

In The  
SUPREME COURT OF OHIO

Ohio Partners for Affordable Energy,	:	Case No. 13-0433
	:	
Appellant,	:	Appeal from the Public Utilities
	:	Commission of Ohio, Case No. 12-
v.	:	1842-GA-EXM, <i>In the Matter of the</i>
	:	<i>Application to Modify, in</i>
The Public Utilities Commission of	:	<i>Accordance with Section 4929.08,</i>
Ohio,	:	<i>Revised Code, the Exemption</i>
	:	<i>Granted to The East Ohio Gas</i>
Appellee.	:	<i>Company dba Dominion East Ohio</i>
	:	<i>in Case No. 07-1224-GA-EXM.</i>

MERIT BRIEF  
SUBMITTED ON BEHALF OF APPELLEE,  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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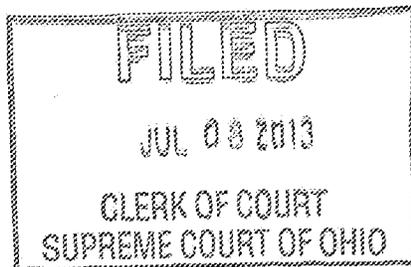
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**MERIT BRIEF  
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**INTRODUCTION**

The Ohio General Assembly set Ohio on the path to a competitive natural gas market almost twenty years ago. Transitioning to a competitive gas market requires the development of direct retail relationships between customers and suppliers. Another part of achieving a fully competitive gas market involves gas utilities transitioning away from their traditional “merchant function” of selling gas to customers. Almost a decade ago, The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO”) began its process of exiting the merchant function. This has been a measured process, taking place in incremental phases while ensuring the protection of customers during each phase. This case involves another incremental step in this process.

Ohio Partners for Affordable Energy (“OPAЕ”) opposes this next step, which involves the Commission’s decision to modify Phase 2 of DEO’s exit of the merchant function. The Commission, however, has statutory authority to modify Phase 2 under R.C. 4929.08(A). The modification was warranted because circumstances have changed since the Commission originally gave DEO authority to implement Phase 2. Phase 2 of DEO’s exit of the merchant function was intended to encourage customers to actively participate in the competitive market and establish direct contractual relationships with suppliers. Although Phase 2 was initially successful at accomplishing these goals, the benefits of Phase 2 eventually plateaued. Therefore, the Commission determined it was necessary to modify Phase 2.

Although OPAЕ disagrees, the record shows that the modification was justified. The modification will help continue the development of direct retail relationships between customers and suppliers. Even if DEO’s non-residential customers take no action at all, they will continue to receive gas from a Commission-certified supplier. No one will go without gas. The modification only changes the method of assigning non-residential customers who choose not to shop to a particular supplier. Non-residential customers will still be able to shop and choose another supplier or join a government aggregation program. This modification is merely another way of developing competitive gas markets. Commission Staff will examine the results of this modification to ensure customers are protected. Moreover, this change is not irreversible. The Commis-

sion has the authority to reestablish any pricing mechanism if such action is necessary to ensure just and reasonable results for customers.

The Commission's decision is lawful and supported by the evidence. It should be affirmed.

## STATEMENT OF THE FACTS AND CASE

In 1996, the Ohio General Assembly passed H.B. 476, which began the deregulation of utility sales of the natural gas commodity and the development of Ohio's competitive natural gas market. H.B. 476 created R.C. 4929.04, which allows natural gas utilities to seek exemptions from the traditional purchased gas cost form of regulation.<sup>1</sup>

Traditionally, gas companies purchased natural gas on their own and then resold that gas to their customers under terms regulated by the Commission. This activity was termed "the merchant function." R.C. 4929.04 permits the Commission to release gas companies from various regulatory requirements including the need to perform this merchant function. Transitioning away from the business of selling gas is called "exiting the merchant function."

Since at least 2005, DEO has implemented 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 General Exemption of Certain Natural Gas Commodity*

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<sup>1</sup> Before beginning its exit of the merchant function, DEO was subject to R.C. 4905.302, which required DEO to adjust the rates that it charged its customers to reflect DEO's actual cost in purchasing and supplying gas. The "purchased gas adjustment clause" was the traditional way of ensuring DEO did not profit from the sale of gas, while also ensuring that DEO recovered costs related to the purchase of gas supplies.

*Sales Services or Ancillary Services*, Case No. 07-1224-GA-EXM (Opinion and Order at 5-7) (June 18, 2008) (“Exemption Order”), OPAE App. at 43-45;<sup>2</sup> *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 (Direct Testimony of Jeffrey A. Murphy at 3) (Sept. 13, 2012) (“Murphy”), OPAE Supp. at 52. Phase 1 of this plan changed the way DEO obtained the gas that it resold to its customers.<sup>3</sup> Exemption Order at 5-7, OPAE App. at 43-45; Murphy at 3, OPAE Supp. at 52. Rather than negotiating separate deals and individual contracts with gas suppliers, DEO held a wholesale auction (the standard service offer or “SSO”) where suppliers bid for the right to supply gas for large groups<sup>4</sup> of DEO’s customer base.

After the success of Phase 1, DEO proposed taking the next step in its exit of the merchant function. DEO proposed providing standard choice offer (“SCO”) service for Choice-eligible customers, while retaining SSO service for non-Choice-eligible customers (the “Exemption Order Case”).<sup>5</sup> The SCO auction allowed suppliers to supply gas at

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<sup>2</sup> References to appellant’s appendix and supplement filed with its brief are denoted “OPAe App. at \_\_\_” and “OPAe Supp. at \_\_\_\_\_,” respectively. References to appellee’s appendix attached hereto are denoted “App. at \_\_\_” and “Supp. at \_\_\_\_\_,” respectively

<sup>3</sup> Phase 1 was the subject of OPAE’s first appeal objecting to DEO’s exit of the merchant function. *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 2007-Ohio-4790.

<sup>4</sup> These large groups are sometimes referred to as “tranches.”

<sup>5</sup> “Choice-eligible” customers participate in DEO’s Energy Choice and have the ability to enter into direct contractual relationships with suppliers. “Non-Choice-eligible” customers are primarily receiving payment assistance while enrolled in DEO’s percentage of income payment plan (“PIPP”) program. Phase 2 did not change service for Non-Choice eligible customers.

retail to Choice-eligible customers, which largely removed DEO as a middleman. There would still be an auction to serve these Choice-eligible customers, but rather than the gas being sold to DEO and then resold, the winning bidders would sell the gas directly to the customers under their own name. Murphy at 3-4, OPAE Supp. at 52-53; *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 (Direct Prepared Testimony of Teresa L. Ringenbach at 5) (Sept. 13, 2012) (“Ringenbach”), Supp. at 7. This would help to establish the direct buyer-seller relationship that is the key to a competitive market.

The Commission approved Phase 2 on June 18, 2008 (the “Exemption Order”). Exemption Order at 20, OPAE App. at 58. In the Exemption Order, 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.” *Id.* Phase 2 was initially successful at engaging customers in the competitive gas market. However, Phase 2 eventually stopped encouraging customers to develop direct retail relationships with suppliers. Murphy at 6, OPAE Supp. at 55. While over 80 percent of DEO’s non-residential customers have selected a supplier or participated in a governmental aggregation program, about 20 percent continue to receive SCO service. Murphy at 5, OPAE Supp. at 54. Although non-residential enrollment in Energy Choice<sup>6</sup> steadily increased in the years 2000 to 2008, non-residential enrollment held relatively steady

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<sup>6</sup> “Energy Choice” is DEO’s program that allows customers to purchase natural gas from suppliers, and then have the gas delivered by DEO. This allows customers to shop for new suppliers in the competitive gas market.

from 2009 to 2012. Murphy at 6, OPAE Supp. at 55. These customers remaining on SCO service do not appear to be engaging in the competitive market. Phase 2 was no longer developing direct retail relationships.

On June 15, 2012, DEO and Ohio Gas Marketers Group (“OGMG”)<sup>7</sup> filed a Joint Motion to Modify the Exemption Order (“Joint Motion”) pursuant to R.C. 4929.08(A) (the “Modification Case”). Joint Motion at 1-10, OAPE Supp. at 1-10. The Joint Movants filed a stipulation (“Modification Stipulation”) with the Joint Motion, signed by the Joint Movants and the Office of Ohio Consumers’ Counsel (“OCC”). Modification Stipulation, OPAE Supp. at 11-19. Because Phase 2 and the SCO were no longer encouraging customers to engage in the competitive gas market, the Joint Movants recommended that the Commission modify the Exemption Order. Specifically, the Joint Movants recommended that SCO service be discontinued for non-residential customers.<sup>8</sup>

Instead of taking SCO service as their default service, non-residential customers would now be randomly assigned to a supplier and charged that supplier’s monthly-variable rate (“MVR”). Murphy 1-2, OPAE Supp. at 50-51. This transition will directly increase the number of customers in the competitive retail market, which will also cause suppliers to engage with these new market participants. Murphy 6-7, OPAE Supp. at 55-56. These non-residential customers will always maintain the option to switch to a dif-

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<sup>7</sup> DEO and OGMG will be referred to as the “Joint Movants.” OGMG and Retail Energy Supply Association (“RESA”) will be referred to as the “Suppliers.” Although RESA was not a signatory party to the Modification Stipulation, RESA worked in conjunction with OGMG in the case below and has joined OGMG in this appeal.

<sup>8</sup> OCC indicated that that it did not take a position regarding elimination of SCO service for DEO’s non-residential customers.

ferent supplier, to enter into a different rate plan with the assigned supplier, or to participate in an opt-out governmental aggregation program. This modification would affect only DEO's Choice-eligible non-residential customers taking SCO service, who constitute approximately 1.2% of DEO's total customer base. Murphy at 8, OPAE Supp. at 57.

After a two-day hearing, the Commission adopted the Modification Stipulation and granted the Joint Motion to modify the Exemption Order. *In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company dba Dominion East Ohio in Case No. 07-1224-GA-EXM* (Opinion and Order at 16, 18-19) (Jan. 9, 2013) ("Modification Order"), OPAE App. at 22, 24-25. Because it opposed the Joint Motion and Modification Stipulation, OPAE brought this appeal.

### **STANDARD OF REVIEW**

R.C. 4903.13 provides that a Commission order shall be reversed, vacated, or modified by the Court only when, upon consideration of the record, the Court finds the order to be unlawful or unreasonable. *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, ¶ 50. The Court "will not reverse or modify a PUCO decision as to questions of fact if the record contains sufficient probative evidence to show that the commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 578, 2004-Oho-6896 (citations omitted). Although this

Court has “complete and independent power of review as to all questions of law” in appeals from the Commission, *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 678 N.E.2d 922 (1997), it may rely on the expertise of a state agency in interpreting a law where “highly specialized issues” are involved and “where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly.” *Consumers’ Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979).

Here, OP&E has the burden of demonstrating that the Commission’s decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.* The Court has consistently refused to substitute its judgment for that of the Commission on evidentiary matters. *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 84, 2002-Ohio-1735, 765 N.E. 862. In addition, the Court should defer to the Commission in its interpretation and application of Title 49.

## ARGUMENT

### Proposition of Law No. I:

**The Commission’s decision to modify the Exemption Order is supported by the record and complies with R.C. 4929.08(A).**

The Commission has the statutory authority to modify exemption orders.

R.C. 4929.08(A) states:

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 commis-

sion, 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.

R.C. 4929.08(A) (emphasis added), App. at 7.

This statute contains a few different requirements that must be met before an exemption order can be modified. However, in OPAE's appeal, only the following requirements are disputed: (1) whether the findings upon which the Exemption Order was based are no longer valid; (2) whether DEO and the Suppliers were being adversely affected by the Exemption Order; and (3) whether the modification was in the public interest.

The Commission determined that each one of these three requirements was met. The record fully supports the Commission's decision.

**A. The Commission correctly determined that the findings supporting the Exemption Order are no longer valid.**

**1. In the Exemption Order Case, the Commission found that Phase 2 “represent[ed] a reasonable structure through which to further the potential benefits of market based pricing of commodity sales by the company.”**

This case addresses the Commission’s determination that a modification of the Exemption Order was justified. Since the Exemption Order was issued, circumstances have changed in such a way that the primary goal of the Exemption Order was no longer being met. The original intent behind the Exemption Order was not to simply create a new auction format. Rather, the Commission believed the SCO was a beneficial tool that would continue the development of a competitive natural gas market in Ohio.

In the Exemption Order Case, DEO submitted evidence regarding the “potential benefits” that Phase 2 was expected to deliver. The primary objective of Phase 2 was to “facilitate the process of Choice-eligible customers establishing a contractual relationship with a competitive natural gas service (CRNGS) provider prior to the time DEO ceases providing commodity service to such customers.” Exemption Order at 6, OPAE App. at 44; Joint Motion at 3, OPAE Supp. at 6. Whereas Phase 1 of DEO’s exit of the merchant function transitioned DEO from the traditional purchased gas cost regulation to a competitive wholesale auction (the SSO auction), Phase 2 created a new mechanism for pricing customers’ gas - the SCO auction. In addition to serving as a default option<sup>9</sup> for

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<sup>9</sup> A default option is essentially a safety net for customers that do not select their own gas supplier. If the customer does not choose to enter into a bilateral agreement with a supplier or is not part of a government aggregation program, the customer will still obtain gas under the default option.

DEO's Choice-eligible customers, the SCO was intended to help establish retail relationships between customers and suppliers. Under Phase 2, the supplier that won the SCO auction would be identified on customers' bills. Exemption Order at 7, OPAE App. at 45; Ringenbach at 5, Supp. at 7. This was supposed to help expose customers to the suppliers that were providing their gas and encourage customers to pursue direct contractual relationships with the suppliers. Ringenbach at 5, Supp. at 7.

The SCO was intended to transition DEO's customers to a more competitive gas market and develop retail relationships between customers and suppliers. The Exemption Order discusses two planned SCO auctions: (1) the February 15, 2009 auction, the term of April 1, 2009 to March 31, 2010 and (2) then another auction for the term of April 1, 2010 to March 31, 2011. Exemption Order at 14-15, OPAE App. at 52-53. After these two auctions, it was expected that DEO would be able to move towards a "market in which choice-eligible customers [would] be required to enter into a direct retail relationship with a supplier or governmental aggregator." Murphy at 4, OPAE Supp. at 53.

**2. In the Modification Case, the Commission found that Phase 2 was no longer facilitating direct contractual relationships between customers and CRNG suppliers.**

Initially, the SCO auction successfully transitioned customers into the competitive natural gas market by fostering direct contractual relationships between customers and suppliers. When DEO sought approval of Phase 2, approximately 25% of DEO's Choice-eligible customers were participating in DEO's Energy Choice program. Exemption Order at 7, OPAE App. at 45. There were 17 suppliers participating in the

choice program when DEO sought approval of Phase 2. Exemption Order at 19, OPAE App. at 57. After the Commission granted the Exemption Order, the SCO helped develop retail relationships between customers and suppliers by encouraging more customers to enter into direct contractual relationships with suppliers. Because of this growth in customer choice and competition, more suppliers began supplying gas to customers in DEO's territory. Exemption Order at 5, OPAE App. at 43; Murphy at 7, OPAE Supp. at 56. When DEO and the Suppliers sought modification of the Exemption Order, over 80% of Choice-eligible customers were being served by a competitive supplier as opposed to taking SCO service. *In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to the East Ohio Gas Company dba Dominion East Ohio in Case No. 07-1224-GA-EXM, Case No. 12-1842-GA-EXM* (Direct Prepared Testimony of Vince Parisi at 6) (Sept. 13, 2012) ("Parisi"), Supp. at 19. Further, the number of suppliers participating in DEO's choice program increased from 17 to 28 by 2012. Exemption Order at 5, OPAE App. at 43; Murphy at 7, OPAE Supp. at 56.

Although it was initially successful, Phase 2 eventually reached a point where the SCO stopped advancing exploration of a fully competitive natural gas market. Murphy at 6, OPAE Supp. at 55. In recent years, the few remaining SCO customers stopped pursuing direct contractual relationships. Instead, these customers were inactively relying upon SCO service. *Id.* The level of customers migrating from SCO service to direct contractual relationships with suppliers leveled out. *In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to*

*The East Ohio Gas Company dba Dominion East Ohio in Case No. 07-1224-GA-EXM, Case No. 12-1842-GA-EXM (Entry on Rehearing at 5-6) (Mar. 6, 2013), OPAE App. at 30-31.* It appeared that many of the remaining SCO customers were not actively engaging in the natural gas market. Instead of continuing to foster direct contractual relationships between customers and suppliers, the SCO began hindering the development of a fully competitive natural gas market. *Id.* at 5-6, OPAE App. at 30-31.

It became clear that the SCO's ability to develop direct retail relationships between customers and suppliers (the primary purpose of the SCO) had been exhausted. Based upon the evidence presented at hearing, the Commission concluded that "phase 2 no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services." Modification Order at 8, OPAE App. at 14.

**3. OPAE's claim that the Commission "mischaracterized" the Exemption Order is unfounded and inconsistent with the record.**

OPAЕ claims that the Commission "deliberately mischaracterized" the findings from the Exemption Order. The Commission did not mischaracterize any finding from the Exemption Order. The Commission quoted directly from the finding in the Exemption Order:

[I]n 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.*

Modification Order at 8 (emphasis added), OPAE App. at 14. After a full hearing in the Modification Case, the Commission made the following finding:

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*.

*Id.* (emphasis added).

OPAE points to the difference between the phrases “market-based pricing of *commodity sales by the company*” and “market-based pricing *for natural gas services*.”

Whether the Commission stated “commodity sales by the company” or “natural gas service” is unimportant. The question is whether the record indicates that there was a change in circumstances that supports the Commission’s decision to modify the Exemption Order. This is purely a question of fact for the Commission to determine.

Contrary to OPAE’s assertion, the purpose behind Phase 2 was not to simply establish an alternative “market-based auction” that DEO would administer forever. As the record clearly showed, the primary purpose behind Phase 2 was for the public to enjoy the potential benefits of “market-based pricing” by facilitating direct contractual relationships between customers and suppliers. Murphy at 5, OPAE Supp. at 54. The goal was to continue Ohio’s progression towards a fully competitive natural gas market with fully engaged retail customers. This is consistent with R.C. 4929.02(A)(7), which states that the policy of the state is to “promote an expeditious transition to the provision of *natural gas services* and goods in a manner that achieves effective competition.” (Emphasis added.) Once the SCO stopped meeting the goal of engaging customers in the natural gas market, the Commission correctly determined that the finding the Exemption Order was based on was no longer valid. Modification Order at 8, OPAE App. at 14.

OPAE also fails to clearly explain why the phrase “commodity sales by the company” is important to its appeal. Regardless, whether DEO “sells” the commodity was irrelevant to the Commission when it issued the Exemption Order. In fact, DEO never technically “sold” gas to customers through the SCO auction. DEO holds the SCO auction, which then results in the winning SCO bidders selling gas directly to customers at retail. DEO’s role is essentially to deliver or transport the gas priced in the SCO auction, not to “sell” the gas. This structure is evidence that Phase 2 was intended to further develop direct retail relationships between customers and suppliers, not to ensure continued “commodity sales by the company.” Additionally, DEO is legally precluded from benefiting from sales of “market-based” gas commodities. Natural gas distribution utilities have been barred from profiting on the sale of the natural gas since the purchased gas cost recovery clause, R.C. 4905.302, was introduced years ago. The purpose of Phase 2 is to benefit *the public* through competition and market-based pricing. Whether or not this benefit arises from “commodity sales by the company” is irrelevant.

The record in the Exemption Order case showed that Phase 2 would benefit the public by furthering the benefits of “market-based pricing” of natural gas. These benefits would arise largely by connecting customers with suppliers. Although the SCO fostered these connections between customers and suppliers, the record in the Modification Case showed that these benefits plateaued. Entry on Rehearing at 5-6, OPAE at App. 30-31. Once the Commission made this finding, it was within its statutory authority to modify the Exemption Order under R.C. 4929.08(A). This modification furthers Ohio’s

“exploration of the benefits of market-based pricing for natural gas services.” Modification Order at 8, OPAE App. at 14.

**B. The Commission’s factual determination regarding the adverse effects of the Exemption Order is supported by the record.**

The record supports the Commission’s finding that DEO, the Suppliers, and all Ohioans are adversely affected by the Exemption Order. This is purely a question of fact and the Commission’s decision should be affirmed unless OPAE proves the decision is against the manifest weight of evidence. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, ¶29.

The Commission found that Phase 2 adversely affected DEO because it hindered the continuing development of a fully-competitive market. Modification Order at 8, OPAE App. at 14. At least since 2005, DEO has stated publicly its goal to fully exit the merchant function so that it can focus on its role as a local gas distribution company. Murphy at 3, OPAE Supp. at 52. DEO expected that the March 2010 SCO would last be the SCO auction. *Id.* at 5, OPAE Supp. at 54. DEO presented evidence in the Exemption Order case that explained the expected timeline for the SCO. Exemption Order at 7-9, 14-15, OPAE App. at 52-53. The Commission discussed this evidence in the Exemption Order itself. *Id.* The Commission explicitly stated:

*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.

Exemption Order at 20 (emphasis added), OPAE App. at 58.

The Commission's finding that the Suppliers were adversely affected is supported by the record also. Two witnesses for the Suppliers testified during the hearing. Each explained how suppliers benefit from a competitive natural gas market when customers are actively engaging in the market. Parisi at 5-7, Supp. at 18-20, Ringenbach at 5-6, Supp. at 7-8. They explained that the competitive natural gas market thrives when customers make informed decisions regarding their gas purchasing options. Parisi at 5-7, Supp. at 18-20; Ringenbach at 4-6, Supp. at 7-8. These witnesses also explained how the SCO, while originally helpful in building relationships between customers and suppliers, was now hindering Ohio's ability to expeditiously transition to a competitive natural gas market. Parisi at 5-6, Supp. at 18-19; Ringenbach at 7-9, Supp. at 9-11. Because the Suppliers are active participants and investors in Ohio's competitive natural gas market, it is undeniable that a delay in the transition to a competitive natural gas market hurts the Suppliers' interests.

The Commission also found that the public was being adversely affected by the Exemption Order.<sup>10</sup> Modification Order at 8, OPAE App. at 14. The General Assembly determined almost twenty years ago that a fully-competitive natural gas market place is

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<sup>10</sup> Assuming, *arguendo*, that the Court disagrees with the Commission's determination that "all Ohioans" were being adversely affected by the Exemption Order, this does not mean the Commission's decision to modify the Exemption Order was unlawful. As OPAE admits, the focus is on the "filers" of the motion to modify, which in this case is DEO and the Suppliers. OPAE Brief at 16.

in the best interest of all Ohioans. Once the Commission determined that the Exemption Order was no longer an effective way of developing a fully-competitive natural gas market, the Commission naturally found that all Ohioans were being adversely affected by the Exemption Order. The finding was supported by witnesses for DEO and the Suppliers. The evidence showed that these remaining customers were not actively making “effective choices over the selection of \* \* \* supplies and suppliers” as called for in R.C. 4929.02(A)(3). Rather, these customers were inactively relying upon the SCO as default service. Murphy at 4, OP&E Supp. at 6. This inaction slows the development of a competitive natural gas market that, according to the General Assembly, benefits all Ohioans.

OP&E claims that the Commission’s finding regarding “all Ohioans” is incorrect because only DEO’s customers are affected by the Exemption Order. OP&E Brief at 17. OP&E is wrong. The development of a competitive gas market affects all Ohioans, not just individuals in DEO’s service territory and not just individuals taking SCO service. The point of exempting natural gas utilities from traditional regulation is to develop a competitive gas market that will benefit all Ohioans. The policy goals in R.C. 4929.02 indicate that the General Assembly believes competitive gas markets will benefit all Ohioans. Further, the record shows that all Ohioans benefit from the modification of the Exemption Order. Entry on Rehearing at 7-9, OP&E App. at 32-34. O&G witness Parisi testified that the modification of the Exemption Order will encourage more suppliers to invest more assets in DEO’s territory and encourage new suppliers to enter Ohio. Parisi 5-7, Supp. at 18-20. These new investments in Ohio will assuredly spread beyond

DEO's service territory. In addition, RESA witness Ringenbach testified that more suppliers will set up offices in Ohio as the competitive market grows. Ringenbach at 5, Supp. at 7. Ms. Ringenbach testified that this will help create more jobs and tax revenues in Ohio. *Id.*

These benefits from the growth of the competitive natural gas market are not merely theoretical. Evidence of such growth can be seen by looking at DEO's service territory, which is one of the most competitive of all of Ohio's natural gas utilities. Murphy at 7, OPAE Supp. at 56. From Phase 2 to the Commission's modification of the Exemption Order, the number of competitive gas suppliers participating in Energy Choice increased from 17 to 28. Exemption Order at 5, OPAE App. at 43; Murphy at 7, OPAE Supp. at 56. Competition between these competitive suppliers drove gas prices down over the past few years in Ohio. Ringenbach at 7-8, Supp. at 9-10. These benefits, however, will be prevented from further developing if the Exemption Order is not modified. Based upon the facts, the Commission correctly concluded that modification of the Exemption Order was necessary to further develop direct relationships between customers and suppliers.

**C. The Commission's factual determination that modification of the Exemption Order is in the public interest should be affirmed.**

**1. The record shows that modification of the Exemption Order is in the public's interest.**

OPAЕ claims that the "public interest will be thwarted by the elimination of SCO service for Dominion's non-residential customers." OPAЕ Brief at 19. The record

proves otherwise. DEO witness Murphy testified that “[d]iscontinuing SCO service will directly increase the entrance of customers into the commodity market.” Murphy at 6-7, OPAE Supp. at 55-56; Modification Order at 12, OPAE App. at 18. Mr. Murphy explained that this would spur “market entry, additional competition, and the development of the natural gas supply market.” Murphy at 7, OPAE Supp. at 56; Modification Order at 12, OPAE App. at 18. He also explained that, as long as SCO service remains, a number of customers will not actively shop for a gas supplier. Mr. Murphy testified that eliminating the SCO will encourage customers to actively participate in the gas market and enter into direct retail relationships with suppliers. Modification Order at 12, OPAE App. at 18; Murphy at 7, OPAE Supp. at 56.

RESA witness Ringenbach testified regarding how elimination of the SCO will further Ohio’s competitive natural gas market. Ms. Ringenbach stated that further development of a fully-competitive marketplace will encourage suppliers to constantly search for more efficient ways to supply natural gas. Ringenbach at 5-6, Supp. at 7-8. This will allow suppliers to provide more varied products to consumers. See R.C. 4929.02(A)(4) (Ohio’s energy policy is to “[e]ncourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods.”), App. at 4. Ms. Ringenbach testified that in states where there has been a complete exit of the merchant function, there are more varied products available involving smart metering, conservation, and alternative payment forms, such as prepayment. Ringenbach at 5, Supp. at 7.

Ms. Ringenbach also testified that elimination of the SCO for non-residential customers will encourage suppliers to increase investment in Ohio’s competitive market.

This is because the SCO now hinders direct contractual relationships between customers and suppliers. The MVR, on the other hand, provides suppliers with a better opportunity to establish direct contractual relationships with customers and provides suppliers with incentives to invest in direct marketing efforts. Such marketing efforts will lead to more investment and jobs in Ohio. Ringenbach at 5, Supp. at 7; *See* R.C. 4929.02(A)(6) (Ohio's policy is to "[r]ecognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment."), App. at 4.

The Commission's modification furthers the public interest goals set forth in R.C. 4929.02(A) while also protecting DEO's non-residential customers. A non-residential customer assigned to a particular MVR supplier will not be charged a monthly variable rate higher than any other monthly variable rate the supplier has posted on the Commission's website. All MVR suppliers must be certified with the Commission and must be active participants in DEO's system. Parisi at 5, Supp. at 18. In addition, the Commission ordered the Joint Movants to share information with OCC and the Commission's Staff which will allow OCC and the Commission to study the results of the discontinuation of SCO service for non-residential customers. Modification Order at 16-17, OPAE App. at 22-23. OCC and Commission Staff will examine this information and will have the ability to compare MVR prices to publicly available information, such as the NYMEX closing price, to ensure prices charged by MVR suppliers are reasonable. Ringenbach at 7, Supp. at 9. Furthermore, the Commission specifically stated that it

would reestablish the SCO for nonresidential customers if this next phase of DEO's exit is determined to be unjust or unreasonable:

[T]he 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.

Modification Order at 17-18, OPAE App. at 22-23.

The modification of the Exemption Order, like all prior phases of DEO's exit of the merchant function, will be closely monitored by the Commission to ensure customers are protected.

**2. OPAE's claim that the SCO is better than bilateral contracts is both unsupported by substantive evidence and irrelevant.**

OPAЕ's appeal hinges largely upon its opinion that the SCO is intrinsically better than direct contractual relationships between customers and suppliers. OPAЕ cites no legal authority supporting its position that Commission must allow the SCO to continue for DEO's non-residential customers. The SCO is not a creature of statute. It is an auction process approved by the Commission as a way to continue the development of a fully-competitive natural gas market. There is no statutory authority instructing the Commission on how the competitive goals of R.C. 4929.02(A) must be met. As such, the Commission is vested with broad discretion and its decision should be affirmed unless proven to be clearly unsupported the record. *Consumers' Counsel v. Pub. Util. Comm.*,

125 Ohio St.3d 57, 2010-Ohio-134, ¶ 40 (“The General Assembly left it to the commission to determine how best to carry out the state’s policy goals in R.C. 4929.02(A)(4)”); *Payphone Assn. of Ohio*, 109 Ohio St.3d 453, 2006-Ohio-2988, ¶ 25 (“When a statute does not prescribe a particular formula, the PUCO is vested with broad discretion”).

Because it has no legal authority to point to, OPAE relies almost entirely upon the opinion of its witness, Ms. Stacia Harper, to prove the SCO is better than bilateral contracts. Ms. Harper testified that the majority of MVR prices posted on the Commission’s website are higher the SCO price. But gas prices fluctuate and, at certain periods, MVR prices are lower than the SCO. In fact, Ms. Harper acknowledged that in October of 2012, two variable plans offered by suppliers were lower than the SCO. Tr. at 133-134, Supp. at 24-25. RESA witness Ringenbach confirmed that fact. *Id.* at 156-157, OPAE Supp. at 213-214.

Ms. Harper claims that the SCO “provides a benchmark” and somehow “keeps everyone honest.” OPAE Brief at 22. However, Ms. Harper admitted that the SCO serves as a price floor, essentially deterring suppliers from making offers below the SCO price. Ms. Harper summarized how the SCO may prevent lower prices:

Q. Well, you say there is little incentive for CRNG suppliers to provide a price below the SCO.

A. ...[J]ust in terms of sheer economics, you have a published price, *you don't have much of a reason to offer a price below that* because we are all profit maximizers.....

Q. If you took away an SCO price, there would be no floor, if you will, that you say currently provides a -- or for which

there is no incentive for CRNG providers to go below presently, correct?

\*\*\*

A. *There is no incentive at this point for CRNG providers to offer a lower price than the SCO other than if they want to acquire more customers.*

Tr. at 144-145 (emphasis added), OP&A Supp. at 210-211.

OP&A's own witness admits the SCO may be hindering competition by creating a barrier to lower prices.

OP&A states that "fixed priced bilateral contracts are higher than the SCO price." OP&A Brief at 26. The fact that a fixed-price contract price can be higher than a fluctuating auction-based price is neither surprising nor unusual. The purpose of fixed-contracts is price certainty. As DEO witness Murphy explained, some customers are willing to pay a small premium in exchange for price certainty. Tr. I at 61, 62, OP&A Supp. at 168-169. The SCO does not provide this price certainty. Although the price adder is set in the SCO auction, the underlying commodity price is based upon the NYMEX price, which fluctuates from month to month. Unlike customers being served under fixed-price contracts, customers taking SCO service are subject to any spikes in the NYMEX price. This is why comparing SCO prices to fixed-price contracts is like comparing apples and oranges; it tells you nothing.

Besides being unhelpful, OP&A's "SCO vs. MVR" argument is the type of regulatory policy decision the General Assembly expects the Commission to make. OP&A admits that the MVR, like the SCO, is a "competitive option." OP&A Brief at 20 ("The fourth [competitive] option is the market variable rate..."). OP&A just prefers the SCO

more. This does not mean, however, that the Commission's decision to eliminate this "competitive option" for a small subset of DEO's customer base is unlawful.

**3. OPAE fails to provide any legal or factual support for its claim that modifying the Exemption Order is contrary to the public interest.**

OPAE cites little evidence to support its appeal. Instead, OPAE insinuates that the Commission's decision is a seismic shift in regulation in Ohio. The record shows, however, that such alarmism is unfounded.

The modification of the Exemption Order is a minor change in how competition will be further developed in DEO's territory. The Commission previously determined that effective competition exists in DEO's territory when it approved Phase 1 and Phase 2 of DEO's exit of the merchant function. The Commission has not granted a full exit of the merchant function by DEO. Rather, the modification slightly alters how competition is going to be achieved in DEO's territory. The Commission has simply replaced one competitive option with another.

In addition, the MVR is nothing new. Both the SCO and the MVR were developed in Phase 2 of DEO's exit of the merchant function plan. Both the SCO and the MVR are default options for gas supply. Both serve as alternatives to traditional purchase gas cost regulation as envisioned by R.C. 4929.02(A)(6) and (7) (the SCO and the MVR are types of "flexible regulatory treatment" that "reduce or eliminate the need for regulation of natural gas services"). Both establish retail relationships between customers and suppliers. In short, the MVR is incredibly similar to the SCO. The auction process is

the only substantive difference. OPAE also ignores the fact that this modification will affect only a small subset of DEO's customer base. The modification only affects DEO's non-shopping, non-residential Choice-eligible customers, which account for 1.2 % of DEO's total customer base. Murphy at 8, OPAE Supp. at 57.

OPAE tries to distract the Court from the evidence supporting the Commission's findings by claiming the Suppliers are only interested in maximizing their profits. OPAE Brief at 14 & 16. OPAE has no record support for this allegation. As the Commission explained in the Modification Order, it believes modification of the Exemption Order will further develop Ohio's competitive natural gas market and further the policies set forth in R.C. 4929.02(A). The Commission discussed the evidence that shows that modification of the Exemption Order will help meet these goals. Labeling the Suppliers as "profiteers" does not change the evidence.

In addition to being unsupported by the evidence, OPAE's allegations regarding "profits" are irrelevant. The Ohio General Assembly decided years ago that a competitive gas market is the best thing for Ohio. The fact the Suppliers may have an economic interest developing a more competitive natural gas market is not unusual or unlawful. In fact, it is how competition works (OPAE's witness admitted "we are all profit maximizers"). Tr. at 144, OPAE Supp.at 210.

It is what the General Assembly expected when it called for the "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." R.C. 4929.02(A)(7).

Although OP&AE may be philosophically opposed to individuals “profiting” from the competitive natural gas market, the General Assembly has already debated this issue. Competition is the policy of this state. The record shows that the modification will help further this state policy.

**4. OP&AE failed to prove any alleged procedural defect in the modification of the Exemption Order and failed to prove it was harmed by any alleged procedural defect.**

OP&AE claims that DEO and the Suppliers’ Joint Motion failed to comply with O.A.C. 4901:1-19-12. OP&AE is wrong. The Joint Motion complied with all applicable provisions of the rule. Subsections (B), (C), and (D) of O.A.C. 4901:1-19-12 explain the obligations of the Commission’s docketing division or the Commission itself. These subsections imposed no obligations on the Joint Movants. Subsections (A)(1)(a) and (b) were not applicable because there was no allegation that DEO had failed to comply with its separation plan or its code of conduct. The only provisions of the rule that applied were O.A.C. 4901:1-19-12(A)(c)-(e), all of which were addressed in the Joint Motion, Stipulation and evidence presented at hearing.

Assuming, *arguendo*, the Joint Motion was procedurally lacking, the Commission was free to waive requirements of its own rules. This Court has upheld the Commission’s waiver of its rules in situations where the rules provided for such a waiver (*see, Maxwell v. Pub. Util. Comm.*, 18 Ohio St.3d 217, 480 N.E.2d 479 (1985)), and in cases where there was no waiver rule but no harm resulted from the waiver. *Bertolini v. Pub. Util. Comm.*, 37 Ohio St.2d 107, 307 N.E.2d 907 (1974); *Ohio Utilities Co. v. Pub. Util.*

*Comm.*, 58 Ohio St.2d 153, 389 N.E.2d 483 (1979). In this case, there is both a rule permitting waiver by action of the Commission<sup>11</sup> and OPAE suffered no harm a result of the waiver. See *Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, ¶ 12 (“this court will not reverse a commission order absent a showing by the appellant that it has been or will be harmed or prejudiced by the order”). Notice was provided to the public regarding the hearing and OPAE was allowed to fully litigate its position. The Court should not reverse a Commission decision simply because the Commission decided to waive portions of a rule that were entirely irrelevant to the hearing.

OPAЕ argues that DEO was required to file a separate application, under R.C. 4929.04, to move to “full choice commodity service.” OPAЕ Brief at 6. DEO, however, is **not** “mov[ing] to full choice commodity service.” Entry on Rehearing at 6, OPAЕ App. at 31. DEO is only substituting one way of assigning customers to suppliers for another. Residential customers’ ability to obtain SCO service remains *unchanged*. Although each phase of DEO’s exit the merchant plan has been successful, the Commission has not granted a full exit of the merchant function by DEO. A full exit of the merchant function is *not* at issue in this case. Rather, this appeal addresses the Commission’s decision to modify the Exemption Order under R.C. 4929.08(A). OPAЕ fails to explain why the Commission’s decision was unlawful. Further, OPAЕ does not explain what procedural opportunity it was denied. OPAЕ issued discovery, participated in a two-day

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<sup>11</sup> Under the Commission’s “Alternative Rate Plan/Exemption” rules, it states that “the [C]ommission may waive any provision in these rules upon a motion for good cause shown, or upon its own motion.” Ohio Adm. Code 4901:1-19-03(A), App. at 8.

hearing, presented expert testimony, and filed numerous post-hearing briefs regarding its opposition to the Modification Stipulation. OPAE was not harmed by the process in the hearing. As such, OPAE's "procedural" claims must fail.

**Proposition of Law No. II:**

**The Commission's decision to adopt the Modification Stipulation is supported by the record and complies with R.C. 4929.08(A).**

OPAE argues that the Commission's decision is unlawful because the "stipulation [did] not address the contested issues in the case." OPAE Brief at 28. This Court has noted that "stipulations are considered merely as recommendations to the commission and, while entitled to substantial weight, they must be supported by the evidence of record to withstand scrutiny under the standard of review provided in R.C. 4903.13." *Consumers' Counsel* (1992), *supra*. See, also, *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978); *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978).

OPAE faults the Commission because "the stipulation itself does not even mention the state's energy policy." OPAE Brief at 29. Whether the Modification Stipulation discusses the state's energy policy is not important. What matters is the record evidence that supports the Modification Stipulation. The signatory parties presented a wealth of evidence that shows that the modification of the Exemption Order complies with R.C. 4929.08(A) and is in the public interest. OPAE had an opportunity to challenge this evidence at hearing. The Commission discussed all the evidence that supported its

decision to adopt the Modification Stipulation. This was lawful and consistent with this Court's precedent.

OPAE argues that no party representing non-residential customers signed the stipulation. This does not make the Commission's decision unlawful because there is no requirement that all customer classes agree to a stipulation before it can be adopted. What is required is "serious bargaining among capable, knowledgeable parties." OPAE Brief at 28 (where OPAE cites the Commission's three prong test for considering stipulations). OPAE allegedly represents non-residential customers. OPAE Brief at 29. OPAE has been involved in DEO's exit of the merchant function since its inception and was involved in discussions regarding the Modification Stipulation. That OPAE opposed the Modification Stipulation does not mean OPAE was excluded from the bargaining process. OPAE, on behalf of non-residential customers, fully litigated its position before the Commission. OPAE's evidence and arguments were discussed thoroughly in the Commission's Opinion and Order. OPAE received all of the process it was entitled to under Ohio law.

Strangely, OPAE cites an Entry on Rehearing from an unrelated Commission case involving AEP Ohio. OPAE Brief at 33-34. This is yet another attempt by OPAE to divert attention from the extensive process that was provided in this case. The record in the case below proves that anybody concerned with the potential modification of the Exemption Order could have participated in the hearing and contested the stipulation. DEO published notice regarding the hearing that indicated that SCO service would be discontinued for non-residential customers. *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 (Proof of Publication) (Oct. 8, 2012), Supp. at 26-28.* The public was notified of the date, time, and place of the hearing. OPAE, the alleged representative of non-residential customers, litigated the position of its members at the hearing. For OPAE to now pretend non-residential customers were excluded from the process is absurd.

Finally, OPAE claims that Ohio Consumers Counsel sacrificed non-residential customers to advantage residential customers. OPAE apparently faults OCC for not representing *non-residential* customers in this hearing. OCC, however, is statutorily charged with representing *residential* customers. OPAE, on the other hand, allegedly represents non-residential customers. OPAE did so in this case. And, while OPAE is unhappy with the results, the Commission's decision comports with R.C. 4929.08(A) and this Court's precedent. It should be affirmed.

## CONCLUSION

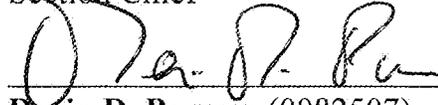
The Commission determined that modifying the Exemption Order is necessary to further the goals of R.C. 4929.02. This modification is another deliberate step in DEO's exit the merchant plan. This modification does not lead to a full exit of the merchant function by DEO. It merely switches one competitive option for another for a small subset of DEO's customers. This modification will further competition in Ohio, which will benefit all Ohioans. The Commission will oversee the results of the modification and will ensure that customers are protected. The Commission's decision complies with the

requirements of R.C. 4929.08(A) and is supported by the record. The Commission's decision should be affirmed.

Respectfully submitted,

**Michael DeWine** (0009181)  
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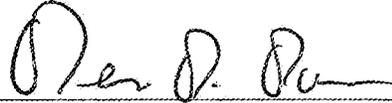
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## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 8<sup>th</sup> day of July, 2013.



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# APPENDIX

**APPENDIX  
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**4905.302 Purchased gas adjustment clause.**

(A)

(1) For the purpose of this section, the term "purchased gas adjustment clause" means:

(a) A provision in a schedule of a gas company or natural gas company that requires or allows the company to, without adherence to section 4909.18 or 4909.19 of the Revised Code, adjust the rates that it charges to its customers in accordance with any fluctuation in the cost to the company of obtaining the gas that it sells, that has occurred since the time any order has been issued by the public utilities commission establishing rates for the company pertaining to those customers;

(b) A provision in an ordinance adopted pursuant to section 743.26 or 4909.34 of the Revised Code or Section 4 of Article XVIII, Ohio Constitution, with respect to which a gas company or natural gas company is required or allowed to adjust the rates it charges under such an ordinance in accordance with any fluctuation in the cost to the company of obtaining the gas that it sells, that has occurred since the time of the adoption of the ordinance.

(2) For the purpose of this section, the term "special purchase" means any purchase of interstate natural gas, any purchase of liquefied natural gas, and any purchase of synthetic natural gas from any source developed after the effective date of this section, April 27, 1976, provided that this purchase be of less than one hundred twenty days duration and the price for this purchase is not regulated by the federal power commission. For the purpose of this division, the expansion or enlargement of a synthetic natural gas plant existing at such date shall be considered a source so developed.

(3) For the purpose of this section, the term "residential customer" means urban, suburban, and rural patrons of gas companies and natural gas companies insofar as their needs for gas are limited to their residence. Such term includes those patrons whose rates have been set under an ordinance adopted pursuant to sections 743.26 and 4909.34 of the Revised Code or Section 4 of Article XVIII, Ohio Constitution.

(B) A purchased gas adjustment clause may not allow, and no such clause may be interpreted to allow, a gas company or natural gas company that has obtained an order from the public utilities commission permitting the company to curtail the service of any customer or class of customers other than residential customers, such order being based on the company's inability to secure a sufficient quantity of natural gas, to distribute the cost of any special purchase made subsequent to the effective date of such order, to the extent that such purchase decreases the level of curtailment of any such customer or class of customers, to any class of customers of the company that was not curtailed, to any class of residential customers of the company, or to any class of customers of the

company whose level of curtailment was not decreased and whose consumption increased as a result of, or in connection with, the special purchase.

(C)

(1) The commission shall promulgate a purchased gas adjustment rule, consistent with this section, that establishes a uniform purchased gas adjustment clause to be included in the schedule of gas companies and natural gas companies subject to the jurisdiction of the public utilities commission and that establishes investigative procedures and proceedings including, but not limited to, periodic reports, audits, and hearings.

(2) The commission shall not require that a management or performance audit pertaining to the purchased gas adjustment clause of a gas or natural gas company, or a hearing related to such an audit, be conducted more frequently than once every three years. Any such management or performance audit and any such hearing shall be strictly limited to the gas or natural gas company's gas or natural gas production and purchasing policies. No such management or performance audit and no such hearing shall extend in scope beyond matters that are necessary to determine the following:

(a) That the gas or natural gas company's purchasing policies are designed to meet the company's service requirements;

(b) That the gas or natural gas company's procurement planning is sufficient to reasonably ensure reliable service at optimal prices and consistent with the company's long-term strategic supply plan;

(c) That the gas or natural gas company has reviewed existing and potential supply sources;

(3) Unless otherwise ordered by the commission for good cause shown and except as provided in division (D) of this section:

(a) The commission's staff shall conduct any audit or other investigation of a natural gas company having fifteen thousand or fewer customers in this state that may be required under the purchased gas adjustment rule.

(b) Except as provided in section 4905.10 of the Revised Code, the commission shall not impose upon such company any fee, expense, or cost of such audit or other investigation or any related hearing under this section.

(4) Unless otherwise ordered by the commission for good cause shown either by an interested party or by the commission on its own motion, no natural gas company having fifteen thousand or fewer customers in this state shall be subject under the purchased gas

adjustment rule to any audit or other investigation or any related hearing, other than a financial audit or, as necessary, any hearing related to a financial audit.

(5) In issuing an order under division (C) (3) or (4) of this section, the commission shall file a written opinion setting forth the reasons showing good cause under such division and the specific matters to be audited, investigated, or subjected to hearing. Nothing in division (C) (3) or (4) of this section relieves such a natural gas company from the duty to file such information as the commission may require under the rule for the purpose of showing that a company has charged its customers accurately for the cost of gas obtained.

(D) A natural gas company that does not sell natural gas under a purchased gas adjustment clause shall not be subject to this section.

(E) Nothing in this section or any other provision of law shall be construed to mean that the commission, in the event of any cost distribution allowed under this section, may issue an order pursuant to which the prudent and reasonable cost of gas to a gas company or natural gas company of any special purchase may not be recovered by the company. For the purpose of this division, such cost of gas neither includes any applicable franchise taxes nor the ordinary losses of gas experienced by the company in the process of transmission and distribution.

(F) The commission shall not at any time prevent or restrain such costs as are distributable under this section from being so distributed, unless the commission has reason to believe that an arithmetic or accounting inaccuracy exists with respect to such a distribution or that the company has not accurately represented the amount of the cost of a special purchase, or has followed imprudent or unreasonable procurement policies and practices, has made errors in the estimation of cubic feet sold, or has employed such other practices, policies, or factors as the commission considers inappropriate.

(G) The cost of natural gas under this section shall not include any cost recovered by a natural gas company pursuant to section 4929.25 of the Revised Code.

#### **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.

(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.

**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.

(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.

#### **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.

### **4901:1-19-03 Waivers.**

(A) The commission may waive any provision in these rules upon a motion for good cause shown, or upon its own motion. In determining whether good cause has been shown, the following factors, among other things, may be taken into consideration.

(1) Whether other information, which the utility would provide if the waiver is granted, is sufficient for commission staff to effectively and efficiently review the application.

(2) Whether the information required to be filed by these rules, absent a waiver, is relevant to the commission's consideration of whether the application is reasonable and in the public interest.

(3) Whether the information, which is the subject of the waiver request, is reasonably available to the applicant from the information which it maintains or is reasonably obtainable by the applicant.

(4) The expense to the applicant in providing the information which is the subject of a waiver request.

(5) Whether granting of the waiver is in the public interest.

(B) Except for good cause shown, all waiver requests in an alternative rate plan case shall be filed thirty calendar days or more before the docketing of the application with the commission.

(C) All waiver requests in an exemption case shall be filed with the application and served upon all parties who are also being served a copy of the application under paragraph (B)(4) of rule 4901:1-19-04 of the Administrative Code. The applicant is encouraged to consult with the commission staff regarding its proposed waiver requests prior to the actual filing of these requests so as to avoid any undue delay in the processing of the application.

(D) Small natural gas companies should contact the staff of the commission of their intent to file an alternative rate plan or an exemption application to review individual company circumstances that support waivers and to investigate alternate filing requirements.