

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

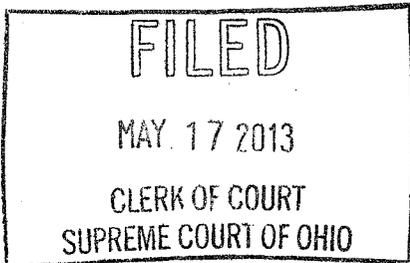
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APPENDIX TO MERIT BRIEF OF APPELLANT,  
OHIO PARTNERS FOR AFFORDABLE ENERGY

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13-0433

Ohio Partners for Affordable Energy,

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Appellant,

v.

The Public Utilities Commission of Ohio,

Appellee.

Case No. \_\_\_\_\_

Appeal from the Public  
Utilities Commission of Ohio

Public Utilities  
Commission of Ohio  
Case No. 12-1842-GA-EXM

**NOTICE OF APPEAL OF  
OHIO PARTNERS FOR AFFORDABLE ENERGY**

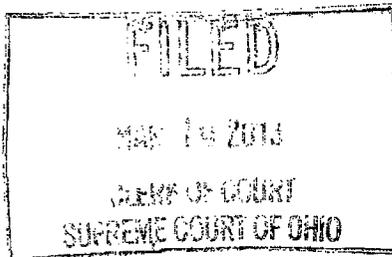
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**NOTICE OF APPEAL OF APPELLANT  
OHIO PARTNERS FOR AFFORDABLE ENERGY**

In accordance with R.C. 4903.11, R.C. 4903.13, Ohio Adm. Code 4901-1-02(A), Ohio Adm. Code 4901-1-36, and Supreme Court Rule of Practice 2.3(B), appellant, Ohio Partners for Affordable Energy (“OPAE”) hereby gives notice of its appeal to this Court and to the Appellee, the Public Utilities Commission of Ohio. OPAE is appealing from the Commission’s Opinion and Order dated January 9, 2013, and Entry on Rehearing dated March 6, 2013 (respectively, Attachments A and B). The case involved consideration of a joint motion filed by Dominion East Ohio Company d/b/a Dominion East Ohio (“Dominion” or “DEO”) and the Ohio Gas Marketers Group to modify an exemption granted to Dominion in order to prohibit the availability of competitively-priced standard choice offer (“SCO”) service to non-residential customers of Dominion.

OPAE was and is a party of record to the proceeding before the Commission, Case No. 12-1842-GA-EXM. On January 25, 2013, OPAE timely filed an application for rehearing of the January 9, 2013 Opinion and Order, in which OPAE set forth all of the grounds that it now urges and relies on for reversal, vacation, or modification of the order on appeal.

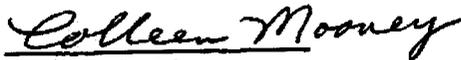
OPAE complains and alleges that the Commission’s January 9, 2013 Opinion and Order and March 6, 2013 Entry on Rehearing in the proceeding below are unlawful, unjust, and unreasonable in the following respects, as set forth in OPAE’s Application for Rehearing:

1. The Commission unreasonably and unlawfully found that the stipulation and recommendation filed with the joint motion as Joint Exhibit 1 resolved the contested issues in this contested proceeding. The stipulation did not address the contested issues in this contested proceeding. Opinion and Order at 18-19; Entry on Rehearing at 10-11.
2. In violation of Ohio Revised Code Sections 4903.09 and 4929.08(A), the Commission unlawfully and unreasonably found 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." 2013 Order at 16, 8; Entry on Rehearing at 8-9. The Commission made these statements without any evidence of record to support them.
3. In violation of Ohio Revised Code Sections 4903.09 and 4929.08(A), the Commission unlawfully found 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. 2013 Order at 16; Entry on Rehearing at 8-9. The record supports a finding that the public interest will be thwarted by the joint motion and does not support the Commission finding that the public interest will be advanced.
4. The Commission unlawfully disregarded the statutory requirements set forth at Revised Code Section 4929.08(A) for a modification of an exemption order. The Commission unlawfully, unreasonably and erroneously found that the 2008 Exemption Order was invalid because "phase two no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services." The 2008 Exemption Order did not find that phase two provides potential for further exploration of the benefits of market-based pricing for natural gas services; therefore, the 2008 Exemption Order cannot be invalid based on this finding invented by the Commission in its 2013 Order. 2013 Order at 8, 16; Entry on Rehearing at 5-6.
5. In violation of Ohio Revised Code Sections 4929.08(A) and 4903.09, the Commission unlawfully and unreasonably found that the joint movants had demonstrated in accordance with Revised Code Section 4929.08(A) that certain findings of the 2008 Exemption Order are no longer valid. 2013 Order at 16; Entry on Rehearing at 5-6. In addition to violating the law, the evidentiary record does not support a finding that the 2008 Exemption Order is now invalid.

WHEREFORE, OP&E respectfully submits that the Commission'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 Commission with instructions to correct the errors complained of herein.

Dated: March 19, 2013

Respectfully submitted,

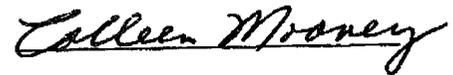


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Attorney for Ohio Partners for Affordable Energy

## CERTIFICATE OF FILING

I certify that in accordance with S.Ct.Prac.R. 3.11(A)(2), the foregoing Notice of Appeal of Appellant, Ohio Partners for Affordable Energy, has been filed with the Docketing Division of the Public Utilities Commission of Ohio by leaving a copy at the office of the Commission in Columbus, Ohio in accordance with Ohio Adm. Code 4901-1-02(A) and 4901-1-36 on the 19<sup>th</sup> day of March 2013.



Colleen Mooney  
Attorney for Appellant  
Ohio Partners for Affordable Energy

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of Appellant, Ohio Partners for Affordable Energy, was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the Office of the Chairman in Columbus and upon all of the parties to the proceeding before the Commission by hand delivery and electronic mail this 19<sup>th</sup> day of March 2013.

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OPINION AND ORDER

The Commission, having considered the record in this matter and the stipulation and recommendation submitted by the signatory parties, and the evidence of record in this case, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Whitt Sturtevant LLP, by Mark A. Whitt, Andrew J. Campbell, and Gregory L. Williams, PNC Plaza, Suite 2020, 155 East Broad Street, Columbus, Ohio 43215, on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio.

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Mike DeWine, Ohio Attorney General, by Devin D. Parram and Stephen A. Reilly, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio, 43215, on behalf of the Staff of the Commission.

Bruce J. Weston, Ohio Consumers' Counsel, by Larry S. Sauer and Joseph P. Serio, Assistant Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215, on behalf of the residential utility consumers of The East Ohio Gas Company d/b/a Dominion East Ohio.

David C. Rinebolt and Colleen L. Mooney, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839, on behalf of Ohio Partners for Affordable Energy.

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OPINION:I. History of the Proceeding

The East Ohio Gas Company d/b/a Dominion East Ohio (DEO) is a natural gas company as defined by Section 4905.03(5), Revised Code, and a public utility as defined by Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of the Commission, pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code.

On April 8, 2005, DEO filed an application requesting an exemption pursuant to Section 4929.04, Revised Code, and seeking approval of phase one of its plan to exit the merchant function. *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a Plan to Restructure Its Commodity Service Function*, Case No. 05-474-GA-ATA (05-474). By opinion and order issued on May 26, 2006, in 05-474, the Commission approved DEO's application, as modified by the stipulation filed in that case, to undertake phase one of its proposal to test alternative, market-based pricing of commodity sales.

On June 18, 2008, in *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 (07-1224), the Commission authorized DEO to implement phase two of its plan to exit the merchant function, in which DEO implemented a standard choice offer (SCO), wherein suppliers bid for the right to supply gas in tranches to choice-eligible customers at a retail level.

On June 15, 2012, a joint motion to modify the order issued on June 18, 2008, in 07-1224 (07-1224 order), pursuant to Section 4929.08, Revised Code, was filed by DEO and the Ohio Gas Marketers Group (OGMG) (DEO Ex. 2). A stipulation and recommendation (Stipulation) signed by DEO, the Ohio Consumers' Counsel (OCC), and OGMG was also filed on June 15, 2012 (Jt. Ex. 1).

On June 28, 2012, Ohio Partners for Affordable Energy (OPAE) filed a motion for intervention, along with a motion to dismiss. By entry issued on July 27, 2012, the attorney examiner set a procedural schedule in this case and granted OPAE's motion to intervene. The July 27, 2012, entry also directed DEO to publish notice of the motion to discontinue providing commodity service to choice-eligible nonresidential customers and the hearing in a newspaper of general circulation in each county of DEO's service area. On October 9, 2012, DEO filed proof of publication of the public notice (DEO Ex. 3). Motions to intervene filed by OCC and the Retail Energy Supply Association (RESA) were granted by attorney examiner entry issued on October 9, 2012.

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Comments on the joint motion to modify were filed on August 30, 2012, by Staff and OPAE (Staff Ex. 2; OPAE Ex. 5). Reply comments were filed by OCC, DEO, and jointly by OGMG and RESA, on September 13, 2012 (OCC Ex. 3; DEO Ex. 4; OGMG/RESA Ex. 4).

The hearing was held on October 16 and 17, 2012. No members of the public were present to testify at the hearing. At the hearing, DEO witness Jeffrey Murphy (DEO Ex. 1) testified in support of the Stipulation. Additional testimony was provided by OPAE witness Stacia Harper (OPAE Ex. 1), Staff witness Barbara Bossart (Staff Ex. 1), OGMG/RESA witnesses Teresa Ringenbach and Vincent Parisi (OGMG/RESA Exs. 2 and 3, respectively), and OCC witness Bruce Hayes (OCC Ex. 2). Briefs in this matter were filed by DEO, OPAE, OCC, Staff, and jointly by RESA and OGMG on November 13, 2012. Reply briefs were filed on November 21, 2012, by DEO, Staff, OPAE, and, jointly, by OGMG and RESA.

## II. Applicable Law

Section 4929.08, Revised Code, provides, in pertinent part, that:

- (A) The public utilities commission has jurisdiction over every natural gas company that has been granted an exemption or alternative rate regulation under section 4929.04 or 4929.05 of the Revised Code. As to any such company, the commission, upon its own motion or upon the motion of any person adversely affected by such exemption or alternative rate regulation authority, and after notice and hearing and subject to this division, may abrogate or modify any order granting such an exemption or authority only under both of the following conditions:
- (1) 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;
  - (2) The abrogation or modification is not made more than eight years after the effective date of the order, unless the affected natural gas company consents.

Rule 4901:1-19-12, O.A.C., sets forth the procedures for the filing of an application for abrogation or modification of a Commission order that granted an exemption. This rule requires the applicant in such a case to, at a minimum, provide a

detailed description of the nature of the violation, supporting documentation for the applicant's allegations, and the form of remedy requested. In addition, paragraph (D) of this rule states that the Commission shall order such procedures as it deems necessary in its consideration for modifying or abrogating such order.

Section 4929.02, Revised Code, sets forth the state policies to be considered, as follows:

- (1) Promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods.
- (2) Promote 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.
- (3) Promote diversity of natural gas supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers.
- (4) Encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods.
- (5) Encourage cost-effective and efficient access to information regarding the operation of the distribution systems of natural gas companies in order to promote effective customer choice of natural gas services and goods.
- (6) Recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment.
- (7) Promote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905. and 4909. of the Revised Code.
- (8) Promote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated natural gas services and goods.

- (9) Ensure that the risks and rewards of a natural gas company's offering of nonjurisdictional and exempt services and goods do not affect the rates, prices, terms, or conditions of nonexempt, regulated services and goods of a natural gas company and do not affect the financial capability of a natural gas company to comply with the policy of this state specified in this section.
- (10) Facilitate the state's competitiveness in the global economy.
- (11) Facilitate additional choices for the supply of natural gas for residential consumers, including aggregation.

### III. Summary of the Motion to Modify and Comments

On June 15, 2012, a joint motion to modify the order issued in 07-1224, pursuant to Section 4929.08, Revised Code, was filed by DEO and OGMG (collectively, joint movants). In their motion, joint movants explain that the proposed modification would allow DEO to discontinue the availability of its SCO to choice-eligible nonresidential customers beginning in April 2013. In its definition of nonresidential customers, DEO includes General Sales Service - Nonresidential (GSS-NR), Large Volume General Sales Service (LVGSS), Energy Choice Transportation Service - Nonresidential (ECTS-NR), and Large Volume Energy Choice Transportation Service (LVECTS) customers. Joint movants propose that nonresidential customers receive commodity service from the next available competitive retail natural gas service (CRNGS) provider on a rotating list maintained by DEO pursuant to the CRNGS provider's applicable monthly variable rate (MVR). (DEO Ex. 2.)

In its initial comments, OP AE argues that the joint motion should be dismissed because it is not authorized by Section 4929.08(A), Revised Code. In particular, OP AE argues that the joint motion does not meet the criteria that it be premised upon findings that are no longer valid. Moreover, OP AE asserts that DEO is not adversely affected by the continuance of SCO service. OP AE also avers that the joint motion is inconsistent with Ohio policy because customers, who still take SCO service and have not chosen a marketer, clearly do not want to choose a marketer, leading OP AE to argue that the state's policy should not force a customer to choose a CRNGS provider. Finally, OP AE argues that no representative of the affected customer group, nonresidential customers, has signed the Stipulation. (OP AE Ex. 5 at 2-10.)

Staff, in its initial comments, states that it generally supports the Stipulation, but argues that DEO should be required to undertake a comprehensive consumer education program in advance of any exit of the merchant function. Staff also suggests the Commission should clarify that nothing would prevent it from

reestablishing the SCO or other pricing mechanism's if DEO's exit of the merchant function proves to be unjust or unreasonable. (Staff Ex. 2 at 3.) In reply comments, OCC express support for Staff's suggestion of a comprehensive consumer education program (OCC Ex. 3 at 4). In its reply comments, DEO accepts Staff's customer education recommendations (DEO Ex. 4 at 1).

OGMG and RESA filed joint reply comments in which they disagree with OP AE's assertions that the joint motion is not authorized by Section 4929.08(A), Revised Code, and argue that existence of the SCO mechanism prevents development of a fully-competitive marketplace. Moreover, OGMG and RESA argue that development of a fully-competitive market is within the policies of the state of Ohio. (OGMG/RESA Ex. 4 at 3-5.)

#### IV. Section 4929.08, Revised Code

In its motion to dismiss, and also in its brief, OP AE asserts that the joint motion does not comply with Section 4929.08(A), Revised Code, and is procedurally defective because joint movants cannot set forth Commission findings that are no longer valid in the 07-1224 order. OP AE argues that the findings that joint movants rely on were not actual Commission findings, but instead statements made in DEO's application, which joint movants are now claiming were Commission findings. Accordingly, OP AE concludes that the joint motion is improper. Instead, OP AE asserts that DEO is attempting to circumvent the requirement that it file a separate application to exit the merchant function for nonresidential customers by filing a motion to modify the exemption granted in 07-1224. OP AE also claims that the joint motion does not explain how the movants are adversely affected by the current order. OP AE submits that the joint motion is not in compliance with Rule 4901:1-19-12, O.A.C., and that the joint motion is out of compliance with the Commission's most recent ongoing review of its rules.<sup>1</sup> (OP AE Br. at 2-6.)

In response, and in support of the joint motion to modify, DEO witness Murphy explains that the findings upon which the exemption order was based are no longer valid. Citing to the initial exemption order issued in 07-1224, DEO points out that the initial expectation was that the last SCO auction would occur in 2010, with phase two ending in March 2011. However, DEO explains that as the March 2011 date approached, it became apparent that a certain set of nonresidential customers would remain on the SCO as long as it was available; thus, leading to a plateau in the competitive market in the DEO territory. Therefore, DEO concludes that phase two will not end on its own, as expected, but will continue indefinitely, unless the order in 07-1224 is modified. (DEO Ex. 1 at 6; DEO Br. at 5.)

<sup>1</sup> See *In the Matter of the Commission's Review of the Alternative Rate Plan and Exemption Rules Contained in Chapter 4901:1-19 of the Ohio Administrative Code*, Case No. 11-5590-GA-ORD.

Second, DEO explains that, contrary to the Commission's finding in 07-1224, phase two, as approved in 07-1224, no longer represents a reasonable structure through which to further the potential benefits of market-based commodity pricing. Rather, DEO asserts that the availability of SCO service is hindering the continued development of the market in DEO's territory. Specifically, DEO points to Mr. Murphy's testimony that SCO enrollment has held steady for approximately three years at 20 percent. Mr. Murphy explains that the presence of the SCO potentially distorts the market and precludes the development of a fully-competitive market. (DEO Br. at 5-6; DEO Ex. 1 at 5; Tr. at 69-98.) RESA and OGMG agree with DEO's arguments, citing the testimony of both DEO witness Murphy and RESA/OGMG witness Parisi who explains that customer migration has stalled out, and is hindering continued development of the competitive marketplace (DEO Ex. 1 at 6; OGMG/RESA Ex. 3 at 5-6).

OGMG and RESA rely on the testimony of Mr. Murphy to show that joint movants are adversely affected. Specifically, Mr. Murphy testified that a core of nonresidential customers have continued to rely on the SCO, thereby, hindering both DEO's ability to fully exit the merchant function, and hindering the development of a more competitive market. OGMG and RESA argue that this adverse effect not only affects DEO, but all customers who could potentially be losing out. Further, Mr. Parisi testified that, under the current structure, customers taking SCO service are having the cost of procurement subsidized by all customers, which has an adverse effect on customers not benefiting from the auction pricing, but paying the cost of the auction. (OGMG/RESA Br. at 5; DEO Ex. 1 at 6; OGMG/RESA Ex. 3 at 6.)

With respect to the procedural deficiencies claimed by OPAE, DEO argues that OPAE has not shown how any party is prejudiced by its perceived noncompliance with Rule 4901:1-19-12, O.A.C. Moreover, DEO asserts that it is not and has not been the practice of this Commission to expect compliance with proposed changes to its rules while they are under review and not finalized. (DEO Reply Br. at 7-9.)

With regard to OPAE's assertions that the filing violates the Commission's rules in Chapter 4901:1-19, O.A.C., the Commission finds OPAE's arguments to be without merit. While it is true the Commission has been considering revisions to this chapter of the code, in accordance with the five-year review requirement, the current rules provide the necessary direction as to what an applicant must include in an application for modification of an exemption order, such as the one filed by the joint movants, pursuant to Section 4929.08, Revised Code.

In considering OPAE's argument that the joint motion is procedurally defective, the Commission finds that joint movants have demonstrated that the exemption order

issued in 07-1224 contains findings that are no longer valid. Specifically, in 07-1224, the Commission found that phase two represents a reasonable structure through which to further the potential benefits of market-based pricing of the commodity sales by the company. We now find that phase two no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services. Further, the Commission is persuaded that 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 the previously discussed procedural arguments, OP&E also opines that the modification is not in the public interest, as required by Section 4929.08, Revised Code. The Commission will consider and address the arguments concerning the public interest requirement later in this order, as part of our discussion and consideration of the Stipulation.

#### V. Stipulation

A Stipulation signed by DEO, OCC, and OGMG was submitted on the record at the hearing held on October 16 and 17, 2012. The Stipulation was intended by the signatory parties to resolve all outstanding issues in this proceeding. The Stipulation includes, *inter alia*, the following modification to the June 18, 2008, Opinion and Order issued in 07-1224:

- (1) Beginning in April 2013, choice-eligible GSS-NR, LVGSS, ECTS-NR, and LVECTS customers (collectively, nonresidential customers) may no longer default into, or have an option to receive, SCO commodity service. Instead, effective April 2013, a nonresidential customer who has not selected a new CRNGS provider will be served by the next available supplier on a rotating list maintained by DEO of CRNGS providers registered to provide default service using the supplier's MVR subject to the limitations set forth in the MVR commodity service portion of DEO's tariff. If a nonresidential customer enters into a new arrangement with a CRNGS provider, including but not limited to the former SCO supplier, or participates in an opt-out governmental aggregation program, the terms of the agreement of the selected CRNGS provider or governmental aggregator will replace the MVR service. New nonresidential customers establishing service with DEO for the first time, relocating within DEO's service territory and whose energy choice or governmental

aggregation agreement is not portable, or restoring service more than 10 days after being disconnected for nonpayment will receive at least one standard service offer (SSO) bill, after which they may enroll with a CRNGS provider or participate in an opt-out governmental aggregation program. If they do not do so, such nonresidential customers will, after their second SSO bill, be assigned to a CRNGS provider that has agreed to accept customers at its posted MVR rate, subject to the limitations set forth in the MVR commodity service portion of DEO's tariff.

- (2) The signatory parties, with the exception of DEO, agree that they shall not individually or jointly request Commission approval for DEO to exit the merchant function for its GSS-Residential or ECTS-Residential customers (collectively, residential customers) with an effective date prior to April 1, 2015. DEO agrees that it shall not file a request for Commission approval to exit the merchant function for residential customers prior to April 1, 2015. DEO will propose a transition that includes an additional one-year SSO/SCO auction that gives residential customers the option to receive SCO service for the year over which the auction results are approved, if it requests to exit the merchant function. If a third-party, who is not a signatory party to the Stipulation, makes a request for approval of DEO's exit of the merchant function for residential customers prior to April 1, 2015, DEO and OGMG may support other parts of the application, but shall take the position that the exit of the merchant function for residential customers should not be implemented prior to April 15, 2015.
- (3) OCC reserves the right to challenge any application or request filed with the Commission by a signatory party or nonsignatory party seeking approval of DEO's exit of the merchant function for residential customers. The signatory parties agree that, in the event OCC makes such a challenge, OCC shall be entitled to exercise all rights available to it under the Commission's rules and Ohio law, including, as applicable, to conduct discovery, present and cross-examine witnesses at an evidentiary hearing, and make legal arguments through a full and adequate briefing

schedule that includes initial and reply briefs. Other signatory parties may respond to OCC as they see fit.

- (4) If DEO determines to file an application or request Commission approval to exit the merchant function for its residential customers, which filing shall not be made before April 1, 2015, DEO shall notify the other signatory parties of its intent to file such an application or request at least 90 days before filing such an application or request. DEO shall provide OCC with readily available, aggregated non-CRNGS provider-specific rate, usage, and customer count information in a format agreed to in advance by the signatory parties intended to enable OCC to periodically analyze, at OCC's discretion, the impact of an exit from the merchant function on nonresidential customers. The signatory parties agree to work cooperatively so that the data can be provided on a timely basis and with the understanding that OCC and DEO may reasonably modify, from time to time, the information to be provided pursuant to this paragraph or request such modification. DEO shall not be obligated to retain any information, or retain information in any format, that it is not already retaining or utilizing as of the date of the Stipulation. OCC shall not use such data or information in any proceeding that does not directly involve DEO's exit from the merchant function for residential customers; provided, however, that the restriction on use of information pursuant to this paragraph shall not prohibit OCC from serving discovery requests in future proceedings to seek information previously provided to OCC pursuant to this paragraph which has independent relevance in such future proceeding. To the extent there is a dispute concerning whether information previously provided to OCC is independently relevant in a future proceeding, such dispute shall be addressed in the future proceeding.

(Jt. Ex. 1 at 2-5.)

## VI. Consideration of the Stipulation

### A. Standard of Review

Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 1994); *Ohio Edison Co.*, Case No. 91-698-EL-FOR et al. (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 31, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used 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 Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561, 629 N.E.2d 423 (1994), citing *Consumers' Counsel* at 126. The Court stated that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission. (*Id.* at 563.)

### B. Review of the Three-Prong Test and the Stipulation

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

DEO witness Murphy testified that the Stipulation is a product of serious bargaining among capable, knowledgeable parties who were represented by experienced counsel and technical experts. Mr. Murphy further explains that the Stipulation was the product of negotiations that required numerous meetings and took place over several months, resulting in numerous concessions, with other nonsignatory parties being invited to the table. (DEO Ex. 1 at 9.) OCC witness Hayes also explains that each signatory party has a history of active participation in Commission proceedings, with all parties representing diverse interests (OCC Ex. 2 at 7-8). As such, the Commission finds that the first criterion has been met.

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

In support of the joint motion, DEO explains that the proposed modification is in the public interest, as required by Section 4929.08(A)(1), Revised Code, because it will encourage innovation and market access. Mr. Murphy explains that discontinuing SCO service to nonresidential customers will directly increase the entrance of customers into the commodity market, spurring market entry by CRNGS providers, the continued development of the competitive market, and will lead to an overall increase in competition. Instead of increasing competition, DEO argues that the current availability of SCO service is hindering the continued emergence of such a marketplace and customers remaining on SCO service are not being encouraged to enter the competitive marketplace, or even monitor offers available in the competitive marketplace to see if those offers provide better options. DEO also points to the testimony of RESA witness Ringenbach, who opines that in a fully-competitive marketplace, suppliers will constantly search for more efficient ways of supplying natural gas and will also provide more varied products for consumers to choose from. When questioned, Ms. Ringenbach explains that in a fully-competitive market, suppliers may combine their natural gas products with other products, such as electricity, a tangible product, such as a furnace, or a warranty product. Ms. Ringenbach further points to developments in other states, where products and services offered in conjunction with the retail supply of natural gas or electricity have included smart metering, conservation, and alternative payment forms, such as prepayment. Ms. Ringenbach further states that she believes, with expansion of the competitive market, will come greater involvement in local communities by CRNGS providers. She explains that one cannot market from afar, and, therefore, suppliers will have offices in Ohio, creating jobs and tax revenue, and will also have people invested in the local communities. (DEO Ex. 1 at 6-7; OGMG/RESA Ex. 2 at 5-6; DEO Br. at 7-9; Tr. at 73, 191-192; OGMG/RESA Br. at 9-10.)

To the contrary, OP&E argues that the Stipulation is not in the public interest because it does not promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods, a state policy articulated in Section

4929.02(A)(1), Revised Code. Moreover, OPAE argues that Section 4929.02(A)(2), Revised Code, encourages the promotion of 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 that meet their respective needs. OPAE argues that the joint motion violates the state policy articulated in Section 4929.02(A)(2) by eliminating the SCO option, with its additional available suppliers, and limiting competition that is spurred by the SCO. Instead, OPAE argues that the evidence in this case demonstrates that effective competition already exists in DEO's service territory. Specifically, OPAE relies on the testimony of DEO witness Murphy that the SCO option is based on the New York Mercantile Exchange, which enables the SCO price to reflect current market pricing. OPAE opines that the SCO auction is competitive and market forces are used to establish the price of the natural gas commodity at auction. If the SCO is eliminated, OPAE argues that approximately 20 percent of nonresidential customers who still take SCO service will be forced to switch from the competitively determined SCO, losing their choice option. According to OPAE, bilateral contracts are no substitute for the SCO with its price determined by a competitive auction and its transparent terms and conditions. Instead, OPAE argues that bilateral contract terms can vary greatly with customers being offered various products, with the potential for high early termination fees. OPAE also states that prices for bilateral contracts have been higher than the SCO, when compared over a 12-month period, with customers paying a premium for a fixed price contract. Finally, OPAE asserts that the SCO price provides a benchmark for natural gas prices, with there being an incentive for individual CRNGS providers to come close to the SCO price. Without the transparency of the SCO price, OPAE argues that customers will have no benchmark with which to compare competitive offers they receive, and may not understand the MVR mechanism on which they are placed. (OPAE Br. at 8-9, 21-26; Tr. at 24-27; OPAE Ex. 1 at Ex. 4.)

OPAE also argues that prior testimony submitted by DEO witness Murphy, in 07-1224, demonstrates that CRNGS providers would be able to establish relationships with customers, without incurring customer acquisition costs, through the SCO auction. Therefore, OPAE concludes that the SCO is a part of the competitive market that saves customer acquisition costs and those costs can be passed on to consumers as savings. (OPAE Br. at 19.)

In response, DEO asserts that nothing in the record supports OPAE's contention that elimination of the SCO option would somehow weaken competition. Instead, DEO argues that the presence of the SCO hinders the development of additional competition. Further, DEO explains that nothing in the record demonstrates that customers who remain on SCO service have made an affirmative decision to do so. DEO also argues that no evidence shows that elimination of SCO service will result in higher prices for customers. DEO disputes OPAE's reliance on

Ms. Harper's calculation that, over a single 12-month period, prices were higher than the SCO for fixed-price bilateral contract and some MVR offers. DEO points out that the point of fixed-price contracts involves the payment of a premium in exchange for rate certainty. With the SCO, only the adder is fixed, so if the price spikes, customers will be subject to rate volatility under the SCO. Further, DEO points out that, if a customer is switched to a higher MVR, market protection exists, as that customer is free to switch to a lower priced supplier. Concluding, DEO relies on the testimony of Ms. Ringenbach, who stated that the auction has not brought low prices, it has been competitive suppliers participating in the auction that has kept prices low. (DEO Reply Br. at 10-12.)

Joint movants also assert that education of customers will help alleviate any difficulty with the elimination of SCO service. OGMG and RESA point out that Staff witness Bossart testified that Staff believe educational materials should be provided to nonresidential customers to help them make fully-informed decisions about their natural gas supply. Staff explains that some nonresidential customers who currently receive SCO service may be unfamiliar with natural gas choice service, or the natural gas commodity market. Staff believes DEO should implement a comprehensive customer education program which would involve customers receiving at least two notices prior to the exit date becoming effective, with the last notice occurring at least 60 days prior to the exit date. Staff witness Bossart, specifically articulates the following elements that should be included in DEO's notice to customers: the process of customer assignment; information regarding the MVR; the fact that an assigned customer may switch at any time; the timeline for switching; a list of current CRNGS providers operating in DEO's territory; and information stating that current contracts and a customer's relationship with DEO will not be affected by this change. Staff also opines that DEO's education programs should be funded through its customer education fund established in 05-474. DEO accepts Ms. Bossart's recommendations in its reply comments. (OGMG/RESA Br. at 6-7; Staff Ex. 1 at 3-6; Staff Br. at 3; DEO Ex. 4 at 1.)

Staff also testified that it believes MVR suppliers who receive new customers should be required to provide certain customer information, to inform customers as to how the MVR is determined and that a customer may switch from an MVR supplier at any time. (Staff Ex. 2 at 5; Staff Br. at 5-6.)

Considering the second criterion, the Commission finds that the second criterion has been met. In particular, the Commission finds 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. Moreover, the Commission believes that the

Stipulation allowing DEO to exit the merchant function for nonresidential customers will encourage innovation, both in how services are provided and in the variety of available products. The Commission further believes that customers will be protected by the market during this transition. Once a customer is switched to an MVR, that customer is immediately free to: switch to a different CRNGS provider, enter into a different rate plan with the same supplier, or participate in opt-out government aggregation, without any type of termination fee. With respect to customer education, DEO has already accepted Staff's recommendations for a comprehensive customer education program, which will commence well in advance of the actual transition. The Commission believes that, with appropriate information and education, customers will be able to make informed decisions when SCO service is discontinued. Further, the Commission directs DEO to meet with Staff to assure coordination of customer education efforts. In addition to the requirements set forth in the Stipulation, the Commission finds that DEO must reach out to small businesses and entities representing small businesses in its service territory, in order to engage them in the stakeholder group and discussions regarding the educational obligations. Accordingly, with the above directives, the Commission finds that the Stipulation, as a package, benefit ratepayers and the public interest.

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

With respect to the third prong, both DEO witness Murphy and OCC witness Hayes opine that the Stipulation does not violate any important regulatory principle or practice and note that the Commission retains authority to modify or abrogate exemption orders to the extent a nonresidential exit may be found to pose any problems. (DEO Ex. 1 at 10; OCC Ex. 2 at 9-10.) Mr. Murphy explains that the settlement benefits customers because it directly furthers several provisions of state policy, while taking a careful, incremental step affecting only a subset of nonresidential customers to explore whether and how a full exit from the merchant function may benefit all customers. Moreover, OGMG and RESA assert that the state policy objectives set forth in Section 4929.02(A)(4), (5), (6), and (7), Revised Code, are furthered by the Stipulation, and DEO's exit for nonresidential customers.

In making their argument that the Stipulation furthers state policy, OGMG and RESA rely on the testimony of DEO witness Murphy, who explains that discontinuing SCO service will directly increase the entrance of customers into the commodity market, spurring market entry by new CRNGS providers, additional competition, and the development of the natural gas supply market. Additionally, DEO witness Murphy opines that SCO service was only serving to hinder the market, and discontinuing SCO service will encourage customers to enter into direct retail relationships with CRNGS providers. (DEO Ex. 1 at 6-7, 10; OGMG/RESA Br. at 6-7; Staff Ex. 1 at 3.)

OPAE responds that joint movants focus on state policy only inasmuch as they can benefit from it. OPAE relies on OCC witness Hayes's testimony that, although joint movants attribute customers remaining on the SCO to inertia, customers may still be taking SCO service because it offers the best price. Moreover, OPAE points to Mr. Hayes' testimony that in the only state where a natural gas company has exited the merchant function, customers consistently pay a price that is higher than the national average. (OPAE Br. at 28-29; OCC Ex. 2 at 5, 15-16, 23.)

In reply, OGMG and RESA assert that joint movants have properly interpreted state policy, and argue that OPAE's argument that joint movants only interpret state policy in their own self-interest has no record support. OGMG/RESA point out that, OPAE witness Harper admits that, for a recent month, there were two variable plans available to consumers in DEO's territory that had lower rates than the SCO rate. Ms. Harper further concedes that, without an SCO rate, there would be nothing to prevent CRNGS providers from making offers below an SCO floor. (OGMG Reply Br. at 14.)

Accordingly, the Commission finds that there is no evidence that the Stipulation violates any important regulatory principle or practice. Instead, the Commission believes the Stipulation furthers state policy by increasing customers access to competitively provided products and services and by increasing the diversity of products available to customers. Therefore, we find the Stipulation meets the third criterion.

#### CONCLUSION:

Upon consideration of the joint motion to modify and the arguments made by the parties, the Commission finds that joint movants have demonstrated that, in accordance with Section 4929.08(A), Revised Code, the 07-1224 order should be modified. Joint movants have shown that certain findings from the 07-1224 order are no longer valid and, absent modification to that order, DEO, the suppliers, and, ultimately, the customers could be adversely affected. Moreover, joint movants have corroborated that the public interest objectives set forth in Section 4929.02, Revised Code, will be advanced by modifying the exemption orders. Accordingly, the Commission concludes that the joint motion to modify should be granted.

Having found that the 07-1224 order should be modified, the Commission will now turn its consideration to how the order should be modify and the Stipulation in this case. Overall, the Commission finds that the Stipulation entered into by the parties is reasonable, in the public interest, and should be adopted. However, the Commission wishes to clarify that nothing precludes us from reestablishing the SCO

or other pricing mechanism, if we determine that DEO's exit is unjust or unreasonable for any customer class. As provided for in Section 4929.08, Revised Code, the Commission is permitted to abrogate or modify the exemption provided for in this order within eight years after the effective date of this order, without DEO's consent.

Moreover, the Commission believes that allowing DEO to exit the merchant function for nonresidential customers provides the Commission with an excellent opportunity to study the consequences of the exit. To determine the consequences of DEO exiting the merchant function, OGMG/RESA witness Ringenbach recommends that parties consider whether new and varied products are offered after the SCO is discontinued. Moreover, if new and varied products are not produced, OGMG/RESA encourage the consideration of whether additional barriers exist to hinder the development of new products. Ms. Ringenbach also recommends that parties study whether the switch to the MVR causes an increased number of calls to the Commission's call center, and whether suppliers have increased their investment in, and commitment to, the local community as a result of the discontinuation of the SCO. In addition, Staff, believes the following information should be provided to the Commission to facilitate the Commission's analysis of DEO's exit for nonresidential customers: a record of the number of suppliers participating in DEO's territory over the next three years; a record of the number and type of various supplier offers of new products and services; a record of customer participation levels in new supplier products and service offerings; an analysis of any increased investment in Ohio by suppliers that was caused by DEO's exit; and, specific customer billing determinants. OCC witness Hayes recommends the Commission require a study to consider the following: the success or failure of the exit to provide customers with reasonably priced natural gas services; the benefit of the exit for customers; and customer attitudes toward the transition. (OGMG/RESA Br. at 9; OGMG/RESA Ex. 2 at 6-7; OCC Ex. 2; OCC Br. at 10.)

The Commission believes that a maximum amount of information should be provided regarding the impact of DEO's exit. Accordingly, we direct DEO to provide to Staff, OCC, and any other interested party the information recommended by Staff, OCC, and OGMG and RESA, so that all parties can become better informed regarding the effect of DEO's exit on competition and customers. Moreover, DEO should meet with Staff and other interested stakeholders, within 45 days of the date of this order, and determine what data should be analyzed, and how it should be provided, including any data Staff determines is necessary to adequately provide information to assist the Commission in determining future actions pertaining to natural gas competition. DEO and suppliers shall collect the information that Staff determines is necessary and provide such information to Staff. Staff shall take appropriate actions to protect information that is marked as confidential.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW:**

- (1) DEO is a natural gas company as defined in Section 4905.03(5), Revised Code, and a public utility under Section 4905.02, Revised Code.
- (2) On June 15, 2012, DEO and OGMG filed a joint motion to modify the order issued in 07-1224, pursuant to Section 4929.08, Revised Code.
- (3) On June 15, 2012, a Stipulation was filed in this proceeding signed by DEO, OCC, and OGMG.
- (4) By entry issued on July 27, 2012, a procedural schedule was set for this matter and DEO was directed to publish notice in a newspaper of general circulation in each county of the company's service area.
- (5) DEO filed proof of publication on October 9, 2012.
- (6) Motions to intervene filed by OPAB, OCC, and RESA were granted.
- (7) The hearing was held on October 16-17, 2012.
- (8) Section 4929.08, Revised Code, and Rule 4901:1-19-12, O.A.C., provide that, upon motion, and after notice and hearing, the Commission may modify any order granting an exemption pursuant to Section 4929.04, Revised Code.
- (9) Joint movants have demonstrated that the joint motion to modify the 07-1224 order should be granted.
- (10) The Stipulation submitted by the signatory parties comports with Section 4929.08, Revised Code, and Rule 4901:1-19-12, O.A.C., meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.

**ORDER:**

It is, therefore,

ORDERED, That the joint motion to modify be granted. It is, further,

ORDERED, That the Stipulation be adopted and approved. It is, further,

ORDERED, That DEO to provide to Staff, OCC, and any other interested party the information recommended by Staff, OCC, and OGMG and RESA. It is, further,

ORDERED, That the parties adhere to the directives set forth herein. It is, further,

ORDERED, That nothing in this opinion and order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That a copy of this opinion and order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Snitchler, Chairman

  
Steven D. Lesser

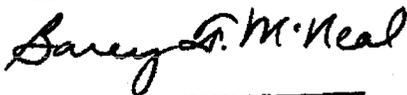
  
Andre T. Porter

  
Lynn Slaby

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Entered in the Journal

**JAN 09 2013**



Barcy F. McNeal  
Secretary

BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY ON REHEARING

The Commission finds:

- (1) The East Ohio Gas Company d/b/a Dominion East Ohio (DEO) is a natural gas company as defined by Section 4905.03(5), Revised Code, and a public utility as defined by Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of the Commission, pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code.
- (2) On April 8, 2005, DEO filed an application requesting an exemption pursuant to Section 4929.04, Revised Code, and seeking approval of phase one of its plan to exit the merchant function. *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a Plan to Restructure Its Commodity Service Function*, Case No. 05-474-GA-ATA (05-474). By opinion and order issued on May 26, 2006, in 05-474, the Commission approved DEO's application, as modified by the Stipulation filed in that case, to undertake phase one of its proposal to test alternative, market-based pricing of commodity sales.
- (3) On June 18, 2008, in *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 (07-1224), the Commission authorized DEO to implement phase two of its plan to exit the merchant function, in which DEO implemented a standard choice offer (SCO), wherein suppliers bid for the right to supply gas in tranches to choice-eligible customers at a retail level.

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- (4) Section 4929.08(A), Revised Code, provides for the modification of an exemption, in pertinent part, as follows:

The public utilities commission has jurisdiction over every natural gas company that has been granted an exemption or alternative rate regulation under section 4929.04 or 4929.05 of the Revised Code. As to any such company, the commission, upon its own motion or upon the motion of any person adversely affected by such exemption or alternative rate regulation authority, and after notice and hearing and subject to this division, may abrogate or modify any order granting such an exemption or authority only under both of the following conditions:

- (1) 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;
  - (2) The abrogation or modification is not made more than eight years after the effective date of the order, unless the affected natural gas company consents.
- (5) On June 15, 2012, a joint motion to modify the order issued on June 18, 2008, in 07-1224 (07-1224 order), pursuant to Section 4929.08, Revised Code, was filed by DEO and the Ohio Gas Marketers Group (OGMG). A stipulation and recommendation (Stipulation) signed by DEO, the Ohio Consumers' Counsel (OCC), and OGMG was also filed on June 15, 2012.
- (6) Motions to intervene filed by Ohio Partners for Affordable Energy (OPAE), OCC, and the Retail Energy Supply Association (RESA) were granted by attorney examiner entry.
- (7) On January 9, 2013, the Commission issued its opinion and order approving DEO's motion to modify the exemption order granted on June 18, 2008, in 07-1224. In addition, the Commission adopted and approved the Stipulation entered into between DEO, OCC, and OGMG. The Stipulation provides, *inter alia*, that, beginning in April 2013, a choice-

eligible non-residential customer may no longer default into, or have an option to receive, SCO commodity service; rather, a non-residential customer who has not selected a new supplier will be served by the next available supplier registered to provide default service using the supplier's monthly variable rate, subject to the limitations set forth in the commodity service portion of DEO's tariff on a rotating basis or the customer may enter into an agreement with a supplier or governmental aggregator. In accordance with the Stipulation, at this time, residential customers, as well as certain non-residential customers (e.g., nonchoice-eligible), continue to receive commodity service pursuant to the standard service offer (SSO) and SCO auctions.

- (8) Section 4903.10, Revised Code, provides that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days after the entry of the order upon the journal of the Commission.
- (9) OP&AE and DEO filed applications for rehearing of the Commission's January 9, 2013, order, on January 25, 2013, and February 5, 2013, respectively.
- (10) On February 4, responses to OP&AE's application for rehearing were filed by DEO and jointly by OGMG and RESA. On February 15, 2013, OCC filed a response to DEO's application for rehearing.
- (11) On February 20, 2013, the Commission granted the applications filed by DEO and OP&AE for the purpose of providing the Commission more time to consider the applications.

#### OP&AE's Application for Rehearing

- (12) For ease of discussion, we will address some of OP&AE's assignments of error together. In its first and second assignments of error, OP&AE argues that the Commission erred in determining that findings contained in the 07-1224 order were no longer valid, as required by Section 4929.08, Revised Code. Specifically, OP&AE argues that our finding

that phase two no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas service was in error. Instead, OP&E argues that DEO's motion to modify should have been denied because the 07-1224 order specifically provided that "phase two represents a reasonable structure through which to further the potential benefits of market-based pricing of the commodity sales by the company." OP&E opines that the Commission mischaracterized this finding in our order in the present case to reach the conclusion that this finding was no longer valid. OP&E asserts that the Commission ignored the phrase "by the company" in our consideration of whether the finding was still valid and ignored evidence to the contrary, including that provided by OP&E witness Harper. OP&E also argues that the stipulation approved in the 07-1224 order provided that DEO should have filed a separate application to accomplish its request for a non-residential exit, instead of the motion to modify. Finally, OP&E asserts that the joint motion to modify disregards the new administrative rules currently under review by the Commission in *In the Matter of the Commission's Review of the Alternative Rate Plan and Exemption Rules Contained in Chapter 4901:1-19 of the Ohio Administrative Code*, Case No. 11-5590-GA-ORD (11-5590).

- (13) In response, DEO asserts that OP&E's argument that the Commission mischaracterized the 07-1224 order hinges on the distinction between "market-based pricing of commodity sales by the company" and "market-based pricing for natural gas services." DEO argues that there is no distinction at all between these phrases with regard to what is provided for in the 07-1224 order. OGMG/RESA further argue that the meaning of that sentence does not turn on whether DEO is experiencing additional benefits, but whether the public is enjoying the potential benefits of market-based pricing. Instead, OGMG/RESA assert that the inclusion of the phrase, by the company, only points out that the benefits are occurring within DEO's service territory because DEO cannot enjoy the benefits of market-based pricing, as it cannot profit from the sale of natural gas commodity. OGMG/RESA counter that the record is full of compelling evidence that circumstances have

changed in the four years since the 07-1224 order was issued. Specifically, OGMG/RESA point out that both DEO witness Murphy and OGMG/RESA witness Parisi explained why the 07-1224 order findings were no longer valid. DEO witness Murphy explained that phase two did not end as DEO anticipated in March 2011 and OGMG/RESA witness Parisi explained that customer migration from the SCO plateaued and was now stagnant. Moreover, Mr. Parisi opined that the continued SCO service places an unnecessary burden on shopping customers, as the cost of the auction is paid by all customers, not just those receiving SCO service. DEO and OGMG/RESA assert that OPAE misrepresents the 07-1224 order when it argues that DEO needed to file an application for further exit of the merchant function. Instead, OGMG/RESA point out that the order in the present case is not a move to full choice commodity service, but, instead, is a move to eliminate barriers to competition by changing the terms of the default service for only a segment of customers, which allows for the filing of a motion to modify without the filing of an application as suggested by OPAE.

- (14) In the 07-1224 order, as OPAE points out, the Commission found that "phase two represents a reasonable structure through which to further the potential benefits of market-based pricing of the commodity sales by the company." In the order in the present case, we held that "phase two no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services." Although OPAE appears to be focused on the semantic issue that we did not specify that there was no longer any potential for further exploration of the benefits of market-based pricing of the commodity sales by the company, that does not make our finding contrary to Section 4928.08, Revised Code. The Commission, as stated in the order in this case, believes that phase two no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services. Moreover, as pointed out by OGMG/RESA, those benefits that the Commission is seeking, could only ever accrue to customers, not to DEO. Therefore, as required by Section

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4928.08, Revised Code, the Commission found that at least one of the findings upon which the 07-1224 order was based is no longer valid. Further, we find it disingenuous of OPAE to argue that there is no evidentiary support for our finding that phase two no longer represents a reasonable structure through which to further the potential benefits of market-based pricing of natural gas commodity sales. Simply because OPAE did not like the evidence presented, does not mean that it can be disregarded. Specifically, DEO witness Murphy explained that the presence of the SCO potentially distorts the market and precludes the development of a fully-competitive market marketplace. Further, RESA/OGMG witness Parisi pointed out that customer migration has stalled out, and is hindering continued development of the competitive marketplace. Evidence presented at the hearing demonstrated that phase two no longer provides its intended benefits and has resulted in stalled market development. Therefore, we find that OPAE's argument that the evidentiary record does not support our conclusion that certain findings in the 07-1224 order are no longer valid is without merit.

- (15) Furthermore, we reject OPAE's interpretation that the 07-1224 order required the filing of a brand new application for two reasons. First, the current motion to modify does not represent, as the stipulation contemplates, a full-choice commodity service market, as the provisions of the motion to modify only effect non-residential customers. Second, the joint motion to modify triggered a completely separate proceeding from the proceeding that resulted in the 07-1224 order, including a hearing and significant opportunity for due process. Accordingly, we do not believe that our current proceeding was in violation of the terms of the stipulation approved in the 07-1224 order. In addition, we reject OPAE's contention that DEO should be expected to comply with the rules under review in 11-5590, which are not yet final. As OPAE raises nothing new that was not addressed in the original order in this case, OPAE's first and second assignments of error are without merit and should be denied.

- (16) In its third assignment of error, OP&E argues that the Commission erred in finding that DEO, competitive retail natural gas service (CRNGS) providers, and, ultimately, customers could be adversely affected by the continuation of phase two. In its fourth assignment of error, OP&E asserts that the Commission unlawfully found that the public interest objectives set forth in Section 4929.02, Revised Code, will be advanced by modifying the 07-1224 order. Specifically, OP&E asserts that these two findings were unsupported by the record evidence produced at the hearing. OP&E argues that DEO is not adversely affected by the continued SCO service, and, as a distribution company, is indifferent as to whether customers are served through the SCO or through bilateral contracts. Further, OP&E argues that O&MG cannot be adversely affected by continued SCO service, except to the extent that its members do not have winning bids in DEO's SCO auction or are unable to convince customers to take their commodity service. Moreover, OP&E argues that private control of prices, as provided by CRNGS providers is not in the interest of customers. Rather, OP&E maintains that customers are better served by continuation of the SCO auction for all customers, and the Commission's finding that continuation of SCO service is negatively affecting all Ohioans by hindering the development of a fully-competitive market is in error. OP&E also asserts that the Commission erred in finding that the joint motion furthered state policy by providing for an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition, transactions between willing buyers and sellers, and that transition from the SCO will encourage innovation in services and products. In support of its argument, OP&E argues that the Stipulation is devoid of any information regarding the policy of the state of Ohio. Instead, OP&E argues that the evidence adduced at hearing indicated that customers would be harmed by the elimination of the SCO option. OP&E asserts that bilateral contracts are no substitute for a competitive auction determined SCO. Instead, OP&E argues that phase two has achieved effective competition and that elimination of the SCO

option for non-residential customers is contrary to the state's policy of promoting reasonable prices.

- (17) In response, DEO asserts that OPAE's third assignment of error is merely a continuation of its first. DEO argues that the language of Section 4929.08(A), Revised Code, does not serve as a limitation on the Commission's authority. Rather, according to DEO, Section 4929.08(A), Revised Code, is authorizing language, clarifying that the Commission's authority may be exercised on its own or in response to any person adversely affected. Accordingly, DEO concludes that a finding of an adverse affect is not a mandatory condition that must be met before the Commission can grant an exemption. In addition, even while arguing a finding of an adverse effect is unnecessary, DEO maintains that joint movants include active participants in Ohio's natural gas markets, which would be directly effected if competition fails to thrive in Ohio. In support of DEO's argument, OGMG/RESA assert that the continued existence of the SCO hinders the development of a more competitive natural gas commodity market, which would benefit both suppliers and consumers. Further, OGMG/RESA assert that the modification granted in the current case will advance the public interest objectives set forth in Section 4929.02, Revised Code, because it is Ohio's policy to recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment and to encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods. OGMG/RESA point out that the Commission found that modifying the 07-1224 order was in the public interest because, in a fully-competitive marketplace, suppliers will constantly search for more efficient ways of supplying natural gas and will also provide more varied products for consumers to choose from.
- (18) The Commission does not find OPAE's arguments that the Commission erred in finding that DEO, CRNGS providers, and ultimately customers could be adversely affected by the continuation of phase two persuasive. Moreover, upon review, we believe that we were correct in finding that the public interest objectives set forth in Section 4929.02,

Revised Code, will be advanced by modifying the 07-1224 order. In our order in the present case, we 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. Moreover, we found that the Stipulation allowing DEO 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. The Commission further believes that customers will be protected by the market during this transition. Once a customer is switched to a monthly variable rate, that customer is immediately free to: switch to a different CRNGS provider, enter into a different rate plan with the same supplier, or participate in opt-out government aggregation, without any type of termination fee. Accordingly, the Commission finds that OPAE's third and fourth assignments of error are without merit, raise nothing new, and should be denied.

- (19) In its fifth assignment of error, OPAE avers that the Commission unlawfully and unreasonably found that the Stipulation resolved the contested issues in this case. Specifically, OPAE argues the Stipulation is irrelevant to the contested issues in this case and contained no legal argument to resolve those issues. OPAE also asserts that our consideration of the three-prong test was irrelevant and meaningless, because OPAE now asserts that the only issues at the hearing were whether the joint motion is lawful. Moreover, OPAE argues that the only issue it raised with respect to the Stipulation was whether it was the product of serious bargaining, because it was not signed by any representative of a non-residential consumer group. OPAE opines that the Commission should have rejected the Stipulation because no real bargaining took place, as OCC only signed the motion to assure that no residential exit would occur, and the other parties had identical interests. OPAE argues that the failure to have a non-residential customer group sign onto the Stipulation in

this case presents a significant problem in the Commission's consideration of the Stipulation.

(20) In response to OPAE's fifth assignment of error, OGMG/RESA point out that, although not binding on the Commission, the terms of stipulations between parties are afforded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). Moreover, the three-prong standard of review has been discussed in numerous Commission proceedings and endorsed by the Ohio Supreme Court. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561, 629 N.E.2d 423 (1994), citing *Consumers' Counsel* at 126. DEO explains that the Stipulation was the result of numerous meetings, and involved several participants who regularly participate in Commission proceedings. Moreover, DEO points out that its witness Murphy explained that other groups and representatives of other customer classes had the opportunity to participate in settlement negotiations and review the drafts of the Stipulation. With respect to the Stipulation, DEO points out that the Stipulation need not contain any legal argument. Instead, DEO argues that legal issues should be addressed at hearing and in briefs, not in a Stipulation filed for the Commission's consideration. With respect to OPAE's assertion that the evidence does not support a finding that the Stipulation is in the public interest, DEO responds that there was a significant amount of evidence that supported adoption of the Stipulation. The mere presence of conflicting evidence in a contested case does not negate the presence of supportive evidence.

(21) In consideration of OPAE's fifth assignment of error, the Commission questions OPAE's contention that we should not have considered the Stipulation using the established three-prong test. The Commission regularly considers stipulations that come before it using the three-prong test. Further, although OPAE appears to insinuate that the Commission should have dismissed the joint motion, the appropriateness of our consideration of the joint motion has already been discussed, to some extent, in this entry and the Commission thoroughly considered OPAE's

motion to dismiss the joint motion to modify in its initial order. However, we would note that OPAE's motion to dismiss the joint motion to modify was not the direct subject of any of OPAE's arguments on rehearing. Therefore, the Commission questions OPAE's assertion that it should not have considered the Stipulation utilizing the three-prong test. Further, the Commission does not believe that the stipulating parties' failure to obtain the signature of a non-residential customer group constitutes a reason to reject the Stipulation. Even assuming that there was an objecting non-residential customer group, the Commission provided due process and a hearing, and no such group came forward to oppose the Stipulation. Moreover, the Council of Smaller Enterprises filed correspondence in this docket indicating its support of the Stipulation. Accordingly, we find that OPAE's fifth assignment of error is without merit and should be denied.

#### DEO's Application for Rehearing

- (22) In its application for rehearing, DEO requests clarification of its obligations under the order with respect to the scope and content of information to be provided, including for the surveys and analysis recommended by various parties. Specifically, DEO requests the Commission clarify our order that it provide information as recommended by Staff, OCC, OGMG and RESA. According to DEO, much of the requested information is not readily available to DEO, including information regarding increased supplier investment, the emergence of new and varied products, and whether suppliers are investing new assets in Ohio. DEO explains that it lacks access to this information. Additionally, DEO voices concern with its ability to provide information to OCC where the scope of the information to be provided has not yet been determined. DEO further requests clarification of whether DEO alone is responsible for providing the information or whether DEO and suppliers are responsible, as well as whether information should be constantly provided or made available upon demand. In sum, DEO requests the Commission clarify that DEO does not have a standing duty to provide all information for the recommended

analysis and that the Commission allow for flexibility in the process going forward.

- (23) In response, OCC asserts that the Commission's order in this case is consistent with the recommendations of OCC witness Bruce Hayes that the Commission conduct appropriate studies of the choice market, choice marketer behavior, natural gas prices, and non-residential customer impacts and feedback. OCC asserts that, in order for DEO to conduct the required studies, a certain amount of information outside of DEO's control would need to be provided by the CRNGS providers. Accordingly, OCC concludes that: the Commission should maintain DEO's responsibility to perform the studies outlined in the its initial order; DEO should be responsible for providing the information necessary to perform the study of the non-residential exit of the merchant function; and DEO should be able to assure cooperation from the CRNGS providers.
- (24) As an initial matter we begin by clarifying that Staff, not DEO, is expected to conduct the studies and surveys of the effects of the elimination of SCO service for non-residential customers. DEO will bear the burden of providing much of the information necessary for Staff to perform its evaluation. However, the Commission agrees with DEO that our order could be read to require DEO to provide information to which it does not have access. Therefore, the Commission wishes to clarify that both DEO and suppliers will bear the responsibility of providing the necessary information to Staff so that a full study of DEO's non-residential exit can occur. Moreover, we do not expect DEO to provide information, unsolicited, on a continued basis. Instead, the Commission expects DEO to work with Staff and other stakeholders to determine what information needs to be provided on a continued basis and to provide any requested information to Staff. All information provided to Staff will also be provided to OCC. The Commission finds that the cost of providing information to Staff, conducting surveys, and any associated costs may be properly funded through DEO's customer education fund. Further, the Commission expects to receive the same cooperation from suppliers, as it does from DEO, but recognizes that some of the information provided may be

confidential and proprietary and would be given appropriate treatment. Accordingly, DEO's application should be granted.

It is, therefore,

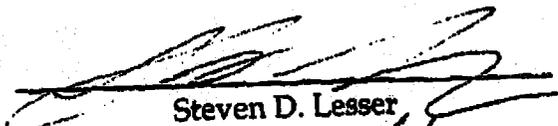
ORDERED, That OP&E's application for rehearing be denied. It is, further,

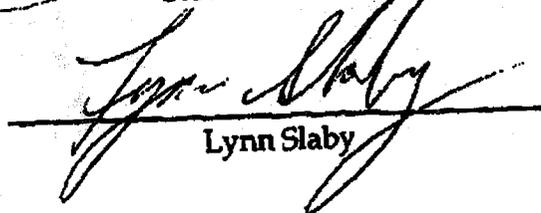
ORDERED, That DEO's application for rehearing be granted. It is, further,

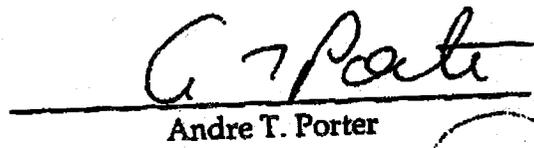
ORDERED, That a copy of this entry on rehearing be served on all parties of record.

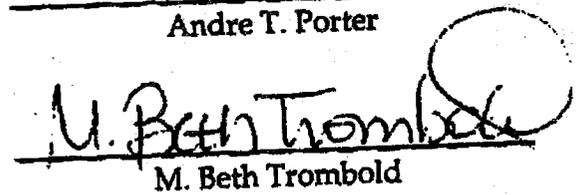
THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

  
Steven D. Lesser

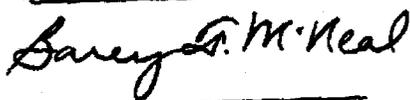
  
Lynn Slaby

  
Andre T. Porter

  
M. Beth Trombold

KLS/sc

Entered in the Journal  
MAR 06 2013



Barcy F. McNeal  
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The East )  
 Ohio Gas Company d/b/a Dominion East )  
 Ohio for Approval of a General Exemption ) Case No. 07-1224-GA-EXM  
 of Certain Natural Gas Commodity Sales )  
 Services or Ancillary Services. )

OPINION AND ORDER

The Public Utilities Commission of Ohio (Commission), considering the application, the testimony, and other evidence presented in this matter, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Jones Day, by Mark A. Whitt and Andrew J. Campbell, P.O. Box 165017, Columbus, Ohio 43216, on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio.

Sheryl Creed Maxfield, First Assistant Attorney General, by Duane W. Luckey, Section Chief, and Anne L. Hammerstein and Stephen A. Reilly, Assistant Attorneys General, Public Utilities Section, 180 East Broad Street, 9th Floor, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Joseph P. Serio, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215, on behalf of the residential customers of The East Ohio Gas Company d/b/a Dominion East Ohio.

McNess, Wallace & Nurick LLC, by Samuel C. Randazzo and Daniel J. Neilsen, 21 East State Street, 17th Floor, Columbus, Ohio 43215, on behalf of Industrial Energy Users-Ohio.

David C. Rinebolt, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839, on behalf of Ohio Partners for Affordable Energy.

Bobby Singh, 300 West Wilson Bridge Road, Suite 350, Worthington, Ohio 43085, on behalf of Integrys Energy Services, Inc.

Vorys, Sater, Seymour & Pease LLP, by M. Howard Petricoff and Stephen M. Howard, 52 East Gay Street, P.O. Box 1008, Columbus, Ohio 43216, on behalf of the Ohio

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Technician SM Date Processed 6/18/08

Gas Marketers Group, comprised of Interstate Gas Supply, Inc.; Direct Energy Services, LLC; Hess Corporation; Commerce Energy of Ohio; SouthStar Energy Services LLC; and Vectren Retail LLC d/b/a Vectren Source.

Bell & Royer Co., LPA, by Barth E. Royer, 33 South Grant Avenue, Columbus, Ohio 43215, on behalf of Dominion Retail, Inc., and MXenergy, Inc.

Bricker & Eckler, LLP, by Thomas J. O'Brien and Glenn Krassen, 100 South Third Street, Columbus, Ohio 43215, on behalf of the Northeast Ohio Public Energy Council.

Craig G. Goodman, 3333 K Street NW, Suite 110, Washington, D.C. 20007, on behalf of the National Energy Marketers Association.

OPINION:

I. BACKGROUND

The East Ohio Gas Company d/b/a Dominion East Ohio (DEO) is a natural gas company as defined by Section 4905.03(A)(6), Revised Code, and a public utility as defined by Section 4905.02, Revised Code, and, as such, is subject to the jurisdiction of the Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code.

On April 8, 2005, DEO filed an application requesting an exemption pursuant to Section 4929.04, Revised Code, and seeking approval of phase one of its plan to exit the merchant function. *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 (05-474).* By opinion and order issued May 26, 2006, in 05-474, the Commission approved DEO's application, as modified by the stipulation filed in the case, to undertake phase one of its proposal to test alternative, market-based pricing of commodity sales.

On December 28, 2007, DEO filed an application, pursuant to Section 4929.04, Revised Code, for approval of phase two of its plan to exit the merchant function and requesting a general exemption of certain natural gas commodity sales services or ancillary services contained in Chapters 4905, 4909, 4933, and 4935, Revised Code.

By entry issued January 30, 2008, the Commission determined that DEO's application complied with the filing requirements of Rule 4901:1-19-04, Ohio Administrative Code (O.A.C.), and concluded that the application filed by DEO on December 28, 2007, should be accepted as of the filing date. Subsequently, on February 6, 2008, the attorney examiner established the procedural schedule in this matter, including the due date for the filing of comments, the deadline for the filing of motions to intervene,

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and the times and locations for the local and evidentiary hearings. No one filed comments in this matter. By entry issued March 26, 2008, the attorney examiner, *inter alia*, granted the motions to intervene filed by the office of the Ohio Consumers' Counsel (OCC); Ohio Partners for Affordable Energy (OPAE); Integrys Energy Services, Inc. (Integrys); Ohio Gas Marketers Group (Gas Marketers) (comprised of Interstate Gas Supply, Inc.; Direct Energy Services, LLC; Hess Corporation; Commerce Energy of Ohio; SouthStar Energy Services LLC; and Vectren Retail LLC d/b/a Vectren Source); MXEnergy, Inc. (MXEnergy); National Energy Marketers Association (NEM); Northeast Ohio Public Energy Council (NOPEC); Dominion Retail, Inc. (Dominion Retail); and Industrial Energy Users-Ohio (IEU-Ohio).

A technical conference was held in this matter on February 12, 2008, at the offices of the Commission. By entry issued February 6, 2008, DEO was directed to publish notice of the hearings in this case in each county in which it provides service. On April 16, 2008, DEO filed the requisite proofs of publication (Late-filed DEO Ex. 16).

Local hearings were held on April 1, 2008, in Youngstown, Ohio, and on April 3, 2008, in Cleveland and Canton, Ohio. There was one public witness who testified in Youngstown, Ohio, four public witnesses in Cleveland, Ohio, and one public witness in Canton, Ohio. Each of the public witnesses testifying expressed opposition to this application. The evidentiary hearing was held on April 7 and 10, 2008. At the hearing on April 10, 2008, DEO submitted a stipulation and recommendation (stipulation), which was filed in this docket on April 10, 2008 (Joint Ex. 1). The stipulation was executed by DEO, staff, and all of the intervenors, with the exception of IEU-Ohio and OPAE.<sup>1</sup> By letter filed in this docket on April 22, 2008, OPAE stated that it had agreed not to oppose the stipulation. At the hearing held on April 10, 2008, staff presented testimony in support of the stipulation. No party testified against, or otherwise objected to, the stipulation.

## II. GOVERNING STATUTES

Section 4929.04, Revised Code, authorizes the Commission, upon the application of a natural gas company such as DEO, to exempt any commodity sales service or ancillary service from all provisions of Chapter 4905, Revised Code (with the exception of Section 4905.10, Revised Code); all provisions of Chapter 4909, Revised Code; all provisions of Chapter 4935, Revised Code (with the exception of Sections 4935.01 and 4935.03, Revised Code); Sections 4933.08, 4933.09, 4933.11, 4933.123, 4933.17, 4933.28, and 4933.32, Revised Code; and from any rule or order issued under those chapters or sections.

Section 4929.04, Revised Code, delineates the standards for the Commission's review, as well as the regulatory policy that we are to follow in determining whether to

<sup>1</sup> By letter filed April 11, 2008, MXEnergy stated that it supports the stipulation and requested that it be added as a signatory party.

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approve applications under that section. Section 4929.04(A), Revised Code, provides that we shall approve the exemption upon a finding, after hearing, that an applicant is in substantial compliance with the policy of this state specified in Section 4929.02, Revised Code, and that either (1) it is subject to effective competition with respect to the commodity sales service or ancillary service, or (2) customers of the commodity sales service or ancillary service have reasonably available alternatives.

Section 4929.04(B), Revised Code, provides that, in determining if the conditions in subsections (1) or (2) exist, the Commission shall consider, among other issues:

- (1) The number and size of alternative providers of the commodity sales service or ancillary service.
- (2) The extent to which the commodity service or ancillary service is available from alternative providers in the relevant market.
- (3) The ability of alternative producers to make functionally equivalent or substitute services readily available at competitive prices, terms, and conditions.
- (4) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

Section 4929.02, Revised Code, sets forth the state policies to be considered, as follows:

- (1) Promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods.
- (2) Promote 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.
- (3) Promote diversity of natural gas supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers.
- (4) Encourage innovation and market access for cost effective supply- and demand-side natural gas services and goods.
- (5) Encourage cost effective and efficient access to information regarding the operation of the distribution systems of natural

gas companies in order to promote effective customer choice of natural gas services and goods.

- (6) Recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment.
- (7) Promote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905 and 4909 of the Revised Code.
- (8) Promote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated natural gas services and goods.
- (9) Ensure that the risks and rewards of a natural gas company's offering of non-jurisdictional and exempt services and goods do not affect the rates, prices, terms, or conditions of nonexempt, regulated services and goods of a natural gas company and do not affect the financial capability of a natural gas company to comply with the policy of this state specified in this section.
- (10) Facilitate the state's competitiveness in the global economy.
- (11) Facilitate additional choices for the supply of natural gas for residential consumers, including aggregation.

### III. SUMMARY OF THE APPLICATION

#### A. General

DEO provides natural gas service to approximately 1.2 million residential customers in the state of Ohio, all of whom will be affected by this application because the application provides for a more competitive market for natural gas commodity service, according to DEO (DEO Ex. 1). DEO maintains that, as of November 2007, two-thirds of DEO's customers (820,572) receive service under either DEO's energy choice program or through governmental aggregation (DEO Ex. 15, Murphy at 4 and 9). In addition, DEO states that it presently has 41 suppliers offering commodity service to its traditional transportation market and 17 suppliers participating in its energy choice program (*Id.* at 8).

In the application in this case, DEO is requesting Commission approval of the second phase of the company's plan to exit the merchant function. DEO explains that phase 2 will be a pilot program and will represent an intermediate step between phase 1 and DEO's ultimate exit of the merchant function (DEO Ex. 15, Murphy at 3). According to DEO, the objectives of the phase 2 pilot are similar to the objectives stated for phase 1 in 05-474. First, DEO explains that both phases are intended to foster a competitive market in which customers can make informed choices among expanded alternative suppliers, while ensuring reliable commodity service by the suppliers. Second, DEO avers that both phases were designed to address, without disrupting the competitive marketplace, the commodity service needs for those customers that cannot or will not choose among the available alternatives. In addition, DEO offers that phase 2 is also intended to facilitate the process of choice-eligible customers establishing a contractual relationship with a competitive retail natural gas service (CRNGS) provider prior to the time DEO ceases providing commodity service to such customers (DEO Ex. 2 at 3). However, DEO notes that, under phase 2, DEO will continue to take title to the gas and resell it (DEO Ex. 15, Murphy at 3).

B. Differences Between Phase 1 and Phase 2

DEO explains that its phase 1 pilot program, approved in 05-474, began in October 2006. Through phase 1, DEO eliminated its existing gas cost recovery (GCR) mechanism and implemented, in its place, a new standard service offer (SSO) gas cost rate. In phase 1, DEO secured wholesale supplies of natural gas through a descending clock auction in which six SSO suppliers won the right to provide natural gas supplies to customers who were not participating in a choice program, at the closing New York Mercantile Exchange (NYMEX) natural gas futures settlement price for the prompt month, plus a retail price adjustment of \$1.44 per thousand cubic feet (mcf). These six bidders provided twelve tranches of supply that formed the pool of gas supplies needed to serve both percentage of income payment plan (PIPP) and non-PIPP customers. In phase 1, the customers' bills showed DEO as the commodity service provider. According to DEO, throughout phase 1, customers eligible to participate in the energy choice program<sup>2</sup> could do so at any time by enrolling with an individual supplier or by participating in a governmental aggregation program. In phase 1, those customers that did not participate in energy choice received commodity service at a price that varies each month in accordance with the results of the Commission-approved SSO auction (DEO Ex. 2 at 3-4). DEO believes that phase 1 successfully assisted in the development of a market-based price and an auction price that was below the historic GCR benchmarks, increased the number of customers receiving service under energy choice or an aggregation program, increased the number of suppliers

<sup>2</sup> DEO explains that, in order to receive service under a choice rate schedule, a customer must have no past due amounts of thirty days or more or must not have broken more than one payment plan during the preceding 12 months (DEO Ex. 2 at 4).

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competing in the market, and attracted a large number of participants to the stakeholder process (DEO Ex. 15, Murphy at 4).

Under phase 2, DEO explains that customers who do not participate in the energy choice program will continue to receive commodity service at a price that varies each month in accordance with the results of a Commission-approved auction. According to DEO, about one quarter of DEO's remaining sales customers (customers that do not receive service under energy choice or through aggregation) are either not eligible to participate in the energy choice program or are PIPP customers. During phase 2, these customers will still be provided with the commodity, which will be acquired through an auction at the SSO price approved by the Commission. DEO states that, under phase 2, these customers will see no change in the way their supplies are purchased or in the appearance of their bills. DEO goes on to explain that about three-quarters of DEO's remaining sales customers are eligible to participate in energy choice but have elected not to do so. During phase 2, these customers will receive their commodity from a specific supplier selected via an auction at the standard choice offer (SCO) price approved by the Commission. For these customers, DEO will purchase the supply from the SCO suppliers for resale to the customers and the supplier will be identified on the customers' bills (DEO Ex. 2 at 4).

### C. Auction Process

DEO explains that it convened a stakeholder group, as required by the Commission's order in 05-474, to discuss the various aspects of phases 1 and 2. This stakeholder group established objectives for any auction that might be conducted. The objectives addressed customer perspectives, market structure perspectives, operational perspectives, and auction structure perspectives (DEO Ex. 2 at 5-6).

DEO states that the phase 1 pilot program commenced in October 2006 and terminates August 31, 2008. Therefore, DEO proposes to begin phase 2 and offer SCO service with tariffs effective the first billing cycle in September 2008. DEO proposes to conduct an initial auction for phase 2 by July 25, 2008. SSO and SCO services will be provided pursuant to this initial auction from September 1, 2008, to March 31, 2010 (DEO Ex. 2 at 5). DEO states that it will seek the Commission's approval of the results of the auctions in phase 2 before making awards and executing the related purchase and sales agreements with suppliers (DEO Ex. 15, Murphy at 14).

For the initial auction in phase 2, DEO intends to hold two separate auctions (the SSO auction and the SCO auction) over the course of one or two days. The SSO auction will utilize a descending clock format and will be used to acquire wholesale natural gas supplies for PIPP, choice-ineligible, and certain other customers. In the SSO auction, DEO states that the suppliers will compete for the right to serve a portion of aggregate customer

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load rather than specific customers. The estimated annual load for these customers, 14.7 billion cubic feet (Bcf), will be divided into three tranches and no one supplier will be allowed to acquire more than one tranche. DEO notes that, because the SSO auction will be conducted for wholesale supplies and customers will not be assigned, the results of the SSO auction will serve as the proxy for the value of wholesale commodity service over the September 1, 2008, to March 31, 2010, period (DEO Ex. 2 at 6 and 8).

DEO further explains that, for the SCO auction, suppliers will compete for the right to service the load of tranches which are comprised of randomly assigned groups of customers and are designed to yield similar weather-normalized annual volumes in the aggregate. There will be nine tranches of choice-eligible customers in the SCO auction. Each tranche will be comprised of approximately 3.8 Bcf of annualized load for 30,000 residential and 2,600 non-residential customers. The SCO auction will begin under a descending clock format. The bidders in the SCO auction must be certified CRNGS providers. The bidders may bid on multiple tranches up to a three-tranche limit. DEO goes on to state that a single supplier can be awarded bids in both the SSO auction and the SCO auction (DEO Ex. 2 at 6-7).

DEO further explains that the SCO auction will use the results of the SSO wholesale supply auction as the floor price. If the SCO auction concludes at a price above the SSO wholesale auction result, the SCO auction will terminate in accordance with pre-established end-of-auction rules. However, if the going price in the SCO retail auction falls to the SSO wholesale auction price and the market remains over-subscribed,<sup>3</sup> the SCO auction will transition into another format, namely an ascending auction format. In the ascending auction format, DEO states that the suppliers will bid for the right to serve tranches of customers at the price established in the SSO wholesale supply auction. The winning suppliers in the ascending auction will make a one-time payment to DEO based on the results of the auction and DEO will return those funds to the customers by crediting amounts that would otherwise be recovered through the Transportation Migration Rider - Part B. Even though DEO will purchase and resell the SCO supplies, DEO expects that the bidding in the SCO auction will reflect the incremental value and that the winning bidders will receive the benefit of serving specific customers to whom they can market other offers and services (DEO Ex. 2 at 7).

Subsequent to the initial service period in phase 2, which is from September 1, 2008, to March 31, 2010, DEO explains that it will conduct a similar auction for the SSO and SCO services to be provided from April 1, 2010, to March 31, 2011. DEO expects that this latter auction will be the final auction and that, once this term expires, choice-eligible customers will be required to enter into a direct retail relationship with a supplier or aggregator to

<sup>3</sup> DEO explains that it will consider the market over-subscribed when suppliers have indicated a willingness to serve more than the nine tranches required to serve the entire SCO market at that price (DEO Ex. 2 at 7).

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receive commodity service. DEO further explains that it will continue to conduct SSO auctions after phase 2 to secure wholesale supply to serve PIPP and choice-ineligible customers (DEO Ex. 2 at 5).

D. Capacity and Operational Issues

As in phase 1, in phase 2, DEO states that it will assign on-system storage rights to the suppliers awarded tranches in both the SSO and the SCO auctions. Since the cost of DEO's storage function will continue to be included in the base transportation rates, DEO points out that there will be no incremental cost to the suppliers for the storage rights. DEO proposes that it will continue to retain only that portion of on-system and contract storage needed to provide operational balancing (DEO Ex. 2 at 10).

With regard to capacity, DEO expounds that, due to the small volumes needed for DEO's isolated markets in Woodsfield and Powhatan Point, Ohio, DEO will release the associated capacity only to SSO providers and will require them to nominate volumes to those delivery points based on targets provided by DEO. Furthermore, in order to ensure adequate deliveries to DEO's Ashtabula, Ohio, market areas, DEO will require energy choice, SSO, and SCO suppliers to accept a release of the associated capacity needed to serve that area on a pro rata basis and all of these suppliers will be obligated to nominate volumes through those pipelines based on targets provided by DEO. As for the capacity for DEO's other areas, DEO explains that, at the inception of phase 2, such capacity will be made available to energy choice, SSO, and SCO suppliers on a pro rata basis. According to DEO, the pro rata calculations will be performed separately for its east Ohio and west Ohio systems because they are served by different upstream pipelines. SSO suppliers will be required to accept pro rata releases and will be required to demonstrate that they have sufficient comparable capacity to provide one hundred percent of design day customer requirements. However, energy choice and SCO suppliers will have the option of accepting the capacity (DEO Ex. 2 at 10).

E. Cost Recovery

DEO intends that the Transportation Migration Rider - Part B be utilized to recover the costs for phase 2. According to DEO, the Transportation Migration Rider - Part B was originally approved by the Commission in *In the Matter of the Application of The East Ohio Gas Company for Authority to Implement Two New Transportation Services, for Approval of a New Pooling Agreement, and for Approval of a Revised Transportation Migration Rider*, Case No 96-1019-GA-ATA, in order to recover costs associated with DEO's energy choice program (DEO Ex 15, Friscic at 2). Subsequently, DEO avers that, in 05-474, the Commission approved the Transportation Migration Rider - Part B to be the tracker designed to recover the costs for phase 1 of DEO's exit from the merchant function. DEO proposes to keep the cost recovery procedures approved in phase 1 intact and continue this rider in

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phase 2 in order to recover all operational balancing costs, as well as other costs formerly handled through the GCR mechanism. According to DEO, the rate, which will be updated on a quarterly basis, will reflect:

- (1) All costs associated with maintaining operational balancing inventories, including contract storage, the withdrawal season firm transportation needed to support firm withdrawals, the injection season firm transportation needed to support firm injections, and carrying cost on the inventory previously recovered through the GCR;
- (2) The cost of purchased gas, net of storage activity, incurred by DEO as a result of the operational balancing requirements, as well as any differences between the actual unaccounted-for gas level and the volume provided through the fuel retention charged to transportation customers;
- (3) The net effect of any receipts of disbursements associated with cash-outs, on-system or contract storage inventory that may be required to address operational issues or tariff requirements;
- (4) The crediting of contract storage costs from Transportation Migration Rider - Part A and Volume Banking Service charges that are billed to non-energy choice transportation customers, as well as migration-related charges included in seasonal storage service rates;
- (5) Any difference between the amount billed for provider of last resort (POLR) service and the actual cost incurred for the volumes purchased or withdrawn from storage; and
- (6) Associated excise tax.

(DEO Ex. 2 at 11). DEO clarifies that the Transportation Migration Rider - Part B for phase 2 does not include a component for unrecovered gas costs because DEO removed the unrecovered gas cost credit from the rider in March 2007 due to the fact that the over-recovery of prior gas costs had been fully passed back to customers at that point (DEO Ex. 15, Friscic at 4). DEO goes on to explain that the accounting of the costs included in the rate and the Transportation Migration Rider - Part B recoveries will be reviewed as part of an annual financial audit that will be docketed in this case (DEO Ex. 2 at 11).

With regard to the fuel retention rate, DEO states that this rate will be updated using DEO's existing methodology, prior to conducting the auction in phase 2. DEO proposes to put this updated rate into effect in September 2008 and to have it serve as the

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standard fuel retention rate that DEO will charge to energy choice, traditional transportation service, SSO, and SCO commodity service providers. DEO notes that it will update the fuel retention rate annually and any change will be implemented each April 1<sup>st</sup> along with the Btu conversion factors applied to interstate deliveries and Ohio production. DEO proposes that the extent to which the fuel retention rate over- or under-collects the actual retention requirement should be reflected in DEO's monthly gas purchase and net storage activity. Further, DEO explains that it proposes to debit or credit the Transportation Migration Rider - Part B with the combined cost of any over- or under-collection of fuel retention and maintaining operational balancing inventories. Also, DEO states that any changes in the storage migration adjustment will be reflected in the annual update of the fuel retention rate (DEO Ex. 2 at 11-12).

Pursuant to the stipulation approved in 05-474, DEO explains that it agreed to fund consumer education and other program costs related to the implementation of phases 1 and 2, up to \$14 million. DEO notes that this program cost fee was discontinued in phase 1, once the \$14 million funding level was reached. Therefore, DEO submits that any consumer education or other program implementation costs over and above the \$14 million will be deferred for recovery in a future rate case. Finally, DEO states that any program-related expenditures will be reviewed as part of the annual financial audit that will be docketed in this case (DEO Ex. 2 at 12-13).

#### F. Provider of Last Resort

In its application, DEO offers that, as in phase 1, DEO will be the POLR during phase 2, in case of a default by an energy choice, SSO, or SCO supplier. If a supplier defaults, DEO says that it will obtain supplies, as needed, sequentially from the following sources: non-defaulting suppliers; storage assigned to the defaulting supplier, which will revert to DEO upon default; operational balancing capacity; and incremental purchases via the city gate. DEO represents that it will provide POLR service to a customer for the remainder of the billing month in which the default occurs and for one additional billing month thereafter and that the customer will continue to be billed the standard SSO or SCO rate, regardless of the supply source used to cover the delivery shortfalls created by the default. According to DEO, the customer will be free to select another supplier as soon as possible after the default occurs. If the customer does not select another supplier or does not have the enrollment submitted in time, the customer will be billed at the standard SSO rate. DEO further proposes that, in the event of a default by an SSO supplier, the tranche that the defaulting supplier previously served will be divided between the two remaining non-defaulting SSO suppliers. If one or both of the non-defaulting suppliers are unable or unwilling to accept the tranche of the defaulting supplier, then DEO states that it will offer the tranche to other suppliers or hold another auction to acquire the needed supplies (DEO Ex. 2 at 13-15).

G. Stakeholder Process

In its application, DEO commits to continue the stakeholder group process that was established in phase 1. DEO states that this process will permit the group to assess the performance of phase 2 and address consumer education and other issues that might arise during the phase 2 pilot. DEO notes that, while it is not obligated to implement the recommendation of the stakeholder group, it will nevertheless endeavor to achieve consensus amongst the group participants and will consider, in good faith, the recommendations of the group (DEO Ex. 2 at 16).

IV. SUMMARY OF THE STIPULATION

As mentioned earlier, at the hearing in this matter on April 10, 2008, DEO submitted a stipulation. The stipulation was executed by DEO, staff, and all of the intervenors, with the exception of IEU-Ohio and OP&E. By letter filed in this docket on April 22, 2008, OP&E stated that it has agreed not to oppose the stipulation. The stipulating parties agree, *inter alia*, that:

- (1) Certain documents should be admitted as exhibits, with the understanding that each exhibit should be amended in accordance with the stipulation. Those documents are: Joint Exhibit 2 attached to the stipulation, which is a matrix illustrating the commodity service options that will be available to customers; DEO Exhibit 1, which is the application filed on December 28, 2007; DEO Exhibits 2 through 6, which were attached to the application and labeled appendices A through E; DEO Exhibits 7 through 14, which were attached to the application and labeled appendices (C)(1) through (C)(8); and DEO Exhibit 15, which is the testimony of Jeffery Murphy and Vicki Friscic.
- (2) DEO will conduct an SSO auction utilizing a descending clock approach to secure natural gas supplies for a seven-month term from September 1, 2008, through March 31, 2009. It is the intent of this SSO auction to effectively extend DEO's phase 1 SSO period through March 31, 2009, with certain operational modifications detailed in the stipulation. Supplies procured in the auction will be used to meet the aggregate commodity service needs of mercantile and non-mercantile sales customers served under DEO's general sales service and large volume general sales rate schedules, including residential PIPP customers. Mercantile and non-mercantile customers served under other rate schedules will not be included in the

aggregate load to be auctioned and will continue to be served by their suppliers.

- (3) On or before February 15, 2009, DEO will conduct the following two auctions to secure natural gas supplies for the one-year term from April 1, 2009, to March 31, 2010: a wholesale SSO auction for PIPP, choice-ineligible, and transitional customers and a retail SCO auction for choice-eligible SSO customers. The retail SCO auction will employ the structure described in DEO Exhibit 2 attached to the application, with the following changes in the nature of the SSO and SCO commodity service:

(a) SCO service will be provided as an energy choice commodity service rather than DEO-provided sales service and will be subject to applicable sales and use tax. DEO will file an application seeking Commission approval to amend its tariff to include terms and conditions that the signatory parties develop regarding how the SCO commodity service will be provided in conjunction with DEO's energy choice transportation service or large volume energy choice transportation service. As a result, DEO will withdraw its proposed designated supplier service and large volume designated supplier service rate schedules.

(b) As illustrated in Joint Exhibit 2, the following commodity service options will be available to customers after the initial movement of choice-eligible sales customers to SCO service through the retail SCO auction. These customers may receive SSO commodity service for up to two consecutive billing periods.

(i) New choice-eligible customers will receive at least one SSO bill, after which they may enroll with an energy choice supplier or participate in an opt-out governmental aggregation program. If they do not do so, after their

second SSO bill, they will be assigned to an energy choice supplier at the price established in the retail SCO auction.

- (ii) Choice-eligible customers whose opt-out governmental aggregation program is terminated may enroll with an energy choice supplier or participate in a subsequent opt-out governmental aggregation program. If they do not do so, after their second SSO bill, they will be assigned to an energy choice supplier at the price established in the retail SCO auction.
- (iii) Choice-eligible customers whose energy choice or opt-out governmental aggregation contract expires without renewal may enroll with an energy choice supplier, participate in an opt-out governmental aggregation program, or elect to be assigned to an energy choice supplier at the price established in the SCO auction. If they do not do so, after their second SSO bill, they will be assigned to an energy choice supplier at the supplier's posted monthly variable rate under the terms of the SCO service in DEO's tariff.

All choice-eligible, SSO, SCO, and monthly variable rate commodity service customers are eligible to be enrolled in opt-out governmental aggregation programs.

- (4) In February 2010, DEO will conduct another wholesale auction and retail SCO auction to secure supplies for the one-year term from April 1, 2010, to March 31, 2011, using the structure described in paragraphs (2) and (3) above for the initial SSO

and SCO auctions, respectively. SSO gas supplies will be procured on a wholesale basis for PIPP and other choice-ineligible customers. The February 2010 SCO retail auction will be for customers receiving SCO service and choice-eligible SSO customers. Other customers, including those assigned to an energy choice supplier at the supplier's monthly variable rate, will not be included in the SCO auction.

- (5) DEO 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-choice 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.
- (7) DEO Exhibit 2, which contains the capacity and operational provisions, will be changed such that:
  - (a) From October 1, 2008, through April 30, 2010, DEO will, on a pilot basis, change the period over which it requires comparable capacity to be demonstrated pursuant to section 6.1 of its tariff, general terms and conditions of energy choice pooling service, from October through April to November through March. DEO reserves the right to revert to the October through April assessment period, after consultation with the staff and OCC.
  - (b) Sections 4.3 and 4.5 of the general terms and conditions in DEO's tariff will be revised to indicate that capacity released by DEO will be recallable upon a material decrease in a supplier's aggregate end user demand rather than energy choice market share. Any capacity recalled will be available to all SSO, SCO, and energy choice suppliers.

- (c) The standard fuel retention rate effective September 2008 will be 3.7 percent and will be reviewed as part of the annual audit of DEO's Transportation Mitigation Rider - Part B. This rate will serve as the standard system-wide fuel retention rate charged to energy choice, traditional transportation service, SSO, and SCO commodity service providers.
- (8) The stakeholders will meet regularly to evaluate the SSO and SCO service and discuss the process by which to achieve potential transition to a full-choice commodity service market.

(Joint Ex. 1 at 1-8).

#### V. CONSIDERATION OF THE STIPULATION AND GOVERNING STATUTES

Rule 4901-1-30, O.A.C., authorizes parties to Commission proceedings to enter into a stipulation. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. See, *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, at 125 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 2004); *Ohio Edison Co.*, Case No. 91-698-EL-FOR *et al.* (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used 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?

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The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559 (1994) (citing *Consumers' Counsel, supra*, at 126). The court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission (*Id.*).

A. Serious Bargaining

At the hearing held on April 10, 2008, Steve Puican, Co-Chief of the Rates and Tariffs/Energy and Water Division in the Commission's Utilities Department, testified in support of the stipulation. Mr. Puican testified that the stipulation was the product of serious bargaining among capable and knowledgeable parties, stating that the participants have many decades of cumulative experience in utility matters. The witness submitted that the discussions involved a diverse group of participants, including staff, DEO, OCC, OP&E, NOPEC, and representatives of industrial, transportation customers (Tr. at 13).

The Commission notes that the signatory parties represent a wide diversity of interests including the utility, residential consumers, marketers, and industrial consumers, and the staff. Moreover, no party opposes the stipulation and no party has argued that the stipulation was not the result of serious bargaining. Further, we are aware that the signatory parties routinely participate in complex Commission proceedings and that counsel for the signatory parties have extensive experience practicing before the Commission in utility matters. On the basis of evidence before us, we find that the stipulation appears to be the product of serious bargaining among capable, knowledgeable parties.

B. Benefit to Ratepayers and the Public Interest

Mr. Puican also stated that he believes the stipulation, as a whole, benefits DEO's ratepayers and the public interest, noting that the SSO process that has been in place for the last 18 months has provided benefits to customers. According to the witness, there is substantial evidence that the customers who are receiving the SSO service are paying a lower rate than they would be paying under a GCR. Mr. Puican offered that he believes that the move from a wholesale auction to a retail auction has the potential to provide even greater benefits and savings. For example, he believes that the auction participants will receive addition value in customers actually being allocated to suppliers through the auction, as opposed to being allocated as a generic load. Furthermore, Mr. Puican explained that the public interest is protected because the Commission retains the authority to reject an auction result if it believes that it is not in the public interest or that it will not benefit customers. (Tr. at 13-14).

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We find that the settlement, as a package, benefits ratepayers and the public interest. Upon consideration of the application, as modified by the stipulation, and the testimony provided by Mr. Puican, the Commission believes that the public interest will be served by approval of the stipulation. The safeguards afforded the Commission, some of which were delineated by Mr. Puican in his testimony, provide us assurance that the public welfare will be protected.

C. Violation of Important Regulatory Principles or Practices

Mr. Puican advocated that the stipulation does not violate any important regulatory principle. Rather, he stated that the stipulation is really just a continuation and enhancement to DEO's existing SSO process and just moves it from wholesale to retail. Furthermore, the witness reiterates that, even with the new retail regime, the Commission retains the ability to revert to the GCR service any time the Commission believes that the auction procedures are no longer serving the public interest (Tr. at 14-15).

In its application, DEO avers that its proposal is in compliance with the state's natural gas policy contained in Section 4929.02, Revised Code. DEO notes that, in the order in 05-474 approving DEO's phase 1 to exit the merchant function, the Commission found that DEO's plan supported and fostered the policy goals specified in Section 4929.02, Revised Code. Further, DEO points out that the Ohio Supreme Court affirmed the Commission's order in 05-474. See *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3rd 208 (2007). According to DEO, nothing has materially changed in the current application requesting approval of phase 2 to exit the merchant function. DEO submits that this application preserves the features that justified approval of phase 1 and adds new elements that further advance the natural gas policy of the state of Ohio. DEO gives a number of bases for this conclusion. First, DEO maintains that the application ensures the availability of adequate and reliable natural gas service due to the fact that DEO will continue to act as the POLR should a supplier default. DEO will also require suppliers to show that they possess capacity comparable to DEO and suppliers will be required to adhere to the same reliability standards as DEO. In addition, DEO submits that the application supports the availability of reasonably priced gas. According to DEO, the provision of a market-based auction price prevents the confusion and market distortion that is created by the unrecovered gas cost portion of the GCR mechanism which hindered the development of the competitive market. Further, DEO expects that the suppliers and customers will benefit in phase 2 because the auction process will allow the suppliers to avoid the customer acquisition costs, thus further reducing customer costs (DEO Ex. 7).

DEO further submits that its proposal for phase 2 will expand consumer options, provide additional choices for the supply of natural gas for residential consumers, promote effective consumer choice of gas supplies, and provide consumer education in

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accordance with Section 4929.02, Revised Code. DEO explains that, by continuing to enable consumers to make apples-to-apples comparisons, a level playing field will be maintained and marketers will have incentives to offer competitive prices, options, and value-added services. According to DEO, it is also expected that the transparency of having the supplier's name on the bill will facilitate the selection of suppliers by choice-eligible customers who have not yet entered the choice program. In addition, DEO explains that additional choices are available for residential customers because the proposal allows SCO customers to leave the SCO service without penalty at any time by enrolling with an individual supplier or in a governmental aggregation program. Finally, DEO provides that, under its proposal, there will be customer education concerning the impact of phase 2 on customers and that DEO will work with stakeholders concerning customer education and other issues to ensure that customers understand their options (DEO Ex. 7).

DEO offers that, in accordance with Section 4929.02, Revised Code, this proposal encourages innovation and market access for the supply- and demand-side natural gas goods and services. DEO explains that, by promoting market-based pricing and preventing price distortions, price-induced conservation will be facilitated and the demand for providers of conservation and energy efficiency services will be increased. In addition, DEO avers that its proposal invites flexible regulatory treatment and fosters transactions between willing buyers and willing sellers. DEO maintains that the application will continue to prevent subsidies that existed under the GCR. DEO submits that, because of customer migration into and out of the energy choice program, the GCR prevented the matching up of consumers who used gas, which gave rise to true-ups, with consumers who paid the true-ups. According to DEO, continued elimination of the GCR promotes competition and avoids these GCR-related subsidies. Finally, DEO posits that this proposal will not affect DEO's rates for regulated service or DEO's financial capabilities and that it will not hinder Ohio's competitiveness in the global economy (DEO Ex. 7).

DEO maintains that there is effective competition and that customers have reasonably available alternatives for commodity sales service in its service area in accordance with Section 4929.04, Revised Code. DEO emphasizes that there are 41 suppliers offering commodity service to DEO's traditional transportation market and 17 suppliers that are participating in DEO's energy choice program. According to DEO, these suppliers possess more than enough capacity to serve DEO's entire choice-eligible load. Furthermore, DEO submits that the commodity sales service provided by these suppliers is functionally equivalent to the service provided by DEO. It is DEO's contention that the number of suppliers competing for market share ensures that the offers must be made at competitive prices, terms, and conditions. DEO points to the Commission's apples-to-apples chart for DEO as evidence that there is a wide range of prices, terms, and

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conditions available for commodity sales in DEO's service area (DEO Ex. 15, Murphy at 8-9).

The Commission finds that the stipulation does not violate any important regulatory principles or practices. As summarized above, DEO explains at length in its application how it believes this application meets the policy requirements established in Chapter 4929, Revised Code. Upon review of DEO's arguments, the Commission agrees that this application, as modified by the stipulation, complies with and supports the policy of the state of Ohio. Furthermore, the Commission notes that DEO has complied with all of the procedural requirements for this type of case and, in fact, no party has argued that DEO has violated any statutory or rule requirements.

### III. CONCLUSION

The Commission has reviewed the stipulation submitted in this case and has determined that it should be approved in its entirety. By virtue of that approval, DEO Exhibits 1 through 15, as well as Joint Exhibit 2, as they were identified in the stipulation, should be admitted into the record with the understanding that each such exhibit is amended in accordance with the stipulation.

Upon review of this application, the stipulation, and the testimony on record, it is the Commission's conclusion that DEO has met the burden of proof set forth in Section 4929.04, Revised Code. We further find 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. DEO is, therefore, authorized to proceed with phase 2. In granting this authority, the Commission reserves all authority to exercise oversight during the process, including the ability to order any studies or reviews of the company or plan as it deems appropriate. We also specifically reserve the right to reject an auction result and the ability to, at any time during phase 2, require that DEO return to the GCR rate in the event that we believe it is no longer in the best interest to continue the SSO or SCO services. Therefore, in accordance with Rule 4901:1-19-10(A), O.A.C., DEO shall file a notice of intent to implement phase 2, along with its proposed tariffs for Commission approval, within 30 days of this order, or 20 days of any decision on rehearing, whichever is later. The Commission recognizes that these tariffs will need to be updated once the auction has been completed.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) DEO is a natural gas company as defined by Section 4905.03(A)(6), Revised Code, and a public utility as defined by Section 4905.02, Revised Code, and, as such, is subject to the

jurisdiction of the Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code.

- (2) On December 28, 2007, DEO filed an application, pursuant to Section 4929.04, Revised Code, for approval of phase 2 of its plan to exit the merchant function and requesting a general exemption of certain natural gas commodity sales services or ancillary services contained in Chapters 4905, 4909, 4933, and 4935, Revised Code.
- (3) By entry issued January 30, 2008, the Commission determined that DEO's application complied with the filing requirements of Rule 4901:1-19-04, O.A.C., and concluded that the application filed by DEO on December 28, 2007, should be accepted as of the filing date.
- (4) Comments were due by February 11, 2008. No one filed comments in this matter.
- (5) Intervention was granted to the OCC, OPAB, Integrys, Gas Marketers, MXEnergy, NEM, NOPEC, Dominion Retail, and IEU-Ohio.
- (6) A technical conference was held on February 12, 2008.
- (7) Local hearings were held on April 1, 2008, in Youngstown, Ohio, and on April 3, 2008, in Cleveland and Canton, Ohio. There was one public witness who testified in Youngstown, Ohio, four public witnesses in Cleveland, Ohio, and one public witness in Canton, Ohio.
- (8) The evidentiary hearing was held on April 7, and 10, 2008.
- (9) At the April 10, 2008, hearing, DEO submitted a stipulation that was executed by DEO, staff, and all of the intervenors, with the exception of IEU-Ohio and OPAB. By letter filed in this docket on April 22, 2008, OPAB stated that it has agreed not to oppose the stipulation. No party testified against, or otherwise objected to, the stipulation.
- (10) The Commission finds that all of the components of the three-pronged test have been met. Therefore, the stipulation presented in this proceeding should be approved in its entirety. By virtue of that approval, DEO Exhibits 1 through 15, as well

as Joint Exhibit 2, as they were identified in the stipulation, should be admitted into the record with the understanding that each such exhibit is amended in accordance with the stipulation.

ORDER:

It is, therefore,

ORDERED, That the stipulation submitted in this proceeding be approved in its entirety. By virtue of that approval, DEO Exhibits 1 through 15, as well as Joint Exhibit 2, as amended by the stipulation, are admitted into the record. It is, further,

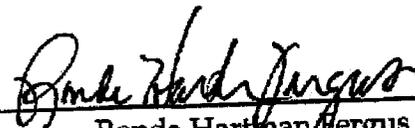
ORDERED, That DEO shall file a notice of intent to implement phase 2, along with its proposed tariffs, within 30 days of this order, or 20 days of any decision on rehearing, whichever is later. It is, further,

ORDERED, That a copy of this opinion and order be served upon each party of record and all other interested persons of record in these proceedings.

THE PUBLIC UTILITIES COMMISSION OF OHIO

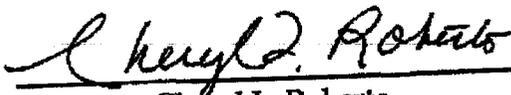
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Alan R. Schriber, Chairman

  
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Paul A. Centolella

  
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Ronda Hartman Ferguson

JUN 18 2008

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Valerie A. Lemmie

  
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Cheryl L. Roberto

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Entered in the Journal

  
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Renee J. Jenkins  
Secretary

Renee J. Jenkins  
Secretary

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio )  
Power Company and Columbus Southern ) Case No. 10-2376-EL-UNC  
Power Company for Authority to Merge )  
and Related Approvals. )

In the Matter of the Application of )  
Columbus Southern Power Company and )  
Ohio Power Company for Authority to ) Case No. 11-346-EL-SSO  
Establish a Standard Service Offer Pursuant ) Case No. 11-348-EL-SSO  
to Section 4928.143, Revised Code, in the )  
Form of an Electric Security Plan. )

In the Matter of the Application of )  
Columbus Southern Power Company and ) Case No. 11-349-EL-AAM  
Ohio Power Company for Approval of ) Case No. 11-350-EL-AAM  
Certain Accounting Authority. )

In the Matter of the Application of )  
Columbus Southern Power Company and ) Case No. 10-343-EL-ATA  
Ohio Power Company to Amend their ) Case No. 10-344-EL-ATA  
Emergency Curtailment Service Riders. )

In the Matter of the Commission Review of )  
the Capacity Charges of Ohio Power ) Case No. 10-2929-EL-UNC  
Company and Columbus Southern Power )  
Company. )

In the Matter of the Application of )  
Columbus Southern Power Company and )  
Ohio Power Company for Approval of ) Case No. 11-4920-EL-RDR  
Mechanisms to Recover Deferred Fuel ) Case No. 11-4921-EL-RDR  
Costs Ordered Under Section 4928.144, )  
Revised Code. )

ENTRY ON REHEARING

The Commission finds:

- (1) On January 27, 2011, Columbus Southern Power Company's (CSP) and Ohio Power Company's (OP) (jointly, AEP-Ohio or

the Companies) filed an application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code, in Case Nos. 11-346-EL-SSO, 11-348-EL-SSO, 11-349-EL-AAM, and 11-350-EL-AAM. This original application was for approval of an electric security plan (ESP 2) in accordance with Section 4928.143, Revised Code. As filed, AEP-Ohio's SSO application for ESP 2 would commence on January 1, 2012, and continue through May 31, 2014.

- (2) On September 7, 2011, numerous parties (Signatory Parties)<sup>1</sup> to the proceedings filed a Joint Stipulation and Recommendation (Stipulation) proposing to resolve the issues raised in AEP-Ohio's ESP 2 cases and related matters pending before the Commission in several other AEP-Ohio cases which include: an emergency curtailment proceeding in Case Nos. 10-343-EL-ATA and 10-344-EL-ATA (Emergency Curtailment Cases); a request for the merger of CSP with and into OP in Case No. 10-2376-EL-UNC (Merger Case); a determination of the capacity charge that the Companies will assess on competitive retail electric service (CRES) providers in Case No. 10-2929-EL-UNC (Capacity Charges Case); and a request for approval of a mechanism to recover deferred fuel costs and accounting treatment in Case Nos. 11-4920-EL-RDR and 11-4921-EL-RDR (Fuel Deferral Cases). Pursuant to entry issued September 16, 2011, the hearing in the ESP 2 case was consolidated with the above listed cases for the sole purpose of considering the Stipulation.
- (3) On December 14, 2011, the Commission issued its Opinion and Order in this proceeding, finding that the Stipulation, as modified by the order, should be adopted and approved. On December 22, 2011, AEP-Ohio filed its compliance tariffs and, on December 29, 2011, AEP-Ohio filed its revised detailed

<sup>1</sup> The Signatory Parties to the Stipulation are: AEP-Ohio, Staff, Ohio Energy Group, Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc., Ohio Hospital Association (OHA), Ohio Manufacturers' Association Energy Group (OMAEG), The Kroger Company, the city of Hilliard, the city of Grove City, Association of Independent Colleges and Universities of Ohio, Exelon Generation Company, LLC, Duke Energy Retail Sales, LLC, AEP Retail Energy Partners LLC (AEP Retail), Wal-Mart Stores East, LP and Sam's East, Inc., Retail Energy Supply Association (RESA), Paulding Wind Farm II LLC, Ohio Environmental Council, Environmental Law and Policy Center, EnerNOC, Inc., Natural Resources Defense Council, and PJM Power Providers Group.

implementation plan (DIP), as modified by the Opinion and Order.

- (4) Pursuant to Section 4903.10, Revised Code, any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.
- (5) On January 13, 2012, AEP-Ohio, Ormet Primary Aluminum Corporation (Ormet), Industrial Energy Users-Ohio (IEU-Ohio), Retail Energy Supply Association (RESA), OMA Energy Group (OMAEG), Ohio Hospital Association (OHA), FirstEnergy Solutions Corp. (FES), and the Ohio Consumers' Counsel and Appalachian Peace and Justice Network (OCC/APJN) filed applications for rehearing. Memoranda contra the various applications for rehearing were filed by the Ohio Environmental Council (OEC), FES, OCC/APJN, IEU-Ohio, OMAEG, RESA, and AEP-Ohio on January 23, 2012.
- (6) On January 23, 2012, the Commission issued an entry that provided a number of clarifications regarding its December 14, 2011, Opinion and Order (Clarification Entry).
- (7) By entry dated February 1, 2012, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing of the ESP 2 Opinion and Order.
- (8) On February 10, 2012, AEP-Ohio filed an application for rehearing of the Commission's Clarification Entry, arguing among other things that the Clarification Entry exceeds the Commission's jurisdiction and violates the statutory rehearing process by expanding the Opinion and Order outside the statutory rehearing process. Further, AEP-Ohio argues the Clarification Entry is not supported by the record, forces AEP-Ohio to involuntarily provide a below-cost subsidy, and unreasonably retreats from the RPM-priced capacity set-aside limitations without an explanation. In addition, AEP-Ohio asserts that the Clarification Entry unreasonably imposes long-term obligations on AEP-Ohio while preserving the option to further modify the RPM set-aside levels in the future. Memoranda contra the application were filed by FES on February 17, 2012, IEU-Ohio on February 17, 2012, as revised

on February 21, 2012, and by Ormet and OCC/APJN on February 21, 2012. Memoranda in response to AEP-Ohio's second application for rehearing were filed by OEG and RESA on February 21, 2012.

- (9) On February 17, 2012, IEU-Ohio filed an application for rehearing of the Commission's Clarification Entry, arguing the entry was unreasonable by not allowing all governmental aggregation programs that complete the necessary process by December 31, 2012, to have access to RPM-priced capacity. IEU-Ohio also asserts that the December 31, 2012, deadline to complete the government aggregation process is unreasonable. AEP-Ohio filed a memoranda contra IEU-Ohio's application for rehearing on February 21, 2012.
- (10) In this Entry on Rehearing, the Commission has reviewed and considered all of the arguments on rehearing regarding the ESP 2 Order as well as the Clarification Entry. As discussed below, upon review of the applications for rehearing, the Commission has determined that the Stipulation, as a package, does not benefit ratepayers and the public interest and, thus, does not satisfy our three-part test for the consideration of stipulations. Accordingly, the Commission will reject the Stipulation. Further, the Commission notes that any arguments on rehearing not specifically discussed herein have been thoroughly and adequately considered by the Commission but are moot in light of our rejection of the Stipulation for the reasons stated below.
- (11) FES alleges the Commission unreasonably failed to modify the Stipulation to impose specific conditions on the Companies' corporate separation and subsequent pool termination. FES proposes that the Commission require AEP-Ohio to provide more detail regarding what it expects from AEP-Ohio in future proceedings involving corporate separation and pool termination. FES also requests that the Commission require AEP-Ohio to provide all details in the corporate separation case regarding the corporate separation plan, including the fair market and book value, and an explanation of how fair market value was determined, for of all property that will be transferred. FES suggests the commission impose a penalty in the event that AEP-Ohio fails to achieve corporate separation and should encourage AEP-Ohio to be more diligent in

completing its corporate separation and pool termination. IEU-Ohio believes the Commission's generation asset divestiture is unlawful in that the transfer of generation assets was prematurely approved without determining that the requirements contained in Section 4928.17, Revised Code, were met.

- (12) AEP-Ohio responds that the proposed modifications would add additional confusion to the corporate separation issue, and would take an extensive amount of time.
- (13) In its application for rehearing, AEP-Ohio argues that the Commission's corporate separation modification is unlawful and unreasonable in that it applies Section 4928.17, Revised Code, and Chapter 4901:1-37, O.A.C., in an inconsistent manner with the corporate separation approved by the Commission in the Duke ESP proceeding. AEP-Ohio claims the Opinion and Order had discriminatory impact on AEP-Ohio. As a result, AEP-Ohio argues that the modification violates state policy of ensuring effective competition under Sections 4928.17, 4928.06, and 4928.02(H), Revised Code.
- (14) FES challenges AEP-Ohio's arguments, noting the Signatory Parties provided no details on the generation asset transfer, and the Commission properly determined that additional time was necessary. FES notes that while AEP-Ohio claims it is receiving discriminatory treatment as compared to the Commission's ruling on Duke's corporate separation, the Stipulations in the Duke ESP case and this case are materially different, as evidenced by the extensive amount of detail Duke provided in its stipulation as compared to AEP-Ohio's Stipulation.

OCC/APJN also oppose AEP-Ohio's request for rehearing, explaining that the Commission's decision to take additional time was reasonable and in compliance with its statutory obligations. OCC/APJN contend that AEP-Ohio's arguments about inconsistent treatment are not ripe for Commission consideration. Further, even if the arguments were ripe for consideration, OCC/APJN point out that the Commission is not statutorily obligated to handle each corporate separation application in the same manner.

IEU-Ohio explains that the differences between the Duke and AEP-Ohio stipulations do not support AEP-Ohio's assertion that corporate separation should be approved through rehearing. IEU-Ohio points out that the Duke proceeding was resolved through an unopposed ESP stipulation, while this proceeding was contested, as were the waiver requests filed by AEP-Ohio. Further, IEU-Ohio states that the Companies have failed to demonstrate how the Commission's decision to provide further review of the corporate separation will injure the public interest, and assert that it unnecessary for the Commission to rush its judgment on the corporate separation proceedings.

- (15) In approving the generation asset divestiture pursuant to Section 4928.17(E), Revised Code, the Commission authorized AEP-Ohio to divest its generation assets from its noncompetitive electric distribution utility (EDU) to a separate competitive retail generation subsidiary (AEP GenCo) and directed AEP-Ohio to notify PJM that the utility intends to enter its auction process for the delivery year 2015. However, as FES correctly points out in its application for rehearing, there is significant uncertainty regarding AEP-Ohio's plan to divest its generation assets, as evidenced by AEP-Ohio's recent filings with the Federal Energy Regulation Commission (FERC)<sup>2</sup> and conflicting interpretations of the Stipulation contained in the record. Because of the contradictory testimony and FERC filings of what AEP-Ohio's responsibilities were in its generation asset divestiture, we grant FES's application for rehearing.

The Stipulation provides that upon the Commission's approval of full legal corporate separation, AEP-Ohio's transmission and distribution assets will be held by the EDU, while any generation resource rider (GRR) assets will also remain with the EDU. Regarding the transfer of generation assets, AEP-Ohio's generation, fuel, and other assets would be transferred to AEP GenCo. This transfer of generation assets includes AEP-Ohio's existing generating units and contractual

<sup>2</sup> On February 10, 2012, AEP-Ohio and other AEP operating companies made filings with FERC regarding corporate separation and the generation asset divestiture in docket numbers: EC12-71; EC12-70; EC12-69; ER12-1041, ER12-1047, 1048, 1049; ER12-1042,1043,1044, 1045, and 1046 . The Commission hereby takes administrative notice of those filings.

entitlements, as well as renewable energy purchase agreements, existing fuel-related assets and contracts, and other assets related to the generation business. (See Joint Ex. 1 at 11, AEP-Ohio Exhibit 7 at PJN-1)<sup>3</sup>. However, at the hearing, AEP witness Nelson testified that the Companies had not determined which of AEP-Ohio's existing generation assets would be bid into the RPM base residual auction. He further claimed that, while the first step would be to transfer all generation assets to AEP GenCo, there were numerous subsequent possibilities, including transferring a plant to an AEP affiliate to shore up their reserve margin or transferring the generation to a third party. In addition, Mr. Nelson explained that AEP-Ohio did not know whether all of its generating units, once transferred, would be bid into the base residual auction (Tr. V. at 690, 697-699, 751).

We note that, Mr. Nelson's testimony was presented under unique circumstances which undermine its credibility. On September 29, 2011, AEP-Ohio filed an expedited request and motion to substitute the testimony of its original witness, Richard Munczinski, with Mr. Nelson's testimony, due to an unforeseen conflict. While the substance and content between both sets of direct testimony were the same, on cross-examination Mr. Nelson testified that Mr. Munczinski was his "boss" at AEP Service Corporation, and that he had no role in the preparation of the direct testimony he was adopting (Tr. V at 681-682). Further, Mr. Nelson's testimony is inconsistent with Attachment PJN-1 to his direct testimony, which confirms that all of AEP-Ohio's existing generating units and contractual entitlements as referenced in Exhibit WAA-1 would be transferred to a newly-created AEP generation affiliate (AEP-Ohio Ex. 4). Moreover, Mr. Nelson speculated on cross-examination that there were many options available to AEP-Ohio for the disposition of its generation assets and claimed that the ultimate disposition of AEP-Ohio's generation assets was an "open question."

Mr. Nelson's testimony is contradicted by the testimony of two other Signatory Parties' witnesses. RESA witness Ringenbach

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<sup>3</sup> In AEP-Ohio Ex. 7, Mr. Nelson states that the detailed description of the generation asset divestiture is contained in exhibit REM-1, however the attached exhibit is labeled as PJN-1, which Mr. Nelson corrected on the record (Tr. V. 675-676).

testified that the "[s]tipulation calls for AEP-Ohio to provide notice to PJM by March of 2012, that it intends to end its term as a Fixed Resource Requirement (FRR) entity and bid all of its load into the next base residual auction under the RPM construct," (RESA Ex. 1 at 6). Similarly, on cross-examination, Constellation witness Fein affirmed that AEP GenCo would be required to bid all the generation it owns into the RPM base residual auction (Tr. VI at 977).

The Commission's intent in approving the generation asset divestiture was based on our understanding that AEP-Ohio would place all of its current (as of September 7, 2011) generation assets into the 2015 base residual auction, pursuant to the plain language of the Stipulation. Our intent is supported by not only the language within the Stipulation but also the testimony of two of the Signatory Parties' primary witnesses. However, AEP-Ohio's FERC filing is inconsistent with the intent of the Commission in that it fails to ensure that all generation assets currently owned by AEP-Ohio will be bid into the upcoming base residual auction.

Based upon the contradictory testimony presented by the Signatory Parties' witnesses, AEP-Ohio's witness Nelson's claim that the ultimate disposition of AEP-Ohio's generation assets was an "open question," and the fact that AEP-Ohio's FERC filing regarding divestiture is inconsistent with the Commission's intent in approving the Stipulation, the Commission finds that there are fundamental disagreements regarding important issues allegedly resolved by the Stipulation. The resolution of these issues is critical to the underlying question of whether the Stipulation benefits ratepayers and the public interest; therefore, we find, upon review of the record of this proceeding, that the Signatory Parties have not met their burden of demonstrating that the Stipulation, as a package, benefits ratepayers and the public interest as required by the second prong of our three-part test for the consideration of stipulations. Accordingly, we must reject the Stipulation. Therefore, the Commission's approval of AEP-Ohio's generation asset divestiture pursuant to Section 4928.17(E), Revised Code, is revoked.

- (16) IEU-Ohio contends that the market transition rider (MTR) does not satisfy the requirements contained within Section

4928.143(B)(2)(d), Revised Code, as the Companies did not meet their burden of showing the MTR would have the effect of stabilizing or providing rate certainty for retail electric service. IEU-Ohio claims the MTR distorts purchasing decisions of customers by lowering rates of customers more likely to shop, and raising rates for customers less likely to shop, in direct violation of state policy. Further, IEU-Ohio argues that because the MTR is being collected though a non-bypassable charge, it is essentially a generation charge that is being collected as a distribution charge. IEU-Ohio further opines that the Commission's order is unlawful and unreasonable in that AEP-Ohio will receive an additional \$24 million in revenue from the MTR without any evidence to support it, in violation of Section 4903.09, Revised Code, and fails to follow Commission precedent which requires cost-justification for generation rate increases.

FES states that, even if the MTR provides rate certainty and stability to AEP-Ohio customers, the MTR is still not justified as a non-bypassable rider, and there was insufficient evidence in the record to support the MTR. In addition, FES claims that there is no statutory basis to permit AEP-Ohio to receive an additional \$24 million in MTR revenues for 2012.

OMAEG argues in that the Commission's Order modified the shopping credit provision in a way that unreasonably fails to maximize the benefits available to GS-2 customers. In its request to further review the GS-2 shopping credit provision, OMAEG raises concerns that while some GS-2 customers may already be shopping, many may realize significant and unavoidable price increases. OMAEG recommends that along with the Commission's expansion of the shopping credit to GS-2 customers, any unused portions of the credit should be given to GS-2 customers who are currently shopping and have had distribution rate increases of thirty percent or more. OMAEG opines that it is in the public interest to allow the unused portion to be accessed by GS-2 customers with notable increases as opposed to just rolling the GS-2 credit over into the next year. OMAEG claims this will also mitigate the impact of the rate increases to the GS-2 customers and provide the necessary rate stability to ensure business retention in Ohio.

- (17) AEP-Ohio responds to IEU-Ohio, and FES, stating that the MTR is a rate design tool that is a valuable part of the Stipulation for customers by facilitating the transition from current generation rates to the market-based SSO generation service rates. AEP-Ohio asserts that IEU-Ohio's argument that the MTR is effectively a distribution charge because it is non-bypassable is flawed. AEP-Ohio argues that the MTR is clearly a generation related charge that the Commission may adopt pursuant to Section 4928.143(B)(2)(d), Revised Code. Further, AEP-Ohio argues there is more than sufficient evidence in the record to support the MTR. Specifically, AEP-Ohio points to AEP-Ohio witness Roush's testimony explaining the MTR was designed to limit changes in rates for all customer classes.
- (18) In its application for rehearing on the Commission's clarification entry, AEP-Ohio raises similar proposals to OMAEG's suggestion to re-allocate the GS-2 shopping credit, as well as other alternatives to address any rate increases for GS-2 customers. In addition to expanding eligibility for the shopping credit as OMAEG proposed, AEP-Ohio raises the possibility of earmarking funds within the Ohio Growth Fund (OGF) to mitigate the impact on the GS-2 customer rate increase. AEP-Ohio also suggests the creation of a revenue neutral phase-in of the GS-2 load factor provision (LFP) demand charge, such that the GS-2 LFP demand charge is 25 percent of the approved non-bypassable demand charge of \$3.29/kW in 2012, 50 percent in 2013, 75 percent in 2014, and 100 percent in 2015. AEP-Ohio suggests that the phase-in of the GS-2 LFP be offset by a commensurate reduction to the GS-3 and GS-4 customers LFP energy credit.
- (19) The Commission finds that rehearing should be granted with respect to the assignments of error raised by IEU-Ohio and FES. Upon review of the record of this proceeding, we find that the Signatory Parties have not demonstrated that the MTR and LFP provisions of the Stipulation promote rate certainty and stability as required by Section 4928.143.(B)(2)(d), Revised Code. We further find that the Signatory Parties have not demonstrated these provisions benefit ratepayers and the public interest as required by the second prong of our three part test for the consideration of stipulations.

At the hearing, AEP-Ohio presented testimony regarding the rate impacts of the Stipulation upon customers, including small commercial customers in the GS-2 class (AEP-Ohio Ex. 2, Exhibit DMR-5). In the Opinion and Order, the Commission recognized that these rate impacts may be significant, based upon evidence indicating that total bill impacts may, in some cases, approach 30 percent. However, the evidence in the record inadvertently failed to present a full and accurate portrayal of the actual bill impacts to be felt by customers, particularly with respect to low load factor customers who have low usage but high demand.

Due to the evidence that some commercial customers were going to receive significant total bill increases in approaching 30 percent, 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 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 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 the 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 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.

- (20) In this Entry on Rehearing, the Commission has determined, on two independent grounds, that the Stipulation submitted by the Signatory Parties does not benefit ratepayers and the public interest. Thus, we find that the Stipulation must be rejected and the application, as modified by the Stipulation, must be disapproved. Section 4928.143(C)(2)(b), Revised Code, provides that:

If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or Section 4928.142, Revised Code, respectively.

Therefore, we direct AEP-Ohio to file, no later than February 28, 2012, new proposed tariffs to continue the provisions, terms, and conditions of its previous electric security plan, including but not limited to the base generation rates as approved in ESP I, along with the current uncapped fuel costs and the environmental investment carry cost rider set at the 2011 level, as well as modifications to those rates for credits for amounts fully refunded to customers, such as the significantly excessive earnings test (SEET) credit, and an appropriate application of capacity charges under the approved state compensation mechanism established in the Capacity Charge Case.

- (21) According to the Stipulation, in the event that the Stipulation is materially modified or rejected by the Commission, this proceeding shall go forward at the procedural point at which the Stipulation was filed; therefore, AEP-Ohio should be provided an opportunity to modify or withdraw its original application for an ESP filed in this proceeding. AEP-Ohio is directed to file a notice in this docket within 30 days stating whether it is prepared to proceed on its application as filed or whether it intends to modify or withdraw such application.

Further, the attorney examiners are directed to establish a new procedural schedule consistent with AEP-Ohio's notice along with a new intervention deadline to enable interested persons who had not previously participated in this proceeding to intervene. In addition, in light of our rejection of the Stipulation, the attorney examiners are directed to establish a procedural schedule in the Capacity Charge Case.

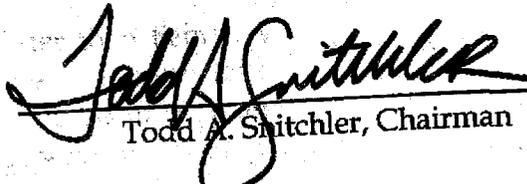
It is, therefore,

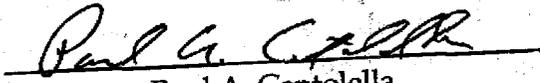
ORDERED, That the applications for rehearing filed by IEU-Ohio and FES be granted, in part, and denied, in part. Further, the applications for rehearing filed by AEP-Ohio, Ormet, OCC/APJN, RESA, OHA, and OMAEG be denied. It is, further,

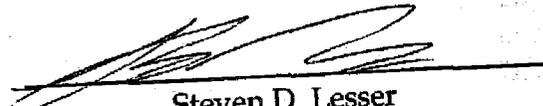
ORDERED, That the Companies shall file proposed tariffs consistent with this order by February 28, 2012. It is, further,

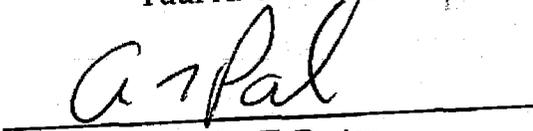
ORDERED, That a copy of this entry on rehearing be served on all parties of record.

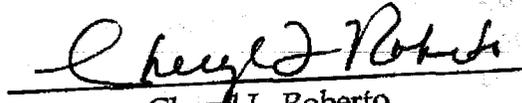
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Snitchler, Chairman

  
Paul A. Centolella

  
Steven D. Lesser

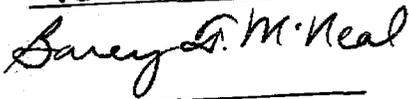
  
Andre T. Porter

  
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GAP/JJT/GNS/vrm

Entered in the Journal

**FEB 28 2012**



Barcy F. McNeal  
Secretary

## **4901:1-19-12 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.

Effective: 11/10/2006

R.C. 119.032 review dates: 08/22/2006 and 09/30/2011

Promulgated Under: 111.15

Statutory Authority: 4929.10

Rule Amplifies: 4929.04

Prior Effective Dates: 3/24/97

**000074**

9/8/2012

## **4903.09 Written opinions filed by commission in all contested cases.**

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.

Effective Date: 10-26-1953

**000075**

1/18/2013

## 4905.03 Public utility company definitions.

As used in this chapter

, any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

(A) A telephone company, when engaged in the business of transmitting telephonic messages to, from, through, or in this state;

(B) A for-hire motor carrier, when engaged in the business of transporting persons or property by motor vehicle for compensation, except when engaged in any of the operations in intrastate commerce described in divisions (B)(1) to (9) of section 4921.01 of the Revised Code, but including the carrier's agents, officers, and representatives, as well as employees responsible for hiring, supervising, training, assigning, or dispatching drivers and employees concerned with the installation, inspection, and maintenance of motor-vehicle equipment and accessories;

(C) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission;

(D) A gas company, when engaged in the business of supplying artificial gas for lighting, power, or heating purposes to consumers within this state or when engaged in the business of supplying artificial gas to gas companies or to natural gas companies within this state, but a producer engaged in supplying to one or more gas or natural gas companies, only such artificial gas as is manufactured by that producer as a by-product of some other process in which the producer is primarily engaged within this state is not thereby a gas company. All rates, rentals, tolls, schedules, charges of any kind, or agreements between any gas company and any other gas company or any natural gas company providing for the supplying of artificial gas and for compensation for the same are subject to the jurisdiction of the public utilities commission.

(E) A natural gas company, when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state. Notwithstanding the above, neither the delivery nor sale of Ohio-produced natural gas or Ohio-produced raw natural gas liquids by a producer or gatherer under a public utilities commission-ordered exemption, adopted before, as to producers, or after, as to producers or gatherers, January 1, 1996, or the delivery or sale of Ohio-produced natural gas or Ohio-produced raw natural gas liquids by a producer or gatherer of Ohio-produced natural gas or Ohio-produced raw natural gas liquids, either to a lessor under an oil and gas lease of the land on which the producer's drilling unit is located, or the grantor incident to a right-of-way or easement to the producer or gatherer, shall cause the producer or gatherer to be a natural gas company for the purposes of this section.

All rates, rentals, tolls, schedules, charges of any kind, or agreements between a natural gas company and other natural gas companies or gas companies providing for the supply of natural gas and for compensation for the same are subject to the jurisdiction of the public utilities commission. The commission, upon application made to it, may relieve any producer or gatherer of natural gas, defined

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in this section as a gas company or a natural gas company, of compliance with the obligations imposed by this chapter and Chapters 4901., 4903., 4907., 4909., 4921., and 4923. of the Revised Code, so long as the producer or gatherer is not affiliated with or under the control of a gas company or a natural gas company engaged in the transportation or distribution of natural gas, or so long as the producer or gatherer does not engage in the distribution of natural gas to consumers.

Nothing in division (E) of this section limits the authority of the commission to enforce sections 4905.90 to 4905.96 of the Revised Code.

(F) A pipe-line company, when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partly within this state, but not when engaged in the business of the transport associated with gathering lines, raw natural gas liquids, or finished product natural gas liquids;

(G) A water-works company, when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state;

(H) A heating or cooling company, when engaged in the business of supplying water, steam, or air through pipes or tubing to consumers within this state for heating or cooling purposes;

(I) A messenger company, when engaged in the business of supplying messengers for any purpose;

(J) A street railway company, when engaged in the business of operating as a common carrier, a railway, wholly or partly within this state, with one or more tracks upon, along, above, or below any public road, street, alleyway, or ground, within any municipal corporation, operated by any motive power other than steam and not a part of an interurban railroad, whether the railway is termed street, inclined-plane, elevated, or underground railway;

(K) A suburban railroad company, when engaged in the business of operating as a common carrier, whether wholly or partially within this state, a part of a street railway constructed or extended beyond the limits of a municipal corporation, and not a part of an interurban railroad;

(L) An interurban railroad company, when engaged in the business of operating a railroad, wholly or partially within this state, with one or more tracks from one municipal corporation or point in this state to another municipal corporation or point in this state, whether constructed upon the public highways or upon private rights-of-way, outside of municipal corporations, using electricity or other motive power than steam power for the transportation of passengers, packages, express matter, United States mail, baggage, and freight. Such an interurban railroad company is included in the term "railroad" as used in section 4907.02 of the Revised Code.

(M) A sewage disposal system company, when engaged in the business of sewage disposal services through pipes or tubing, and treatment works, or in a similar manner, within this state.

(C) **[As added by 129th General Assembly File No. 127, HB 487, § 101.01]**As used in this section:

(1) "Gathering lines" has the same meaning as in section 4905.90 of the Revised Code.

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(2) "Raw natural gas liquids" and "finished product natural gas liquids" have the same meanings as in section 4906.01 of the Revised Code.

Amended by 129th General Assembly File No. 125, SB 315, § 101.01, eff. 9/10/2012.

Amended by 129th General Assembly File No. 127, HB 487, § 101.01, eff. 6/11/2012.

Amended by 128th General Assembly File No. 43, SB 162, § 1, eff. 9/13/2010.

Effective Date: 01-01-2001

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1/18/2013

## 4929.01 Alternate rate plan for natural gas company definitions.

As used in this chapter:

- (A) "Alternative rate plan" means a method, alternate to the method of section 4909.15 of the Revised Code, for establishing rates and charges, under which rates and charges may be established for a commodity sales service or ancillary service that is not exempt pursuant to section 4929.04 of the Revised Code or for a distribution service. Alternative rate plans may include, but are not limited to, methods that provide adequate and reliable natural gas services and goods in this state; minimize the costs and time expended in the regulatory process; tend to assess the costs of any natural gas service or goods to the entity, service, or goods that cause such costs to be incurred; afford rate stability; promote and reward efficiency, quality of service, or cost containment by a natural gas company; provide sufficient flexibility and incentives to the natural gas industry to achieve high quality, technologically advanced, and readily available natural gas services and goods at just and reasonable rates and charges; or establish revenue decoupling mechanisms. Alternative rate plans also may include, but are not limited to, automatic adjustments based on a specified index or changes in a specified cost or costs.
- (B) "Ancillary service" means a service that is ancillary to the receipt or delivery of natural gas to consumers, including, but not limited to, storage, pooling, balancing, and transmission.
- (C) "Commodity sales service" means the sale of natural gas to consumers, exclusive of any distribution or ancillary service.
- (D) "Comparable service" means any regulated service or goods whose availability, quality, price, terms, and conditions are the same as or better than those of the services or goods that the natural gas company provides to a person with which it is affiliated or which it controls, or, as to any consumer, that the natural gas company offers to that consumer as part of a bundled service that includes both regulated and exempt services or goods.
- (E) "Consumer" means any person or association of persons purchasing, delivering, storing, or transporting, or seeking to purchase, deliver, store, or transport, natural gas, including industrial consumers, commercial consumers, and residential consumers, but not including natural gas companies.
- (F) "Distribution service" means the delivery of natural gas to a consumer at the consumer's facilities, by and through the instrumentalities and facilities of a natural gas company, regardless of the party having title to the natural gas.
- (G) "Natural gas company" means a natural gas company, as defined in section 4905.03 of the Revised Code, that is a public utility as defined in section 4905.02 of the Revised Code and excludes a retail natural gas supplier.
- (H) "Person," except as provided in division (N) of this section, has the same meaning as in section 1.59 of the Revised Code, and includes this state and any political subdivision, agency, or other

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instrumentality of this state and includes the United States and any agency or other instrumentality of the United States.

(I) "Billing or collection agent" means a fully independent agent, not affiliated with or otherwise controlled by a retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code, to the extent that the agent is under contract with such supplier or aggregator solely to provide billing and collection for competitive retail natural gas service on behalf of the supplier or aggregator.

(J) "Competitive retail natural gas service" means any retail natural gas service that may be competitively offered to consumers in this state as a result of revised schedules approved under division© of section 4929.29 of the Revised Code, a rule or order adopted or issued by the public utilities commission under Chapter 4905. of the Revised Code, or an exemption granted by the commission under sections 4929.04 to 4929.08 of the Revised Code.

(K) "Governmental aggregator" means either of the following:

(1) A legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting exclusively under section 4929.26 or 4929.27 of the Revised Code as an aggregator for the provision of competitive retail natural gas service;

(2) A municipal corporation acting exclusively under Section 4 of Article XVIII, Ohio Constitution, as an aggregator for the provision of competitive retail natural gas service.

(L)(1) "Mercantile customer" means a customer that consumes, other than for residential use, more than five hundred thousand cubic feet of natural gas per year at a single location within this state or consumes natural gas, other than for residential use, as part of an undertaking having more than three locations within or outside of this state. "Mercantile customer" excludes a customer for which a declaration under division (L)(2) of this section is in effect pursuant to that division.

(2) A not-for-profit customer that consumes, other than for residential use, more than five hundred thousand cubic feet of natural gas per year at a single location within this state or consumes natural gas, other than for residential use, as part of an undertaking having more than three locations within or outside this state may file a declaration under division (L)(2) of this section with the public utilities commission. The declaration shall take effect upon the date of filing, and by virtue of the declaration, the customer is not a mercantile customer for the purposes of this section and sections 4929.20 to 4929.29 of the Revised Code or the purposes of a governmental natural gas aggregation or arrangement or other contract entered into after the declaration's effective date for the supply or arranging of the supply of natural gas to the customer to a location within this state. The customer may file a rescission of the declaration with the commission at any time. The rescission shall not affect any governmental natural gas aggregation or arrangement or other contract entered into by the customer prior to the date of the filing of the rescission and shall have effect only with respect to any subsequent such aggregation or arrangement or other contract. The commission shall prescribe rules under section 4929.10 of the Revised Code specifying the form of the declaration or a rescission and procedures by which a declaration or rescission may be filed.

(M) "Retail natural gas service" means commodity sales service, ancillary service, natural gas

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aggregation service, natural gas marketing service, or natural gas brokerage service.

(N) "Retail natural gas supplier" means any person, as defined in section 1.59 of the Revised Code, that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of a competitive retail natural gas service to consumers in this state that are not mercantile customers. "Retail natural gas supplier" includes a marketer, broker, or aggregator, but excludes a natural gas company, a governmental aggregator as defined in division (K)(1) or (2) of this section, an entity described in division (A)(2) or (3) of section 4905.02 of the Revised Code, or a billing or collection agent, and excludes a producer or gatherer of gas to the extent such producer or gatherer is not a natural gas company under section 4905.03 of the Revised Code.

(O) "Revenue decoupling mechanism" means a rate design or other cost recovery mechanism that provides recovery of the fixed costs of service and a fair and reasonable rate of return, irrespective of system throughput or volumetric sales.

Amended by 129th General Assembly File No. 127, HB 487, § 101.01, eff. 6/11/2012.

Effective Date: 06-26-2001; 2008 SB221 07-31-2008

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9/3/2012

## **4929.02 Policy of state as to natural gas services and goods.**

(A) It is the policy of this state to, throughout this state:

- (1) Promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods;
- (2) Promote 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;
- (3) Promote diversity of natural gas supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers;
- (4) Encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods;
- (5) Encourage cost-effective and efficient access to information regarding the operation of the distribution systems of natural gas companies in order to promote effective customer choice of natural gas services and goods;
- (6) Recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment;
- (7) Promote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905. and 4909. of the Revised Code;
- (8) Promote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated natural gas services and goods;
- (9) Ensure that the risks and rewards of a natural gas company's offering of nonjurisdictional and exempt services and goods do not affect the rates, prices, terms, or conditions of nonexempt, regulated services and goods of a natural gas company and do not affect the financial capability of a natural gas company to comply with the policy of this state specified in this section;
- (10) Facilitate the state's competitiveness in the global economy;
- (11) Facilitate additional choices for the supply of natural gas for residential consumers, including aggregation;
- (12) Promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation.

(B) The public utilities commission and the office of the consumers' counsel shall follow the policy specified in this section in exercising their respective authorities relative to sections 4929.03 to 4929.30 of the Revised Code.

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(C) Nothing in Chapter 4929. of the Revised Code shall be construed to alter the public utilities commission's construction or application of division (E) of section 4905.03 of the Revised Code.

Amended by 129th General Assembly File No. 127, HB 487, § 101.01, eff. 6/11/2012.

Amended by 128th General Assembly File No. 43, SB 162, § 1, eff. 9/13/2010.

Effective Date: 06-26-2001; 2008 SB221 07-31-2008

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## **4929.04 Exempting commodity sales service or ancillary service of natural gas company from other rate provisions.**

(A) The public utilities commission, upon the application of a natural gas company, after notice, after affording the public a period for comment, and in the case of a natural gas company with fifteen thousand or more customers after a hearing and in the case of a natural gas company with fewer than fifteen thousand customers after a hearing if the commission considers a hearing necessary, shall exempt, by order, any commodity sales service or ancillary service of the natural gas company from all provisions of Chapter 4905. with the exception of section 4905.10, Chapter 4909., and Chapter 4935. with the exception of sections 4935.01 and 4935.03 of the Revised Code, from sections 4933.08, 4933.09, 4933.11, 4933.123, 4933.17, 4933.28, and 4933.32 of the Revised Code, and from any rule or order issued under those Chapters or sections, including the obligation under section 4905.22 of the Revised Code to provide the commodity sales service or ancillary service, subject to divisions (D) and (E) of this section, and provided the commission finds that the natural gas company is in substantial compliance with the policy of this state specified in section 4929.02 of the Revised Code and that either of the following conditions exists:

(1) The natural gas company is subject to effective competition with respect to the commodity sales service or ancillary service;

(2) The customers of the commodity sales service or ancillary service have reasonably available alternatives.

(B) In determining whether the conditions in division (A)(1) or (2) of this section exist, factors the commission shall consider include, but are not limited to:

(1) The number and size of alternative providers of the commodity sales service or ancillary service;

(2) The extent to which the commodity sales service or ancillary service is available from alternative providers in the relevant market;

(3) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive prices, terms, and conditions;

(4) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

(C) The applicant shall have the burden of proof under this section.

(D) The commission shall not issue an order under division (A) of this section that exempts all of a natural gas company's commodity sales services from the chapters and sections specified in that division unless the commission finds that the company offers distribution services on a fully open, equal, and unbundled basis to all its customers and that all such customers reasonably may acquire commodity sales services from suppliers other than the natural gas company.

**000084**

12/8/2012

(E) An order exempting any or all of a natural gas company's commodity sales services or ancillary services under division (A) of this section shall prescribe both of the following:

(1) A separation plan that ensures, to the maximum extent practicable, that the operations, resources, and employees involved in the provision or marketing of exempt commodity sales services or ancillary services, and the books and records associated with those services, shall be separate from the operations, resources, and employees involved in the provision or marketing of nonexempt commodity sales services or ancillary services and the books and records associated with those services;

(2) A code of conduct that governs both the company's adherence to the state policy specified in section 4929.02 of the Revised Code and its sharing of information and resources between those employees involved in the provision or marketing of exempt commodity sales services or ancillary services and those employees involved in the provision or marketing of nonexempt commodity sales services or ancillary services. The commission, however, shall not prescribe, as part of any such separation plan or code of conduct, any requirement that unreasonably limits or restricts a company's ability to compete with unregulated providers of commodity sales services or ancillary services.

(F) Notwithstanding division (A)(2) of section 4929.08 of the Revised Code or any exemption granted under division (A) of this section, the commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon the complaint or initiative of the commission, to determine whether a natural gas company has failed to comply with a separation plan or code of conduct prescribed under division (E) of this section. If, after notice and hearing as provided in section 4905.26 of the Revised Code, the commission is of the opinion that a natural gas company has failed to comply with such a plan or code, the commission may do any of the following:

(1) Issue an order directing the company to comply with the plan or code;

(2) Modify the plan or code, if the commission finds that such a modification is reasonable and appropriate, and order the company to comply with the plan or code as modified;

(3) Abrogate the order granting the company's exemption under division (A) of this section, if the commission finds that the company has engaged in one or more material violations of the plan or code, that the violation or violations were intentional, and that the abrogation is in the public interest.

(G) An order issued under division (F) of this section is enforceable in the manner set forth in section 4905.60 of the Revised Code. Any violation of such an order shall be deemed a violation of a commission order for the purpose of section 4905.54 of the Revised Code.

Effective Date: 09-17-1996; 05-27-2005

000085

12/8/2012

## **4929.05 Request for approval of alternative rate plan.**

(A) A natural gas company may request approval of an alternative rate plan by filing an application under section 4909.18 of the Revised Code, regardless of whether the application is for an increase in rates. After investigation, which may include a hearing at the discretion of the public utilities commission, the commission shall authorize the applicant to implement an alternative rate plan if the natural gas company has made a showing and the commission finds that all of the following conditions are met:

- (1) The natural gas company is in compliance with section 4905.35 of the Revised Code and is in substantial compliance with the policy of this state specified in section 4929.02 of the Revised Code.
- (2) The natural gas company is expected to continue to be in substantial compliance with the policy of this state specified in section 4929.02 of the Revised Code after implementation of the alternative rate plan.
- (3) The alternative rate plan is just and reasonable.

(B) The applicant shall have the burden of proof under this section.

Amended by 129th General Assembly File No. 20, HB 95, § 1, eff. 9/9/2011.

Effective Date: 09-17-1996

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12/8/2012

## **4929.08 Abrogation or modification of order.**

(A) The public utilities commission has jurisdiction over every natural gas company that has been granted an exemption or alternative rate regulation under section 4929.04 or 4929.05 of the Revised Code. As to any such company, the commission, upon its own motion or upon the motion of any person adversely affected by such exemption or alternative rate regulation authority, and after notice and hearing and subject to this division, may abrogate or modify any order granting such an exemption or authority only under both of the following conditions:

(1) 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;

(2) The abrogation or modification is not made more than eight years after the effective date of the order, unless the affected natural gas company consents.

(B) After receiving an exemption or alternative rate regulation under section 4929.04 or 4929.05 of the Revised Code, no natural gas company shall implement the exemption or alternative rate regulation in a manner that violates the policy of this state specified in section 4929.02 of the Revised Code. Notwithstanding division (A) of this section, if the commission determines that a natural gas company granted such an exemption or alternative rate regulation is not in substantial compliance with that policy, that the natural gas company is not in compliance with its alternative rate plan, or that the exemption or alternative rate regulation is affecting detrimentally the integrity or safety of the natural gas company's distribution system or the quality of any of the company's regulated services or goods, the commission, after a hearing, may abrogate the order granting such an exemption or alternative rate regulation.

Effective Date: 09-17-1996

**000087**

7/16/2012

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**OHIO PARTNERS FOR AFFORDABLE ENERGY'S  
APPLICATION FOR REHEARING**

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January 25, 2013

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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**OHIO PARTNERS FOR AFFORDABLE ENERGY'S  
APPLICATION FOR REHEARING**

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Ohio Partners for Affordable Energy ("OPAE") applies for rehearing of the January 9, 2013 Opinion and Order ("2013 Order") issued by the Public Utilities Commission of Ohio ("Commission") in the above-captioned docket, which is a joint motion of The East Ohio Gas Company d/b/a Dominion East Ohio ("Dominion") and the Ohio Gas Marketers Group ("OGMG") to modify the June 18, 2008 Opinion and Order in Case No. 07-1224-GA-EXM ("2008 Exemption Order"). The joint motion, filed on June 15, 2012, requested a modification of the Commission's 2008 Exemption Order in order to allow Dominion, beginning in April 2013, to discontinue the availability of standard choice offer ("SCO") service to choice-eligible non-residential customers. Joint Motion at 1. Attached to the joint motion was a joint exhibit, which was a stipulation and recommendation that asked the Commission to issue an order approving the joint motion. Joint Exhibit 1 at 2. The Commission's 2013 Order granted the joint motion and adopted and approved the stipulation attached to the joint motion.

Pursuant to Revised Code Section 4903.10 and Ohio Adm. Code Rule 4901-1-35, the Commission's 2013 Order is unjust, unreasonable, and unlawful in the following regards:

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1. The Commission unlawfully disregarded the statutory requirements set forth at Revised Code Section 4929.08(A) for a modification of an exemption order. The Commission unlawfully, unreasonably and erroneously found that the 2008 Exemption Order was invalid because "phase two no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services." The 2008 Exemption Order did not find that phase two provides potential for further exploration of the benefits of market-based pricing for natural gas services; therefore, the 2008 Exemption Order cannot be invalid based on this finding invented by the Commission in its 2013 Order. 2013 Order at 8, 16.
2. In violation of Ohio Revised Code Sections 4929.08(A) and 4903.09, the Commission unlawfully and unreasonably found that the joint movants had demonstrated in accordance with Revised Code Section 4929.08(A) that certain findings of the 2008 Exemption Order are no longer valid. 2013 Order at 16. In addition to violating the law, the evidentiary record does not support a finding that the 2008 Exemption Order is now invalid.
3. In violation of Ohio Revised Code 4903.09 and 4929.08(A), the Commission unlawfully and unreasonably found 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." 2013 Order at 16, 8. The Commission made these statements without any evidence of record to support them.
4. In violation of Ohio Revised Code 4903.09 and 4929.08(A), the Commission unlawfully found 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. 2013 Order at 16. The record supports a finding that the public interest will be thwarted by the joint motion and does not support the Commission finding that the public interest will be advanced.
5. The Commission unreasonably and unlawfully found that the stipulation and recommendation filed with the joint motion as Joint Exhibit 1 resolved the contested issues in this contested proceeding. The stipulation did not address the contested issues in this case.

The reasons for granting this application for rehearing are set forth in the attached Memorandum in Support. Consistent with Revised Code Section 4903.10 and OPAE's claims of error, the Commission should grant rehearing.

Respectfully submitted,

/s/ Colleen L. Mooney

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A.	The Commission unlawfully disregarded the statutory requirements set forth at Revised Code Section 4929.08(A) for a modification of an exemption order. The Commission unlawfully, unreasonably and erroneously found that the 2008 Exemption Order was invalid because "phase two no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services." The 2008 Exemption Order did not find that phase two provides potential for further exploration of the benefits of market-based pricing for natural gas services; therefore, the 2008 Exemption Order cannot be invalid based on this finding invented by the Commission in its 2013 Order. 2013 Order at 8, 16.	7
B.	In violation of Ohio Revised Code Sections 4929.08(A) and 4903.09, the Commission unlawfully and unreasonably found that the joint movants had demonstrated in accordance with Revised Code Section 4929.08(A) that certain findings from the 2008 Exemption Order are no longer valid. 2013 Order at 16. In addition to violating the law, the evidentiary record does not support a finding that the 2008 Exemption Order is now invalid.	13
C.	In violation of Ohio Revised Code 4903.09 and 4929.08(A), the Commission unlawfully and unreasonably found 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." 2013 Order at 16, 8. The Commission made these statements without any evidence of record to support them.	16
D.	In violation of Ohio Revised Code 4903.09 and 4929.08(A), the Commission unlawfully found 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. 2013 Order at 16. The evidentiary record supports a finding that the public interest will be thwarted by the joint motion and does not support the Commission finding that the public interest will be advanced.	22

E. The Commission unreasonably and unlawfully found that the stipulation and recommendation filed with the joint motion as Joint Exhibit 1 resolved the contested issues in this contested proceeding. The stipulation did not address the contested issues in this proceeding. .... 33

III. Conclusion..... 41

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**OHIO PARTNERS FOR AFFORDABLE ENERGY'S  
MEMORANDUM IN SUPPORT OF THE  
APPLICATION FOR REHEARING**

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**I. Introduction**

Ohio Partners for Affordable Energy ("OPAE") submits to the Public Utilities Commission of Ohio ("Commission") this memorandum in support of OPAE's application for rehearing in the above-captioned docket, which is a joint motion of The East Ohio Gas Company d/b/a Dominion East Ohio ("Dominion") and the Ohio Gas Marketers Group ("OGMG") to modify the June 18, 2008 Opinion and Order in Case No. 07-1224-GA-EXM ("2008 Exemption Order"). The joint motion filed on June 15, 2012 requested a modification of the Commission's 2008 Exemption Order in order to allow Dominion, beginning in April 2013, to discontinue the availability of standard choice offer ("SCO") service to choice-eligible non-residential customers. Joint Motion at 1. The Commission granted the joint motion and approved the stipulation and recommendation attached to the joint motion as Joint Exhibit 1 in its Opinion and Order issued January 9, 2013.

**II. Argument**

**A. The Commission unlawfully disregarded the statutory requirements set forth at Revised Code Section 4929.08(A) for a modification of an exemption order. The Commission unlawfully, unreasonably and erroneously found that the 2008 Exemption Order was invalid because "phase two no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services." The 2008 Exemption Order did not find that phase two provides potential for further exploration of the benefits of market-based pricing for natural gas services; therefore, the 2008 Exemption Order cannot be invalid based on this finding invented by the Commission in its 2013 Order. 2013 Order at 8, 16.**

Ohio Revised Code Section 4929.08(A) provides that the Commission 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).

The Commission claims 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." 2013 Order at 8. The Commission has unlawfully re-written the 2008 Exemption Order to justify the modification. The Commission ignores the requirements of Revised Code Section 4929.08(A) for requesting a modification to an exemption order. The statute requires that there be a prior Commission finding that is no longer valid. Because the Commission did not make the finding in the 2008 Exemption Order

upon which the Commission now bases its modification, the criteria for requesting a modification to an exemption order at Revised Code Section 4929.08(A) have not been met. Under the statute, the Commission may not modify the 2008 Exemption Order. Therefore the joint motion to modify should have been denied.

What the Commission actually 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." 2008 Exemption Order at 20. This actual finding in the 2008 Exemption Order is absolutely not the same finding as the 2013 order claims, i.e., that phase two provides "potential for further exploration of the benefits of market-based pricing for natural gas services." The 2013 Commission has deliberately mischaracterized the 2008 finding in the 2008 Exemption Order by referring simply to "market-based pricing for natural gas service" and deleting from the actual 2008 finding "market-based pricing of commodity sales by the company". This is not an honest mistake. This is the crux of the issue in the 2013 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 standard choice offer ("SCO") service. The 2008 Exemption Order found that Phase 2, with its SCO market-based offer determined by an auction held by the company, represents 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 utility company, i.e., SCO service. At the company-held auction, suppliers bid for a portion of the SCO customers' commodity service.

Phase 2 is not Phase 3, under which Dominion has no role to play in offering market-based pricing of commodity sales. The 2008 Exemption Order approved Phase 2 and stated that Phase 2 represents a reasonable structure through which to further the potential benefits of market-based pricing of commodity sales by the company. Phase 2 is the SCO, a market-based pricing offer determined through an auction managed by the natural gas utility. The 2013 Commission is now trying to bring about Phase 3, in which the company conducts no auction and offers no market-based pricing of commodity sales. The 2013 Order does not comport with the statute for a modification of an existing exemption order. The Commission has not found that any finding in the 2008 Exemption Order is now invalid. The Commission has mischaracterized the 2008 Exemption Order as if Phase 3 were supposed to be accomplished under the 2008 Order. In fact, Phase 3 was not to be accomplished under the 2008 Exemption Order. Nothing in the 2008 Exemption Order anticipates or contemplates Phase 3 in which the company has no role in offering an SCO.

The 2013 Commission ignored the actual findings in the 2008 Exemption Order that demonstrate that Phase 3 would not be accomplished under the 2008 Exemption Order. Nowhere in the 2013 Order did the Commission discuss its actual findings in the 2008 Exemption Order that Dominion would need to file a separate application to move from Phase 2, the SCO service, to Phase 3, the exit

of the merchant function. The 2008 Exemption Order approved a Stipulation and Recommendation that is described at 15 of the 2008 Exemption Order:

- (5) DEO 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.

2008 Exemption Order at 15. If Dominion did not obtain Commission approval to move to a full choice commodity service, i.e., exit the merchant function, i.e., Phase 3, upon the expiration of the second term of the SCO service, which was March 31, 2011, another SCO service auction would be held for a subsequent annual period, and so thereafter. Dominion did not obtain such approval by March 31, 2011; therefore the SCO service auctions continue. This actual finding of the Commission in the 2008 Exemption Order is also not invalid, and the 2013 Commission did not find it invalid. It cannot be modified pursuant to Revised Code Section 4929.08(A).

As the 2008 Exemption Order states, the Commission would have entertained an application for an exemption under Revised Code Section 4929.04 for an exit of the merchant function. Dominion was free to file such an application. But in 2011, when the application should have been filed, a grant of such an application was by no means a certainty. Dominion did not follow the

2008 Exemption Order and file a separate application in 2011 for Phase 3 to exit the merchant function. Dominion's July 13, 2012 Memorandum Contra OP&E's Motion to Dismiss included an Attachment A, which, at Page 3 of 4, are e-mails sent by Dominion to "stakeholders." Dominion Ex. 4, Dominion Reply Comments (September 13, 2012) at 2. 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."

Thus, rather than file a separate application for "full choice commodity service" as the 2008 Exemption Order requires, Dominion filed the joint motion with O&G to modify the 2008 Exemption Order so that non-residential customers would be subject to full choice commodity service (i.e., denied SCO service) without Dominion filing the separate application contemplated by the 2008 Exemption Order. The strategic decision to use Revised Code 4929.08(A) to modify the 2008 Exemption Order so that non-residential customers would be denied SCO service is the methodical process that served Dominion well in the past. Agreeing that residential customers would not lose SCO service places residential customer needs at the forefront.

The problem is that the joint motion does not comport with Ohio Revised Code Section 4929.08(A). The joint motion to modify the June 18, 2008 Exemption Order should have been dismissed as a matter of law. The criteria at Revised Code Section 4929.08(A) were not met because no actual findings of the Commission in the 2008 Exemption Order were shown to be invalid so as to justify a modification. Findings that were never made cannot magically become invalid. The joint motion is an effort by Dominion and OGMG, now approved by the Commission, to rewrite the Commission's 2008 Exemption Order as if the 2008 Exemption Order were to accomplish an exit of the market function and somehow failed to do so. In reality, the 2008 Exemption Order approved Dominion's Phase 2, the SCO option, and ordered that SCO auctions continue until Dominion files a separate application for an exit of the merchant function, which Dominion never did.

At this time, the Commission has just adopted new administrative rules for applications by natural gas utilities to exit the merchant function. *In the Matter of the Commission's Review of the Alternative Rate Plan and Exemption Rules Contained in Chapter 4901:1-19 of the Ohio Administrative Code, Case No. 11-5590-GA-ORD, Finding and Order (December 12, 2012)*. The joint motion to modify the 2008 Exemption Order not only disregards Revised Code Section 4929.08(A), it also disregards the new administrative rules that set up a process for an application by a public utility to exit the merchant function.

The joint motion avoids the requirements of Revised Code Section 4929.04 for a new exemption, the requirements of Revised Code Section

4929.08(A) for a modification to an existing exemption, and the new rules for the filing by a utility of an application to exit the merchant function. Dominion intends to avoid having to comply with the statutes and the new administrative code rules. This is unlawful and must not be allowed.

**B. In violation of Ohio Revised Code Sections 4903.09 and 4929.08(A), the Commission unlawfully and unreasonably found that the joint movants had demonstrated in accordance with Revised Code Section 4929.08(A) that certain findings from the 2008 Exemption Order are no longer valid. 2013 Order at 16. In addition to violating 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 Commission's written opinions setting forth the reasons for its decisions be based on the Commission's findings of fact. This is a contested case. Rather than write opinions setting forth the reasons for its decisions based on its findings of fact, the Commission re-wrote and mischaracterized the 2008 Exemption Order to arrive at its decision. There was no factual basis for the Commission to find that the 2008 Exemption Order is invalid because it did not accomplish Dominion's ostensible Phase 3, the exit of the merchant function. The 2008 Exemption Order was not made to accomplish Phase 3.

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 has not been achieved. Mr. Murphy complained that the 2008 Exemption Order no longer represents a reasonable structure through which to "further the benefits of market-based pricing" because the SCO still exists. In his pre-filed testimony in this case, it was Mr. Murphy who first deleted the words from the Commission's 2008 Exemption Order "of the commodity sales by the company" so that the Commission's actual 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 Commission parroted in its 2013 Order. See Direct Testimony of Jeffrey A. Murphy at 5-6. Even if Mr. Murphy feels free to mischaracterize and re-write the 2008 Exemption Order, the Commission is not free to do so. The Commission must follow the law. Ohio Revised Code Section 4903.09.

OGMG's witness Ringenbach, who works for the supplier Direct Energy, testified that the joint motion will be the completion of an exit of the merchant function for non-residential customers by removing them from retail auctions and requiring competitive suppliers to fulfill completely the default commodity role. OGMG Ex. 2 at 3. Tr. I at 161. Ms. Ringenbach 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." 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, things are "very different" because Dominion is "entering into negotiations that would include an exit from the merchant function." 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." 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 Commission [in the country] to say "We'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". Tr. I at 175. But 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 forces Dominion's non-residential customers to take commodity service directly from Direct, Ohio will be "where it's at."

The problem with the approach chosen by Dominion and OGMG to request a modification to the 2008 Exemption Order to achieve an exit of the merchant function is that there is a law in Ohio, Revised Code 4929.08(A) setting

forth the criteria for a modification of an exemption order. The Commission must find that something in the 2008 Exemption Order is now invalid because an exit of the merchant function has not been achieved. Unlike Dominion and OGMG, the Commission cannot simply re-write and mischaracterize the 2008 Exemption Order. The Commission has no authority to take the same route as Dominion and OGMG; the Commission cannot violate or disregard Ohio law for modifications of exemption orders.

**C. In violation of Ohio Revised Code 4903.09 and 4929.08(A), the Commission unlawfully and unreasonably found 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." 2013 Order at 16, 8. The Commission made these statements without any evidence of record to support them.**

Ohio Revised Code Section 4929.08(A) also provides that the Commission may modify any order granting an exemption "upon its own motion or upon the motion of any person adversely affected...." Neither Dominion nor the OGMG have shown pursuant to Ohio Revised Code Section 4929.08(A) that it is adversely affected by the 2008 Exemption Order. The primary reason for this is, of course, that the Commission did not make the findings that Dominion and OGMG cite in the joint motion. It is obvious that no one can be adversely affected by Commission findings that were never made.

The importance of an adversely affected party to an application for a modification is set forth both in the statute and the Ohio administrative code. In

addition to Ohio Revised Code Section 4929.08(A), there is also an administrative code rule for modifications to exemption orders. Ohio Administrative Code Rule 4901:1-19-12 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.

From a mere glance at the joint motion, one would never know that there is an administrative code, let alone a rule for filings to modify exemption orders. The

joint motion and the Commission in its 2013 Order completely disregard the Commission's rule. The joint motion provides no information upon which it bases its complaint that 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 Commission in the 2008 Exemption Order that are no longer valid, about how the complainants are adversely affected by the actual Commission 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.

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, is not adversely affected by the continued SCO service. Dominion, as a public utility distribution company, is indifferent whether customers are served through the SCO or through bilateral contracts.

Likewise, OGMG is not adversely affected by the continued SCO service except to the extent that one of its members does not place a winning bid at the SCO auction or convince customers to take its commodity at a higher price than that provided by the SCO. Such failure is irrelevant and of no concern to the Commission. The Commission is charged with fostering competition that produces fair and reasonable prices, not maximizing marketers' profits. Ohio Revised Code Section 4929.02(A)(1).

Even though Dominion and OGMG are not adversely affected by the continuation of SCO service in any way that should interest the Commission, they complain about SCO service and apparently believe that the elimination of

the SCO auction is the answer to their prayers. One of the complaints about the SCO voiced by Dominion and OGMG is that few customers are now leaving SCO service and choosing an individual supplier. Mr. Murphy complained that customers are not switching to bilateral contracts. Tr. I at 80. Mr. Murphy also complained that the auction at first spurred the competitive market, but "for the last two years that participation has been stable." Tr. I at 68. It has reached a plateau. Id. Mr. Murphy testified that initially there were 22,000 non-residential customers on the standard offer; that declined to 17,000 in the next auction, and in the last two auctions the number was around 14,000. Tr. I at 80.

OGMG's witness Parisi testified that the SCO retail price adjustment, i.e., the adder which is added to the New York Mercantile Exchange ("NYMEX") end of month close, has generally trended down. 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." 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. However, contrary to Mr. Parisi, these are characteristics of a competitive market. Lower prices mean that the competitive market is working. As the Office of the Ohio Consumers' Counsel ("OCC") witness Hayes testified, there is limited upward pressure on natural gas prices due to the abundance of natural gas and the reduced industrial load. OCC Ex. 2 at 16.

The current economic and environmental conditions have contributed to less growth in natural gas commodity sales, fewer customers, declining prices,

and possibly lower profits for Dominion and OGMG. However, to blame the current market conditions on the existence of the SCO service is as false as the joint motion itself.

Dominion and OGMG seek to eliminate the SCO competitive option for non-residential customers. The SCO is a market-priced offer derived by an auction held by the utility. OGMG wants to set the commodity itself without regard to an actual market-determined price benchmark, the SCO, to which customers can compare other offers. OGMG does not want a transparent, competitive market. OGMG wants private control of prices, but this is not in the public interest. And it is not the Commission's role to secure private profits for suppliers. The Commission has no responsibility to cater to private special interests at the expense of consumers and competitive-market options. The claims of adverse effects by OGMG cannot be taken seriously.

The Commission claims adverse effects to customers due to the continuance of SCO service. The joint motion itself made no such claims. The Commission's finding that "DEO, the suppliers, and, ultimately, the customers could be adversely affected" by the continuance of SCO service is irrelevant under the statute. 2013 Order at 16. There is no statutory provision for a modification of an exemption order because someone "could be adversely affected." The statute and the rule require that the complainant be adversely affected.

The Commission also claims 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." 2013 Order at 8. There is no evidence of record regarding the continuance of SCO service "negatively affecting all Ohioans by hindering the development of a fully-competitive market." The Commission simply made this up. The only SCO service at issue in this case for which there is an evidentiary record is Dominion's. There is no evidence that all Ohioans even have SCO service. There is no evidence whatsoever that the continuance of SCO service in Dominion's service territory is "negatively affecting all Ohioans."

This is a contested case before an adjudicative body, the Public Utilities Commission of Ohio. This is not a political campaign where a lie told often enough somehow gains traction. By law, which the Commission must follow, the Commission's findings must be based on the evidence of record. Ohio Revised Code Section 4903.09. The Commission offers no citation to the record in making these ridiculous statements about all Ohioans being negatively affected by the continuation of SCO service. This Commission finding is clearly not in any way supported by the record evidence. The Commission is not free to make stuff up. Ohio Revised Code Section 4903.09

**D. In violation of Ohio Revised Code Sections 4903.09 and 4929.08(A), the Commission unlawfully found 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. 2013 Order at 16. The record supports a finding that the public interest will be thwarted by the joint motion and does not support the 2013 Commission finding that the public interest will be advanced.**

Revised Code 4929.08(A) also 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 Commission, the Commission shall make findings of fact and written opinions setting forth the reasons prompting the decisions arrived at based on the findings of fact.

The Commission's 2013 Order violates both Revised Code Sections 4903.09 and 4929.08(A). The Commission 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 Commission 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. 2013 Order at 14-15.

Contrary to the findings of the Commission in the 2013 Order, the "stipulation" filed in this case does not address and is in fact completely devoid of any provision regarding the public interest or the policy of the state of Ohio. The stipulation makes no reference at all to the public interest or the policy of

the state of Ohio. The Commission apparently has not read the stipulation filed in this case. The Commission's findings with regard to the stipulation's compliance with the policy of the state of Ohio and the public interest are not based on anything contained in the stipulation.

The purpose of the stipulation in this case is to set a timeline for the elimination of SCO service for non-residential customers and a possible timeline for the process by which residential customers may no longer have SCO service. Non-residential customers will lose SCO service as of April 2013 without any further process at the Commission. Residential customers are protected from this outcome. Under the stipulation, Dominion may not file an application for an exit for residential customers until 2015 and then an application must be filed and a full process be conducted. The stipulation stands for the proposition that residential customers must be protected from the loss of SCO service and a utility's exit of the merchant function but non-residential customers need have no protection at all. The stipulation cannot possibly conform to the state's energy policy.

Ohio Revised Code Section 4929.08(A) requires that the modification to the exemption order be in the public interest. This is a statutory matter that is not resolved by the Commission's three-part test for the reasonableness of stipulations, especially when the stipulation is silent on any public interest considerations. The Commission's three-part test is irrelevant here. The statute requires that the public interest be addressed. That is the reason the public interest is relevant to this proceeding.

OPAEC witness Stacia Harper described the competitive options now available to non-residential customers in Dominion's service area. First, there are price offers from suppliers, who offer customers direct bilateral contracts with variable or fixed rates, short or long terms, and various other features. OPAEC Ex. 1 at 9. Second, customers may join a government aggregation if one is available to them. In a government aggregation, suppliers sell natural gas to aggregation customers with a bidding or auction process establishing the price. The third competitive option is the SCO. The SCO price is established through an auction held by the natural gas utility where the winning bidders receive the same price. Fourth 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. Id. 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. Tr. I at 16. While the MVR is capped at the lowest competitive monthly variable rate offer that the supplier has posted on the Commission's Apples to Apples chart, it is the suppliers that set their MVR price. Tr. I at 17.

The auction used to set the SCO is a competitive auction. 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/>.

In this case, Dominion and OGMG sought to eliminate the SCO option for non-residential customers, and the Commission found the elimination of the SCO to be in the public interest. Non-residential customers will no longer have a price established through a competitive auction. Choice-eligible non-residential customers who have not chosen to enter into a bilateral contract with a supplier or are not served through a governmental aggregation will be assigned a supplier by Dominion through the MVR process at a variable rate determined by the supplier participating in the MVR process. This change will result in roughly 20% of all non-residential customers losing their current choice, the competitively determined SCO, by April 2013. 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. Exhibit SH-4. Bilateral contracts simply cost more. Bilateral contracts also vary greatly as to terms and conditions, and there may be early termination fees as high as \$150. OPAE Ex. 1 at 12. The terms of bilateral contracts are not generally known to the public or transparent in any way. Id. In addition, some suppliers may offer bilateral contracts at prices that are not on the Apples to Apples chart. Tr. I at 157. The only way a customer would know about such an offer is to call a supplier or visit a supplier's website to obtain the information. Tr. I at 157. 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.

Tr. I at 143. Moreover, the SCO option, set by a competitive bid process, is generally lower priced than the marketers' MVRs. 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 Commission's Apples to Apples chart are higher, often much higher, than the SCO price. OPAE Ex. 1 at 14; Exhibit SH-3. MVR prices are higher because they are not set by competitive forces.

The SCO provides a benchmark for natural gas prices, and, if there is an SCO, there is an incentive for suppliers to try to come close to the SCO price in order to win customers. Tr. I at 143. The SCO provides a benchmark that keeps the suppliers honest. Tr. I at 143.

In addition, the SCO price, unlike bilateral contract prices and MVRs, is transparent. Currently, it is the NYMEX close plus 60 cents, the adder determined at the auction. 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. Tr. I at 157. The MVR is not always NYMEX priced, nor is any adder known. Tr. I at 157. The MVR is anything a marketer wants it to be, and there is no insight into how an MVR is set. Tr. I at 133. After Dominion assigns a non-residential customer to a marketer's MVR, the customer will not know his price for natural gas until he gets his first bill. 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. 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. Tr. I at 38.

In the 2009 to 2010 period, approximately 241,000 SCO 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. 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 SCO customers through the entire time. Tr. I at 38. Clearly, the SCO service is a choice that customers make, including non-residential customers. Tr. I at 39.

In addition to the SCO auction spurring price competition, the SCO eliminates the supplier's customer acquisition costs, which is a significant barrier to entry into the competitive natural gas market of new suppliers. Id. at 15. The SCO is comparable to a government aggregation where suppliers are 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. OPAE Ex. 1 at 15.

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 method selected to achieve this is 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).

Bilateral contracts, government 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).

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. 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 Commission's promotion of innovative supply options in such a way that competition is harnessed 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 and variable rates 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). 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 suppliers would be able to establish relationships with customers without incurring customer acquisition costs, such as sales and marketing expense. In the competitive market that includes the SCO, the savings in customer acquisition costs would be reflected in the suppliers' bids and thus passed on to customers. Testimony of Jeffrey A. Murphy, Case No. 07-1224-GA-EXM at 4. He also testified that the promotion of direct contractual relationships between customers and suppliers would accrue regardless of the auction result. Id. at 6. As Mr. Murphy testified that, "If DEO's natural gas commodity market is not competitive, it is difficult to imagine one that is." Testimony of Jeffrey A. Murphy, Case No. 07-1224-GA-EXM at 10.

The state's energy policy is not to force 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 an individual marketer.

For the Joint Movants, 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 Movants narrowly interpret state policy to benefit only themselves.

In a move contrary to the state's policy to promote reasonable prices, Dominion and OGMG advocate eliminating a competitive option that generally costs less than the alternatives. Dominion also does not care if it assigns customers, who have taken no action at all, to a supplier who will charge a higher price than their current competitive choice. Tr. I at 57. Mr. Murphy was also unconcerned if customers are paying a higher price if they select a fixed-price bilateral contract and pay a high price to address risks that they may see in a price that varies every month. Tr. I at 61. Mr. Murphy also believes that higher prices will lead customers to shop, whereas lower prices may not. Tr. I at 61. 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. Tr. I at 62.

Ms. Ringenbach conceded that Direct's fixed price bilateral contract would be higher than the SCO price. Tr. I at 176. As she testified, customers are going to say "I don't like this." Tr. I at 176. OGMG's witness Parisi, from 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." Tr. II at 217. He testified that IGS watches the market daily. 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. 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 the contract that is right for them. It is clear that what benefits suppliers does not always benefit consumers. 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.

The Commission 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. 2013 Order at 14. The Commission also believes that the "stipulation" will encourage innovation in how services are provided. The Commission refers to the state's energy policy at Revised Code Sections 4929.02(A)(7) and (A)(4). But, the stipulation does not even mention the state's energy policy. The stipulation is irrelevant to the issue of whether the joint motion for modification of the 2008 Exemption Order conforms to Ohio law.

By agreeing to eliminate the SCO service for non-residential customers, the Commission's view of the state's energy policy limits competition and reduces supply options available to customers. The Commission refers to only two aspects of the state's energy policy while ignoring the other policies that the

Commission must consider. The Commission ignores the availability to consumers of 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)]. The Commission also does not recognize the dishonesty of its finding that forcing customers to accept a supplier chosen by Dominion makes them "willing buyers" as required by Ohio law. Revised Code Section 4929.02(A)(7). 2013 Order at 14. Nor is it clear how eliminating the SCO service will reduce the need for competition when the Commission claims that it will monitor the effects of the elimination of SCO service on non-residential customers and also stand ready to reestablish SCO service for non-residential customers. 2013 Order at 16-17.

The Commission pays no attention to the entirety of the state's energy policy, the fact that the stipulation does not even address the state's policy, or that the outcome of this case is to eliminate competitive options rather than promote them. The Commission's finding with regard to the state's energy policy is not supported by the record in this case. The Commission should grant rehearing and conform its finding to the record.

**E. The Commission unlawfully and unreasonably found that the stipulation and recommendation filed with the joint motion as Joint Exhibit 1 resolved the contested issues in this contested proceeding. The stipulation did not address the contested issues in this case.**

After finding erroneously and unlawfully 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 Commission goes on to discuss the stipulation and recommendation filed with the joint motion as Joint Exhibit 1. The Commission incorrectly finds that this stipulation referred to as Joint Exhibit 1 resolves the issues in this contested proceeding. The Commission describes contested positions on the stipulation that were never raised. Opinion and Order at 12.

In fact, the stipulation is not relevant to any contested position on the joint motion to modify the 2008 Exemption Order because the stipulation is completely irrelevant to the contested proceeding. OPAE's position is that the joint motion should be dismissed because it is unlawful. The stipulation attached to the joint motion is irrelevant to OPAE's argument that the joint motion should be dismissed.

The stipulation referred to as Joint Exhibit 1 basically concerns the timing of the elimination of SCO service for non-residential customers and isolates residential customers from the timing to which non-residential customers are subjected. There are three signatory parties to this stipulation and recommendation, Dominion, OGMG, 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 process before the Commission.

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 rest of the stipulation simply protects residential customers from the fate of non-residential customers. This is the sole purpose of the stipulation signed by OCC, the representative of residential customers. 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." 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 OGMG. The legal position set forth in the Memorandum in Support of the joint motion, which is what OPAE has challenged in this case, is Dominion's and OGMG's position only. OCC Ex. 2 at 12. In fact, Mr. Hayes testified that OCC agrees with OPAE's legal 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. OCC Ex. 2 at 13-14. As Mr. Hayes points out, and as OPAE has argued, the Commission made provisions in the 2008 Exemption Order for SCO service to be provided indefinitely unless and until such time as Dominion receives Commission approval to eliminate the competitive SCO option. 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 a Commission expectation. OCC Ex. 2 at 14. It should not, in other words, be considered an invalid finding in the 2008 Exemption Order.

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." 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, these 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 in this case but the fact that 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 Commission to launch into its customary, but in this case irrelevant and meaningless, discussion of how the stipulation meets the Commission's three-part test for the reasonableness of stipulations is beyond belief. It is as if the Commission 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. The stipulation resolves no issue contesting the lawfulness of the joint motion and the Commission'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 Commission found that the stipulation is the product of serious bargaining among capable, knowledgeable parties. 2013 Order at 12. This is the first criterion for the Commission's evaluation of settlements. *Consumers Counsel*, 64 Ohio St.3d at 126. However, the Commission did not address OPAE's arguments on serious bargaining for the stipulation.

The Stipulation is not signed by any customer group that will be affected by the joint motion. The stipulation allows the Commission, Dominion, and OGMG to claim falsely that a customer group supports the desired outcome in this case, which is Dominion's exit of the merchant function for **non-residential** customers. No customer group supports this outcome. OPAE is representing the interests of its member anti-poverty agencies, which are non-residential customers. OPAE is the only party in this case representing the affected customers, Dominion's non-residential customers. And, OPAE did not negotiate nor agree to the stipulation.

OCC is only authorized to represent residential customers. The Stipulation signed by OCC and filed in this docket only refers to residential customers to **assure that they will not be affected by the joint motion, i.e., the desired modification to the 2008 Exemption Order, which eliminates the low-cost**

**SCO service for non-residential customers.** While OCC cannot be faulted for its understandable attempt to protect residential customers from the loss of SCO service and the bill increases that will result from Dominion's exit of the merchant function for residential customers, 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 desired modification, but that does not make OCC a party of interest in a matter that only affects non-residential customers. It does, however, cast suspicions with respect to the validity of the joint motion because the stipulation protects residential customers from the joint motion and also because the joint motion allows for disparate treatment of residential and non-residential customers without any basis for this disparate treatment.

Given that OCC has no interest in the joint motion because it does not apply to residential customers, the stipulation signed by one party with no interest in the matter and two other parties (Dominion and OGMG) with identical interests is not the product of serious bargaining because no bargaining took place with respect to the joint motion. All the bargaining with OCC took place to assure that residential customers are not affected by the joint motion. This gives the Commission no basis to claim that the stipulation is the product of serious bargaining and to claim that it benefits ratepayers and the public interest. The only possible benefit to ratepayers and the public interest from the stipulation is that the stipulation protects residential customers from the joint motion.

The Commission, 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 this stipulation to claim that there is a reasonable settlement that meets the Commission's three-part test for the reasonableness of stipulations. OCC's signature on the stipulation simply means that OCC's clients, the residential customers, will not be affected by the joint motion. Dominion and the OGMG have the same interest, to eliminate SCO service for non-residential customers. The Commission must find that the stipulation signed by Dominion, the OGMG and OCC is not the product of serious bargaining among interested groups. A stipulation signed by one party with no interest in the matter (because it represents only residential customers) and by two other parties with identical interests, which are adverse to customers who have not signed the stipulation, is not the product of serious bargaining because no bargaining took place with respect to the joint motion.

The Commission should have been concerned that none of the stipulating parties represent customers who will be adversely impacted by the joint motion. The non-profit agencies that OPAE represents are the only non-residential customer group in this case. It is easy for the other parties to resolve their problems through an agreement that harms non-residential customers. For example, in the case of American Electric Power's ("AEP") standard service offer ("SSO") case, the Commission was belatedly forced to recognize that a stipulation resulted in "disproportionate rate impacts" for small commercial customers. The Commission 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.

Entry on Rehearing, Case No. 11-346-EL-SSO, et al. (February 23, 2012) at 11.

This eventual rejection of the stipulation occurred, of course, after the Commission had previously approved it as meeting the three-part test but before the Commission realized the impact to small commercial customers, who had no

part in the stipulation and no voice at the Commission. The Commission should remember this notable event, as it occurred less than a year ago. The parallels between this case and the AEP case are clear, except that OP&E, representing non-residential customers, has provided evidence in the record that the joint motion will raise rates for non-residential customers.

Similar to the approval of the stipulation as a settlement of issues raised in this case, the Commission also pretends that there is some value to studying the impact of the elimination of SCO service for non-residential customers.

Dominion claimed that the stipulation creates a "measured opportunity to evaluate the effects of an exit of the merchant function." Dominion Brief at 11. O&E claimed the stipulation will "explore whether and how a full exit from the merchant function may benefit all customers." O&E Brief at 13. OCC is also looking for studies to see how an exit of the merchant function for non-residential customers will work. OCC Brief at 6-16. The Commission also claims that it can undo its orders if circumstances make it necessary. 2013 Order at 16-17.

This appeal of studies and possible rescission of the 2013 Order is all nonsense. There is no value in sacrificing non-residential customers for the purpose of conducting a study on how non-residential customers will be harmed by the elimination of SCO service. SCO service is a competitive option that non-residential customers will no longer be able to access. The Commission's decision eliminates a choice that non-residential customers currently have. It defies logic and common sense to pretend that eliminating a customer choice might somehow prove to be beneficial and that some study of this has any value.

The record established in this case makes clear that rates will increase for 14,000 non-residential customers who will lose SCO service. That analysis has been completed. There is nothing left to study. When Dominion exits the merchant function, customers pay higher rates. Marketers win and customers lose. There should be no elimination of the SCO service so that a rescission of the elimination of the SCO service is ever necessary.

#### **IV. Conclusion**

The Commission should grant rehearing of its January 9, 2013 Order. The criteria at Revised Code Section 4929.08(A) have not been met because the 2008 Commission did not make the findings in the June 18, 2008 Exemption Order that the 2013 Commission now claims the 2008 Commission made. Findings that were never made cannot magically become invalid and no party can be adversely affected by findings that were not made. It is not in the public interest for the 2013 Commission to ignore Ohio law or to deny, mischaracterize, or re-write the findings of the 2008 Commission. The Commission has no authority to violate or ignore Ohio law.

The requirements of Ohio Administrative Code Rule 4901:1-19-12, the Commission's rule for modifications to exemption orders, have been ignored. No complaint has been filed regarding the 2008 Exemption Order, nor has any of the information required by the rule been submitted. Like the statute, the rule requires detailed information about the findings of the Commission in the 2008 Exemption Order that are now invalid. The joint motion refers to no findings

actually made by the 2008 Commission. The record evidence leads to no other outcome than rehearing and a denial of the joint motion. The evidence demonstrates that the 2013 Commission is rewriting the 2008 Exemption Order as if it ordered an exit of the market function, Dominion's Phase 3. 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 an exit of the merchant function. Dominion determined that an application to exit the merchant function would be a far harder course than to file a motion to modify an exemption order, especially if no one paid attention to the legal requirements for a modification. The Commission cannot be the handmaiden to a strategy based on disregarding Ohio law and the Commission's orders. Therefore, because the statutory requirements of Revised Code Section 4929.08(A) and the administrative requirements of Rule 4901:1-19-12 have not been met, the Commission has no authority to issue an order modifying the 2008 Exemption Order. Revised Code Section 4929.08(A).

The Commission's 2013 Order also violates the policy of the state of Ohio. Revised Code Section 4929.02(A). Eliminating SCO service and requiring non-residential customers to choose a supplier or have Dominion choose a supplier for them conflict with the policy of the state of Ohio. R. C. 4929.02(A). By eliminating the SCO service option, 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 they 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 supplier do not want to choose a supplier; others are shopping and choosing the lowest price – the SCO. The Ohio General Assembly has not sanctioned raising prices for consumers by eliminating competitive market options.

The evidence of record also demonstrates that the joint motion violates the policy of the state of Ohio. R. C. 4929.02(A). 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 those consumers to confront opaque and highly volatile markets without any benchmark to guide them, and take away a competitive choice that customers currently choose. The requested modification 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 Commission inexplicably emphasizes, has no relevance to the contested issues in this case. The purpose of the stipulation is to protect residential customers from the fate that the joint motion assigns to non-residential customers. Under the stipulation, residential customers will not lose SCO service in April 2013 as non-residential customers will, nor will residential customers lose SCO service without a Commission process as the non-residential customers will. Far from demonstrating the reasonableness of the joint motion and the exit of the merchant function for non-residential customers, the stipulation actually demonstrates how customers need

protection, a lot of protection, from the elimination of SCO service. The Commission approved the stipulation protecting, at least temporarily, residential customers, but finds the stipulation is reasonable in its disparate treatment of non-residential customers who have no protection at all. The Commission has no concern for non-residential customers' loss of SCO service and process at all.

OPAE did not contest the joint motion in the context of anything set forth in the stipulation. The stipulation is irrelevant to OPAE's issues in this case, which are all concerned about the legality of the joint motion and the evidence of record which proves that the joint motion is unlawful. The stipulation resolves no issue raised by OPAE in contesting the lawfulness of the joint motion and the Commission's approval of it. However, the stipulation does support OPAE's position that customers must be protected from the loss of SCO service.

The Commission's 2013 Opinion and Order is unjust, unreasonable, and unlawful. Pursuant to Revised Code Section 4903.10, the Commission should grant rehearing and issue a lawful and reasonable Entry on Rehearing based on Ohio law and the evidence of record. The joint motion should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing and Memorandum in Support was served electronically upon the parties identified below in this case on this 25th day of January 2013.

/s/Colleen L. Mooney  
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appendix to the Merit Brief of Appellant, Ohio Partners for Affordable Energy, was served upon the parties by hand delivery this 17<sup>th</sup> day of May 2013.

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