ORIGINAL

IN THE SUPREME COURT OF OHIO

Ohio Partners for Affordable Energy, Appellant, v. The Public Utilities Commission of Ohio, Appellee.	))))))))))))	Case No. 13-433 Appeal from the Public Utilities Commission of Ohio Public Utilities Commission of Ohio Case No. 12-1842-GA-EXM

BRIEF OF APPELLANT, OHIO PARTNERS FOR AFFORDABLE ENERGY

Colleen L. Mooney, Trial Attorney
(Reg. No. 0015668)

Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45840
(419) 425-8860 – Telephone
(419) 425 8862 – Facsimile
cmooney@ohiopartners.org

Attorney for Appellant
Ohio Partners for Affordable Energy

Michael DeWine
(Reg. No. 0009181)
Attorney General of Ohio

William L. Wright, Trial Attorney
(Reg. No. 0018010)
Section Chief, Public Utilities Section
Devin D. Parram
(Reg. No. 0082507)
Stephen P. Reilly
(Reg. No. 0019267)
Assistant Attorneys General

Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793
(614) 644-8698 - Telephone
(614) 644-8764 – Facsimile
william.wright@puc.state.oh.us
devin.parram@puc.state.oh.us
stephen.reilly@puc.state.oh.us

Attorneys for Appellee
Public Utilities Commission of Ohio

FILED
MAY 17 2013
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF THE FACTS 2

III. ARGUMENT 3

Proposition of Law No. 1: 3

The PUCO acts unlawfully when it disregards the statutory requirements set forth at Revised Code Section 4929.08(A) for a modification to an existing exemption order by ignoring the findings of the existing exemption order in order to find the existing order "invalid".

Proposition of Law No. 2: 9

The PUCO violates Ohio Revised Code Sections 4929.08(A) and 4903.09, when it unreasonably finds that the evidence demonstrates in accordance with Revised Code Section 4929.08(A) that certain findings of the 2008 Exemption Order are no longer valid. In addition to the PUCO's violation of the law, the evidentiary record does not support a finding that the 2008 Exemption Order is now invalid.

Proposition of Law No. 3: 12

The PUCO violates Ohio Revised Code Sections 4903.09 and 4929.08(A), when it invents evidence to find that absent modification to the 2008 Exemption Order, "DEO, the suppliers, and, ultimately, the customers could be adversely affected" and that the continuation of SCO service is "adversely affecting DEO and is negatively affecting all Ohioans by hindering the development of a fully-competitive marketplace."

Proposition of Law No. 4 19

The PUCO acts unreasonably and unlawfully in violation of Ohio Revised Code Sections 4903.09 and 4929.08(A), when it finds against the weight of evidence that the joint movants had corroborated that the public interest objectives set forth in Section 4929.02, Revised Code, will be advanced by modifying the 2008 Exemption Order. The record supports a finding that the public interest will be thwarted by the elimination of SCO service for Dominion's non-residential customers.

Proposition of Law No. 5 28

The PUCO acts unreasonably and unlawfully when it treats a contested case as a settled case when the settlement does not address the contested issues in the case.

IV. CONCLUSION.....34

TABLE OF AUTHORITIES

Page

Cases

Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm. (1994), 68 Ohio St.3d 559 28

Ohio Consumers' Counsel v. Pub. Util. Comm. (1992), 64 Ohio St.3d, 123, 126 28,32

Statutes

R.C. 4903.09 9,12,17

R.C. 4905.03 13

R.C. 4929.01 13

R.C. 4929.02 ..... passim

R.C. 4929.04 7

R.C. 4929.08 ..... passim

PUCO Administrative Code Rules

Ohio Administrative Code Rule 4901:1-19-12 17,18

Orders from which Appeal is Taken

In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM, Case No. 12-1842-GA-EXM, Opinion and Order (January 9, 2013) ..... passim

TABLE OF AUTHORITIES, cont.

Page

In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM,
Case No. 12-1842-GA-EXM, Entry on Rehearing
(March 6, 2013) 3

Orders Relevant to the Issue

In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services.
Case No. 07-1224-GA-EXM, Opinion and Order
(June 18, 2008) ..... passim

In the Matter of the Application of Ohio Power Company And Columbus Southern Power Company for Authority To Merge and Related Approvals,
Case No. 10-376-EL-UNC, Entry on Rehearing
(February 23, 2012) 33,34

APPENDIX TO MERIT BRIEF OF APPELLANT,
OHIO PARTNERS FOR AFFORDABLE ENERGY
TABLE OF CONTENTS

Page

Notice of Appeal

Ohio Partners for Affordable Energy, Appellant, v. The Public Utilities Commission of Ohio, Appellee, Notice of Appeal, Ohio Supreme Court Case No. 13-433 (March 19, 2013) 001

Orders from which Appeal is Taken

In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM, Case No. 12-1842-GA-EXM, Opinion and Order (January 9, 2013) 007

In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM, Case No. 12-1842-GA-EXM, Entry on Rehearing (March 6, 2013) 026

Orders Relevant to the Issue

In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services. Case No. 07-1224-GA-EXM, Opinion and Order (June 18, 2008) 039

In the Matter of the Application of Ohio Power Company And Columbus Southern Power Company for Authority To Merge and Related Approvals, Case No. 10-2376-EL-UNC, Entry on Rehearing (February 23, 2012) 61

PUCO Administrative Code Rules

Ohio Administrative Code Rule 4901:1-19-12 74

Statutes

R.C. 4903.09 75

R.C. 4905.03 76

R.C. 4929.01 79

R.C. 4929.02 82

R.C. 4929.04 84

R.C. 4929.05 86

R.C. 4929.08 87

Appellant's Application for Rehearing

In the Matter of the Joint Motion to Modify the June 18, 2008
Opinion and Order in Case No. 07-1224-GA-EXM,
Case No. 12-1842-GA-EXM,
Application for Rehearing by Ohio Partners for Affordable Energy
(January 25, 2013) 88

SUPPLEMENT TO MERIT BRIEF OF APPELLANT,
OHIO PARTNERS FOR AFFORDABLE ENERGY
TABLE OF CONTENTS

Page

In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM,
Case No. 12-1842-GA-EXM, Joint Motion to Modify Orders Granting Exemption
(June 15, 2012) 001

In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM,
Case No. 12-1842-GA-EXM, Memorandum Contra of Dominion,
(July 13, 2012) 020

In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM,
Case No. 12-1842-GA-EXM, Reply of OPAE,
(July 19, 2012) 035

In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM,
Case No. 12-1842-GA-EXM, Direct Testimony of Jeffrey A. Murphy,
(September 13, 2012).....048

In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM,
Case No. 12-1842-GA-EXM, Direct Testimony of Bruce M. Hayes
(October 16, 2012).....060

In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM,
Case No. 12-1842-GA-EXM, Direct Testimony of Stacia Harper (October 4, 2012) 094

In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM,
Case No. 12-1842-GA-EXM, Pages from Transcript Vol. I (October 16, 2012) 119

In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM,
Case No. 12-1842-GA-EXM, Pages from Transcript Vol. II (October 17, 2012) 241

In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM,
Case No. 12-1842-GA-EXM, Hearing Exhibits (October 16-17, 2012) 261

In the Matter of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services from Chapters 4905, 4909, and 4935 Except Sections 4905.10, 4935.01, and 4935.03, and from Specified Sections of Chapter 4933 of the Revised Code, Case No. 07-1224-GA-EXM, Application (December 28, 2007) 265

In the Matter of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a General Exempt of Certain Natural Gas Commodity Sales Services or Ancillary Services from Chapters 4905, 4909, and 4935 Except Sections 4905.10, 4935.01, and 4935.03, and from Specified Sections of Chapter 4933 of the Revised Code, Case No. 07-1224-GA-EXM, Direct Testimony of Jeffrey A. Murphy (December 28, 2007) 278

I. INTRODUCTION

Ohio Partners for Affordable Energy ("OPAE" or "Appellant") is a non-profit Ohio corporation with the stated purpose of advocating for affordable energy policies for low- and moderate-income Ohioans. OPAE includes as members non-profit organizations located in the area served by The East Ohio Gas Company d/b/a Dominion East Ohio ("Dominion"). OPAE members advocate on behalf of Dominion's low- and moderate-income customers and manage bill payment assistance programs to ensure customer access to natural gas distribution service from Dominion. OPAE members also provide weatherization and energy efficiency services to Dominion customers. OPAE's members are non-residential customers of Dominion.

The case was initiated by a joint motion ("Joint Motion") filed at the Public Utilities Commission of Ohio ("PUCO") by Dominion and the Ohio Gas Marketers Group ("Marketers"). The filers styled their motion "Joint Motion to Modify Order Granting Exemption". OPAE Supplement to Merit Brief ("Supp.") 001. Attached to the Joint Motion was a Memorandum in Support, which was also signed by Dominion and the Marketers. Id. The Memorandum in Support asked the PUCO to modify the June 18, 2008 Opinion and Order in Case No. 07-1224-GA-EXM ("2008 Exemption Order") so that, effective April 2013, non-residential customers would no longer have the choice to receive standard choice offer ("SCO") natural gas commodity service. Id. The price of the natural gas SCO is determined through a combination of an auction process, which sets the price associated with providing natural gas to customers, and the monthly closing price for natural gas determined through the New

York Mercantile Exchange ("NYMEX"). Marketers who win at the auction directly sell natural gas to customers at prices set by the SCO process.

OPAE intervened in this case on behalf of its non-profit members who are non-residential customers of Dominion and who would lose the availability of SCO service if the Joint Motion were granted and thus, in all likelihood, pay higher natural gas bills, thereby reducing the amount of funds available to alleviate poverty in their communities. OPAE intervened on behalf of the only customer group in this case that will be affected by the PUCO's approval of the Joint Motion.

II. STATEMENT OF FACTS

The Joint Motion of Dominion and the Marketers was filed at the PUCO on June 15, 2012. Attached to the Joint Motion was a Memorandum in Support, which asked the PUCO to issue an order modifying its June 18, 2008 Opinion and Order in Case No. 07-1224-GA-EXM ("2008 Exemption Order") so that, effective April 2013, non-residential customers would no longer have the option to receive standard choice offer ("SCO") service. Supp. 001. Instead, if a non-residential customer had not selected a competitive retail natural gas supplier, the non-residential customer would be assigned one by Dominion. Id.

Besides the Memorandum in Support attached to the Joint Motion, a "Joint Exhibit" was also attached to the Joint Motion. The Joint Exhibit was a stipulation and recommendation signed by Dominion, the Marketers, and the Office of the Ohio Consumers' Counsel ("OCC") as a representative of residential consumers. The stipulation and recommendation specifically did not subject residential consumers to

immediate loss of SCO service, thus protecting households from the Joint Motion and leaving non-residential customers in the lurch. No customer group affected by the Joint Motion signed the stipulation.

OPAE intervened and opposed the Joint Motion on behalf of its members who are non-residential customers of Dominion. The PUCO held an evidentiary hearing from October 16 to October 17, 2012. After briefs were filed, the PUCO granted the Joint Motion in its Opinion and Order dated January 9, 2013 ("2013 Order"). Appellant's Appendix ("App.") 007.

On January 25, 2013, OPAE timely filed an application for rehearing of the 2013 Order, in which OPAE set forth all of the grounds that it now urges and relies on at the Court for reversal, vacation, or modification of the order on appeal. App. 88. The PUCO denied OPAE's application for rehearing in its entirety in the PUCO's Entry on Rehearing dated March 16, 2013. App. 026. OPAE filed its Notice of Appeal with the Court on March 19, 2013. App. 001.

III. ARGUMENT

Proposition of Law No. 1

The PUCO acts unlawfully when it disregards the statutory requirements set forth at Revised Code Section 4929.08(A) for a modification to an existing exemption order by ignoring the findings of the existing exemption order in order to find the existing order "invalid".

Ohio Revised Code Section 4929.08(A) provides that the PUCO may modify any order granting an exemption upon its own motion or upon the motion of any person adversely affected by such exemption, but only under certain conditions. The statute

requires that the exemption order may be modified only if the "Commission determines that the findings upon which the order was based are no longer valid and that the abrogation or modification is in the public interest." Ohio Revised Code Section 4929.08(A). App. 87.

In its 2013 Order, the PUCO claimed that the 2008 Exemption Order is no longer valid because "phase two no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services." App. 007; 2013 Order at 8. With this finding, the 2013 PUCO unlawfully ignored, mischaracterized, and re-wrote the 2008 Exemption Order to justify the modification sought by Dominion and the Marketers. For a modification to an exemption order, Revised Code Section 4929.08(A) requires that there be a PUCO finding in a prior exemption order that is no longer valid. Only an invalid finding in the 2008 Exemption Order would trigger the ability of the 2013 PUCO to modify the earlier order. The 2013 PUCO chose to pretend the 2008 PUCO said something it did not say. Thus, the criteria for a modification to an exemption order at Revised Code Section 4929.08(A) have not been met. App. 87.

What the 2008 PUCO found in the 2008 Exemption Order is that "phase 2 represents a reasonable structure through which to further the potential benefits of market-based pricing of the commodity sales by the company." App. 039; 2008 Exemption Order at 20. This finding of the 2008 Exemption Order is absolutely not the same thing as the finding the 2013 Order claims is invalid, i.e., that Phase 2 was to provide "potential for further exploration of the benefits of market-based pricing for natural gas services." App. 007; 2013 Order at 8. The 2013 PUCO has deliberately mischaracterized the 2008 PUCO finding by referring to "market-based pricing for natural gas service" instead of the 2008

finding, which refers to "market-based pricing of commodity sales by the company". This is not an honest or trivial mistake. It is the crux of the issue on appeal to the Court. It is the difference between Dominion's Phase 2, which the 2008 PUCO approved and which gave customers the standard choice offer ("SCO"), and Dominion's Phase 3, which prohibits the SCO and was not approved in the 2008 Order.

The 2008 Exemption Order approved Dominion's Phase 2, under which Dominion would hold an auction to set a market price for Dominion's SCO service. The 2008 Exemption Order found that Phase 2 represented a reasonable structure through which to further the potential benefits of market-based pricing of the commodity sales by the company. That is what Phase 2 is. Phase 2 gives customers the option to take the market-based price determined by an auction held by the company, i.e., SCO service. Under Phase 2, a customer also has the option of purchasing natural gas commodity service through a governmental aggregation or bilateral contracts at prices also set by the competitive market. Marketers are the exclusive providers of natural gas commodity service. The 2008 Exemption Order allowed three different approaches to be used to set retail prices available from marketers to all customers.

The 2013 PUCO unlawfully attempts to bring about for choice-eligible non-residential customers Phase 3, in which Dominion conducts no SCO auction and offers no market-based pricing of commodity sales. The 2013 PUCO is unlawfully pretending that the 2008 Order was supposed to bring about Phase 3; in fact, nothing in the 2008 Exemption Order anticipates or contemplates Phase 3.

Nowhere in the 2013 Order did the PUCO discuss the findings in the 2008 Exemption Order, which approved a Stipulation and Recommendation described at 15 of the 2008 Exemption Order:

> (5) DEO [Dominion] must seek, through a separate application in the future, Commission approval before moving from the SCO commodity service market to a market in which choice-eligible customers will be required to enter into a direct retail relationship with a supplier or governmental aggregator to receive commodity service, i.e., full commodity service market.
>
> (6) If DEO does not obtain Commission approval to move to a full choice commodity service market upon the expiration of the second term of the SCO service, March 31, 2011, another SCO service auction will be held for a subsequent annual period, and so on thereafter.

App. 039, 2008 Exemption Order at 15.

The meaning of the 2008 Exemption Order is clear. If Dominion wants to eliminate SCO service, it must file a separate application. If Dominion did not obtain PUCO approval to eliminate the SCO, i.e., move to full choice commodity service upon the expiration of the second term of the SCO service in March 31, 2011, another SCO service auction would be held for a subsequent annual period and so thereafter until an application was filed and approved.

Dominion did not file an application for full choice commodity service and obviously did not obtain approval by March 31, 2011; the SCO service auctions continued. The finding of the 2008 Exemption Order is not invalid. The 2013 PUCO did not find the 2008 finding invalid. Instead, the 2013 PUCO invented a finding that the 2008 PUCO never made and declared that invented finding invalid.

As the 2008 Exemption Order states, the PUCO would have entertained an application for an exemption for full choice commodity service if Dominion had filed one. Dominion was free to file such an application under Revised Code Section 4929.04. App. 84. But in 2011, when the application should have been filed, the approval of such an application was by no means a certainty.

Dominion's July 13, 2012 Memorandum Contra OPAE's Motion to Dismiss included an Attachment A, which, at Page 3 of 4, are e-mails sent by Dominion to "stakeholders." Supp. 020, 035. Dominion states in its April 21, 2012 e-mail to the "stakeholders" that it wants to identify alternatives for the future direction of Dominion's choice program and SCO structure, but that the "stakeholder group should be mindful of Staff's comment that there is a high hurdle to obtaining Commission approval of a full merchant function exit at this time. If we are to make any changes, those changes will need to continue the methodical process that has served us well in the past and place customer needs at the forefront."

The 'methodical process' chosen was to file a motion for modification of the 2008 Exemption Order rather than the application required under Revised Code Section 4929.04 for "full choice commodity service", i.e., exit of the merchant function, as the 2008 Exemption Order required. Dominion chose to file the Joint Motion with the stakeholder Marketers to modify the 2008 Exemption Order so that non-residential customers would no longer have the option of choosing competitive SCO service. Dominion chose not to file the new application required by the 2008 Exemption Order and the statute. The strategic decision was to avoid a full process under Revised Code Section 4929.04 and instead improperly rely on Revised Code 4929.08(A) to modify the

2008 Exemption Order to deny non-residential customers SCO service. A procedurally defective strategic decision is still procedurally defective.

The Joint Motion itself did not comport with Ohio Revised Code Section 4929.08(A). The Joint Motion to modify the June 18, 2008 Exemption Order violated the law because the criteria at Revised Code Section 4929.08(A) are not met when no actual findings of the PUCO in the 2008 Exemption Order are shown to be invalid, thus authorizing a modification. Findings that were never made cannot magically become invalid.

In order to approve the Joint Motion, the PUCO re-wrote the 2008 Exemption Order as if the 2008 Exemption Order were to accomplish Phase 3 and somehow failed to do so. In reality, the 2008 Exemption Order approved only Dominion's Phase 2, the SCO option, and ordered that SCO auctions continue until Dominion filed a separate application for Phase 3. Dominion chose not to file the application, instead attempting an end run past the statute by "modifying" the 2008 Exemption Order.

Nothing in the actual 2008 Exemption Order is invalid, and the PUCO found nothing invalid in the 2008 Exemption Order. Under Revised Code Section 4929.08(A), there is nothing to justify a change of an exemption order through a motion.

The Court must overturn the 2013 PUCO's improper revision of the 2008 Exemption Order, which the PUCO made solely in order to justify approval of the modification. In order to modify the 2008 Order, the PUCO had to re-write it. The PUCO had no lawful basis upon which to modify the 2008 Exemption Order.

Proposition of Law No. 2.

The PUCO violates Ohio Revised Code Sections 4929.08(A) and 4903.09, when it unreasonably finds that the evidence demonstrates in accordance with Revised Code Section 4929.08(A) that certain findings of the 2008 Exemption Order are no longer valid. In addition to the PUCO's violation of the law, the evidentiary record does not support a finding that the 2008 Exemption Order is now invalid.

Ohio Revised Code Section 4903.09 states as follows:

> In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

Ohio law requires that, in contested cases, the PUCO's written opinions setting forth the reasons for its decisions be based on findings of fact. This was a contested case. Rather than write its opinions setting forth the reasons for its decision based on findings of fact, the PUCO re-wrote the 2008 Exemption Order to arrive at its decision. There was no factual basis for the PUCO to find that the 2008 Exemption Order is invalid.

Dominion's witness Jeffrey A. Murphy attempted to turn the 2008 Exemption Order into an order that is invalid because an exit of the merchant function for non-residential customers had not been achieved. The 2008 Exemption Order speaks of the approval of the SCO to "explore further the benefits of market based pricing *of the commodity sales by the company.*" [Emphasis added.] Mr. Murphy misquotes the 2008 Exemption Order, complaining that the continued existence of the SCO fails to "further the benefits of market-based pricing". Mr. Murphy, in his pre-filed testimony, pointedly deleted the words "of the commodity sales by the company" from the PUCO's 2008

Exemption Order. Under the selective quotation by Mr. Murphy, the 2008 PUCO's finding that "phase 2 represents a reasonable structure through which to further the potential benefits of market-based pricing of the commodity sales by the company" became simply, "Phase 2 is no longer furthering the potential benefits of market-based pricing" that the 2013 PUCO parroted in its 2013 Order. Supp. 048; Testimony of Murphy at 5-6. In short, the PUCO relied upon a false quote by the Dominion witness.

The Marketers' witness Ringenbach, who works for the supplier Direct Energy, also contributed to the false evidence about the 2008 Exemption Order. She testified that the Joint Motion will complete the exit of the merchant function for non-residential customers by removing them from retail auctions and allowing competitive suppliers to provide default commodity service at the prices suppliers choose. Supp. 119; Tr. I at 161. Ms. Ringenbach testified that the 2008 PUCO did not favor Dominion's Phase 3. She stated that in June 2008, gas suppliers were "told by the chairman of the Commission at that time, "You will never get an exit on the gas side." Supp. 119; Tr. I at 170. According to Ms. Ringenbach, that led to a lot of suppliers leaving the state because the business was not growing. Tr. I at 170. Suppliers reduced their presence in Ohio because they did not think that an exit was going to come. Tr. I at 172.

But now, in 2012, Ms. Ringenbach testified that things are "very different" because Dominion is "entering into negotiations that would include an exit from the merchant function." Supp. 119; Tr. I at 170. "This gives certainty to suppliers to make an investment here and keep growing this market." Id. Ms. Ringenbach testified that Direct Energy's CEO "came here and talked to people and he got in the car with me and said: "You're going to open an office and you're going to staff it here because I believe

in Ohio." Supp. 119; Tr. I at 173. Now instead of Ohio being "dead", "Ohio is where it's at." Ms. Ringenbach testified that this will be the first approval by a utility commission in the country to say "[w]e're willing to let it go and see what happens. That's what this settlement is." Id. Direct Energy is also an upstream producer "so deciding if we want to, you know, buy wells or invest in Utica or if we want to do something in New York or pay a premium with Marcellus, right, the difference is going to be in that market where we hold the largest amount of customers". Supp. 119; Tr. I at 175. Direct does not want to feel that "the rug's going to be pulled out from underneath them again." Tr. I at 172. If the Joint Motion is granted and the state of Ohio eliminates SCO service for non-residential customers forcing them to take commodity service from a supplier chosen by Dominion, Ohio will be "where it's at."

There is a fundamental flaw with the approach taken by the Joint Motion to modify the 2008 Exemption Order to achieve an exit of the merchant function (Phase 3) for Dominion's non-residential customers – it violates Ohio law. Revised Code 4929.08(A) sets forth the criteria for a modification of an exemption order. The PUCO must find that a finding in the 2008 Exemption Order is now invalid because Phase 3, an exit of the merchant function for non-residential customers, has not been achieved. But the 2008 Exemption Order did not find that there should be an exit of the merchant function or that Phase 3 should be approved; therefore, the criteria for a modification of the 2008 Exemption Order pursuant to Revised Code Section 4929.08(A) have not been met. All the 2008 Exemption Order did was authorize Phase 2, an alternative approach to providing market-based pricing to customers using an auction conducted by the company

that awarded customers to a competitive retail natural gas supplier through the auction. There is nothing invalid about the 2008 Exemption Order.

Even if Dominion's Murphy felt free to mischaracterize and re-write the 2008 Exemption Order in his testimony before the PUCO, the PUCO was not free to do so in its 2013 Order. Even if Direct's Ringenbach wants to grow Direct's business in Ohio by eliminating SCO service for non-residential customers and having Dominion assign current SCO customers to Direct, the PUCO is not free to modify the 2008 Exemption Order unless some finding in the 2008 Exemption Order is now invalid. The PUCO must make findings of fact and follow the law. Ohio Revised Code Sections 4903.09 and 4929.08(A). There is simply no factual basis for finding that the 2008 Exemption Order is invalid. Dominion has held the authorized auctions. The PUCO accepted the results of the auction. The Joint Motion does not allege any findings in the 2008 Exemption Order to be invalid, so there are none for the PUCO to use for a modification. The PUCO decision fails to follow the law.

Proposition of Law No. 3

The PUCO violates Ohio Revised Code Sections 4903.09 and 4929.08(A), when it invents evidence to find that absent modification to the 2008 Exemption Order, "DEO, the suppliers, and, ultimately, the customers could be adversely affected" and that the continuation of SCO service is "adversely affecting DEO and is negatively affecting all Ohioans by hindering the development of a fully-competitive marketplace."

In addition to requiring a finding in an existing exemption order that is now invalid, Ohio Revised Code Section 4929.08(A) also requires that a modification to an existing exemption order may be made upon the PUCO's own motion or "upon the motion of any person adversely affected" by the existing exemption order. The PUCO

filed no motion, so the filers of the Joint Motion must show that they are adversely affected by the existing exemption order.

Neither Dominion nor the Marketers showed pursuant to Ohio Revised Code Section 4929.08(A) that it is adversely affected by the findings of the 2008 Exemption Order. The primary reason for this is, of course, that the 2008 Exemption Order did not make the finding that Dominion and the Marketers cited in the Joint Motion; instead, the findings of the 2008 Order were rewritten and mischaracterized in order for it to appear that Dominion and the Marketers were somehow discomfited, but for purposes of Revised Code Section 4929.08(A), they cannot be adversely affected by PUCO findings that were never made.

Dominion is not adversely affected by the 2008 Exemption Order. Dominion is a public utility pursuant to Revised Code Section 4905.03(A)(5). Dominion, as a public utility gas distribution company, is not adversely affected by the continued SCO commodity service because, as a public utility distribution company, Dominion does not provide commodity service. Dominion conducts the auction, but marketers provide the service.

The Marketers are not adversely affected by the continued SCO service except to the extent that some of them do not place a winning bid at the SCO auction or do not convince customers to take commodity service through a bilateral contract at a higher price than provided by the SCO auction. The Marketers are free to bid at the SCO competitive auction and are only adversely affected by the auction if they, as individual marketers, do not place winning bids. Competition has winners and losers. Who wins the competition is irrelevant and of no concern to the PUCO. The PUCO is charged by

the General Assembly with fostering competition that produces fair and reasonable prices. The SCO price is set by the competitive market and produces a fair and reasonable price. The PUCO is not charged with protecting marketers from competition – in this case open competition with each other. Nor is the PUCO responsible for increasing the profits of marketers by letting them escape from the rigorous competition of an auction. Ohio Revised Code Section 4929.02(A)(1). App. 082.

Even though Dominion and the Marketers are not adversely affected by the continuation of SCO service in any way that should interest the PUCO, they complain that few customers are now leaving SCO service and choosing an individual supplier. Dominion's Murphy complained that customers are not switching from the SCO to bilateral contracts. Supp. 119; Tr. I at 80. He also complained that the auction at first spurred the competitive market, but "for the last two years that participation has been stable." Supp. 119; Tr. I at 68. By participation in the competitive market in this context, Mr. Murphy means the number of non-residential customers taking the SCO. He testified that initially there were 22,000 non-residential customers receiving SCO service; that declined to 17,000 in the next auction, and in the last two auctions the number was around 14,000. Supp. 119; Tr. I at 80. He did not provide any information for the record to ascertain why the number of non-residential customers on the SCO had declined over the past few years. He simply created the impression that the popularity of SCO service for non-residential customers was declining and that the PUCO should act to eliminate it in its entirety.

The record reflects a different circumstance. OCC's witness Bruce Hayes testified that OCC agrees with OPAE's position on the Joint Motion filed at the PUCO in June 2012

that the 2008 Exemption Order is not based on findings that are no longer valid. Supp. 060; OCC Ex. 2 at 13-14. As Mr. Hayes points out, and as OPAE has argued, the 2008 PUCO required that Dominion file an application to eliminate the SCO. Therefore, the Joint Motion's request for an exit for non-residential customers should not be characterized as an action to address the 2008 PUCO's expectation. Supp. 060; OCC Ex. 2 at14. The 2008 Exemption Order requires an application to eliminate the competitive options currently available to customers, yet Dominion has filed no application, only a defective motion.

Mr. Hayes also contested the idea that the elimination of the SCO for non-residential customers somehow will benefit non-residential customers. He testified that non-residential customers may be currently taking SCO service because SCO service "has consistently been better – meaning at a lower price – than the numerous comparable variable rate offers from Choice Marketers on the PUCO Apples to Apples chart." Supp. 060; OCC Ex. 2 at 17. Mr. Hayes testified that it is possible that "these non-residential customers have made a choice, with that choice being to take the lower price SCO option." Supp. 060; Id. at 18. In addition, Mr. Hayes testified that "with limited upward pressure on price due to the abundance of natural gas and the reduced industrial load, SCO customers may not see the value in paying a premium for a fixed rate contract to hedge against a risk that is not perceived as realistic or threatening." Id.

Thus, current economic and environmental conditions have contributed to less growth in natural gas commodity sales, fewer customers, declining prices, and possibly lower profits for the Marketers. However, to blame current market conditions on the existence of the SCO service is absurd.

Dominion and the Marketers seek to eliminate the competitive SCO option for non-residential customers. The SCO is a market-priced offer derived by an auction held by the utility. The Marketers want to set their prices without regard to an actual market-based benchmark price, the SCO, to which customers can compare other offers. Dominion and the Marketers do not want a transparent, open, competitive market; thus, their desire to eliminate the SCO is not in the public interest. It is not the PUCO's role to secure profits for Marketers. The PUCO has no responsibility to cater to their desire for higher prices at the expense of consumers. The inability of individual marketers to maximize their individual profits is not an adverse effect that is relevant under Ohio law.

Given that there is no relevant adverse effect on either Dominion or the Marketers to support a modification of the 2008 Exemption Order, the PUCO chose to claim there were adverse effects to customers due to the continuance of SCO service. The Joint Motion itself made no such claims, and the statute requires that the filers of the Joint Motion be adversely affected. The PUCO's finding that "customers *could* be adversely affected" by the continuance of SCO service is irrelevant under the statute. [Emphasis added.] App. 007; 2013 Order at 16. Moreover, there is no statutory provision for a modification of an exemption order because someone 'could' be adversely affected. The statute requires that the filers of the motion be adversely affected. Customers filed no motion, but the PUCO-invented adverse effects on consumers are irrelevant under the law. There is also no evidence cited by the PUCO that customers have been adversely affected by the 2008 Exemption Order. In fact, the evidence clearly demonstrates that eliminating the SCO will raise customer prices. That is the adverse effect.

The PUCO also claimed that the continuation of SCO service is "negatively affecting all Ohioans by hindering the development of a fully-competitive marketplace." App. 007; 2013 Order at 8. Again there is no evidence of record to support the PUCO's assertion. The PUCO's findings must be based on the evidence of record. Ohio Revised Code Section 4903.09. App. 75. The only SCO service relevant to this case for which there is any evidentiary record is Dominion's. There is no evidence that all Ohioans even have SCO service, much less SCO service from Dominion. There is no evidence that the SCO is negatively affecting customers, nor that elimination of the SCO will benefit customers in some way. There is no evidence that the continuance of SCO service in Dominion's service territory is "negatively affecting all Ohioans." Again, the 2013 PUCO simply invented its findings.

The importance of an adversely affected party to a modification of an existing exemption order is also set forth in Ohio Administrative Code Rule 4901:1-19-12, which sets forth the filing requirements for a modification of an exemption order. The rule states:

> Abrogation or modification of an order granting an exemption.
>
> (A) A complainant shall provide at a minimum the following information with its application to modify or abrogate an order granting an exemption.
>
> (1) A detailed description of the exact nature of the violation.
>
> (a) Which portion(s) of the separation plan the applicant has failed to comply with and how the applicant has failed to comply.
>
> (b) Which portion(s) of the code of conduct the applicant has failed to comply with and how the applicant has failed to comply.
>
> (c) How the complainant has been adversely affected by such exemption.
>
> (d) Which findings of the order granting the exemption are no longer valid and why.
>
> (e) How the modification or abrogation of the order granting the exemption is in the public interest.

(2) Supporting documentation for the complainant's allegation.

(3) The form of remedy requested.

(B) Such complaint shall be designated by the commission's docketing division using the acronym CSS.

(C) The docketing division of the commission shall serve the complaint upon the parties of record for the original exemption case which is the subject of the motion to modify or abrogate.

(D) The commission shall order such procedures as it deems necessary, consistent with these rules, in its consideration for modifying or abrogating an order granting an exemption.

Ohio Administrative Code Rule 4901:1-19-12. App. 74.

From a mere glance at the Joint Motion and the PUCO's 2013 Order approving it, one would never know that there is an Ohio Administrative Code, let alone a rule for filings to modify exemption orders. The Joint Motion and the PUCO 2013 Order completely disregard the rule. The Joint Motion provides no information on why the findings of the 2008 Exemption Order are no longer valid. The Joint Motion is not even a complaint. There is no detail about the actual findings of the PUCO 2008 Exemption Order that are no longer valid, about how the complainants are adversely affected by the actual PUCO findings, about the code of conduct, about the corporate separation plan, or any of the other information that the rule requires. The rule is simply ignored. This justifies the reversal of the PUCO's decision.

Proposition of Law No. 4:

The PUCO acts unreasonably and unlawfully in violation of Ohio Revised Code Sections 4903.09 and 4929.08(A), when it finds against the weight of evidence that the joint movants had corroborated that the public interest objectives set forth in Section 4929.02, Revised Code, will be advanced by modifying the 2008 Exemption Order. The record supports a finding that the public interest will be thwarted by the elimination of SCO service for Dominion's non-residential customers.

Revised Code 4929.08(A) requires that the modification to the exemption order be in the public interest. Ohio Revised Code Section 4903.09 requires that, in all contested cases heard by the PUCO, the PUCO shall make findings of fact and written opinions setting forth the reasons prompting the decisions arrived at based on the findings of fact. Dominion and the Marketers sought to eliminate the SCO option for non-residential customers, and the PUCO found the elimination of the SCO to be in the public interest. The evidence of record demonstrates that the Joint Motion is not in the public interest.

OPAE witness Stacia Harper described the four competitive options available to non-residential customers in Dominion's service area. Suppliers supply all the natural gas commodity available to customers through these four methods.

First, there are individual offers from individual suppliers, who offer customers direct bilateral contracts with variable or fixed rates, short or long terms, with various other features. Supp. 094; OPAE Ex. 1 at 9. Second, customers may join a governmental aggregation if one is available to them. In a governmental aggregation, suppliers sell natural gas to aggregation customers with a bidding or auction process establishing the price.

The third competitive option is the SCO. Suppliers bid into the auction held by the natural gas distribution utility, and the winning bidders provide customers with the same market-based price as retail customers of the marketers. The auction used to set the SCO is a competitive auction. The auction sets the retail adder, which is added to the New York Mercantile Exchange ("NYMEX") end of month close to establish the SCO. At the close of Dominion's 2011 SCO auction, Chairman Todd A. Snitchler stated, "The auction process has again yielded positive results for Dominion East Ohio customers . . . [t]he market continues to provide a competitive commodity price for natural gas." See: http://www.puco.ohio.gov/puco/index.cfm/media-room/media-releases/puco-approves-results-of-dominion-natural-gas-supply-auctions/.

The fourth option is the market variable rate ("MVR") where Dominion maintains a list of suppliers who choose to post an MVR. The MVR is unique to each supplier, is set by each supplier, and has a price that is not determined by an auction. Supp. 094; OPAE Ex. 1 at 11. Dominion's Murphy testified that he does not know how the suppliers' MVRs are set. Only individual suppliers know how their MVR is set. Supp. 119; Tr. I at 16. While the MVR is capped at the lowest competitive monthly variable rate offer that the supplier has posted on the PUCO's Apples to Apples chart, it is the suppliers that set their MVR price. Supp. 119; Tr. I at 17.

Under the PUCO's 2013 Order, non-residential customers will no longer have the SCO price established through a competitive auction (the third method). Choice-eligible non-residential customers who have not chosen to enter into a bilateral contract with a supplier (the first method) or are not served through a governmental aggregation (the second method) will be assigned a supplier by Dominion through the MVR process at a

variable rate determined by the participating supplier (the fourth method). This change will result in roughly 20% of all non-residential customers losing their current choice, the third method, the SCO, as of April 2013. Supp. 094; OPAE Ex. 1 at 12.

Bilateral contracts are no substitute for the SCO with its price determined by a competitive auction and its terms and conditions transparent. Bilateral contract prices are higher than the SCO when compared over a twelve-month period to a 12-month average SCO price. Supp. 094; Exhibit SH-4. Bilateral contracts simply cost more. Bilateral contracts also vary greatly as to terms and conditions, including early termination fees as high as $150. Supp. 094; OPAE Ex. 1 at 12. The terms of the hundreds of bilateral contracts are not generally known to the public or transparent in any way. Id. Suppliers generally offer bilateral contracts at prices that are not on the PUCO's Apples to Apples chart. Supp. 119; Tr. I at 157. The only way for a customer to know about such an offer is to call a supplier or visit a supplier's website to obtain the information. Id. The variable price offers from marketers almost always exceed the price offered through the SCO, in part because of the customer acquisition costs associated with supplier offers. Supp. 119; Tr. I at 143.

The SCO option, set by a competitive bid process, is generally lower priced than the marketers' MVRs, the only other default price available to customers. Ms. Harper testified that while there is occasionally an MVR price that is at or below the SCO price, the vast majority of MVR prices posted on the PUCO's Apples to Apples chart are higher, often much higher, than the SCO price. Supp. 094; OPAE Ex. 1 at 14; Exhibit SH-3. The SCO provides a benchmark for natural gas prices, and there is an incentive for

suppliers to try to come close to the SCO price in order to win customers. Supp. 119; Tr. I at 143. The SCO provides a benchmark that keeps the suppliers honest. Id.

The SCO price, unlike bilateral contract prices and MVR prices, is transparent. Currently, it is the NYMEX monthly closing price plus 60 cents, the adder determined at the auction. Supp. 119; Tr. I at 132-133. A customer can easily know and understand the SCO price; however, a customer has no way to know how the MVR price is set. Supp. 119; Tr. I at 157. The MVR is not always NYMEX priced, nor is any adder known. Id. The MVR is anything a marketer wants it to be, and there is no insight into how an MVR is set. Supp. 119; Tr. I at 133. After Dominion assigns a non-residential customer to a marketer's MVR rate, the customer will not know his price for natural gas until he gets his first bill. Supp. 119; Tr. I at 158.

Given the lack of transparency and the higher cost of bilateral contracts and the MVR, it is not surprising that customers leave bilateral contracts with suppliers to take the SCO service option. Supp. 119; Tr. I at 37; OPAE Ex. 4. Customers leave bilateral contracts for the SCO even though customers must take the step to call Dominion to return to SCO service. In short, customers are willing buyers of the SCO service. Supp. 119; Tr. I at 38.

In the 2009 to 2010 period, approximately 241,000 SCO residential and non-residential customers were included in the Dominion auction. At the present, there are approximately 170,000 SCO customers. Of these, there are approximately 14,000 non-residential customers on the SCO service who will now lose the SCO option. Supp. 119; Tr. I at 39. Mr. Murphy testified that many of the customers who were SCO customers at

the outset of the SCO have simply remained on the SCO. Tr. I at 38. Clearly, the SCO service is a choice that non-residential and residential customers make. Tr. I at 39.

The Marketers' witness Parisi testified that the SCO retail price adjustment, i.e., the adder which is added to the NYMEX end of month close, has generally trended down. Supp. 241; Tr. II at 217. He also testified that the declining rate of the adder in the auction, "is primarily an effect of the declining market in total, but we still are in a very volatile market." Supp. 241; Tr. II at 218. Commodity prices have been as high as $16 in the last few years, dropped lower, and currently are trending slightly upward again. Id. These are characteristics of a competitive market. Lower prices mean that the competitive market is working. As the OCC's witness Hayes testified, there is limited upward pressure on natural gas prices due to the abundance of natural gas and the reduced industrial load. Supp. 060; OCC Ex. 2 at 16.

The SCO auction spurs price competition, and eliminates the supplier's customer acquisition costs which are a significant barrier to entry into the competitive natural gas market for new suppliers. Supp. 094; OPAE Ex. 1 at 15. The SCO is comparable to a government aggregation, where suppliers are also able to acquire customers without incurring significant acquisition costs. Customers without access to a government aggregation are able to obtain a similar competitive option through the SCO. Without the transparent SCO price set by an auction held by Dominion, there is a reduction in the efficiency of the competitive market. Supp. 094; OPAE Ex. 1 at 15. There are also higher commodity prices, which customers must pay. Elimination of the SCO for non-residential customers simply raises natural gas commodity prices for those customers.

A review of state policy as articulated by Revised Code Section 4929.02(A) clearly states the preference of the General Assembly to promote all types of competition in order to: "[p]romote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods". Revised Code Section 4929.02(A)(1). The SCO auction is designed 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". Revised Code Section 4929.02(A)(2). App. 82.

Bilateral contracts, governmental aggregations, and the SCO represent options that are consistent with the state's policy because they provide customers with diverse competitive options. The fact that roughly 20% of Dominion non-residential customers have chosen the SCO makes clear that SCO service is in demand and is a desired competitive option. Revised Code 4929.02(A)(3). App. 82.

The SCO is also an innovative approach to providing cost-effective natural gas services within the meaning of R.C. 4929.02(A)(4), which calls for the promotion of innovative supply options. App. 82. To eliminate the SCO would eliminate consumers' access to this innovative supply approach to competition, in contravention of R.C. 4929.02(A)(4). The SCO is not a vestige of traditional regulation; rather it is a manifestation of the General Assembly's promotion of innovative supply options in such a way that competition is harnessed through an auction to provide customers with the lowest competitive market price. There is nothing innovative about eliminating the SCO option. Customers already have the choice of bilateral contracts with suppliers.

Eliminating the SCO option adds nothing to the competitive choices available; in fact, competitive options will be reduced.

State policy also promotes "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". Revised Code Section 4929.02(A)(7). App. 82. The evidence of record is that Phase 2 has achieved effective competition. Dominion witness Murphy testified that effective competition has already been achieved. In his testimony in Case No. 07-1224-GA-EXM, Mr. Murphy testified that the SCO enables suppliers to establish contractual relationships with customers without incurring customer acquisition costs such as sales and marketing expense. A competitive market that excludes the SCO will eliminate the savings in customer acquisition costs reflected in the suppliers' bids and thus passed on to customers. Supp. 265; Testimony of Murphy, Case No. 07-1224-GA-EXM at 4. Mr. Murphy also testified that the promotion of direct contractual relationships between customers and suppliers would continue regardless of the auction result. Supp. 265; Testimony of Murphy, Case No. 07-1224-GA-EXM at 6. As Mr. Murphy testified, "[i]f DEO's natural gas commodity market is not competitive, it is difficult to imagine one that is." Supp. 265; Testimony of Murphy, Case No. 07-1224-GA-EXM at 10.

The state's energy policy does not require forcing unwilling customers to choose a supplier and certainly not to allow a utility to choose a supplier for them. The promotion of competition requires an SCO option that gives consumers a price for natural gas commodity set by the competitive market and also the choice not to choose a bilateral contract with an individual marketer. Under the Joint Motion, the state's energy policy is

not about competition, open markets, transparent prices, or consumers' choices; it is about eliminating competitive options that benefit consumers and forcing consumers into pricing options under which customers will pay more. The Joint Motion benefits only the Marketers.

Dominion and the Marketers sought to eliminate a competitive option that generally costs less than the alternatives, a move contrary to the state's policy to promote reasonable prices. Dominion does not care if it assigns customers, who have taken no action at all, to a supplier who will charge a higher price than the competitive SCO option. Supp. 119; Tr. I at 57. Mr. Murphy was also unconcerned that customers are paying a higher price if they select a fixed-price bilateral contract and pay a high price to address risks that result from a price that varies every month. Supp. 119; Tr. I at 61. Mr. Murphy believes that higher prices will lead customers to shop, whereas lower prices may not. Id. He is unconcerned if high exit fees effectively prohibit consumers from correcting a mistake or if high prices for natural gas impede a business from staying in business or hiring more employees. Supp. 119; Tr. I at 62.

Ms. Ringenbach conceded that Direct's fixed price bilateral contracts are higher than the SCO price. Supp. 119; Tr. I at 176. As she testified, customers are going to say "I don't like this." Id. The Marketers' witness Parisi, who works for the supplier IGS, would not agree that lower prices are good for consumers because he believes that "what's good for consumers, frankly, is to be engaged in the market." Supp. 241; Tr. II at 217. He testified that IGS watches the market daily. Supp. 241; Tr. II at 226. IGS is in the market daily, buying 365 days a year. IGS has a risk department that focuses on the forward market and tries to predict trends. Supp. 241; Tr. II at 226.

Consumers generally cannot commit this level of attention to the natural gas market and will confront a considerable challenge to determine which contract is right for them. It is clear that what benefits suppliers does not always benefit consumers. But, the state's energy policy does not put the interests of suppliers in higher prices and opaque contract offers ahead of the interests of consumers.

By agreeing to eliminate the SCO service for non-residential customers, the PUCO's view of the state's energy policy limits competition and reduces supply options available to customers. The PUCO refers to only some aspects of the state's energy policy while ignoring the other policies the PUCO must consider. The PUCO ignores the requirement to ensure consumers have access to adequate, reliable, and reasonably priced natural gas services and goods [Revised Code Section 4929.02(A)(1)]; the provision of 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" [Revised Code Section 4929.02(A)(2)]; and, the provision of a diversity of options available to consumers to meet their respective needs" [Revised Code Section 4929.02(A)(3)]. App. 82.

The PUCO also does not recognize the dishonesty of its finding that forcing customers to accept a bilateral contract from a supplier chosen by Dominion makes them "willing buyers" as required by Ohio law. Revised Code Section 4929.02(A)(7). App. 82; App. 007; 2013 Order at 14. Nor is it clear how eliminating the SCO service will affect competition because the PUCO claims that it will monitor the effects of the elimination of SCO service on non-residential customers. App. 007; 2013 Order at 16-17.

The PUCO pays no attention to the entirety of the state's energy policy or that the outcome of its orders is to eliminate competitive options rather than promote them. The PUCO's finding with regard to the state's energy policy is not supported by the record in this case and should be reversed.

Proposition of Law No. 5

The PUCO acts unreasonably and unlawfully when it treats a contested case as a settled case if a stipulation does not address the contested issues in the case.

In considering the reasonableness of a stipulation, the PUCO uses the following criteria:

1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

2) Does the settlement, as a package, benefit ratepayers and the public interest?

3) Does the settlement package violate any important regulatory principle or practice?

The Court has endorsed the PUCO's analysis using these three criteria to resolve issues in a manner economical to ratepayers and to public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 559; *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d, 123, 126.

After erroneously determining that the findings of the 2008 Exemption Order are now invalid and that all Ohioans are adversely affected by the continuation of Dominion's SCO service, the PUCO goes on to discuss the stipulation and recommendation filed with the Joint Motion as Joint Exhibit 1. The PUCO incorrectly

finds that the stipulation referred to as Joint Exhibit 1 resolves the issues in this contested proceeding. However, the PUCO describes contested positions that the stipulation did not raise. App. 007; Opinion and Order at 12. The PUCO found that the stipulation provides for 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. The PUCO also found that allowing Dominion to exit the merchant function for non-residential customers will encourage innovation, both in how services are provided and in the variety of available products. App. 007; 2013 Order at 14-15. The PUCO also claims that the stipulation provides for 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. App. 007; 2013 Order at 14. The PUCO believes that the stipulation will encourage innovation in how services are provided. Id.

However, the stipulation itself does not even mention the state's energy policy. Contrary to the findings of the PUCO in the 2013 Order, the stipulation is completely devoid of any provision regarding the public interest or the policy of the state of Ohio. In fact, the stipulation is not relevant to any contested issue in this case. OPAE is the only party contesting the Joint Motion. OPAE is the only party representing non-residential customers. The stipulation attached to the Joint Motion is irrelevant to OPAE's position because it merely protects residential consumers, not the non-residential customers OPAE represents, who will actually be harmed by the stipulation. The issues raised by OPAE are not addressed in the stipulation.

The stipulation referred to as Joint Exhibit 1 isolates residential customers from the loss of SCO service to which non-residential customers will be subjected. There are three signatory parties to this stipulation, Dominion, the Marketers, and the Office of the Ohio Consumers' Counsel ("OCC"). The stipulation states that non-residential customers will lose SCO service as of April 1, 2013 with no further proceeding before the Commission. Supp. 001; Joint Exhibit 1 at 2. Non-residential customers who have not chosen a supplier will be assigned a supplier by Dominion and will pay that supplier's posted market variable rate ("MVR") whatever it may be. Id.

The remainder of the stipulation simply protects residential customers from the fate of non-residential customers. This is the sole purpose of OCC, the representative of residential customers, in signing the stipulation. OCC witness Bruce Hayes stated that in the stipulation "Dominion has agreed not to seek an exit from the merchant function for residential customers prior to April 1, 2015." Supp. 060; OCC Ex. 2 at 5. Mr. Hayes stated that the stipulation provides for "the opportunity for a hearing to challenge Dominion's application to exit for residential customers." Id. He also stated that OCC takes no position on Dominion's non-residential exit. Id.

Mr. Hayes also emphasized that OCC did not sign the joint motion, which was signed only by Dominion and the Marketers. The position set forth in the Memorandum in Support of the Joint Motion, which is what OPAE has challenged in this case, is the position of Dominion and the Marketers only. Supp. 060; OCC Ex. 2 at 12. In fact, Mr. Hayes testified that OCC agrees with OPAE's position on the joint motion. OCC does not concur with the Joint Movants' statement that the 2008 Exemption Order is based on findings that are no longer valid. Supp. 060; OCC Ex. 2 at 13-14. As Mr. Hayes points

out, and as OPAE has argued, the 2008 PUCO requires that an application be filed in order to eliminate the SCO. Therefore, as Mr. Hayes testified, the Joint Motion's request for an exit for non-residential customers should not be characterized as an action to address the 2008 PUCO's expectation. Supp. 060; OCC Ex. 2 at14. The 2008 Exemption Order requires an application to eliminate the competitive options currently available to customers, yet no application has been filed, only a defective motion.

Mr. Hayes also contested the idea that the elimination of the SCO for non-residential customers somehow will benefit non-residential customers. He testified that non-residential customers may be currently taking SCO service because SCO service "has consistently been better – meaning at a lower price – than the numerous comparable variable rate offers from Choice Marketers on the PUCO Apples to Apples chart." Supp. 060; OCC Ex. 2 at 17. This is also OPAE's position. Mr. Hayes testified that it is possible that "these non-residential customers have made a choice, with that choice being to take the lower price SCO option." Id. at 18. In addition, Mr. Hayes testified that "with limited upward pressure on price due to the abundance of natural gas and the reduced industrial load, SCO customers may not see the value in paying a premium for a fixed rate contract to hedge against a risk that is not perceived as realistic or threatening." Id. OPAE agrees completely. What could make it more obvious that the stipulation is irrelevant to OPAE's contested position when one of the signatory parties to the stipulation completely agrees with OPAE's contested position? The stipulation is irrelevant to this contested proceeding.

For the PUCO to launch into its customary, but in this case irrelevant and meaningless discussion of how the stipulation meets the PUCO's three-part test for the reasonableness of stipulations, strains credulity. It is as if the PUCO has no idea what the

stipulation says. OPAE did not contest the Joint Motion in the context of anything set forth in the stipulation. The stipulation is irrelevant to the contested issues in this case, which are all concerned with the legality of the Joint Motion and the evidence of record that proves that the joint motion is unlawful and not in the public interest. The stipulation resolves no issue contesting the lawfulness of the Joint Motion and the PUCO's approval of it.

The only issue that OPAE raised with respect to the stipulation is whether it is the product of serious bargaining. The PUCO found that the stipulation is the product of serious bargaining among capable, knowledgeable parties. App. 007; 2013 Order at 12. This is the first criterion for the PUCO's evaluation of settlements. *Consumers' Counsel*, 64 Ohio St.3d at 126. However, the PUCO did not address OPAE's arguments as to whether serious bargaining occurred. OPAE's argument is that the stipulation was not signed by any customer group that would be affected by the Joint Motion. In fact, the stipulation was filed along with the motion, a clear indication that there were no contested issues between the signatories to the stipulation. The stipulation allows the PUCO, Dominion, and the Marketers to pretend this is a settled case.

OPAE represents the interests of its members, which are non-residential customers, the only customers affected by the motion and stipulation. OPAE did not negotiate nor agree to the stipulation. While OCC cannot be faulted for its understandable desire to protect residential customers from the loss of SCO service and the bill increases that will result, this does not make OCC a party of interest to the Joint Motion which has no effect on residential customers at all. Under the Joint Motion, it is only non-residential customers who lose the SCO and are subjected to higher rates. OCC has negotiated to protect

residential customers from the change sought by Dominion that will increase prices to non-residential customers, but that does not make OCC a party of interest in a matter.

OCC has no interest in the Joint Motion because it does not apply to residential customers. A stipulation signed by one party with no interest and two other parties (Dominion and the Marketers) with identical interests – elimination of the lower-priced SCO -- is not the product of serious bargaining. The bargaining with OCC took place to assure that residential customers are not affected by the Joint Motion and subjected to higher prices. The PUCO has no basis to claim that the stipulation is the product of serious bargaining relevant to the Joint Motion. The PUCO, as a regulatory body with responsibility to the public, to the General Assembly, to the law, and to the evidentiary record in this case, cannot use the stipulation to claim that there is a settlement that meets the PUCO's three-part test for the reasonableness of stipulations.

The PUCO should have been concerned that none of the stipulating parties represent customers who will be adversely impacted by the Joint Motion. It is easy for parties to agree to harm others. For example, in the case of American Electric Power's ("AEP") standard service offer ("SSO") case, the PUCO was belatedly forced to recognize that approval of a stipulation resulting in "disproportionate rate impacts" for small commercial customers was in error. The PUCO stated:

> Due to the evidence that some commercial customers were going to receive significant total bill increases approaching 30%, we modified the shopping credits provision to provide additional relief to GS-2 customers in the form of an additional allocation of shopping credits to new shopping customers. However, the actual impacts suffered by a significant number of GS-2 customers appear to have vastly exceeded AEP-Ohio's representations at the hearing.

> Since we issued the Opinion and Order, numerous customers have filed, in the case record of this proceeding, actual bills containing total bill rate increases disproportionately higher than the 30 percent predicted by AEP-Ohio. The disproportionate rate impacts indicated by these bills undermine the evidence presented by the signatory parties [to the AEP Stipulation] that the MTR and LFP provide rate certainty and stability pursuant to Section 4928.143(B)(2)(d), Revised Code. We note that the parties seeking rehearing acknowledge that customers in the GS-2 class have received significant total bill rate increases and that it is appropriate to provide relief to these customers. However, the Commission is not persuaded that the actual total bill impacts inherent in the MTR and LFP can be cured by a phase-in of the LFP or an additional allocation of shopping credits as recommended by AEP-Ohio. We find that the Signatory Parties have not met their burden of proof of demonstrating that the MTR and LFP provisions meet the statutory requirement of Section 4928.143(B)(2)(d), Revised Code, to provide rate certainty and stability, and that the Signatory Parties have not demonstrated that the MTR and LFP benefit ratepayers and the public interest. Accordingly, pursuant to our three-part test for the consideration of stipulations, we must reject the Stipulation.

App. 61; Entry on Rehearing, Case No. 11-346-EL-SSO, et al. (February 23, 2012) at 11. The eventual rejection of the stipulation occurred after the PUCO had approved it as meeting the three-part test but before the PUCO was forced to recognize the impact of the stipulation on small commercial customers who had no part in the stipulation. The PUCO should have remembered this notable event, as it occurred only a year ago. The parallels between the Joint Motion in this case and the AEP case are clear.

IV. Conclusion

The PUCO's January 9, 2013 Opinion and Order and March 6, 2013 Entry on Rehearing are unlawful, unjust, and unreasonable. The PUCO's 2013 orders ignore

statutes, ignore administrative code rules, invent evidence, and unreasonably rely on an irrelevant stipulation.

The PUCO's orders should be reversed because the criteria at Revised Code Section 4929.08(A) for a modification to an existing exemption order are not met. App. 87. The 2008 PUCO did not make the findings in the June 18, 2008 Exemption Order that the 2013 PUCO claimed the 2008 PUCO made. App. 007; App. 039. Findings that were never made are non-existent, not invalid. It is not in the public interest for the 2013 PUCO to ignore the requirements of Revised Code Section 4929.08(A) or to deny, mischaracterize, or re-write the findings of the 2008 PUCO. The PUCO has no authority to violate or ignore Ohio law.

The requirements of Ohio Administrative Code Rule 4901:1-19-12, the PUCO's rule for modifications to exemption orders, are also ignored. App. 74. No complaint has been filed regarding the 2008 Exemption Order, nor has any of the information required by the rule been submitted. Like Revised Code Section 4929.08(A), the rule requires detailed information about the findings of the PUCO in the 2008 Exemption Order that are now invalid. In violation of the PUCO's rule, the Joint Motion referred to no findings actually made by the 2008 PUCO. Supp. 001.

In addition to the obvious violations of the law, the record evidence requires a reversal of the PUCO's orders, a denial of the Joint Motion, and the continued availability of the SCO service option to Dominion's non-residential customers. The evidence demonstrates that the 2013 PUCO re-wrote the 2008 Exemption Order as if the 2008 Exemption Order ordered the end state of an exit of the market function, Dominion's Phase 3, and is now invalid because Phase 3 has not been accomplished.

This is not true. The 2008 Exemption Order established the SCO, Dominion's Phase 2 and set forth the path for Dominion to take to move to Phase 3. SCO auctions are to continue until Dominion files a separate, new application for the Phase 3 exit of the merchant function. Dominion did not take that path. Dominion never filed an application to move to Phase 3.

Dominion determined that the procedural requirements for a Phase 3 application to eliminate the SCO would be far more stringent than the filing of a motion to modify an existing exemption order, especially if no one opposed the motion for modification and no one paid any attention to the legal requirements for a modification. The 2013 PUCO granted the motion regardless of the law and the facts. Because the statutory requirements of Revised Code Section 4929.08(A) and the administrative requirements of Rule 4901:1-19-12 were not followed, the 2013 PUCO had no authority to issue an order modifying the 2008 Exemption Order. Revised Code Section 4929.08(A).

The PUCO's 2013 Orders violate the policy of the state of Ohio. Revised Code Section 4929.02(A). Eliminating SCO service and requiring non-residential customers to choose an individual supplier or have Dominion choose an individual supplier for them conflict with the policy of the state of Ohio. R. C. 4929.02(A). By eliminating the SCO service option for non-residential customers, those customers are deprived of the choice to take natural gas commodity service at a competitive market price determined through an auction held by the public utility and are deprived of the choice not to choose a particular supplier. Customers need the choice of the SCO service option. Some customers who have not chosen a particular supplier do not want to choose a particular supplier; instead they are choosing the consistently lowest available retail price – the

SCO. The Ohio General Assembly has not sanctioned raising prices for consumers by eliminating competitive market options.

The state's policy is not a one-way street benefiting suppliers and harming consumers. The requested modification to eliminate the SCO service will raise prices choice-eligible non-residential customers pay, force these consumers to confront opaque and highly volatile markets without any benchmark to guide them, and take away a competitive choice that these customers have made. Because the requested modification merely reduces competitive options, it is not consistent with the policy of the state of Ohio. The evidence demonstrates that the SCO conforms to the state's energy policy and must not be eliminated for non-residential customers.

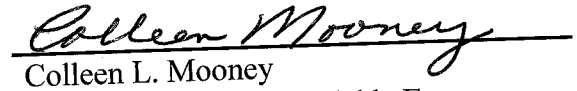
Finally, the stipulation, which the PUCO inexplicably emphasized in its orders, has no relevance to the contested issue in this case. The purpose of OCC's signature on the stipulation was simply to protect residential customers from the fate that the Joint Motion imposes on non-residential customers. The stipulation states that residential customers will not lose SCO service in April 2013, nor will residential customers ever lose SCO service without the full process required by the 2008 Exemption Order and the Ohio Revised Code, protections non-residential customers are not afforded under the 2013 PUCO orders. The stipulation exempts residential customers from the Joint Motion; it does nothing more. It presents no reason at all to approve the Joint Motion for non-residential customers who are the only customers affected by the Joint Motion.

The PUCO approved the stipulation and decided this case as if it were settled. The PUCO ignored the fact that the stipulation did not even discuss the contested issue in this case, the loss of SCO service for non-residential customers. Far from demonstrating

the reasonableness of the Joint Motion, the stipulation actually demonstrates that customers need protection, a lot of protection, from the elimination of SCO service.

WHEREFORE, OPAE respectfully submits that the PUCO's January 9, 2013 Opinion and Order and March 6, 2013 Entry on Rehearing in the proceeding below are unlawful, unjust, and unreasonable and should be reversed. The case should be remanded to the PUCO with instructions to correct the errors complained of herein. The non-residential customers of Dominion should again have SCO service available to them.

Respectfully submitted,



Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45840
Telephone: (419) 425-8860
FAX: (419) 425-8862
cmooney@ohiopartners.org

Attorney for Ohio Partners for Affordable Energy

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant, Ohio Partners for Affordable Energy, was served upon the Attorney General's Public Utilities Section by hand delivery this 17th day of May 2013.

PARTIES OF RECORD

William L. Wright, Trial Attorney
Devin D. Parram
Stephen P. Reilly
Attorney General's Office
Public Utilities Commission Section
180 E. Broad Street, 6th Floor
Columbus, Ohio 43215-3793
William.Wright@puc.state.oh.us
stephen.reilly@puc.state.oh.us
Devin.parram@puc.state.oh.us

Colleen Mooney
Trial Attorney for Appellant
Ohio Partners for Affordable Energy