See* Post-Auction Report, Attachment A at 3–4 (Aug. 29, 2006); Dom. Supp. 147–48.)

If lower prices were the goal, the auction was a success. It established a retail price adjustment of $1.44/Mcf above the monthly NYMEX price. The GCR historically produced an adjustment that ranged from $2.196 to $2.504/Mcf. (Comm. Entry at 2 (Aug. 30, 2006); Comm. Supp. 62; *see also* Post-Auction Report at 4 (Aug. 29, 2006); Dom. Supp. 143.) The auction thus provided "tangible benefits" to consumers that OPAE and other groups advocated for throughout the Phase 1 proceeding. (*See* Comm. Opin. & Order at 13 (May 26, 2006); OPAE Appx. 30.)[2] Indeed, although well over a dozen parties took part in the nearly 17-month process, including a number of consumer groups, only OPAE has appealed the Commission's order approving Phase 1.

ARGUMENT

OPAE raises three objections to the Commission's order. First, it alleges that the Commission's handling of Dominion's application was procedurally defective. Second, it asserts that insufficient evidence supported the Commission's decision. Third, it contends that the Commission should have required the application to provide for weatherization funding. But for each of these arguments, OPAE either neglected to preserve the issue below or fails now to demonstrate error or prejudice. Therefore, this Court should affirm the Commission's order.

[2] Office of the Ohio Consumers' Counsel, in fact, is now advocating that the Commission require other Ohio gas companies to develop pricing mechanisms like Dominion's. (*See* OCC News Release, "Consumers' Counsel requests natural gas auction to provide lower rates for Columbia Gas customers" (Dec. 13, 2006) ("'We strongly believe based on the success of the Dominion auction that consumers would benefit from lower rates if Columbia were to determine its monthly rates through an auction as well,' said Janine Migden-Ostrander, Consumers' Counsel."); Dom. Supp. 149; available at http://www.pickocc.com/news/2006/12132006.shtml.)

Proposition of Law No. I:

This Court will not consider arguments that have not been raised on rehearing or set forth in a notice of appeal.

A. OPAE never complained on rehearing or in its notice of appeal that the Commission ignored the rules it promulgated for applications under R.C. 4929; nor has it demonstrated error or prejudice.

In Proposition of Law No. 1, OPAE complains that the Commission did not require Dominion's application to comply with provisions of the Ohio Administrative Code governing applications for exemptions under R.C. 4929.04. This issue is not properly before the Court for two independent reasons.

First, OPAE never raised any argument before the Commission concerning noncompliance with any Administrative Code provisions. Further, OPAE's application for rehearing made no mention of the Ohio Administrative Code. (OPAE Appx. 138.) This is fatal to OPAE's appeal on that ground.

Under R.C. 4903.10, rehearing applications "shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." Additionally, "[n]o party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application." *Id.* Based on this statutory mandate, this Court has held that "setting forth specific grounds for rehearing is a jurisdictional prerequisite for our review." *Consumers' Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 244, 247; *Agin v. Pub. Util. Comm.* (1967), 12 Ohio St.2d 97, 98 (holding that "a casual similarity" between "parts of some of the grounds stated in appellants' application for rehearing . . . and parts of some of the statements of law in appellants' brief" does not "meet the requirements of Section 4903.10"). Having failed to raise this issue before the Commission, and specifically in its application for rehearing, OPAE cannot raise the issue here.

Second, OPAE did not assign this error in its notice of appeal. Indeed, confirming that this argument is a latecomer, OPAE did not indicate in its case information statement filed with this appeal that the Administrative Code was implicated in any way. (OPAE Appx. 7.) This, too, bars consideration of that issue before this Court.

R.C. 4903.13 requires that notices of appeal "set[] forth the order appealed from and the errors complained of." In a case arising under R.C. 4903.13, this Court held that a party's "notice of appeal and its complaints of alleged commission error delimit the issues for this court's consideration." *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5466, ¶ 21. Likewise, OPAE's failure in this case to raise this issue in its notice places its proposed remedies outside "the power of this court." *Id.*; *see also McCruter v. Bd. of Review, Bureau of Employment Servs.* (1980), 64 Ohio St.2d 277, 279–80 (holding that the Court lacked "jurisdiction to entertain [an] argument" not "set forth . . . in the notice of appeal" where the statutory language similarly required that the notice "set forth the decision appealed from and the errors therein complained of"). Therefore, the Commission's alleged failure to comply with the Ohio Administrative Code is not properly before the Court.

Even if OPAE's arguments had been preserved, OPAE has not carried its burden of demonstrating error on appeal. *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, ¶ 76; *City of Cincinnati v. Pub. Util. Comm.* (1949), 151 Ohio St. 353, 356. The regulations in question set forth filing requirements for exemption applications under R.C. 4929.04 and by their terms may be waived sua sponte. Ohio Admin. Code 4901:1-19-03(A) ("The commission may waive any provision in these rules . . . upon its own motion."). Dominion's application did not meet the filing requirements under Administrative Code Chapter 4901:1-19 because Dominion did not file the application under R.C. 4929.04. Dominion filed the application under R.C. 4909.18. When the Commission determined that R.C. 4929.04 applied, it did not require (and OPAE did not request) Dominion to refile the application. Instead, the Commission set a discovery schedule, dates for filing testimony and dates for an evidentiary hearing.

The Commission did not err by waiving its filing requirements and allowing the matter to go forward on the application filed by Dominion. The Commission has been given broad latitude and authority to regulate the form and manner of its proceedings. *See* R.C. 4901.13 ("The public utilities commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings relating to parties before it."); R.C. 4929.10 ("The public utilities commission shall adopt rules to carry out this chapter."). And, as noted, the rules are waivable sua sponte. Ohio Admin. Code 4901:1-19-03(A). This Court has recognized that such authorities confer "broad discretion" on the Commission "in the conduct of its hearings." *See, e.g., Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 19, 2000-Ohio-5 (quotation omitted); *see also id.* ("It is well-settled that pursuant to R.C. 4901.13, the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort.") (quotation omitted).

Indeed, R.C. 4929.04 says nothing concerning the form of applications—that section requires only an "application," "notice," "a period for comment," and "a hearing." All of which (and more) were provided during the proceeding below. If anything, the lack of statutory detail concerning the form of the application represents an additional delegation of authority on these matters. "When a statute does not prescribe a particular formula, the PUCO is vested with broad discretion." *Payphone Ass'n v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, ¶ 25; *see also Charvat v. Dispatch Consumer Servs.*, 95 Ohio St.3d 505, 2002-Ohio-2838, ¶ 26 (noting that a legislature's explicit delegation of power to an agency "creates implicit powers where [the legislature] fails to fill in the blanks"). Given the breadth of the Commission's authority and the waivable nature of the challenged rules, OPAE has not shown error.

Moreover, OPAE has not alleged prejudice by virtue of the procedures employed in the case below, much less demonstrated such prejudice, as OPAE must to succeed here. It is settled law that "[t]he Supreme Court will not reverse an order of the Public Utilities Commission unless the party seeking the reversal demonstrates that the order has a prejudicial effect as applied to that party." *Holladay Corp. v. Pub. Util. Comm.* (1980), 61 Ohio St.2d 335, 335. OPAE is not prejudiced; its position is pure formalism. Any information required by the Administrative Code for exemption applications was presented during discovery, through prefiled testimony, and at the evidentiary hearing. If anything was omitted, OPAE had full discovery rights and could have made the appropriate requests. It never did.[3]

B. OPAE never complained on rehearing or in its notice of appeal that the Commission should have treated Dominion's application as an alternative rate plan under R.C. 4929.05; nor has it demonstrated error or prejudice.

OPAE also asserts in its first proposition of law that the Commission "should have found that Dominion was requesting an alternative form of regulation pursuant to R.C. 4929.05." (OPAE Br. 25.) Provided that certain standards are met, R.C. 4929.05 authorizes the

[3] OPAE also cites a past Commission case in which a waiver request was filed and granted. OPAE suggests that because the applicant in that case filed under R.C. 4929.05 and in this case Dominion did not, Dominion's application should have been rejected. (*See* OPAE Br. 21–22 (citing *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Opinion & Order (Sept. 13, 2006)).) The *Vectren* application has nothing to do with the application in this case. Here, the Commission held a proceeding to determine whether Dominion met the criteria under R.C. 4929.04. Simply put, whether a different applicant, in a different case, met different criteria under a different statute for approval of a different application, does not speak to whether, in *this* proceeding, Dominion showed that it met the criteria for approval under R.C. 4929.04.

Commission to approve an "alternative rate plan" "request[ed]" by a "natural gas company" in conjunction with an R.C. 4909.18 application. Once again, this issue is not properly before the Court.

OPAE raised no argument concerning R.C. 4929.05 on rehearing. *See, e.g., Consumers' Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 244, 247 ("[S]etting forth specific grounds for rehearing is a jurisdictional prerequisite for our review."). OPAE never even cited R.C. 4929.05, much less set forth a specific argument based on it. Nor was this argument even hinted at in the notice of appeal. *See, e.g., Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5466, ¶ 21 (holding that a "notice of appeal and its complaints of alleged commission error delimit the issues for this court's consideration"). Confirming this, OPAE did not indicate in its case information statement that this case would "involve the interpretation of" R.C. 4929.05. (OPAE Appx. 7.)

In any event, OPAE makes little effort to explain why R.C. 4929.05 applies, beyond a conclusory statement that the Commission "should have" applied it. (OPAE Br. 25.) Given that the factual predicate to R.C. 4929.05's operation never occurred (a "request" by "a natural gas company" for "approval of an alternate rate plan"), the applicability of that statute is less than self-evident. Thus, OPAE has not carried its burden of demonstrating error. Even if OPAE had done so, it has not even attempted to show prejudice, which forecloses reversal. *See Holladay Corp. v. Pub. Util. Comm.* (1980), 61 Ohio St.2d 335, 335.

Both of OPAE's procedural arguments brush over the fact that OPAE received the procedures it asked for below: full discovery rights, a full evidentiary hearing, and local public hearings. (Mot. for Ext. of Time by Joint Stakeholders at 4 (May 6, 2005) ("[T]he Joint Stakeholders [including OPAE] urge the Commission to set this matter for a full evidentiary hearing, complete with full discovery rights, and local public hearings."); Dom. Supp. 7.) OPAE points to no evidence or argument it could not have presented below or would have presented if given another chance. (*See* Comm. Opin. & Order at 13 (May 26, 2006) ("The consumer groups have had full opportunity to pursue their positions with respect to all issues in this proceeding at hearing and on brief."); OPAE Appx. 30.) There is no reason, as a matter of law or good sense, to order another hearing. *See Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, ¶ 19 (holding that certain statutory notice-and-hearing provisions were not violated but also noting that the appellant "ignores the fact that the commission provided notice and held extensive hearings in this matter").

<u>Proposition of Law No. II:</u>

This Court will not overturn a Commission order approving an application under R.C. 4929.04 where that order is supported by substantial evidence.

In its Proposition of Law No. 2, OPAE presents its substantive argument, which boils down to this: although the Commission erred in applying R.C. 4929.04, there was insufficient evidence to grant the application under that statute. As with its procedural arguments, OPAE fails to justify reversal of the Commission's order.

A. The Commission did not err by considering Dominion's application under R.C. 4929.04.

(1) OPAE's argument that the Commission erred in analyzing the application under R.C. 4929.04 is untimely.

Although OPAE challenged the applicability of R.C. 4929.04 before the Commission, it did not do so until eleven months after the Commission announced that R.C. 4929.04 would govern the proceeding. OPAE's complaints concerning the form of the application and the structure of the application process (assuming *arguendo* the complaints had merit) easily could have been remedied if raised at the time of the order, as opposed to eleven months later in a rehearing application. OPAE's argument, therefore, is not properly before the Court.

A similar situation was presented in *City of Parma v. Pub. Util. Comm.*, 86 Ohio St.3d 144, 148, 1999-Ohio-141. There, the Court confronted a party that failed to object to a scheduling order at the time the order was given, although it did object on rehearing (about two months later). Although the Court noted that the Commission's order did not comply with the statute, the Court would not hear the appellant's argument. "By failing to raise an objection until the filing of an application for rehearing, Parma deprived the commission of an opportunity to redress any injury or prejudice that may have occurred. Wherefore, we do not accept Parma's objections . . . ." *Id.*; *cf. MCI Telecommunications Corp. v. Pub. Util. Comm.* (1988), 38 Ohio St.3d 266, 269–70 ("If MCI had objections to the actions that were about to be implemented [following a hearing], it should have made its objections within that time frame and preferably in that forum."). Having waited until the end of the process to voice an objection best dealt with at the beginning, OPAE has not preserved its argument that the Commission dealt with Dominion's application under the wrong statute.

(2) The Commission acted well within its discretion in applying R.C. 4929.04 to Dominion's application.

OPAE argues that the Commission erred by applying R.C. 4929.04 to Phase 1 of the application. But the Commission did not err because Dominion's application and the Commission's authority to review it fall within that statute.

R.C. 4929.04 governs the "exemption of natural gas compan[ies] from other rate provisions." It authorizes the Commission to "exempt, by order, any commodity sales service or ancillary service of the natural gas company from all provisions of Chapter 4905 . . . including the obligation under section 4905.22 of the Revised Code to provide the commodity sales service." This appeal deals only with the approval of the first of two potential phases of a transition in the way Dominion's customers buy gas. Phase 1 of this process does not alter Dominion's basic role as procurer and provider of commodity service; it merely changes the way in which the commodity service is priced. Phase 2 (if approved) would relieve Dominion of the obligation to procure and provide the gas commodity. That phase would allow eligible customers to bypass Dominion altogether for commodity service and enter into direct retail relationships with competitive suppliers.

The Commission found that Dominion's application "constitutes a request for an exemption from the provisions of Revised Code Chapter 4905 governing commodity sales services." (Comm. Entry at 4 (Aug. 3, 2005); OPAE Appx. 53.) The record supports that finding. For instance, in Phase 2, Dominion will request authority to cease providing "commodity service." (Dominion Application, Attachment 1 at 3 (describing Dominion's plan to "move to a full retail model in which suppliers have a direct retail relationship with all eligible customers and [Dominion] provides no commodity service other than as a provider of last resort"); OPAE Supp. 8.) Thus, this aspect of Dominion's plan requires an exemption from R.C. 4905.22, which creates a duty to "furnish necessary and adequate service," and such an exemption is expressly authorized by R.C. 4929.04. Likewise, the auction-based pricing mechanism established during Phase 1 requires an exemption from R.C. 4905.302, which requires a "purchased gas adjustment clause to be included in the schedule of gas companies."[4] This exemption is also authorized by R.C. 4929.04.

Tellingly, none of the witnesses for the consumer groups involved in this proceeding, including OPAE's witness Elizabeth Hernandez, offered testimony suggesting that the

[4] OPAE seems to agree that an exemption is necessary. (*See* OPAE Br. 25 (arguing that the new pricing framework is "contrary to the statutory scheme for a prudence review of wholesale procurement policies and practices under R.C. 4905.302").)

Commission should proceed with Dominion's application under any statute other than R.C. 4929.04. The sum and substance of these witnesses' testimony was that the Commission should not approve the application without also requiring Dominion to increase funding for low-income and weatherization programs. (*See* Direct Testimony of Elizabeth Hernandez at 2; OPAE Supp. 55; Direct Testimony of Wilson Gonzales at 3; OPAE Supp. 70; Direct Testimony of Beth Hixon at 6–7; OPAE Supp. 98–99.) It was not error for the Commission to approve Dominion's application under R.C. 4929.04 simply because the Commission refused to attach the strings to the application that the consumer groups requested.

(3) Nothing in R.C. 4929.04 prohibits a multi-phase approach.

OPAE next argues that the Commission should not have handled Dominion's application in two phases. (*Compare* OPAE Br. 24 ("R.C. § 4929.04 . . . . is not relevant to the Phase 1 plan to modify the method of procurement of wholesale natural gas by the utility.") *with* OPAE App. for Rehearing at 6 ("The Commission could use the statutory authority of R.C. § 4929.04 if *both* phases [of the application] were before it for consideration.") (emphasis added); OPAE Appx. 144.) No authority prohibits the Commission's approach. Indeed, the Commission acted well within its discretion handling the application as it did.

To begin with, the Commission possesses "broad authority" in its administration of Title 49, *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 150, and "broad discretion in the conduct of its hearings," *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 367, 379; *see also Clifford v. Pub. Util. Comm.* (1986), 24 Ohio St.3d 162, 165 (upholding the decision to bifurcate when "not unreasonable"). Additionally, the specific statutes governing this case reveal that the legislature has granted discretion to the Commission in the conduct of R.C. 4929 hearings. The General Assembly has encouraged "flexible regulatory treatment" in the context of R.C. 4929 applications. R.C. 4929.02(A)(6). Further, the legislature has given the

Commission general rule-making authority "to carry out . . . chapter [4929]." R.C. 4929.10. In addition, the lack of procedural detail in R.C. 4929.04 operates as an implicit delegation of discretion to the Commission regarding such matters. "When a statute does not prescribe a particular formula, the PUCO is vested with broad discretion." *Payphone Ass'n v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, ¶ 25; *see also Charvat v. Dispatch Consumer Servs.*, 95 Ohio St.3d 505, 2002-Ohio-2838, ¶ 26 (noting that a legislature's explicit delegation of power to an agency "creates implicit powers where [the legislature] fails to fill in the blanks").

Moreover, as this Court has recognized in other Commission cases, the authority to accomplish the greater (*i.e.*, exempt Dominion from the merchant function and transform the entire market into a competitive one) includes the authority to accomplish lesser, incremental steps to the goal (*i.e.*, prepare the market for a fully competitive approach, evaluate how the market will handle competition). *See Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶ 38 (statute authorizing rate adjustments "certainly gave the PUCO the authority to take the smaller step of authorizing [certain] accounting changes"); *Dworkin, Inc. v. Pub. Util. Comm.* (1953), 159 Ohio St 174, 181 ("If the commission had the broad authority to revoke, alter or amend, this clearly would seem to include the lesser authority to suspend operations.").

These statutes and decisions make clear that the Commission possessed ample authority to take a cautious, commonsense approach to Dominion's two-phase application. The Commission Staff's witness, Mr. Puican, acknowledged that Phase 1 establishes a market-based price for commodity service, while posing "minimal risk" to consumers. (Puican at 11; Dom. Supp. 76.) Dominion explained that it favored an incremental approach because any "lessons learned" during Phase 1 could be considered before moving to Phase 2, when customers will enter into direct retail relationships with competitive suppliers. (Murphy at 4; OPAE Supp. 33.) This step-by-step approach, allowing for a return to the *status quo ante* if necessary, is all the more appropriate given the restructuring of Dominion's customers' method of purchasing natural gas planned under Phase 2.

To the extent that OPAE complains that the Commission considered aspects of Phase 2 during the Phase 1 hearing, OPAE does not advance its case. Although the Commission expressly determined not to "review and consider the merits of Phase 2" during the hearing below, the Commission stated that it intended during the proceeding "to promote an understanding and allow discussion of the implications of [Dominion's] entire proposal." (Comm. Entry on Rehearing at 3 (Sept. 7, 2005); OPAE Appx. 59.) For this reason, the Commission declined to limit discovery in the proceeding to Phase 1. Notably, this ruling (to allow discussion of both phases but to approve or reject only Phase 1) was met only with approval by consumer groups below. As stated by OCC, "both Phase I and Phase II issues should be open for review in the Phase I hearing." (*See* OCC Memo. Contra Dominion's App. for Rehearing at 5 (Aug. 29, 2005); Dom. Supp. 14.) None of the other consumer groups, including OPAE, disagreed. The Commission did not err by doing what the consumer groups asked it to do, which was to consider all aspects of Dominion's two-phase plan in the context of the proceeding to consider approval of Phase 1. In fact, by allowing Phase 1 to proceed and to withhold any further review of Phase 2 pending the results of Phase 1, the Commission acted wisely in balancing the interests of all concerned.

B. The Commission did not err in finding that Dominion met the requirements of R.C. 4929.02 and 4929.04.

In its Proposition of Law No. 2, OPAE also argues that the Commission erred in approving Dominion's application because Dominion did not meet its burden of proving the criteria specified in R.C. 4929.02 and 4929.04. This too is wrong.

The Commission's determination that Dominion satisfied the standards of R.C. 4929.04 receives deferential review. "The burden is on the appellant to show that the commission's decision is against the manifest weight of the evidence or is clearly unsupported by the evidence. This burden is difficult to sustain." *Payphone Ass'n v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, ¶ 34 (quotation and citation omitted). The record shows that OPAE cannot meet this burden.

Indeed, OPAE ignores the record when it states that Dominion provided only "a simple declaration" in support of its application. (OPAE Br. 28.) True, Dominion's application stated that it "conformed to the state's energy policies and met the requirements of R.C. 4929.02 and 4929.04." (*Id.* at 23.) But contrary to OPAE's assertions, Dominion did more. In fact, as demonstrated below, review of the record shows extensive evidence supporting Dominion's application.[5]

(1) Dominion proved that it "is subject to effective competition with respect to the commodity sales service or ancillary service," and that "[t]he customers of the commodity sales service . . . have reasonably available alternatives," as required by R.C. 4929.04(A)(1) and (2).

R.C. 4929.04(A)(1) requires that an applicant "is subject to effective competition with respect to the commodity sales service." R.C. 4929.04(A)(2) requires that "customers of the

[5] That some of the evidence was presented by other parties makes no difference. *See City of Cincinnati*, 151 Ohio St. at 355 ("[T]he decision of the commission in favor of the utility . . . will be sustained if supported by substantial evidence in the record, even if such evidence was offered by the municipal corporation instead of the utility.").

commodity sales service . . . have reasonably available alternatives." R.C. 4929.04(B) provides a non-exhaustive list of factors—such as "number and size of alternative providers," "market share," and "ease of entry"—that the Commission may consider in determining whether an application satisfies R.C. 4929.04(A)(1) or (A)(2). The presence of competition and availability of alternatives were proved in numerous ways.

First, as Mr. Murphy explained, participation in Dominion's Energy Choice program (through which gas suppliers may compete with Dominion) was the highest in the nation, with the exception of the completely deregulated market in Georgia. (Murphy at 12; OPAE Supp. 41.) A gas supplier, Scott White, confirmed that Dominion's market in Ohio "is probably the most competitive natural gas market in the country, with the exception of the Georgia markets, when one considers both the migration levels of residential natural gas users as well as commercial and industrial users." (White at 9; Dom. Supp. 60.) Indeed, as the Commission Staff witness observed, the rate of Dominion's customers participating in the Energy Choice program exceeds 50%. (Puican at 3; Dom. Supp. 68.)

Additionally, numerous suppliers participated in Dominion's market, giving consumers numerous alternatives for their choice of suppliers. Staff witness Stephen Puican observed that "[s]ixteen marketers are currently providing commodity service" in the Energy Choice market, which serves over 600,000 customers. (*Id.*; *see also* Murphy at 11–12; OPAE Supp. 40–41.)

Although many marketers compete in Dominion's service territory, their market power is diffuse. In the opinion of the Commission's staff, "No single supplier dominates the Choice marketplace." (Puican at 3; Dom. Supp. 68.) Dominion confirmed that of the seven largest suppliers participating in the Energy Choice market, two serve about 25% of the market each and five serve from 5% to 18% each. (Murphy at 13; OPAE Supp. 42.) Low entry barriers allowed ready market entry. As observed by economist Robert Lawson, even though there is no evidence of collusion among marketers, "most importantly the market appears to be open to new entrants should collusion take place." (Lawson at 8; Dom. Supp. 27.)

In light of this unrebutted evidence, it is difficult to see how OPAE could contend that effective competition does not exist or that alternative sources of gas supply are not available to Dominion's customers. Dominion more than carried its burden of proof under R.C. 4929.04(A)(1) and (2).

(2) The record supported the Commission's finding that Dominion was in substantial compliance with the policies described in R.C. 4929.02.

The record also supports the Commission's determination that the application substantially complied with state policy. After finding the presence of competition or availability of alternatives, the commission must also "find[] that the natural gas company is in substantial compliance with the policy of this state specified in section 4929.02." R.C. 4929.04(A). If the Commission makes both findings, it "shall" grant the applied-for exemption. *Id.* The statute makes clear that "substantial"—not strict—compliance is required. As the following list of policy goals and supporting evidence shows, Dominion's application affirmatively advanced many of the policy goals and hindered none.

(a) The application promotes the availability of adequate, reliable, and reasonably priced gas, in accordance with R.C. 4929.02(A)(1).

R.C. 4929.02(A)(1) announces that Ohio's policy is to "[p]romote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods." Abundant evidence established that the application advanced this point. For example, Staff witness Stephen Puican testified that "customers will continue to have the protection of Dominion retaining its provider of last resort obligations." (Puican at 10; Dom. Supp. 75.) He further observed, "Dominion has designed Phase 1 to ensure reliability of gas supplies in the event of a supplier default." (*Id.*) Dominion's witness Jeffrey Murphy stated that under Phase 1, "suppliers will have to meet the same reliability requirements faced by [Dominion]." (Murphy at 10; OPAE Supp. 39.) He outlined "several ways that [Dominion] will ensure continued reliability of gas supplies for sales customers," which include requiring Phase 1 providers "to demonstrate that they hold comparable capacity" as Dominion and creating a plan "to ensure that [Dominion] can obtain sufficient supplies if one or more [Phase 1] suppliers fail to deliver the volume of gas needed to meet their customers' requirements." (*Id.* at 6; OPAE Supp. 35.) He also explained that "[b]y bidding out supply responsibility in tranches [*i.e.*, slices, or shares], [Dominion] is able to mitigate the risk of any one supplier defaulting on its delivery obligation." (*Id.* at 18; OPAE Supp. 47.) Notably, maintaining the status quo could be contrary to the goal of reliable supply. As Dr. Robert Lawson explained, "Shortages are one possible result" of non-market-based rates like the GCR. (Lawson at 4; Dom. Supp. 23.)

The record also established that granting the application would likely create a lower price than what existed under the GCR, a prediction borne out by the SSO auction results. A number of witnesses explained how the GCR can result in an unreasonable price. For example, Mr. White, a gas supplier, explained that "[t]he GCR mechanism . . . is not a good indic[a]tor of the current market cost of gas nor does it reflect the actual cost that the customer ends up paying for that period." (White at 3; Dom. Supp. 54.) A witness familiar with deregulation in other industries theorized that the GCR *exceeded* market price. Specifically, economist Dr. Lawson presented historical evidence that regulatory agencies often "set prices *above* competitive market rates" and that "[w]hen market pricing began . . . , prices to consumers fell dramatically." (Lawson at 5; Dom. Supp. 24.) Events confirmed Dr. Lawson's prediction. To evaluate whether the SSO represented a reasonable price for gas, Commission Staff compared past GCR prices with corresponding monthly NYMEX settlement prices for the period February 2000 through June 2006. (Post-Auction Report at 1 (Aug. 29, 2006); Dom. Supp. 140.) This comparison revealed that if the SSO had been in effect during the review period, customers would have reaped significant savings on their gas bills. This is because the retail price adjustment (*i.e.*, the price added to the NYMEX settlement price to establish the SSO price) of $1.44/Mcf established at the auction was less than the adjustments required by the GCR, which during the period under review ranged from $2.196/Mcf to $2.504/Mcf. (Comm. Entry at 2 (Aug. 30, 2006); Comm. Supp. 62.)

(b) The application expands consumer options, in accordance with R.C. 4929.02(A)(2).

According to R.C. 4929.02(A)(2), Ohio seeks to "[p]romote the availability of unbundled and comparable natural gas services and goods that provide wholesale and retail consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs." Several witnesses explained how GCR distortion limited the "options" "availab[le]" to consumers and how unbundling Dominion's "merchant" function from its distribution function would increase these options. As Dominion witness Jeffrey Murphy explained, "Suppliers have indicated that, with the pricing certainty provided by [Phase 1], they will be more inclined to offer longer-term and/or fixed price arrangements due to the reduction in risk." (Murphy at 4; OPAE Supp. 33.) Likewise, Mr. White testified that "instead of only being able to make offers during limited times of the year, with a market based standard service offer price, IGS [Mr. White's company] will be better able to put offers into the market at all times during the year." (White at 8; Dom. Supp. 59.) This improvement to the competitive market "also means that marketers will have to be even more competitive with pricing, options and value added services."

(*Id.* at 9; Dom. Supp. 60.) Staff witness Stephen Puican agreed that removing the GCR "will allow suppliers more flexibility in the types of offers they make." (Puican at 11; Dom. Supp. 76.) In fact, he stated that the GCR represented "the single biggest impediment [Energy Choice] suppliers face in attempting to compete for market share." (*Id.*)

(c) The application promotes effective consumer choice of gas supplies, in accordance with R.C. 4929.02(A)(3).

Under R.C. 4929.02(A)(3), Ohio's policy is to "[p]romote diversity of natural gas supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers." Record evidence showed that the distortion caused by the GCR prevented "effective" consumer choice. Customers deciding whether to take gas under the GCR or to take Energy Choice gas cannot compare apples to apples. Supplier prices under the Energy Choice program reflect market price; the GCR does not. As Dominion's Jeffrey Murphy testified, "A GCR that is temporarily increased by a positive [unrecovered-gas-cost adjustment] overstates the price-to-compare, which could lead a customer to accept an unduly high supplier offer. Conversely, a GCR that is temporarily decreased by a negative [adjustment] may lead a customer to turn down an attractive offer." (Murphy at 5; OPAE Supp. 34.) "Either way," he concluded, "customers are disadvantaged by the distortion caused by the [adjustments]." (*Id.*) Other witnesses revealed how the GCR hindered marketers and offers from entering the market. For instance, gas supplier Scott White testified that "price transparency is likely to induce more marketers to enter the [Dominion] market, which in the long run will benefit all [Dominion] service area customers." (White at 6; Dom. Supp. 57.) And Staff witness Stephen Puican testified that "[e]limination of the GCR target will allow suppliers more flexibility in the types of offers they make." (Puican at 11; Dom. Supp. 76.)

(d) The application encourages innovation and market access for supply- and demand-side natural gas goods and services, in accordance with R.C. 4929.02(A)(4).

R.C. 4929.02(A)(4) states that it is Ohio's policy to "[e]ncourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods." Testimony revealed how eliminating the GCR would increase market access for both supply-side and demand-side goods and services. As noted above, witnesses observed how elimination of the GCR would encourage suppliers to participate by providing price transparency and flexibility. Concerning demand-side issues, economist Robert Lawson testified that the application would clear up price distortions, and thus encourage conservation and increase demand for providers of services (like weatherization) that assist in the economization of gas usage: "The real advantage of market based pricing [which would result from Phase 1] is how market prices communicate information and proper incentives to buyers and sellers." (Lawson at 3; Dom. Supp. 22.) Continuing, Dr. Lawson explained how prices are a powerful tool for managing demand. "[A] price increase will immediately communicate to people all that they need to know: They had better economize on the use of this commodity." (*Id.*) Conversely, where prices are set under GCR-like mechanisms, consumers will not promptly "get the [price] information to economize on gas and so they will not." (*Id.* at 4; Dom. Supp. 23.)

(e) The application provides for consumer education regarding potential changes under Phase 2, in accordance with R.C. 4929.02(A)(5).

R.C. 4929.02(A)(5) declares that it is the policy of the state to "[e]ncourage cost-effective and efficient access to information regarding the operation of the distribution systems of natural gas companies in order to promote effective customer choice of natural gas services and goods." The application provided for customer education concerning the application's impact on customers and their choices. For example, Dominion's application provided that Dominion "will conduct a customer education program developed in consultation with the Stakeholder Group prior to and throughout the [Phase 1] period to ensure that customers understand their options, the implications of their choices and the available consumer protections." (OPAE Supp. 9.) This type of program was supported by other consumer parties. OCC witnesses urged that education concerning Phase 2 be provided during Phase 1. For example, a manager of outreach and education programs for OCC, Linda Rominski, stated, "[C]ustomer education is extremely important to ensure that consumers are aware of and understand the implications of the exit." (Rominski at 6; Dom. Supp. 41.) Further, she advocated that education "should be provided to consumers well in advance of Phase 2." (*Id.* at 8; Dom. Supp. 43.) The $14 million in funding for consumer education and other program costs approved by the Commission in conjunction with Phase 1 significantly increased the resources available to further the policy contained in R.C. 4929.02(A)(5). (*See* Comm. Opin. & Order at 22 (May 26, 2006); OPAE Appx. 39.)

(f) The Commission's handling of Dominion's application exemplified flexible regulatory treatment, in accordance with R.C. 4929.02(A)(6).

R.C. 4929.02(A)(6) states that the Ohio legislature seeks to "[r]ecognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment." The Commission's incremental approach to this case exemplified "flexible regulatory treatment." Phase 1 creates a proving ground for Phase 2, while at the same time lowering prices and increasing choices for consumers.

(g) Dominion's application fosters transactions between willing buyers and willing sellers, in accordance with R.C. 4929.02(A)(7).

R.C. 4929.02(A)(7) states that it is Ohio policy to "[p]romote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905. and 4909. of the Revised Code." As the evidence before the Commission established, the GCR caused price distortions and consequently prevented "willing buyers and willing sellers" from transacting business effectively. The application would remedy this problem. For example, a gas supplier testified, "Without the distortion of the GCR in the market, customers will be able to more actively participate in the market because more offers will be available, which also means that marketers will have to be even more competitive with pricing, options and value added services." (White at 9; Dom. Supp. 60.) In addition to increasing the number of offers available, removing the GCR would improve the ability of consumers to evaluate offers. As Jeffrey Murphy of Dominion stated, Phase 1 will "eliminate unrecovered gas cost on any purchases during the pilot period" and "thus remov[e] the single biggest contributor to customer confusion about the Energy Choice program." (Murphy at 3; OPAE Supp. 32.) Without this confusion, "customers will be able to compare offers more readily and with more certainty." (*Id.* at 4; OPAE Supp. 33.) All of this testimony was unrebutted.

(h) The application avoids subsidies, in accordance with R.C. 4929.02(A)(8).

R.C. 4929.02(A)(8) establishes that it is state policy to "[p]romote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated natural gas services and goods." The only party in this case proposing any subsidy is OPAE. Specifically, OPAE advocates establishing demand-side management ("DSM") programs in which one group of customers would fund the weatherization of other customers' homes.[6] The Commission recently rejected a similar request, noting that such DSM programs

[6] On cross-examination, OCC witness Wilson Gonzales agreed that under consumer-group proposals, "increased funding for DSM will result in an increase in customers' monthly

could "cause nonparticipants . . . to pay higher rates to subsidize the program." (*See In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Opin. & Order at 12 (Sept. 13, 2006); OPAE Appx. 75.) Additionally, the GCR (because of customer migration into and out of the Energy Choice program) "can prevent matching up between those who used the gas which gave rise to the true up [*i.e.*, the reconciliation adjustments under the GCR], with those who pay the true ups," and thus operate as a random, private subsidy. (White at 4; Dom. Supp. 55.)

(i) Dominion's application facilitates additional supply choices for consumers, in accordance with R.C. 4929.02(A)(11).

R.C. 4929.02(A)(11) [7] states that Ohio's policy is to "[f]acilitate additional choices for the supply of natural gas for residential consumers, including aggregation." Dominion's competitive choice and aggregation market flourished despite the GCR, not because of it. As discussed above, the GCR warded off marketers and offers, preventing "additional choices" for consumers. Jeffrey Murphy of Dominion stated that "[i]n many discussions with marketers, they indicated that they would be more willing to invest time, effort and resources in [Dominion's] market if it were to proceed along the path being outlined." (Murphy at 13; OPAE Supp. 42.) Scott White, a gas supplier, confirmed that "if the GCR is significantly 'off' from [*i.e.*, lower than] current market prices, marketers may not actively solicit customers because their prices will appear 'too high.'" (White at 5; Dom. Supp. 56.) Such reluctance would be eliminated under the proposed program. As Mr. White explained, "[I]nstead of only being able to make

(continued...)

bills" and that this increase "will apply to all residential customers regardless of whether they participate in DSM." (Hrg. Tr. at 187–88 (Dec. 7, 2005); Dom. Supp. 118–19.)

[7] OPAE has raised no challenge relating to the application and its compliance with R.C. 4929.02(A)(9) or (10).

offers during limited times of the year, with a market based standard service offer price, IGS [a gas marketer] will be better able to put offers into the market at all times during the year. More offers mean more choices for customers . . . ." (White at 8; Dom. Supp. 59.)

Based on the unrebutted record evidence showing compliance with the state policies contained in R.C. 4929.02(A), the Commission properly approved Dominion's application. OPAE has failed to meet its burden of showing that the Commission's decision is unsupported or against the manifest weight of the evidence.

Proposition of Law No. III:

Neither R.C. 4929.04 nor 4905.70 requires that exemption applications provide funding for weatherization programs.

In its Proposition of Law No. 3, OPAE argues that R.C. 4929.04 and 4905.70 mandate the funding of DSM programs (*e.g.*, weatherization funding). But the statutes do not say what OPAE says they do.

As demonstrated above,[8] Dominion's application promotes encouraging "innovation and market access for cost-effective supply- and demand-side natural gas services," an aspect of state policy articulated in R.C. 4929.02(A)(4). Despite OPAE's protests, R.C. 4929.02(A)(4) does not require or even suggest that distribution companies fund weatherization programs through exemption applications. That statute discusses encouraging "innovation" and "market access"; it never mentions funding or weatherization. If anything, OPAE's arguments reveal a broader misapprehension of the statute. R.C. 4929.02 is *not* a checklist of prerequisites for application approval, but a wide-ranging proclamation of Ohio's natural gas policy. It informs the Commission of the larger picture each application should fit within and further. Guided by these principles, the Commission found that Dominion's application advanced Ohio's policy goals.

[8] *See* p. 29, *supra.*

OPAE does not dispute that the application will encourage market access for "supply-side" goods and services. Concerning "demand-side" access, the evidence showed that the GCR insulated consumers during times of high cost and exacted payment later, thus blunting the instinct to conserve when it was most needed. As supported by expert testimony, and as the Commission found (*see* Comm. Opin. & Order at 25 (May 26, 2006); OPAE Appx. 42), clearer price signals during times of high gas cost—some that may occur in the proposed program—encourage conservation and produce "the most efficient mechanisms" for reducing consumption. (Hrg. Tr. at 66 (Lawson); Dom. Supp. 102.) Encouraging conservation increases the demand (and hence "market access") for "demand-side goods and services." The testimony of economist Robert Lawson summarized this aptly: "[M]arket prices communicate information and proper incentives to buyers and sellers. . . . [A] price increase will immediately communicate to people all that they need to know: They had better economize on the use of this commodity." (Lawson at 3; Dom. Supp. 22.) Indeed, Dr. Lawson stated that "a pure [price] signal about the relative supply and demand conditions of the marketplace" is "the most economical[ly] efficient means for reducing . . . consumption by the amount needed." (Hrg. Tr. at 66–67 (Lawson); Dom. Supp. 102–03.)

The application represents a significant step in the direction given by the General Assembly, which is all that R.C. 4929.04 requires. The application will improve the market's functionality and lower prices across the board.

Notably, even if there was no evidence that the application *advanced* the policy announced in R.C. 4929.02(A)(4), OPAE submitted no evidence that the application *hindered* that goal. As shown above, the application promoted at least eight of the remaining ten aspects of Ohio policy and obstructed none, which is more than enough to support the Commission's finding of substantial compliance.

Although R.C. 4929.02(A)(4) poses no problem to this application, one can understand at least why it is being discussed. The same cannot be said for OPAE's reliance on R.C. 4905.70. The Commission observed that neither R.C. 4929.04 nor 4905.70 required it "to order [weatherization] programs in satisfaction of the statutory requirements for an exemption program." (Comm. Opin. & Order at 19 (May 26, 2006); OPAE Appx. 36.) Indeed, R.C. 4905.70 is not mentioned anywhere in Chapter 4929. Nothing in R.C. 4905.70 reveals that it applies in R.C. 4929.04 proceedings. It presents an independent mandate to the Commission, imposes no duty on a gas distribution company like Dominion, and holds no relevance to this case.

CONCLUSION

OPAE has not sustained its burden of preserving issues for review, demonstrating error, or proving prejudice. Therefore, this Court should affirm.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief and Appendix of Intervening Appellee, the East Ohio Gas Company d/b/a Dominion East Ohio, was delivered to the following by hand delivery or regular U. S. Mail this 27th day of December, 2006:

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APPENDIX

§ 4901.13 Publication of rules governing proceedings.

The public utilities commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings relating to parties before it. All hearings shall be open to the public.

§ 4903.13 Reversal of final order; notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

§ 4905.22 Service and facilities required; unreasonable charge prohibited.

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

§ 4909.18 Application for establishment or change in rate.

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A report of its property used and useful in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed;

(D) A statement of financial condition summarizing assets, liabilities, and net worth;

(E) A proposed notice for newspaper publication fully disclosing the substance of the application. The notice shall prominently state that any person, firm, corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The notice shall further include the average percentage increase in rate that a representative industrial, commercial, and residential customer will bear should the increase be granted in full;

(F) Such other information as the commission may require in its discretion.