

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Motion to)
Modify the June 18, 2008 Opinion and)
Order in Case No. 07-1224-GA-EXM.) Case No 12-1842-GA-EXM

**INITIAL BRIEF
OF
THE OHIO GAS MARKETERS GROUP AND
RETAIL ENERGY SUPPLY ASSOCIATION**

November 13, 2012

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Pursuant to the Attorney Examiner’s direction at the close of the hearing, the Ohio Gas Marketers Group and the Retail Energy Supply Association (“OGMG/RESA”) respectfully submits this Initial Brief.

I. INTRODUCTION

The Commission’s June 18, 2008 Opinion and Order in Case No. 07-1224-GA-EXM (“Exemption Order”) granted an exemption, pursuant to Section 4929.04, Revised Code, authorizing The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO”) to implement Phase 2 of DEO’s plan to exit the merchant function.

On June 15, 2012, DEO and OGMG filed a joint motion requesting that the Commission modify the Exemption Order pursuant to Section 4929.08(A), Revised Code to allow DEO, beginning in April 2013, to discontinue the availability of Standard Choice Offer (“SCO”) service to Choice-eligible General Sales Service – Non-Residential, Large Volume General Sales Service, Energy Choice Transportation Service – Non-Residential and Large Volume Energy Choice Transportation Service customers (collectively “Non-Residential Customers”). Both DEO and OGMG/RESA propose that such Non-Residential Customers receive commodity

service from the next available competitive retail natural gas (“CRNG”) supplier on a rotating list maintained by DEO pursuant to the CRNG Supplier’s then-applicable monthly variable rate (“MVR”). Attached to the Joint Motion was a Stipulation and Recommendation (“Joint Exhibit 1”) which was signed by DEO, the Ohio Gas Marketers Group (“OGMG”) and the Ohio Consumers Counsel (“OCC”).

On June 28, 2012, the Ohio Partners for Affordable Energy (“OPAE”) filed a motion seeking leave to intervene in this matter as well as a motion to dismiss the June 15, 2012 joint motion. On July 13, 2012, DEO and the OGMG each filed a memorandum contra. The OPAE filed its reply on July 19, 2012.

On July 27, 2012, the Attorney Examiner issued an Entry setting forth a procedural schedule. It established August 30, 2012 as the deadline for filing motions to intervene and for filing of comments and/or memorandum contra the June 15, 2012 motion. The Attorney Examiner also established the deadline for filing reply comments, replies to memorandum contra and direct testimony by the joint movants on September 13, 2012. The deadline for filing testimony on behalf of the Staff and intervenors was established as September 27 with the hearing scheduled for October 9. The July 27 Entry also granted the motion to intervene of OPAE.

Comments were filed by the Staff and OPAE on August 30, 2012. OCC, Direct Energy Services/Direct Energy Business, and the Retail Energy Supply Association (“RESA”) each filed motions to intervene on August 30.

Reply comments and the direct testimony of Jeffrey Murphy (DEO Ex. 1) was filed by Dominion East Ohio on September 13. The OGMG/RESA filed reply comments (OGMG/RESA Ex. 4) and direct testimony of Teresa L. Ringenbach (OGMG/RESA Ex. 2) and Vince Parisi

(OGMG/RESA Ex. 3). The OCC also filed reply comments on September 13 (OCC Ex. 3). The OPAE filed its memorandum contra the motions to intervene also on September 13, 2012.

Direct Energy and Direct Energy Business filed their Reply to OPAE's memorandum contra the motions to intervene on September 18. RESA and OCC each filed their respective Replies to the OPAE memorandum contra on September 20, 2012.

On September 27, the Attorney Examiner granted the Staff's request for a continuance of the scheduled filing of Staff testimony and intervener testimony to October 4 as well as the hearing date to begin on October 16. On October 2, 2012 Direct Energy Services and Direct Energy Business withdrew their motion to intervene.

On October 4, the Staff filed the testimony of Barbara Bossart (Staff Ex. 1), OCC filed the testimony of Bruce M. Hayes (OCC Ex. 2) and OPAE filed the testimony of Stacia Harper (OPAEx. 1).

On October 9, 2012, OPAE withdrew its memorandum contra OCC's motion to intervene and the Attorney Examiner issued an entry granting the motions to intervene filed by OCC and RESA. Subsequently, OCC filed revised testimony of Bruce M. Hayes on October 17 and the hearing proceeded on October 16-17, 2012. The Attorney Examiner directed that briefs be filed on November 13 and 21. (Tr. 241-242.)

This case boils down to the question of whether the Commission can and should adopt the Joint Movants' proposal that Non-Residential Customers receive commodity service directly from CRNG suppliers, who have not selected a supplier. The commodity service rate would equal the CRNG supplier's then-applicable MVR. The customer would always maintain the option of switching to a different CRNG supplier, entering into a different rate plan with the assigned supplier, or participating in an opt-out governmental aggregation program. The OPAE opposes the Joint Motion, but OGMG and RESA submit that granting the June 15, 2012 Joint

Motion and adopting the Stipulation and Recommendation is authorized by law and warranted by the facts.

II. ARGUMENT

A. The Joint Motion is authorized by Section 4929.08(A), Revised Code and supported by the record.

Section 4929.08(A), Revised Code provides in part:

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.

DEO witness Murphy testified that the Commission specifically noted in its Exemption Order the expectation that the March 2010 auction would “be the final auction and that, once [its] term expires, choice-eligible customers will be required to enter into a direct retail relationship with a supplier or aggregator to receive commodity service,” citing the Exemption Order at pp. 8-9. Mr. Murphy also testified that the Commission expressly relied on DEO’s “application, the Stipulation, and the testimony of record” in approving Phase 2, citing the Exemption Order at p. 20, which set forth this expectation. Mr. Murphy also noted that the Commission also found “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,” citing the Exemption Order at p. 20. (DEO Ex. 1.0, p. 5.)

Both DEO witness Murphy and OGMG/RESA witness Parisi explained why certain of the Commission's June 18, 2008 Exemption Order findings are no longer valid. Mr. Murphy testified as follows:

Q14. How is it that these findings are no longer valid?

A14. Despite the expectation that Phase 2 would end in March 2011, which was recognized and relied upon in the Exemption Order, it is becoming increasingly clear that there is a core of non-residential customers who will continue to rely on the SCO rate and thereby hinder DEO's exit of the merchant function and the formation of a more competitive natural gas commodity market. After steadily increasing from 2000 to 2008, non-residential enrollment in Energy Choice has held relatively steady at between approximately 46,000 and 49,000 from 2009 to 2012. Thus, despite the expectation that the March 2010 SCO service auction would be the last, this has not come to pass.

It has also become clear that Phase 2 is no longer "further[ing] the potential benefits of market-based pricing," *id.*, and in fact may be hindering the further development of the market. As these premises of the Order no longer appear valid, the Joint Movants propose modifying the Exemption Order pursuant to R.C. 4929.08(A), as set forth in the Stipulation. (DEO Ex. 1.0, p. 6.)

OGMG/RESA witness Parisi also testified regarding the change in certain conditions since June 18, 2008. He testified as follows:

Q.9. What has changed since the Commission's last order in Case 07-1224-GA-EXM that merits amending the current tariffs?

A9. In large measure, the most notable change in circumstances since the last Order is the continuing load migration which is the result of the success of the transition efforts thus far. At this point, in terms of load, less than two percent of the through-put into the East Ohio system is being served by the SCO. More than 80% of the choice-eligible residential and non-residential customers are being served by competitive retail natural gas suppliers. The residual SCO load has reached a plateau over the last few years. It is my opinion that this leveling reflects the recalcitrance of the remaining small portion of the market that simply does not respond. Further, the customers that receive the auction-driven SCO service do so without paying the full cost of the auction. The cost of the auction

is socialized and paid by all customers as part of East Ohio's base rates. When such few residual non-migrated customers remain, it is fair to ask whether there is a more efficient method of supplying the default natural gas load that is consistent with the statutory directive to move to market-based pricing and service. Simply stated, the more efficient method is to apply the MVR. When switching all the default service to the MVR was suggested, there was concern raised by some of the stakeholders that residential customers would need more time and that if the non-residential customers went first, potential problems that arise from that transfer could be addressed before the more numerous and less sophisticated residential customers are moved. The Suppliers do not agree with those concerns, but as a part of the Stipulation the Suppliers were willing to pledge that they would not petition the Commission to transfer residential customers to the MVR prior to June 2015, so that lessons learned by the non-residential transfer could be applied. (OGMG/RESA Ex. 3, pp. 5-6.)

Contrary to any argument that the OPAE may make, the record clearly demonstrates that the findings the Commission made in its June 18, 2008 Opinion and Order in Case No. 07-1224-GA-EXM are no longer valid. Phase 2 is no longer furthering the benefits of a competitive market. Once the Commission makes that finding, it next must consider whether the modification proposed by the Joint Movants is in the public interest.

B. As evidenced by the record, the Joint Motion comports with Ohio's energy policy and will produce additional benefits in the public interest.

At least four of the energy policy objectives of this state will be met if the Commission grants the Joint Motion. These policy objectives are set forth in Section 4929.02(A)(4), (5), (6) and (7), Revised Code which provide:

- (A) It is the policy of this state too, throughout this state: ...
- (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 networks through the development and implementation of flexible regulatory treatment; and
- (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.

With respect to subsection (A)(4), DEO witness Murphy testified that discontinuing SCO service will directly increase the entrance of customers into the commodity market, thus spurring market entry, additional competition, and the development of the natural gas supply market.

(DEO Ex. 1, pp. 6-7.)

With respect to subsection (A)(5), Staff witness Barbara Bossart testified that the Staff believed that educational materials should be provided to non-residential customers in order for them to make a fully informed decision on who should supply their natural gas. (Staff Ex. 1, p. 3.)

With respect to subsection (A)(6), DEO witness Murphy testified that granting the Joint Motion would further this provision of state policy because it appears that SCO service, although serving as an important step in the process, may now be hindering the continuing emergence of competitive natural gas markets. (DEO Ex. 1, p. 6.)

With respect to subsection (A)(7), DEO witness Murphy explained that granting the Joint Motion would further this objective as well. He testified that several years into Phases 1 and 2, it appears that as long as SCO service remains an option, some customers -- for any number of reasons -- will not exercise their ability to choose a CRNG supplier. Discontinuing SCO service will accordingly encourage customers and suppliers to enter into direct retail relationships.

(DEO Ex. 1, p. 7.)

The OGMG/RESA acknowledges that customers cannot be forced to enter into a bi-lateral contract with a competitive retail natural gas supplier, and that those who have not entered into a contract continue to have a right to opt-out of a governmental aggregation. Thus, the Joint Motion does not change the right of a retail customer to not make a choice and yet still receive natural gas service. (OGMG/RESA Ex. 3, p. 7.) The Joint Motion merely amends the manner in which default gas supplies for customers who opt-out of a governmental aggregation or have not entered into a bi-lateral contract with a CRNGS are procured.. Granting the Joint Motion is not a leap of faith; it is the next step in the gradual and methodical transition to a fully competitive market. (OGMG/RESA Ex. 2, p. 9.) The Joint Motion seeks a full market method where each customer pays their full price and no individual price is subsidized by the entire market– the MVR – which is in place now and does not create the same barriers to full competition. This will result in DEO’s “full exit” out of the merchant function with respect to Choice-Eligible Non-Residential Customers. (DEO Ex. 1, p. 4.) Nowhere in the energy policy of this state is there a goal or objective that promotes the use of less efficient procurement methods for the default natural gas supplies needed to assure bundled service.

In addition to fulfilling these state policy objectives, there will be additional benefits by granting the Joint Motion. OGMG/RESA witness Parisi testified that another benefit is uniformity in that it should be easier for Suppliers to provide quotes to commercial customers, and for the Commission’s call center to answer questions if all commercial customers were treated alike. Currently, some Choice-Eligible Commercial Customers are on MVR and some are on SCO; if the Joint Motion is approved, all Choice-Eligible Commercial Customers will be on the MVR. A second benefit, according to Mr. Parisi, would be that granting the Joint Motion would create an incentive for existing suppliers to contribute more assets to the East Ohio market and for new suppliers to enter the Ohio market. (OGMG/RESA Ex. 3, p. 7.) He also explained

that under either the MVR or the SCO, a customer, upon request, can leave the default supply program with the next administratively available meter reading and there is never an exit fee. (OGMG/RESA Ex. 3, p. 7.)

OGMG/RESA witness Ringenbach also testified as to a variety of benefits that will result if the Stipulation is adopted. Under the MVR, Suppliers will not only compete on the cost of service (price) but will also be encouraged to develop new products and services to distinguish their nature gas service and attract customers. In other Texas where this default model was developed for electricity, these products and services have involved smart metering, conservation, and alternative forms of payment, such as pre-paid products. In addition, she stated that full competition will result in retail suppliers having offices and personnel in Ohio that will not only create jobs and tax revenues, but also additional participation in charitable and community activities. (OGMG/RESA Ex. 2, pp. 5-6.)

Ms. Ringenbach also believed that for the Commission to fully understand the importance of an exit-the-merchant function, certain items should be studied. Staff witness Bossart concurred in the need to have the Commission fully understand the consequences of a fully-competitive market before there is any further movement toward a fully-competitive residential market. (Staff Ex. 1, p. 7.)

Ms. Ringenbach recommended that DEO and the Staff should look at whether suppliers during this period offer new and varied products in the market. In addition, if new and varied products are not produced, East Ohio and the Staff should study if there are barriers to competition that inhibited development of such new products and services and whether those barriers can be remedied. Ms. Ringenbach also recommended that the Staff and East Ohio study whether suppliers are gearing up their work force and Ohio located assets in order to offer more and varied products. She also recommended that East Ohio and the Staff observe whether the

switch to MVR causes an increase in the number of complaints to the Commission's call center that are legitimately connected to the MVR, such as concerns related to price gouging or customer confusion and whether these concerns appear to be warranted. Finally, she recommended that East Ohio and the Staff study whether or not the suppliers directly or indirectly have caused an additional investment in the community. (OGMG/RESA Ex. 2, pp. 6-7.)

OPAE witness Stacia Harper testified in opposition to the Joint Motion. She opposed eliminating the SCO option for two reasons. First, she believed that the SCO prices are lower than competitive retail natural gas supplier's direct offers as a result of the auction process. She also believed that the SCO eliminated the competitive retail natural gas service supplier's customer acquisition costs which she believed was a significant barrier to entry into the competitive natural gas market of new competitive retail natural gas suppliers. (OPAE Ex. 1, p. 15.) The record does not support Ms. Harper's beliefs. On cross-examination, Ms. Harper admitted that for a recent month, two of the three variable plans offered by competitive retail natural gas suppliers on the Apples to Apples chart had prices lower than the SCO. (Tr. 133-134.)¹ With respect to her notion that the SCO eliminated customer acquisition costs, she conceded that the price of the auction is socialized and then paid by both shopping and non-shopping customers alike. (Tr. 138-139.) Finally, Ms. Harper testified that competitive retail natural gas suppliers do not have much reason to offer a price below the SCO. However, she conceded that if one eliminated the SCO price, as proposed in the Joint Motion, there would be nothing to prevent competitive retail natural gas providers from making offers below that "SCO floor." (Tr. 145.)

¹ The record reflects that both of the lower cost suppliers were members of OGMG\RESA. Tr. 133-135.

Based on the record before it, the Commission should find that granting the Joint Motion will advance the natural gas policy objectives of this state and will produce additional benefits in the public interest.

C. Joint Exhibit 1 attached to the Joint Motion of June 15, 2012 is valid, supported by the record and should be approved.

OPAE may reiterate its argument that the Commission should be concerned that no customer group affected by the Joint Motion has signed the Stipulation, arguing that because OCC represents residential customers and because this Joint Motion does not affect residential customers, OCC should not be considered a party of interest in this matter.

On August 30, 2012, OCC exercised its statutory right to intervene. Regardless of the identity of the signatory parties or their interests, the fact that the Stipulation has been reduced to writing and is signed by two parties allows it to be considered by the Commission to review it in light of the evidence presented. There is no rule that prescribes the character of signatories to a Stipulation.

Rule 4901-1-30 of the Ohio Administrative Code (“O.A.C.”) authorizes parties to Commission proceedings to enter into Stipulations. Although not binding on the Commission, the terms of such agreements are accorded substantial weight. *See Consumers’ Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, at 125 (1992), citing *Akron v. Pub. Util. Comm. Consumers’ Counsel v. Pub. Util. Comm.*, 55 Ohio St.2d 155 (1978).

The standard of review for considering the reasonableness of a Stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT (March 30, 2004); *Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al. (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-170-EL-AIR (January 30,

1989); *Restatement of Accounts and Records (Zimmer Plant)*, Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for the Commission upon consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a Stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 547 (1994) (citing *Consumers' Counsel, supra*, at 126). The Court stated in that case that the Commission may place substantial weight on the terms of a Stipulation, even though the Stipulation does not bind the Commission (*Id.*).

DEO, the OGMG and OCC each signed the Stipulation. OGMG/RESA witness Teresa Ringenbach testified that the settlement is the product of several years of negotiations among the parties. (OGMG/RESA Ex. 2, p. 3.) OCC witness Hayes testified that the settlement met all three criteria. (OCC Ex. 2, pp. 7-9.) OPAE witness Harper did not address the Stipulation criteria.

DEO witness Jeffrey A. Murphy testified that each of the signatory parties has a history of active participation in Commission proceedings and is represented by experienced and competent counsel. Negotiations required numerous meetings and took place over several

months, resulting in numerous concessions, as evidenced by the Stipulation. Mr. Murphy testified that the signatory parties represent the interest of a local distribution company, marketers and suppliers, and residential customers. The Staff, OP&A and Industrial Energy Users-Ohio each had the opportunity to participate in settlement negotiations and to review drafts of the Stipulation. (DEO Exhibit 1.0, pp. 9-10.) Mr. Murphy testified that he and DEO counsel contacted counsel for OP&A to review prior drafts of the Stipulation and to participate in the negotiations. Mr. Murphy testified that there was never any intent to exclude any party from participating in negotiations and that the OP&A had ample opportunity to participate but chose not to. (DEO Ex. 1.0, p. 10; Tr. 90-91.)

With respect to the question as to whether the settlement, as a package, benefits ratepayers and the public interest, Mr. Murphy testified that the settlement directly furthers several provisions of the state policy. He explained that the Stipulation takes a careful, incremental step affecting only a subset of non-residential customers to explore whether and how a full exit from the merchant function may benefit all customers. He testified that the granting the joint motion and adopting the Stipulation would further Sections 4929.02(A)(4) and (6), Revised Code. Discontinuing SCO service would, in Mr. Murphy's view, directly increase the entrance of customers into the commodity market, thus spurring market entry, additional competition, and the development of the natural gas supply market. (DEO Ex. 1.0, pp. 6-7.)

Finally, rather than violating any important regulatory principle or practice, Mr. Murphy testified that the Stipulation promoted state policy, benefited ratepayers and the public interest, and allowed the Commission to retain authority to modify or abrogate exemption orders to the extent a non-residential exit were found to pose any problems. (DEO Ex. 1.0, p. 10.)

The Commission should find that the Stipulation signed by DEO, the O&A and OCC is reasonable in light of the Commission's three criteria and should be approved.

III. CONCLUSION

The Joint Motion is authorized by Section 4929.08(A), Revised Code. It comports with Ohio's Natural Gas Policy as set forth in Section 4929.02(A), Revised Code. Granting the Joint Motion will also produce additional benefits that are in the public interest and will allow the Commission to understand the consequences of a fully-competitive market before there is any further movement toward a fully-competitive residential market. Joint Exhibit 1 attached to the Joint Motion meets the Commission's three-pronged test for evaluating Stipulations and should be approved.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail on the following persons this 13th day of November, 2012:

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