

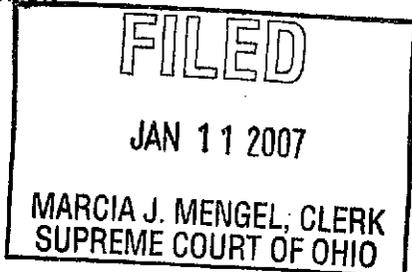
IN THE SUPREME COURT OF OHIO
On Appeal from the Public Utilities Commission of Ohio

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

**REPLY BRIEF OF APPELLANT,
OHIO PARTNERS FOR AFFORDABLE ENERGY**

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iv
I. INTRODUCTION	1
II. ARGUMENT	
A. The PUCO has no statutory authority to approve an exemption from regulation pursuant to R.C. §4929.04 in the absence of the applicant's satisfaction of the requirements of R.C. §§4929.02 and 4929.04.	1
B. The PUCO has no statutory authority to approve an exemption from regulation in the absence of an applicant meeting its burden of proof pursuant to R.C. §4929.04(C).	8
C. The PUCO has no statutory authority to approve an exemption from regulation in the absence of the satisfaction of the requirements of R.C. §4929.02(A)(4).	12
D. The PUCO's unlawful and unreasonable orders have caused harm to OPAE and similarly situated parties.	17
III. CONCLUSION	18
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Canton Storage and Transfer Co. v. Pub. Util. Comm.</i> (1995), 72 Ohio St.3d 1.....	8,19,20
<i>Pike Natural Gas Co. v. Pub. Util. Comm.</i> (1981), 68 Ohio St.2d 181.....	8,19,20
 <u>Entries and Orders of the Public Utilities Commission of Ohio</u>	
<i>In the Matter of the Application of The East Ohio Gas Company dba Dominion East Ohio for Approval of a Plan to Restructure its Commodity Service Function, Case No. 05-474-GA-ATA, Entry on Rehearing (July 12, 2006)</i>	12,13
<i>In the Matter of the Application of The East Ohio Gas Company dba Dominion East Ohio for Approval of a Plan to Restructure its Commodity Service Function, Case No. 05-474-GA-ATA, Opinion and Order (May 26, 2006)</i>	12,13
<i>In the Matter of the Application of The East Ohio Gas Company dba Dominion East Ohio for Approval of a Plan To Restructure its Commodity Service Function, Case No. 05-474-GA-ATA, Entry (November 30, 2005)</i>	12,13
<i>In the Matter of the Application of The East Ohio Gas Company dba Dominion East Ohio for Approval of a Plan To Restructure its Commodity Service Function, Case No. 05-474-GA-ATA, Entry on Rehearing (September 7, 2005)</i>	2,3,13
<i>In the Matter of the Application of The East Ohio Gas Company dba Dominion East Ohio for Approval of a Plan To Restructure its Commodity Service Function, Case No. 05-474-GA-ATA, Entry (August 3, 2005)</i>	2,3,13
<i>In the Matter of Application of Vectren Energy Delivery of Ohio, Inc. For Approval, Pursuant to Revised Code Section 4929.11, of a Tariff To Recover Conservation Expenses and Decoupling Revenues Pursuant To Automatic Adjustment Mechanisms, Case No. 05-1444-GA-UNC, Opinion and Order (September 13, 2006)</i>	15

TABLE OF AUTHORITIES, cont.

Page

*In the Matter of Application of Vectren Energy Delivery of Ohio, Inc.
For Approval, Pursuant to Revised Code Section 4929.11, of a Tariff
To Recover Conservation Expenses and Decoupling Revenues Pursuant
To Automatic Adjustment Mechanisms,
Case No. 05-1444-GA-UNC, Entry
(April 5, 2006)* 6

*In the Matter of Application of Vectren Energy Delivery of Ohio, Inc.
For Approval, Pursuant to Revised Code Section 4929.11, of a Tariff
To Recover Conservation Expenses and Decoupling Revenues Pursuant
To Automatic Adjustment Mechanisms,
Case No. 05-1444-GA-UNC, Entry
(February 7, 2006)* 6

Statutes

R.C. 4905.302 2,7,18
R.C. 4905.70 16,17,19
R.C. 4929.02 passim
R.C. 4929.04 passim
R.C. 4929.05 7,18

Administrative Rules

O.A.C. Rule 4901:1-19-03 5,18
O.A.C. Rule 4901:1-19-04 3,18

I. INTRODUCTION

Ohio Partners for Affordable Energy (“OPAE”) herein replies to the merit briefs filed by the Public Utilities Commission of Ohio (“PUCO”) and The East Ohio Gas Company d/b/a Dominion East Ohio (“Dominion”). The PUCO argues erroneously that its approval of Dominion’s application is consistent with the PUCO’s statutory authority pursuant to R.C. §4929.04 to approve exemptions from regulation. Dominion argues falsely that the PUCO did not err in finding that Dominion met the requirements of R.C. §§4929.02 and 4929.04 for an exemption from regulation. Contrary to the arguments of the PUCO and Dominion, Dominion did not satisfy the statutory requirements set forth at R.C. §§4929.02 and 4929.04 for an exemption from regulation, and the PUCO acted unlawfully and unreasonably in approving an exemption from regulation for Dominion. The Court should reverse the PUCO’s orders approving the exemption and remand this case with instructions to the PUCO to correct its unlawful and unreasonable orders.

II. ARGUMENT

- A. The PUCO has no statutory authority to approve an exemption from regulation pursuant to R.C. §4929.04 in the absence of the applicant’s satisfaction of the requirements of R.C. §§4929.02 and 4929.04.

R.C. §4929.04(A) states, in pertinent part, that the PUCO, upon the application of a natural gas company, after notice, after affording the public a period for comment, and after a hearing, shall exempt any commodity sales service of a natural gas company from certain provisions of Chapters 4905 and 4909 if the PUCO finds, *inter alia*, that the natural gas company is in substantial compliance with the policy of the state of Ohio specified in R.C. §4929.02. OPAE Appendix to Merit Brief (“App.”) 133,

134. Among other things, the policy of the state of Ohio set forth at R.C. §4929.02 is to promote the availability to consumers of adequate, reliable and reasonably priced natural gas services; to promote the availability of unbundled and comparable natural gas services and goods; to promote diversity of natural gas supplies and suppliers; and to encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods. App. 133.

The PUCO admits that Dominion did not file an application for exemption from regulation pursuant R.C. §4929.04. PUCO Merit Brief at 11; App. 134. Dominion filed an application merely to revise its tariffs. Dominion's proposed tariff revisions, however, also requested the elimination of the gas cost recovery ("GCR") process set forth at R.C. §4905.302. App. 127. The PUCO found that it could not eliminate the GCR process except pursuant to its authority under R.C. §4929.04 to grant exemptions from regulation. App. 050, 057. Although there was no application for an exemption before it, the PUCO "processed" Dominion's application as if it were an application for an exemption pursuant to R.C. §4929.04 "because substantively it requested an exemption from R.C. 4905.302 (the gas-cost-recovery or GCR statute)". PUCO Merit Brief at 11.

Dominion's failure to file for an exemption from regulation was not an inadvertent error on Dominion's part. Dominion chose not to file an application for an exemption because Dominion did not consider an exemption appropriate to its proposal to change its method of procuring wholesale natural gas. When the PUCO found that it would consider Dominion's application to be one for an exemption from regulation, Dominion filed an application for rehearing from the PUCO's order. App.

50; OPAE Supplement to Merit Brief (“Supp.”) 024. In its application for rehearing, Dominion stated that it did not seek an exemption from regulation for its commodity sales. Supp. 024. The PUCO denied Dominion’s application for rehearing and proceeded with the case as if Dominion had requested an exemption. App. 057. In short, its merit brief to the contrary, Dominion came very late to the notion that this case concerns an exemption from regulation.

Thus, the PUCO pretended the application was one for an exemption from regulation, even though Dominion protested that it was not seeking an exemption and even though such an application would have included a full array of procedural and substantive requirements that are wholly lacking in this case. O.A.C. Rule 4901:1-19-04(C) lists the exhibits to an exemption application. App. 103. The applicant is to demonstrate fully that it is in substantial compliance with the policy of the state of Ohio specified in R.C. §4929.02. App. 133, 103. The applicant is also to include a detailed discussion as to how the approval of the proposed exemption would promote the state’s policy. App. 103. None of this is included in Dominion’s application, nor was Dominion’s application ever modified to include any of the procedural or substantive requirements for an exemption application. Dominion never filed requests to waive these procedural and substantive filing requirements.

Both the PUCO and Dominion attempt to convince the Court that OPAE is making merely a procedural argument regarding Dominion’s failure to request an exemption. The PUCO and Dominion argue, for example, that OPAE may not raise before the Court the PUCO’s complete disregard of its administrative rules for applications for exemptions because OPAE did not discuss the procedural rules in

its appeal to the Court or its application for rehearing. PUCO Merit Brief at 26; Dominion Merit Brief at 12. The PUCO also contends that it established a comment period, held a hearing and allowed briefs; therefore, the parties received all the process required under R.C. §4929.04. PUCO Merit Brief at 15.

OPAE has not based its appeal on the PUCO's disregard for its administrative rules or any other of the numerous procedural flaws in this case. OPAE's appeal is based on OPAE's proposition of law that the PUCO should not have approved an exemption from regulation for Dominion in the absence of Dominion's satisfaction of the requirements of R.C. §§4929.02 and 4929.04. OPAE's application for rehearing before the PUCO alleged that the PUCO acted unreasonably and unlawfully when it approved an application under R.C. §4929.04, which fails to meet the requirements of R.C. §4929.02. App. 138. In its notice of appeal to the Court, OPAE likewise alleged that the PUCO acted unreasonably and unlawfully when it found that Dominion's application met the requirements of R.C. §§4929.02 and 4929.04. App. 001. Therefore, the issue of the PUCO's approval of the exemption without the applicant's satisfaction of the statutory requirements is properly before the Court in this appeal.

OPAE's reference to the procedural rules and the numerous procedural flaws illustrates the substantive issue that Dominion did not satisfy the requirements for an exemption from regulation. As OPAE stated in its merit brief, if the applicant does not even address the matters to be included in an application for an exemption, the application cannot possibly be adequate. See OPAE's Merit Brief at 14-26. The applicant for an exemption from regulation must make a strong showing not only regarding the status of competition in its service area but also regarding customer

safeguards in the competitive environment. The applicant must comply with the state's policies, which, among other things, promote the availability to consumers of adequate, reliable and reasonably priced natural gas services and goods; promote unbundled and comparable natural gas services and goods that provide consumers with supplier, price, terms, conditions, and quality options; promote diversity of natural gas supplies and suppliers; encourage innovation and market access for cost-effective supply- and demand-side natural gas goods and services; encourage access to information regarding the operation of the distribution system; avoid certain subsidies; and facilitate additional choices for residential consumers, including aggregation. R.C. §§4929.02(A)(1), (2), (3), (4), (5), (8), (9) and (11). The PUCO failed to require Dominion to file an application for an exemption and make any of the showings required for such an application.

The PUCO concedes that "some minor procedural rules were not strictly followed", but argues that the PUCO can and did waive them "by deciding to evaluate Dominion's proposal under R.C. 4929.04." PUCO Merit Brief at 28. Contrary to the PUCO's argument, the PUCO's decision to evaluate the Dominion proposal pursuant to R.C. §4929.04 should have brought the procedural rules for applications pursuant to R.C. §4929.04 into play, not the opposite. Moreover, Dominion never made any waiver requests, which should have been filed with the application pursuant to O.A.C. Rule 4901:1-19-03(C). App. 102. The PUCO never waived any of its administrative rules in this case; the PUCO simply ignored the rules as if they did not exist.

Contrary to the implication of the PUCO and Dominion, the PUCO does not ignore its procedural rules when considering applications before it. The case of an application made by Vectren Energy Delivery of Ohio, Inc. ("Vectren") proves this point. When the PUCO, as in the case here, determined that Vectren's application would be considered as one for alternative regulation, Vectren recognized that its filing was not adequate for a request for alternative regulation. App. 084, 082. Vectren applied for a waiver of the procedural rules for applications for alternative regulation, and the PUCO issued an order affirmatively waiving its rules. App. 82. Here, Dominion and the PUCO simply ignored the procedural rules for applications for exemptions.

Dominion's argument that OPAE was not prejudiced by the PUCO's irregular conduct of this case is clearly wrong. Dominion Merit Brief at 12. OPAE was prejudiced because Dominion did not address the substantive requirements for an exemption from regulation. One of those requirements, set forth at R.C. §4929.02(A)(4), is that the policy of the state of Ohio is to encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods. App. 133. OPAE has a strong interest in this state policy and was prejudiced by the failure of Dominion and the PUCO to address this state policy seriously in the context of this case.

Likewise, Dominion misses the point when it complains about OPAE's reference to alternative rate plans and GCR regulation. Dominion Merit Brief at 15. On brief, OPAE noted that there are aspects of Dominion's application (such as the elimination of the GCR process) that rightfully concern an exemption from regulation

and other aspects of the application (such as the PUCO's approval of the new standard service offer) that concern an alternative regulation plan. On brief, OPAE also noted that elimination of the GCR process, which Dominion demanded, was not necessary if Dominion merely wished to change its method of procuring wholesale natural gas. Arguably, Dominion could have made an application for alternative regulation under R.C. §4929.05 or an application for an exemption under R.C. §4929.04; alternatively, Dominion could have procured its wholesale gas in a new way and simply submitted to a review by a GCR management/ performance audit.

OPAЕ's point is that the PUCO's conduct of this case is a complete muddle, which can be explained only in the context of the PUCO's desire to provide Dominion the outcome Dominion wanted without regard to the PUCO's statutory authority. This case did not conform to the PUCO's statutory authority to approve applications. The PUCO did nothing to remedy the problem, but gave Dominion the outcome it wanted. Thus, the PUCO exceeded its statutory authority.

In order to receive an exemption from regulation, Dominion must make a showing consistent with the requirements of R.C. §§4929.04 and 4929.02 and the PUCO's rules for applications made pursuant to those statutes. App.133, 134, 103. The PUCO acted unreasonably and unlawfully when it approved the application under R.C. §4929.04 because the application fails to meet the statutory requirements. App. 134. The PUCO's approval of the exemption from regulation in response to Dominion's filing violates R.C. §§4905.302, 4929.02, 4929.04, 4929.05 and O.A.C. Chapters 4901:1-14 and 4901:1-19. App. 127, 133, 134, 136, 086, 099.

The PUCO is a creature of statute and lacks authority to deviate from statutory requirements related to ratemaking. *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181. The PUCO does not have the authority to approve an application that ignores Ohio law. The PUCO has no authority to ignore and violate the requirements of Ohio law as it did in this case on appeal. The PUCO's orders approving Dominion's application should be reversed and remanded.

- B. The PUCO has no statutory authority to approve an exemption from regulation in the absence of an applicant meeting its burden of proof pursuant to R.C. §4929.04(C).

On rehearing and appeal, OPAE argued that Dominion had not met its burden of proving that its application meets the requirements of R.C. §§4929.02 and 4929.04. App. 138, 001. The requirement that an applicant for exemption from regulation meet its burden of proof is explicitly set forth in the statute. R.C. §4929.04(C). App. 134. Given that Dominion's application is devoid of any mention of the requirements of R.C. §§4929.02 and 4929.04, Dominion could not have met the statutory burden of proof for an application for an exemption from regulation. Supp. 001. Dominion could not meet its burden of proof, because Dominion never filed an application for an exemption from regulation.

Dominion, of course, made belated efforts to conform this case (if not its application) to one superficially related to an exemption filing. Dominion filed testimony including one short sentence, which merely claims that its proposal is consistent with the state's policy set forth at R.C. §4929.02. Supp. 029, 037. On brief, Dominion repeats the state's policies and strains to find some way to claim that

its proposal to eliminate the GCR process satisfies or furthers them. Dominion Merit Brief at 25-33. In reality, the entirety of Dominion's record evidence is one conclusive sentence that its proposal satisfies the state's policies set forth at R.C. §4929.02. Supp. 029, 037. The Court cannot possibly find that Dominion satisfied its statutory burden of proof in this case without specific proof of compliance.

The PUCO and Dominion attempt to paper over the evidentiary deficiency by claiming, without any supporting evidence, that Dominion met its burden of proof for an exemption from regulation. To bolster their false claim that Dominion met its burden of proof, Dominion and the PUCO provide theories relating to the benefits of a competitive market and speculation regarding the extent to which Dominion's proposal would further competition in Dominion's service area. The status of competition and the furtherance of competition are essentially the only factors that Dominion and the PUCO present in support of their claims.

OPAE does not concede that the record evidence in this case regarding competition and the furtherance of competition is adequate; in fact, the record does not show that Dominion's proposal will further competition. Even if the record regarding competition and the furtherance of competition were adequate, however, those factors alone would not be sufficient to support approval of an exemption from regulation. Competition and the furtherance of competition are not the only factors the PUCO considers when it reviews applications for exemption from regulation; therefore, such factors, even if they had been completely proven (and they were not) do not mean that the applicant has met its burden of proof for an exemption as set forth at R.C. §4929.04. App. 134.

The applicant must also show that it is in compliance with the state policy to promote the availability to consumers of adequate, reliable and reasonably priced natural gas services and goods; to promote the availability of unbundled and comparable natural gas services and goods that provide customers with supplier, price, terms, conditions, and quality options; to promote diversity of natural gas supplies and suppliers; to encourage innovation and market access for cost-effective supply- and demand-side natural gas goods and services; to encourage access to information regarding the operation of the distribution system; to avoid certain subsidies; and to facilitate additional choices for residential consumers, including aggregation. In short, the state policies also encompass consumer protections. R.C. §§4929.02(A)(1), (2), (3), (4), (5), (8), (9) and (11). The PUCO did not consider a complete application for an exemption, which application would have addressed each and every one of the state policies. Therefore, the PUCO could not and did not have before it the evidence required to grant an exemption from regulation.

Dominion claims that it “substantially” complied with the state policies and that this is sufficient. Dominion Merit Brief at 25. By that, Dominion apparently means that furthering competition alone is sufficient to constitute “substantial” compliance with the state policy. Dominion argues that the application promoted at least eight of the Ohio policies and obstructed none. Dominion Merit Brief at 35. Dominion also complains that OPAE’s interest is limited to the state policy set forth at R.C. §4929.02(A)(4) to encourage innovation and market access for cost-effective demand-side natural gas services and goods and that even if Dominion did not satisfy that particular policy, Dominion substantially complied with the state policy.

Dominion is wrong because competition and the furtherance of competition are not sufficient to constitute substantial compliance with the state policy set forth at R.C. §4929.02(A). App. 133. While several of the policies enunciated at R.C. §4929.02(A) relate to the competitive environment, not all of those policies concern competition. Several other of the policies concern customer protections that would mitigate the effects on consumers of competition and an unfettered market. R.C. §§4929.02(A)(1), (2), (3), (4), (5), (8), (9) and (11). Dominion failed to address any consumer protection issues in this case; therefore, Dominion could not possibly have substantially complied with the policy of the state of Ohio nor met its burden of proof required for approval of an exemption from regulation.

Dominion claims there is evidence that its proposal will further the state policy set forth at R.C. §4929.02(A)(4). Dominion's evidence is that the market and price signals will encourage a demand-side response. Dominion Merit Brief at 29. Contrary to Dominion's argument, the idea that market price signals will encourage a demand response is a theory, not evidence. Apparently, Dominion's view is that high natural gas prices in and of themselves constitute a demand-side service or good to which the statute refers. This presumes that alternative regulation was authorized by the General Assembly to increase prices so that the goal of encouraging demand-side resources is achieved. In reality, touting undocumented consumer response to price signals does not even remotely show evidence that could satisfy Dominion's burden of proof that it is in compliance with the state's policy to encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods.

Dominion also argues that even if there were no evidence that the application advanced the policy at R.C. §4929.02(A)(4), OPAE submitted no evidence that the application hindered that goal. Dominion Merit Brief at 34. Of course, it is Dominion who has the burden of proving its case for an exemption from regulation. OPAE is under no obligation to demonstrate that the application hindered anything. The application is required to comply with the state policy; it is not sufficient that the applicant be neutral to the state policy or simply not hinder the policy.

Thus, Dominion failed to meet its burden of proving compliance with the state policy set forth at R.C. §4929.02 and the requirements for an exemption set forth at R.C. 4929.04. App. 133, 134. The PUCO unreasonably and unlawfully found that Dominion met its burden of proof pursuant to R.C. §4929.04(C). App. 016, 009,134. The Court should correct this error by remanding this case to the PUCO with orders that the exemption be denied, or in the alternative, that Dominion comply with the state policy set forth at R.C. §4929.02 and the requirements set forth at R.C. §4929.04 for an exemption from regulation. App. 133, 134.

- C. The PUCO has no statutory authority to approve an exemption from regulation in the absence of the satisfaction of the requirements of R.C. §4929.02(A)(4).

Given that Dominion never requested an exemption under R.C. §4929.04 in the first place, it is not surprising that Dominion resisted the fact that demand-side natural gas services and goods are an issue in this case. When OPAE and the Office of the Ohio Consumers' Counsel ("OCC") filed their testimony recommending demand-side natural gas services and goods to satisfy the statutory requirements for an exemption from regulation, Dominion filed motions to strike this testimony filed by

OPAIE and OCC. Supp. 107, 115. Dominion protested that energy efficiency programs were not the subject of its application. Supp. 107. Dominion claimed that demand-side management was not an issue in this case and had nothing to do with Dominion's proposal to move from GCR service to a standard service offer. Id.

The PUCO denied Dominion's motion to strike the testimony of OPAIE and OCC recommending demand-side services and goods. In its Entry, the PUCO claimed to have "broad discretion" in R.C. §4929.04(B) with respect to the factors to be considered when deciding whether to grant an exemption from regulation. App. 061. The PUCO claimed it was interested in the likelihood of consumer benefits given the possibility of risk in implementing Dominion's proposal and in a full and complete record for use in making its decision in the case. Id. Unfortunately, the PUCO did not follow up on its interest in consumer benefits relative to risk or demand-side services and goods in making its final orders. App. 016, 009.

The PUCO complains that OPAIE's single focus is on the PUCO's failure to implement "a single provision of the statute, namely R.C. 4929.02(A)(4), to encourage innovation and market access for cost-effective supply and demand-side natural gas services and goods." PUCO Merit Brief at 16. The PUCO argues that OPAIE recommended additional funding for low-income assistance programs, that the law does not "mandate" such funding, and that such funding would simply create more costs to be recovered from customers. PUCO Merit Brief at 17, 33.

The PUCO is incorrect to imply that an application for an exemption from regulation does not require additional efforts on the applicant's part to encourage demand-side natural gas services and goods. The law requires compliance with the

state policy to encourage innovation and market access for cost-effective supply and demand-side natural gas services and goods and also requires other consumer protections that the PUCO ignores. It is unlawful for the PUCO to dismantle the GCR process without addressing the problems consumers may face under an exemption. The General Assembly intended that exemptions from regulation occur only with protections for consumers. R.C. §§4929.02 and 4929.04. App. 133, 134.

The PUCO urges the Court to find that demand-side and conservation programs are not mandated. While the particular recommendations of OPAE and OCC for demand-side goods and services may not be “mandated,” the PUCO is required pursuant to R.C. §4929.02 to help alleviate and lessen the uncertainty associated with exemptions from regulation. The PUCO unlawfully ignored the statutory requirements of R.C. §§4929.02 and 4929.04 to encourage innovation and market access for cost-effective supply and demand-side natural gas services and goods. App. 134. Regardless of whether OPAE’s or OCC’s particular recommendations were adopted, the PUCO is required to find that the applicant substantially complies with the policy of the state of Ohio. An applicant for an exemption cannot possibly be in substantial compliance with the state policy if the entirety of the state policy requiring consumer protections is ignored.

As for the PUCO’s claims that OPAE’s recommended demand-side and conservation programs would create more costs to be recovered from customers, this is pure speculation on the PUCO’s part. PUCO Merit Brief at 33. The PUCO cannot honestly argue before the Court that the utility’s costs somehow reflect rates to be paid by customers when the PUCO is deregulating natural gas service and

instituting a competitive paradigm in which markets determine prices to be paid by customers, and not utility costs. Moreover, the PUCO cannot honestly claim that any additional costs incurred by Dominion would have any effect on its distribution rates, which have not been reviewed by the PUCO since the early 1990's. The PUCO has no knowledge whatsoever of Dominion's current distribution costs.

The PUCO also argues that it approved additional low-income funding in Vectren's alternative regulation plan filing but not in this case, which is an exemption filing. PUCO Merit Brief at 17. The PUCO is wrong on both counts. First, there is no exemption filing here. Second, even if there were an exemption filing, there is no difference whatsoever between the requirements for an alternative regulation plan and an exemption with regard to compliance with the state policy set forth at R.C. §4929.02. Both of these filings require the same adherence to the policy requirements set forth at R.C. §4929.02. The distinction that the PUCO attempts to make between the Vectren case and the Dominion case is groundless. App. 064.

Dominion argues that the requirement of R.C. §4929.02(A)(4) to encourage innovation and market access for cost-effective supply and demand-side natural gas services and goods is satisfied because the elimination of the GCR process would encourage suppliers to participate in the market, clear up price distortions and encourage conservation. Dominion Merit Brief at 29. Dominion argues that pure price signals are the most economically efficient means for reducing consumption. Regardless of Dominion's market price theories, price signals are not the innovative demand-side goods and services required by the statute. Price signals offer no consumer protections and mitigate no risk.

Finally, the PUCO argues that R.C. §4905.70 applies only to electricity conservation programs. While there is no doubt that the statute refers to electric conservation programs as well, the statute is not so limited. In fact, the statute is entitled “energy conservation programs,” which refers to both natural gas and electricity. Pursuant to the statute, the PUCO is to initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiency and take into account long-run incremental costs. If the statute were intended only to apply to electricity conservation programs, it would have said so. The plain reading of the statute, with its explicit reference to “energy” conservation, includes electricity and natural gas.

Dominion argues that R.C. §4905.70 is not mentioned in R.C. Chapter 4929 and that nothing in R.C. §4905.70 applies to R.C. §4929.04 proceedings. Dominion argues that R.C. §4905.70 imposes no duty on a gas distribution company and holds no relevance to this case. Dominion Merit Brief at 35.

Dominion is wrong to contend that goods and services to promote energy conservation are not an issue in this case. They are part of the state policy with which an applicant for an exemption must comply. Both OPAE and OCC presented testimony as to the programs Dominion could undertake to satisfy the state policy of encouraging innovation and market access for cost-effective demand-side natural gas services and goods. The PUCO failed to adopt any of the recommendations made by OPAE and OCC. Even if the PUCO did not adopt the specific recommendations made by OPAE and OCC, the PUCO was required to find compliance with the state policy. The PUCO did not require Dominion to show that it

was promoting or encouraging the goals set out in R.C. §4929.02 through significant improvements to the natural gas services available to its customers. App. 133. The PUCO also unlawfully ignored the statutory requirement at R.C. §4905.70 to initiate energy conservation programs.

D. The PUCO's unlawful and unreasonable orders have caused harm to OPAE and similarly situated parties.

The PUCO claims that OPAE has made no showing that it has been harmed by the PUCO's orders. PUCO Merit Brief at 32. The PUCO contends that any harm is speculative and that OPAE's desire for more funding for low-income programs is not an interest that has been harmed or prejudiced. PUCO Merit Brief at 33.

Of paramount interest to OPAE is the state policy set forth at R.C. §4929.02(A)(4) that applicants for an exemption from regulation be required to demonstrate that they are in compliance with the state policy of encouraging innovation and market access for cost-effective supply- and demand-side natural gas services and goods. OPAE was harmed when the PUCO ignored OPAE's recommendations for demand-side and energy efficiency programs. Such programs are precisely the innovative demand-side goods and services that advance the state policy set forth at R.C. §4929.02(A)(4).

The PUCO and Dominion argue that no such funding is mandated and no such funding should be required. This case, however, involves an exemption from regulation, which requires compliance with the state policy. The PUCO cannot excuse its failure to address the policy of the state of Ohio designed to protect consumers at the same time the PUCO grants Dominion an exemption from regulation pursuant to that same policy. The PUCO fulfills Dominion's interest in

exemption from regulation, but calls into question the interests of others that make recommendations to protect consumers from the harmful effects of deregulation.

III. CONCLUSION

Dominion did not seek an exemption from regulation pursuant to R.C. §4929.04. The application was inappropriate to Dominion's proposal to change its method of procuring wholesale gas. Dominion requested a new form of regulation but did not seek approval for an alternative regulation plan pursuant to R.C.

§4929.05. The PUCO called what was filed an application for exemption and then approved the insufficient application that Dominion filed. The exemption should not have been approved. The PUCO's approval of Dominion's inadequate application violates R.C. §§4905.302, 4929.02, 4929.04, 4929.05 and O.A.C. Chapters 4901:1-14 and 4901:1-19. App. 127, 133, 134, 136, 086, 099.

Unless this Court reverses the PUCO's unlawful and unreasonable orders, Dominion will now be exempt from regulation under R.C. §4905.302 without having met the statutory or procedural requirements to merit such an exemption. R.C. §4929.04 requires a strong showing by an applicant seeking exemption, including a showing that the applicant is in compliance with the policy of the state of Ohio set forth at R.C. §4929.02. Dominion made no such showing, and the PUCO did not require one. Therefore, the PUCO's approval of Dominion's application violated R.C. §§4929.04 and 4929.02.

Dominion also did not meet its burden of proving its case for an exemption, as explicitly required by R.C. §4929.04(C). The exemption was granted without affirmative evidence from Dominion to satisfy its burden of proving its case.

Because Dominion failed to demonstrate compliance with the state policy set forth at R.C. §4929.02, the PUCO's approval of Dominion's application violated R.C. §4929.04(C).

Finally, Dominion's application does nothing to protect consumers from the effects of deregulation, does nothing to encourage innovation and market access for demand-side goods and services as required by R.C. §4929.04(A)(2), and does nothing to initiate conservation and energy efficiency programs as required by R.C. §4905.70. Therefore, the PUCO's approval of Dominion's application violates R.C. §§4929.04(A)(2) and 4905.70.

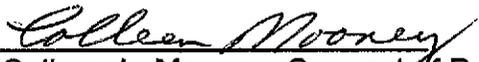
In sum, the PUCO's approval of Dominion's application is unlawful and unreasonable. The approval violates R.C. §§4929.02, 4929.04, 4929.05 and 4905.70. The PUCO approved Dominion's application as if it met the statutory and procedural requirements for an exemption from regulation pursuant to R.C. §4929.04 though it did not even address those requirements, much less meet them. The PUCO makes its usual false claims that it "enjoys broad authority in the conduct of its business" and has "discretion to decide how, in light of its internal organization and docket considerations, to best manage its docket to promote efficient and timely adjudication of cases before it." PUCO Merit Brief at 11-12. The issue here goes far beyond the PUCO's management of its internal organization and docket. The issue is the PUCO's blatant disregard for the statutory authority given it under Ohio law.

The Court has not given the PUCO carte blanche to ignore Ohio law. The Court should find, as it has on numerous occasions, that the PUCO is a creature of statute and lacks authority to deviate from statutory requirements related to

ratemaking. *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181. The PUCO does not have the authority to approve an application that ignores Ohio law. The PUCO has no authority to ignore and violate the requirements of Ohio law as it did in this case on appeal.

Wherefore, OP&E respectfully requests that the Court reverse and remand the PUCO's orders in this case approving the exemption of Dominion from regulation pursuant to R.C. §4929.04. The Court should find that the exemption should be denied or, in the alternative, that, on remand, the PUCO order Dominion to conform its application to the requirements of R.C. §§4929.02, 4929.04, 4929.05 and 4905.70. The PUCO's orders approving Dominion's application should be reversed and remanded.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant, Ohio Partners for Affordable Energy, was served upon all parties to this proceeding by hand delivery or regular U. S. Mail this 11th day of January 2007.


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