

IN THE SUPREME COURT OF OHIO

Ohio Partners for Affordable Energy,	)	Case No. 2013-433
	)	
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
	)	

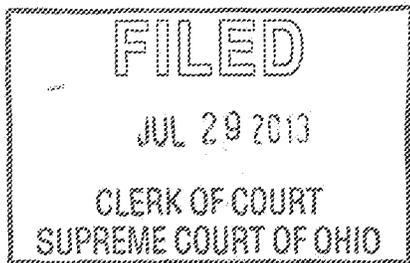
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**REPLY BRIEF OF APPELLANT,  
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## I. INTRODUCTION

Ohio Partners for Affordable Energy (“OPAE”) herein replies to the initial briefs filed by the appellee Public Utilities Commission of Ohio (“PUCO”) and the intervening appellees The East Ohio Gas Company d/b/a Dominion East Ohio (“Dominion”) and The Ohio Gas Marketers Group and The Retail Energy Supply Association (“Marketers”). The PUCO’s order on appeal (“2013 Order”) falsely purports to modify the PUCO’s June 18, 2008 Opinion and Order in Case No. 07-1224-GA-EXM (“2008 Exemption Order”) so that, effective April 2013, non-residential customers of Dominion no longer have the option to choose standard choice offer (“SCO”) service, which is a competitive option with a price established by an open auction conducted by an independent third party hired by Dominion. OPAE filed this appeal on behalf of its non-profit members who are non-residential customers of Dominion and who will lose the option of SCO service if the PUCO’s order is affirmed.

## II. ARGUMENT

### **A. The General Assembly has not restricted competitive natural gas commodity markets to bilateral contracts between marketers and customers, and the PUCO’s order to limit competition to bilateral contracts is not authorized by any statute and is contrary to the statutory provisions for competitive natural gas markets.**

The PUCO states that OPAE’s appeal will halt the progress to a “fully competitive market” in Dominion’s service area. PUCO Merit Brief at 1. The PUCO defines a “fully competitive market” as one in which competition is limited to bilateral contracts between customers and marketers which the PUCO also calls “direct retail relationships between customers and suppliers.” *Id.* The PUCO uses its limited definition of a “fully competitive market” to justify eliminating the competitive SCO, a move which violates Ohio law. R.C. 4929.02. Reply Brief Appendix (“Reply App.”) 007. The PUCO’s definition of a “fully

competitive market” is particularly curious given that SCO customers have a direct retail relationship with marketers even if they do not have a bilateral contract. The substantive difference between the SCO and a bilateral contract is that the price SCO customers pay is set by an open competitive auction instead of unilaterally by a marketer. As OPAE witness Stacia Harper explained in her testimony, elimination of the SCO will limit competition and result in an increase in prices for customers who no longer have the option of the SCO. Appellant’s Supplement to Merit Brief (“Supp.”) 094.

In establishing the policy of the state of Ohio, the General Assembly sanctioned diverse competitive options. A review of state policy as articulated by Revised Code (“R.C.”) 4929.02(A) clearly states the General Assembly’s policy to: “[p]romote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods.” R.C. 4929.02(A)(1). Reply App. 007. The state’s policy is also 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.” *Id.* Bilateral contracts, governmental aggregations, other types of aggregation, and the SCO represent the different 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 a desired competitive option. R.C. 4929.02(A)(3). *Id.*

The state’s policy also promotes innovative approaches to providing cost-effective natural gas services. *Id.* The elimination of the SCO denies consumers access to an innovative competitive option that generally represents the lowest competitive

market price. Supp. 094. There is nothing innovative about eliminating the market-based SCO option. Customers already have the choice of bilateral contracts with marketers. Eliminating the SCO option adds nothing to the competitive choices available; in fact, competitive options are reduced.

Marketers want to eliminate the SCO option because bilateral contracts produce a higher profit margin than the SCO. As a result, Dominion Retail, a marketer and sister corporation of Dominion, the public utility in this case, will benefit when the SCO is eliminated. The Marketers and Dominion filed a joint motion to modify Dominion's existing 2008 Exemption Order, which motion was approved by the PUCO. With the SCO and its auction eliminated, marketers reap a greater profit than marketers receive when they serve those same customers through the SCO.

Unfortunately for these special interests, the state's policy is not to force unwilling customers to enter into bilateral contracts with marketers. R.C. 4929.02(A)(7). Reply App. 007. Under the 2013 Order, when a non-residential customer realizes it has been assigned to a marketer by Dominion, discovers the price the marketer is charging, and is unhappy with the price because it is higher priced than the SCO option that has been eliminated, the customer's only option is a different bilateral contract with a marketer. This is hardly the description of a willing customer. The PUCO's elimination of the SCO option for non-residential customers produces this result. State policy does not support nor justify elimination of an SCO option. The SCO gives consumers a price for natural gas commodity set by the competitive market, and also gives customers the choice not to choose a bilateral contract with an individual marketer.

The General Assembly's promotion of diverse competitive options is obvious not only from the policy of the state at R.C. 4929.02 but also from the General Assembly's explicit approval of governments or groups of customers joining together to negotiate for natural gas supply. Aggregation is not a "direct retail relationship between customers and suppliers," yet the General Assembly explicitly promotes it. Governmental aggregator is defined at R.C. 4929.01(K), and aggregator is defined at R.C. 4929.01(N). Reply App. 004. Governmental aggregators and other aggregators are certified along with retail natural gas suppliers per R.C. 4929.20. Id. 012. Governmental aggregators and other aggregators provide information to the PUCO along with marketers pursuant to R.C. 4929.23. Id. 017. The PUCO is to resolve disputes regarding all types of aggregation under R.C. 4929.28. Id. 019. Aggregation is clearly another competitive option available under Ohio law.

Aggregations are essentially the same as the SCO. They are a service offer, with a price set by a competitive bid process or a negotiation, in which groups of customers are able to obtain a competitive, low price, in part because the substantial cost of marketing bilateral contracts -- mailings, telephone calls, and door-to-door solicitation -- are reduced or eliminated. Aggregations are proof that the General Assembly has not limited competition to bilateral contracts. There is nothing sacrosanct about bilateral contracts. The simple goal of Ohio's natural gas policy is to use competition rather than old-fashioned regulation to set natural gas commodity prices. The SCO, aggregations, and bilateral contracts all coexist within that statutory framework that supports competition.

This case is about the elimination of the SCO for non-residential customers, a competitive option that non-residential customers often choose. The PUCO states falsely that OPAE's appeal "hinges largely upon its opinion that the SCO is intrinsically better than direct

contractual relationships between customers and suppliers.” PUCO Brief at 22. No, it does not. OPAE is clear that all competitive options and even more should be available. This is the policy of the state of Ohio. R.C. 4929.02. Reply App. 007.

The PUCO claims that there is no “legal authority” for OPAE to argue that the PUCO does not have broad discretion to carry out the state’s policy goals. OPAE’s response is that the PUCO does not have broad discretion to change the state’s policy goals. The PUCO is not carrying out the state’s statutory policy goals; the PUCO is changing the goals. The state’s policy as determined by the General Assembly does not limit competition to bilateral contracts between customers and marketers. Regardless of whether the PUCO has “broad discretion,” it has no legal authority to limit competitive options solely to bilateral contracts offered by corporations that sell natural gas directly to individual customers any more than the PUCO can eliminate the right of customers to aggregate and purchase gas collectively.

The PUCO has no authority to violate Ohio law. As the Court has found, the PUCO is a creature of the General Assembly and cannot ignore statutes and legislate in its own right. *Office of Consumers’ Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 153, 164, 166. The PUCO cannot transform the General Assembly’s policy goals into something different from the legislated policy goals. The PUCO must follow the law.

**B. In order for the PUCO to reach its finding in this case pursuant to R.C. 4929.08, the PUCO had to re-write the 2008 Exemption Order.**

The appellees attack OPAE’s argument that the PUCO had to re-write the 2008 Exemption Order in order to find it “invalid”. It was Dominion and the Marketers who chose to initiate their action to eliminate SCO service for non-residential customers with a motion for a modification of an existing exemption order under R.C. 4929.08. Reply App. 011. Such a motion requires that changed circumstances have rendered a finding of a previous

exemption order invalid. If Dominion and the Marketers had filed for a new exemption order under R.C. 4929.04, following the correct procedural path, this case would not be bogged down in a futile search for an invalid finding in the 2008 Exemption Order. Reply App. 009.

Dominion and the Marketers thought the filing of a motion under R.C. 4929.08 to be the easy route to violating the policy of the state. Unfortunately for the filers of the motion to modify, nothing in the 2008 Exemption Order is now invalid. Under the PUCO's 2013 Order, residential customers continue to receive SCO service pursuant to the 2008 Exemption Order, which makes no distinction between residential and non-residential customers. With service continuing pursuant to the 2008 Exemption Order, it is not invalid.

The only way for the PUCO to find anything invalid in the 2008 Exemption Order was for the PUCO to re-write the 2008 Exemption Order to suit the motion to modify's purposes. That is exactly what the PUCO did. The 2008 Exemption Order stated 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". The 2008 Exemption Order provides all customers the option to purchase natural gas through the SCO. Appellant's Merit Brief Appendix ("App.") 039, 058. In the 2013 Order, the PUCO claimed that the 2008 Exemption Order was no longer valid because "phase two no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services." App. 007, 014. Therefore, the PUCO's 2013 Order invalidated a finding in the 2008 Exemption Order that was never made.

The PUCO states that the difference between the phases "market-based pricing of commodity sales by the company" used in the 2008 Exemption Order and "market-based pricing for natural gas services" used in the 2013 Order is unimportant. PUCO Brief at 14.

The appellees argue that this is all semantics, but they are wrong. The evidence of record clearly establishes that there is a fundamental difference between the 2008 PUCO and the 2013 PUCO. Appellant's Supplement ("Supp.") 119; Tr. I at 170. The SCO price is set by an auction held by the utility, in other words "market-based pricing of commodity sales by the company." The 2008 Exemption Order adopted the SCO. In 2013, the PUCO declared the 2008 Exemption Order invalid because it does not permit "further exploration of the benefits of market-based pricing for natural gas service," but obviously the 2013 PUCO's language does not address the 2008 Exemption Order. There is nothing in the 2008 Exemption Order that conditions the existence of the SCO on whether or not "exploration" is furthered.

The PUCO also states that Phase 2 "was intended to encourage customers to actively participate in the competitive market and establish direct contractual relationships with suppliers." PUCO Merit Brief at 2. The PUCO cannot back up this unsupported claim about the 2008 Exemption Order because there is no such intention expressed in the 2008 Exemption Order. The 2008 Exemption Order authorized SCO service for customers. There was no expectation in the 2008 Exemption Order that a future exemption order, which was not before the PUCO and is not before this Court, would be approved to eliminate the SCO for non-residential customers. The 2008 Exemption Order is not invalid because it did not bring about bilateral contracts to the exclusion of other competitive options. SCO customers have a "direct retail relationship" with marketers at a price established through a competition auction. Dominion, not the General Assembly, invented Phase 3, under which customers have no choice but bilateral contracts. Dominion may have a grand plan to require customers to purchase natural gas commodity service only through bilateral contracts with marketers, including its affiliate, but the 2008 Exemption Order simply authorized the SCO.

The record in this case confirms that the PUCO ignored this evidence. The Marketers' own witness testified that the previous chairman of the PUCO had told her: "You will never get an exit on the gas side." Supp. 119; Tr. I at 170. Because Dominion's Phase 3, the "exit" referred to by the Marketers' witness, limits competition to bilateral contracts, it is unlawful under Ohio law. With its Phase 2, which adopted the SCO, Dominion achieved effective competition compatible with the goals of the state of Ohio because all customers were served by marketers through retail relationships. Phase 2 competition includes the SCO, aggregations, and bilateral contracts. Ohio law and the 2008 Exemption Order authorize these diverse competitive options. The 2008 Exemption Order provides no foundation for disapproving any of these options at a future date.

The PUCO selected one sentence from the 2008 Exemption Order and misinterpreted it to create the myth that the 2008 Exemption Order is invalid. The 2008 Exemption Order approved a stipulation under which, if Dominion did not file an application to alter Phase 2 and did not obtain approval for the alteration by March 31, 2011, SCO service auctions would continue until a new approach was approved. But, on the strength of its unsupported finding that the SCO violates state law, the PUCO eliminated SCO service for non-residential customers while retaining it for residential customers. The PUCO unlawfully violated R.C. 4929.08. Reply App. 019. No finding in the 2008 Exemption Order is invalid.

In rushing to its unlawful conclusion, the PUCO also ignored its own administrative rule for modifications to exemption orders, Ohio Administrative Code (O.A.C.) Rule 4901:1-19-12. Reply App. 020. The PUCO claims that it considered its rule. PUCO Brief at 27. A simple glance at the rule proves otherwise. Sensing this, the PUCO also argues that if the motion for modification was procedurally defective, the PUCO was free to waive its rule.

PUCO Brief at 27. The PUCO argues without citations to any PUCO decision in this case that the PUCO did waive the rule. The PUCO points the Court to a rule that allows the PUCO to waive its rules, but the PUCO cannot cite any PUCO order in this case waiving the rule. Under the rule for a waiver, some process is required for the PUCO to waive its rules. The PUCO did not undertake such a process in this case. Instead, the PUCO simply ignored its rule.

The appellees claim that OP&E was not hurt by the failure of the motion for a modification to follow the rule for modification of exemption orders. This is untrue. The PUCO could not have moved this case as quickly and recklessly if the law had been followed. The PUCO, under Ohio statutes and its own rule, could not have approved the motion for modification at all. This is OP&E's point; the law was misused to get the order as quickly as possible without regard to the law. The Court should not allow this procedural sleight of hand.

**C. By definition, the PUCO has no specialized expertise in competitive markets and the investments of competitive marketers and is entitled to no deference to its findings of fact about competitive markets.**

The PUCO cites *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, Paragraph 29, to support its argument that a PUCO decision will be affirmed unless the appellant proves the decision is against the manifest weight of the evidence. PUCO Brief at 16. The manifest weight of the evidence standard is not applicable in this case.

Under *Monongahela Power*, the Court found that a PUCO order shall be reversed by the Court only if upon consideration of the record the Court finds the orders to be unlawful or unreasonable. The Court will not reverse a PUCO decision as to questions of fact where the record contains sufficient probative evidence to show the PUCO's determination is not manifestly against the weight of the evidence and is not so clearly

unsupported by the record as to show misapprehension, mistake or willful disregard of duty. The Court notes in *Monongahela Power* that it has consistently refused to substitute its judgment for that of the PUCO on evidentiary matters and that the Court “has consistently found it proper to defer to the commission’s judgment in matters that require the commission to apply its specialized expertise and discretion, as it did below, with regard to factual matters now on appeal.” *Id.* Whenever a PUCO finding of fact is challenged, the PUCO shields itself by reminding everyone that the Court will defer to the PUCO. PUCO Brief at 22-23.

However, in this case, the strict *Monongahela Power* precedent does not apply. Instead, the Court should question whether its deference for the PUCO’s “specialized expertise” is relevant to this appeal. The findings of fact challenged here by OPAE do not involve the PUCO’s specialized expertise. The PUCO has regulatory authority and its specialized expertise is based on its authority to regulate public utility monopolies. R.C. 4905.04. Reply App. 002. However, the findings of fact for which the PUCO asks deference here are completely unrelated to the PUCO’s regulatory function.

For example, the PUCO found that “all Ohioans” are adversely affected by the 2008 Exemption Order. PUCO Brief at 18. OPAE noted that there is no evidence of record whatsoever about “all Ohioans” being adversely affected by the 2008 Exemption Order or the competitive market’s failing and thus adversely affecting all Ohioans. Dominion’s own witness, Mr. Murphy, declared as early as 2007, that “if the current market isn’t competitive, I don’t know what is.” Supp. 278.

The PUCO claims that the modification will encourage more marketers to invest more assets in Dominion’s service territories and encourage new marketers to enter Ohio.

PUCO Brief at 18. According to the PUCO, these new investments in Ohio will assuredly spread beyond Dominion's service territory. *Id.* at 19. More marketers will set up offices in Ohio as the competitive market grows. *Id.* This will create more jobs and tax revenues. *Id.* There is, however, no record evidence that supports these supposed outcomes. The PUCO does not regulate natural gas marketers' business investments in Ohio. The PUCO merely certifies competitive suppliers, adopts minimum service rules, and hears customer complaints against suppliers. Reply App. 012, 014, 015, 017, 018, 019. The PUCO has no jurisdiction to consider whether marketers invest assets in Ohio or to make findings about marketer investments. The PUCO has no jurisdiction to encourage new marketers to enter Ohio. It has no jurisdiction over whether marketers set up offices in Ohio. The PUCO has nothing to do with whether marketers increase tax revenues or create jobs. This is pure political propaganda, not specialized expertise within the PUCO's jurisdiction.

For the PUCO to claim that the Court must defer to findings such as these is absurd. The PUCO has aligned itself with the interests of competitive marketers who want to monopolize service to customers exclusively with more expensive bilateral contracts in violation of Ohio law. This is not only unlawful, it also has nothing to do with the PUCO's expertise as a regulatory authority. The Court should afford these PUCO findings no deference at all.

The PUCO has no specialized expertise in competitive markets. The General Assembly has sought competition in electric and gas markets and has deregulated commodity pricing by eliminating the authority of the PUCO to regulate prices. The PUCO also has no statutory authority to limit competitive markets and to eliminate competitive options. For

example, the PUCO found that “circumstances had changed” since the 2008 Exemption Order because the level of interest in the SCO had “plateaued” since 2008 and fewer customers were entering into bilateral contracts. The PUCO never reviewed or discussed why the plateau was occurring. If the PUCO had considered the testimony of OCC witness Hayes, the PUCO would have been aware that since 2008 a number of economic changes have occurred above and beyond the establishment of the SCO. There was a financial crisis throughout the economy. Homes were foreclosed on; factories closed; jobs were lost. If the PUCO knew anything about competitive markets, it might have discerned that the slow growth in the number of customers engaged in the competitive market had nothing to do with the SCO or the failure of the natural gas commodity market but had something to do with the severe financial crisis affecting the country.

The Court should not condone the PUCO’s habitual reference to its “expertise” as a regulatory body when the PUCO’s findings of fact are irrelevant to any regulatory role currently assigned to the PUCO. This case concerns competitive markets, which have nothing to do with any specialized expertise of the PUCO. The expertise to which the PUCO refers is its regulatory expertise, which is irrelevant to the PUCO’s findings here.

**D. Even if the Court applies its standard applicable to the PUCO as a regulator of public utilities in this case, which it should not, the Court should still find that the PUCO’s findings are manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.**

The PUCO’s 2013 Order eliminates the SCO, a competitive option that non-residential customers of Dominion had previously chosen. The PUCO has no statutory authority to eliminate competitive options. The PUCO is authorized to implement, not change, the policy of the state of Ohio, which promotes diverse competitive options. R.C. 4929.02(A).

The SCO provides a benchmark for natural gas prices, and, if there is an SCO in the competitive market, there is an incentive for marketers to come close to the SCO price in order to win customers. Supp. 119; Tr. I at 143. The SCO provides a benchmark that helps non-residential customers evaluate their competitive options. Id. The SCO is a competitive market-based option established by the NYMEX end-of-month close and the adder determined at the auction. Marketers with high administrative and gas supply costs cannot bid low enough to win customers at the auction. This is why these marketers want to eliminate the competition of the SCO. The SCO auction serves to drive the price charged to customers down. Marketers with low costs will win at the auction, and marketers with high costs will not. This is competition, what the General Assembly enacted.

The SCO is a generic product, sold and purchased in lieu of a brand name. Like the SCO, a generic product is usually, but not always, less expensive because marketing costs have been reduced or eliminated. Some customers will buy a less expensive generic product, others will pay more for a brand name. The brand name supplier will complain that its costs are higher and that generic products are unfair. But generic products are lawful and remain in stores. Here, the “regulator”, the PUCO, takes advantage of its position and orders the generic SCO to be eliminated in favor of the brand name. This is a corruption of the market and violates the policy of the state of Ohio.

In addition, the SCO price, unlike marketers’ bilateral and monthly variable rate (“MVR”) contract prices, is transparent. The SCO, now available only to residential customers, is the NYMEX close plus 60 cents, the adder determined at the auction. Supp. 119; Tr. I at 132-133. A residential customer can easily know and understand the SCO price; however, the non-residential customer has no way to know how the supplier’s MVR price is

set. Supp. 119; Tr. I at 157. The MVR is not always based on the NYMEX price, nor is a mark-up of the commodity price known. *Id.* The MVR is anything a marketer wants it to be, and the Marketers' witnesses could provide no insight into how individual marketers set their MVR. Supp. 119; Tr. I at 133. Under the PUCO's 2013 Order, 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 weeks later. 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 prefer the SCO service. Supp. 119; Tr. I at 37. 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. At this point, however, non-residential customers no longer have this competitive choice.

In addition to the SCO auction spurring price competition, the SCO eliminates the marketer's customer acquisition costs, which are a significant barrier to entry into the competitive natural gas market for new marketers. Supp. 094; *Id.* at 15. The SCO spurs the entry of new marketers into the competitive market, contrary to the opinion of the PUCO. The SCO is comparable to governmental or other aggregation programs where suppliers are able to acquire customers without incurring significant marketing costs. Customers without access to a governmental aggregation or another aggregation are able to obtain a similar competitive option through the SCO. Without the transparent SCO price set by an auction, there is a reduction in the efficiency of the competitive market. Supp. 094; OPAE Ex. 1 at 15.

The Marketers complain that customers that choose the auction-driven SCO do so without paying the full cost of the auction. The Marketers complain that the cost of the auction is subsidized and paid by all customers as part of Dominion's base rates. Marketers Brief at

13. First, the record shows that the cost of the auction is de minimis. Dominion's Murphy testified that the auction costs a mere \$65,000, and the resulting SCO price is available to Dominion's 1.2 million customers. Supp. 119. Second, all customers benefit from the SCO's benchmark market price. Third, the Marketers are not customers who can legitimately complain about distribution rates which include auction costs because the Marketers do not pay distribution rates. Their interest here is in establishing higher unregulated commodity prices. That is why the Marketers want the competitively-priced SCO eliminated.

OCC witness Hayes did not believe that the elimination of the SCO would somehow benefit non-residential customers. He testified that non-residential customers may have taken SCO service because SCO service "has consistently been better – meaning at a lower price – than the numerous comparable variable rate offers from Choice Marketers on the PUCO Apples to Apples chart." Supp. 060; OCC Ex. 2 at 17. Mr. Hayes testified that it is possible that "these non-residential customers have made a choice, with that choice being to take the lower price SCO option." 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. The current economic conditions have contributed to less growth in natural gas commodity sales and fewer customers. The PUCO ignored Mr. Hayes' unrefuted testimony. The PUCO also ignored similar unrefuted testimony of OP&AE's witness Harper, an economist whose background includes employment with marketers.

The PUCO's fabrication that the SCO caused poor market conditions for natural gas commodity service in Ohio is not the only prevarication evident in its brief. The PUCO

states that its modification of the 2008 Exemption Order “only changes the method of assigning non-residential customers who choose not to shop to a particular supplier.” PUCO Merit Brief at 2, 25. This is false. The modification eliminates SCO service for non-residential customers. Non-residential customers no longer have access to a competitive, auction-based service offer. Elsewhere, the PUCO claims that its modification slightly alters how competition is going to be achieved in Dominion’s territory and that it “simply replaced one competitive option with another.” PUCO Brief at 25, 31. It is disgraceful for the PUCO to pretend that the substitution of the MVR for the SCO is harmless. The MVR is not auction-based; it is not transparently priced; it is any amount a marketer wants it to be. Later on, the PUCO acknowledges that it eliminated a competitive option, the SCO, without replacing it with anything new. PUCO Brief at 25. Forcing a non-residential customer onto a marketer’s MVR instead of the SCO means that the customer no longer has access to a competitive, market-based, auction-driven offer.

The misrepresentation that this case “only changes the method of assigning non-residential customers who choose not to shop” is repeated again in the PUCO’s brief when the PUCO claims that Dominion is not moving to “full choice commodity service” in this case and need not have used R.C. 4929.04 as the 2008 Exemption Order requires. The PUCO claims that because residential customers still have SCO service, Dominion is still not moving to “full choice commodity service”. The problem with that argument is that the 2008 Exemption Order applies equally to residential and non-residential customers and the denial of SCO service to non-residential customers violates the 2008 Exemption Order.

Finally, the PUCO notes that Dominion, a public utility distribution company, itself sells no gas and does not profit from the sale of gas. That is true. Dominion hires an

independent third party to conduct the SCO auction which establishes the SCO price. However, the PUCO fails to recognize that Dominion is part of a multi-state corporation which has a gas marketing arm that does sell gas to customers in the Dominion service territory and does profit from those sales. The PUCO does not question Dominion's conflict of interest when it is right in front of the PUCO's eyes. This is additional evidence that the PUCO has little expertise in competitive markets. Still, it is surprising that the PUCO could not discern that while the regulated portion of Dominion's business is no worse off under the 2013 Order, the competitive arm of Dominion's business will benefit as assigned customers are denied the SCO and charged any MVR price Dominion's affiliate wants to charge.

If the PUCO had acted lawfully as a regulator of the public utility Dominion, the PUCO would have noticed its administrative rule for complaints to modify existing exemption orders, Rule 4901:1-19-12. Reply App. 020. This is the rule the PUCO first claims it followed but did not, and then claims it waived but did not. The rule requires a complaint to be filed to modify an existing exemption order. The rule was promulgated by the PUCO pursuant to R.C. 4929.08, the statute authorizing modifications to existing exemption orders that the PUCO violated. Reply App. 011. The rule addresses compliance with corporate separation plans and codes of conduct which define Dominion's legal obligations as a public utility to separate itself from the business of commodity supply. The PUCO failed to recognize Dominion's code of conduct. The PUCO's failure as a regulator is as obvious as its lack of understanding of competitive markets.

This is a contested case before an adjudicative body. The PUCO's findings must be based on the evidence of record. R.C. 4903.09. The PUCO cannot create findings without

evidentiary support. The PUCO cannot ignore evidence it does not like such as the testimony of OP&A's witness Harper that the SCO contributes to and enhances competitive options and OCC's witness Hayes' testimony on market conditions and the purpose of Phase 2. The PUCO's brief should not identify the testimony of Dominion's witness Murphy as PUCO "findings". The Court should rule that the PUCO's findings of fact are manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power*, supra.

**E. The stipulation signed by Dominion, the Marketers, and the Office of the Ohio Consumers' Counsel protects residential customers from the loss of SCO service; therefore the stipulation is irrelevant to the contested issue in this case, which is the loss of SCO service for non-residential customers. The PUCO should not have applied its three-part test for the reasonableness of stipulations to the contested issues in this case.**

The PUCO quotes OP&A's brief stating that the stipulation does not even mention the state's energy policy. The Marketers do the same. Marketers' Brief at 17-18. The Marketers state that "there is no requirement that a stipulation contain provisions that address the state's energy policy." Of course there is no such requirement. But the PUCO's Opinion and Order considered the stipulation as if it addressed the state's energy policies. This is OP&A's point. The fundamental problem with the PUCO's treatment of the stipulation is that the PUCO pretended that the stipulation addressed the contested issues in this case.

The stipulation was signed by the Office of the Consumers' Counsel ("OCC"). The stipulation protects residential customers from the outcome of this case, the loss of SCO service. The stipulation does nothing to protect non-residential customers. It is unusual for a stipulation to have nothing to do with the contested issue in a case. It is also unusual for the PUCO to pretend that the stipulation somehow addressed the contested issues in the case. But that is what has happened here. It was unreasonable for the PUCO to base its Opinion

and Order on its three-part test for the reasonableness of stipulations when the stipulation does not have anything to do with the contested issue: the loss of SCO service for non-residential customers. It was also unreasonable for the PUCO to claim that a stipulation not supported by non-residential customers is a benefit to non-residential customers.

The only thing the stipulation does is protect residential customers from the fate of non-residential customers. This was the sole purpose of the stipulation negotiated and 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.” Supp. 060; OCC Ex. 2 at 5. Mr. Hayes stated that the stipulation provides for “the opportunity for a hearing to challenge Dominion’s application to exit for residential customers.” Id. He also stated that OCC takes no position on Dominion’s non-residential exit. Id. He emphasized that OCC did not sign the motion for a modification of the existing exemption order, which was signed only by Dominion and the Marketers. The position set forth in the memorandum in support of the motion is Dominion’s and the Marketers’ position alone. OCC Ex. 2 at 12. It is not a position set forth in the stipulation which the OCC signed.

In fact, Mr. Hayes testified that OCC agrees with OPAE that the 2008 Exemption Order is not based on findings that are no longer valid. Supp. 050; OCC Ex. 2 at 13-14. As Mr. Hayes pointed out, the 2008 Exemption Order found that a separate application must be filed for an exit. The motion’s request for an exit for non-residential customers should not be characterized as an action to address the 2008 Exemption Order’s expectation. Id. OCC may well have negotiated the stipulation after considering that the PUCO might violate the 2008 Exemption Order’s requirement that an application be filed if Dominion chose to alter the

SCO. What is clear is that a signatory party to the stipulation does not agree that there is an invalid finding in the 2008 Exemption Order.

The PUCO claims that it does not know why OPAE cites the AEP-Ohio case. PUCO Brief at 30. The problem in AEP-Ohio was a PUCO Opinion and Order that ignored the effects of the order on those who were the victims of the stipulation, as non-residential customers are the victims of the stipulation here. The PUCO should pay attention when stipulating parties have only reached their agreement by harming other parties. That is what happened in AEP-Ohio and that is what has happened here.

### **III. CONCLUSION**

The PUCO's January 9, 2013 Opinion and Order and March 6, 2013 Entry on Rehearing are unlawful and unreasonable. The PUCO ignored and misinterpreted statutes, an administrative code rule, a prior PUCO order, the evidence of record, and the stipulation signed by OCC solely to protect residential customers from the outcome of this case. The PUCO's concept of a competitive market is inconsistent with the policy promulgated by the General Assembly for the state of Ohio. Eliminating the SCO for non-residential customers eliminates transparent, auction-based pricing competition among marketers and increases the price of gas sold by marketers. The PUCO has no authority to change the policy of the state and no jurisdiction over the pricing of natural gas commodity. The PUCO strayed outside its expertise and jurisdiction, and its findings should be given no deference. The Court's role is to reverse the PUCO's unreasonable and unlawful order. The case should be remanded to the PUCO with instructions to correct the errors. When the non-residential customers of Dominion again have the SCO option, they should be notified and given the opportunity to return to the SCO.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Reply Brief of Appellant, Ohio Partners for Affordable Energy, was served upon the parties by hand delivery this 29th day of July 2013.

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REPLY BRIEF APPENDIX

**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

**000001**

## **4905.04 Power to regulate public utilities and railroads.**

The public utilities commission is hereby vested with the power and jurisdiction to supervise and regulate public utilities and railroads, to require all public utilities to furnish their products and render all services exacted by the commission or by law, and to promulgate and enforce all orders relating to the protection, welfare, and safety of railroad employees and the traveling public, including the apportionment between railroads and the state and its political subdivisions of the cost of constructing protective devices at railroad grade crossings.

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

Effective Date: 06-18-1996; 11-04-2005

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## **4905.05 Scope of jurisdiction.**

The jurisdiction, supervision, powers, and duties of the public utilities commission extend to every public utility and railroad, the plant or property of which lies wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or property which lies within this state; to the persons or companies owning, leasing, or operating such public utilities and railroads; to the records and accounts of the business thereof done within this state; and to the records and accounts of any companies which are part of an electric utility holding company system exempt under section 3(a)(1) or (2) of the "Public Utility Holding Company Act of 1935," 49 Stat. 803, 15 U.S.C. 79c, and the rules and regulations promulgated thereunder, insofar as such records and accounts may in any way affect or relate to the costs associated with the provision of electric utility service by any public utility operating in this state and part of such holding company system.

Nothing in this section, or section 4905.06 or 4905.46 of the Revised Code pertaining to regulation of holding companies, grants the public utilities commission authority to regulate a holding company or its subsidiaries which are organized under the laws of another state, render no public utility service in the state of Ohio, and are regulated as a public utility by the public utilities commission of another state or primarily by a federal regulatory commission, nor do these grants of authority apply to public utilities that are excepted from the definition of "public utility" under divisions (A)(1) to (3) of section 4905.02 of the Revised Code.

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

Effective Date: 03-29-1988

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

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(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 (C) 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 aggregation service, natural gas marketing service, or natural gas brokerage service.

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(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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## **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

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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.

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.

(E) An order exempting any or all of a natural gas company's commodity sales services or ancillary

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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

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7/17/2013

## **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

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## **4929.20 Certifying governmental aggregators and retail natural gas suppliers.**

(A) No governmental aggregator as defined in division (K)(1) of section 4929.01 of the Revised Code or no retail natural gas supplier shall provide a competitive retail natural gas service on or after thirteen months following the effective date of this section to a consumer in this state without first being certified by the public utilities commission regarding its managerial, technical, and financial capability to provide that service and providing reasonable financial assurances sufficient to protect customers and natural gas companies from default. In addition, a retail natural gas supplier may be required to provide a performance bond sufficient to protect customers and natural gas companies from default. Certification shall be granted pursuant to procedures and standards the commission shall prescribe in accordance with rules adopted under section 4929.10 of the Revised Code. However, certification or certification renewal shall be deemed approved thirty days after the filing of an application with the commission unless the commission suspends that approval for good cause shown. In the case of such a suspension, the commission shall act to approve or deny certification or certification renewal to the applicant not later than ninety days after the date of the suspension.

(B) Capability standards adopted in rules pursuant to division (A) of this section shall be sufficient to ensure compliance with section 4929.22 of the Revised Code and with the minimum service requirements established under section 4929.23 of the Revised Code. The standards shall allow flexibility for voluntary aggregation, to encourage market creativity in responding to consumer needs and demands. The rules shall include procedures for biennially renewing certification.

(C)

(1) The commission may suspend, rescind, or conditionally rescind the certification of any retail natural gas supplier or governmental aggregator issued under this section if the commission determines, after reasonable notice and opportunity for hearing, that the retail natural gas supplier or governmental aggregator has failed to comply with any applicable certification standards prescribed in rules adopted pursuant to this section or section 4929.22 of the Revised Code.

(2) An affected natural gas company may file an application with the commission for approval of authority to recover in accordance with division (C)(2) of this section incremental costs reasonably and prudently incurred by the company in connection with the commission's continuation, suspension, rescission, or conditional rescission of a particular retail natural gas supplier's certification under division (C)(1) of this section. Upon the filing of such an application, the commission shall conduct an audit of such incremental costs as are specified in the application. Cost recovery shall be through a rider on the base rates of customers of the company for which there is a choice of supplier of commodity sales service as a result of revised schedules approved under division (C) of section 4929.29 of the Revised Code, a rule or order adopted or issued by the 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. The rider shall take effect ninety days after the date of the application's filing unless the commission, based on the audit results and for good cause shown, sets the matter for hearing. After the hearing, the commission shall approve the application, and authorize such cost recovery rider effective on the date specified in the order, only for such incremental costs as the commission determines were reasonably and prudently incurred by the company in connection with the

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continuation, suspension, rescission, or conditional rescission of a retail natural gas supplier's certification under division (C)(1) of this section. Any proceeding under division (C)(2) of this section shall be governed by Chapter 4903. of the Revised Code.

(D) No natural gas company, on and after thirteen months following the effective date of this section, shall knowingly distribute natural gas, to a retail consumer in this state, for any governmental aggregator, as defined in division (K)(1) of section 4929.01 of the Revised Code, or retail natural gas supplier, that has not been certified by the commission pursuant to this section.

Effective Date: 06-26-2001

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**4929.21 Consent to jurisdiction - appointment of statutory agent.**

(A)

(1) Beginning on the effective date of initial rules adopted pursuant to division (A) of section 4929.20 of the Revised Code, no person shall operate in this state as a retail natural gas supplier, unless that person first does both of the following:

(a) Consents irrevocably to the jurisdiction of the courts of this state and service of process in this state, including, without limitation, service of summonses and subpoenas, for any civil or criminal proceeding arising out of or relating to such operation, by providing that irrevocable consent in accordance with division (A)(4) of this section;

(b) Designates an agent authorized to receive that service of process in this state, by filing with the public utilities commission a document designating that agent.

(2) Beginning on the effective date of initial rules adopted pursuant to division (A) of section 4929.20 of the Revised Code, no person shall continue to operate as such retail natural gas supplier unless that person continues to consent to such jurisdiction and service of process in this state and continues to designate an agent as provided under this division, by refiling in accordance with division (A)(4) of this section the appropriate documents filed under division (A)(1) of this section or, as applicable, the appropriate amended documents filed under division (A)(3) of this section. Such refiling shall occur during the month of December of every fourth year after the initial filing of a document under division (A)(1) of this section.

(3) If the address of the person filing a document under division (A)(1) or (2) of this section changes, or if a person's agent or the address of the agent changes, from that listed on the most recently filed of such documents, the person shall file an amended document containing the new information.

(4) The consent and designation required by divisions (A)(1), (2), and (3) of this section shall be in writing, on forms prescribed by the commission. The original of each such document or amended document shall be legible and shall be filed with the commission, with a copy filed with the office of the consumers' counsel and with the attorney general's office.

(B) A person who enters this state pursuant to a summons, subpoena, or other form of process authorized by this section is not subject to arrest or service of process, whether civil or criminal, in connection with other matters that arose before the person's entrance into this state pursuant to such summons, subpoena, or other form of process.

(C) Divisions (A) and (B) of this section do not apply to any of the following:

(1) A corporation incorporated under the laws of this state that has appointed a statutory agent pursuant to section 1701.07 or 1702.06 of the Revised Code;

(2) A foreign corporation licensed to transact business in this state that has appointed a designated agent pursuant to section 1703.041 of the Revised Code;

(3) Any other person that is a resident of this state or that files consent to service of process and designates a statutory agent pursuant to other laws of this state.

Effective Date: 06-26-2001

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## **4929.22 Minimum service requirements.**

For the protection of consumers in this state, the public utilities commission shall adopt rules under section 4929.10 of the Revised Code specifying the necessary minimum service requirements of a retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code regarding the marketing, solicitation, sale, or provision, directly or through its billing and collection agent, of any competitive retail natural gas service for which it is subject to certification. Rules adopted under this section shall include additional consumer protections concerning all of the following:

(A) Contract disclosure. The rules shall include requirements that a retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code do both of the following:

(1) Provide consumers with adequate, accurate, and understandable pricing and terms and conditions of service, including any switching fees, and with a document containing the terms and conditions of pricing and service before the consumer enters into the contract for service;

(2) Disclose the conditions under which a customer may rescind a contract without penalty.

(B) Service qualification and termination. The rules shall include a requirement that, before a consumer is eligible for service from a retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code, the consumer shall discharge, or enter into a plan to discharge, all existing arrearages owed to or being billed by the natural gas company from which the consumer presently is receiving service. The rules also shall provide for disclosure of the terms identifying how customers may switch or terminate service, including any required notice and any penalties.

(C) Minimum content of customer bills. The rules shall include all of the following requirements, which shall be standardized:

(1) Price disclosure and disclosures of total billing units for the billing period and historical annual usage;

(2) To the maximum extent practicable, separate listing of each service component to enable a customer to recalculate its bill for accuracy;

(3) Identification of the supplier of each service;

(4) Statement of where and how payment may be made and provision of a toll-free or local customer assistance and complaint number for the retail natural gas supplier or governmental aggregator, as well as a consumer assistance telephone number or numbers for state agencies, such as the commission, the office of the consumers' counsel, and the attorney general's office, with the available hours noted;

(5) Other than for the first billing after the effective date of initial rules adopted pursuant to division (A) of section 4929.20 of the Revised Code, highlighting and clear explanation on each customer bill,

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for two consecutive billing periods, of any changes in the rates, terms, and conditions of service.

(D) Disconnection and service termination, including requirements with respect to master-metered buildings. The rules shall include policies and procedures that are consistent with sections 4933.12 and 4933.122 of the Revised Code and the commission's rules adopted under those sections, and that provide for all of the following:

(1) Coordination between suppliers for the purpose of maintaining service;

(2) The allocation of partial payments between suppliers when service components are jointly billed;

(3) A prohibition against switching, or authorizing the switching of, a customer's supplier of competitive retail natural gas service without the prior consent of the customer in accordance with appropriate confirmation practices, which may include independent, third-party verification procedures;

(4) A requirement of disclosure of the conditions under which a customer may rescind a decision to switch its supplier without penalty;

(5) Specification of any required notice and any penalty for early termination of contract.

(E) Minimum service quality, safety, and reliability.

(F) Customer information. The rules shall include requirements that a natural gas company make generic customer load pattern information available to a retail natural gas supplier or governmental aggregator as defined in division (K)(1) or (2) of section 4929.01 of the Revised Code on a comparable and nondiscriminatory basis, and make customer information available to a retail natural gas supplier or governmental aggregator as defined in division (K)(1) or (2) of section 4929.01 of the Revised Code on a comparable and nondiscriminatory basis unless, as to customer information, the customer objects. The rules shall ensure that each natural gas company provide clear and frequent notice to its customers of the right to object and of applicable procedures. The rules shall establish the exact language that shall be used in all such notices. The rules also shall require that, upon the request of a governmental aggregator defined in division (K)(1) of section 4929.01 of the Revised Code, solely for purposes of the disclosure required by division (D) of section 4929.26 of the Revised Code, or for purposes of a governmental aggregator defined in division (K)(2) of section 4929.01 of the Revised Code, a natural gas company or retail natural gas supplier must provide the governmental aggregator, in a timely manner and at such cost as the commission shall provide for in the rules, with the billing names and addresses of the customers of the company or supplier whose retail natural gas loads are to be included in the governmental aggregation.

(G) Ohio office. The rules shall require that a retail natural gas supplier maintain an office and an employee in this state.

Effective Date: 06-26-2001

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## **4929.23 Information provided by supplier or aggregator.**

(A) A retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code shall provide the public utilities commission with such information, regarding a competitive retail natural gas service for which it is subject to certification, as the commission considers necessary to carry out sections 4929.20 to 4929.24 of the Revised Code. The commission shall take such measures as it considers necessary to protect the confidentiality of any such information.

(B) The commission shall require each retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code to file an annual report of such receipts and sales from the provision of those competitive retail natural gas services for which it is subject to certification. For the purpose of the reports, sales of hundred cubic feet of natural gas are deemed to occur at the meter of the retail customer.

Effective Date: 06-26-2001

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## **4929.24 Public utilities commission jurisdiction.**

(A)

(1) The public utilities commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or complaint or initiative of the commission regarding the provision by a retail natural gas supplier subject to certification under section 4929.20 of the Revised Code of any service for which it is subject to certification.

(2) The commission also has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or complaint or initiative of the commission to determine whether a retail natural gas supplier subject to certification under section 4929.20 of the Revised Code has violated or failed to comply with any provision of sections 4929.20 to 4929.23 of the Revised Code regarding a competitive retail natural gas service for which it is subject to certification or any rule or order adopted or issued by the commission for purposes of those sections.

(B) In addition to its authority under division (C)(1) of section 4929.20 of the Revised Code and to any other remedies provided by law, the commission, after reasonable notice and opportunity for hearing in accordance with section 4905.26 of the Revised Code, may do any of the following:

(1) Order rescission of a contract, or restitution to customers, in any complaint brought pursuant to division (A)(1) or (2) of this section;

(2) Order any remedy or forfeiture provided under sections 4905.54 to 4905.60 and 4905.64 of the Revised Code upon a finding under division (A)(2) of this section that the retail natural gas supplier subject to certification under section 4929.20 of the Revised Code has violated or failed to comply, regarding a competitive retail natural gas service for which it is subject to certification, with any provision of sections 4929.20 to 4929.23 of the Revised Code or any rule or order adopted or issued under those sections.

(C)

(1) In addition to the authority conferred under section 4911.15 of the Revised Code, the consumers' counsel may file a complaint under division (A)(1) or (2) of this section on behalf of residential consumers in this state or appear before the commission as a representative of those consumers pursuant to any complaint filed under division (A)(1) or (2) of this section.

(2) In addition to the authority conferred under section 4911.19 of the Revised Code, the consumers' counsel, upon reasonable grounds, may file with the commission under section 4905.26 of the Revised Code a complaint for discovery if the recipient of an inquiry under section 4911.19 of the Revised Code fails to provide a response within the time specified in that section.

(D) The commission's jurisdiction with respect to a natural gas company under Chapter 4905. of the Revised Code extends to any violation of division (D) of section 4929.20 or any failure to comply with division (C) of section 4929.29 of the Revised Code.

Effective Date: 06-26-2001

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## **4929.28 Resolving issues regarding aggregation.**

Any governmental aggregator as defined in division (K)(1) or (2) of section 4929.01 of the Revised Code or retail natural gas supplier shall act in good faith with a natural gas company to resolve any issues regarding an aggregation prior to the date of commencement of service to the aggregated load. In the event agreement cannot be reached, either party may petition the public utilities commission to resolve the issues.

Effective Date: 06-26-2001

## **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

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Statutory Authority: 4929.10

Rule Amplifies: ~~4929.04~~

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