**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Commission's Review of the Alternative Rate Plan and Exemption Rules Contained in Chapter 4901:1-19 of the Ohio Administrative Code. | ) ) ) ) | Case No. 11-5590-GA-ORD |

# REPLY COMMENTS OF COLUMBIA GAS OF OHIO, INC., DUKE ENERGY OHIO, INC., THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO, AND VECTREN ENERGY DELIVERY OF OHIO, INC.

## I. INTRODUCTION

In its August 22, 2012 Entry in this case, the Commission authorized the filing of comments on Staff's revised recommended changes to the rules and also authorized the filing of reply comments. *Id*. at 4. In accordance with that Entry, Columbia Gas of Ohio, Inc. ("Columbia"), Duke Energy Ohio, Inc. ("Duke Energy Ohio"), The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO") and Vectren Energy Delivery of Ohio, Inc. ("VEDO") (collectively, "the Companies") offer the following reply to the comments of the Office of the Ohio Consumers' Counsel ("OCC") and Ohio Partners for Affordable Energy ("OPAE").

## II. REPLY TO OCC'S COMMENTS

OCC's comments generally allege that the proposed rules will not provide due-process protections. This is not true.

### A. The Commission's rules provide sufficient due-process protections for applications to exit the merchant function.

OCC maintains that the Commission's rules should set forth an independent set of procedural rules to govern exit-the-merchant-function cases ("exit cases"), in addition to those contained in Ohio Admin. Code Chapter 4901-1. It argues that "[t]he existence of non-

mandatory procedural rules elsewhere in the administrative code, as the PUCO Staff references, will not ensure due process protection." (OCC Supp. Comments at 5.)

First, while OCC's due-process comments could be relevant in a given exit case, they are not well taken in this rulemaking. OCC misapprehends the nature of due-process protections. "'[D]ue process' has never been, and perhaps can never be, precisely defined. . . . [D]ue process is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (internal quotations omitted). "The flexibility of due process . . . recognizes that not all situations calling for procedural safeguards call for the same kind of procedure. A court's task is to ascertain what process is due in a given case . . . ." *In re C.S.*, 115 Ohio St. 3d 267, 2007-Ohio-4919, ¶ 81 (citation and internal quotation marks omitted). Not only is due process flexible, but "the commission has broad discretion in the conduct of its hearings." *Duff v. Pub. Util. Comm.*, 56 Ohio St. 2d 367, 379 (1978). It may be that in some cases due process requires certain procedures, while in others those procedures may be waived—but that is a determination for the Commission when it faces a specific case. The point is that the rules generally provide ample procedure for exit cases, and that is all that needs to be shown in this rulemaking.

Second, OCC's argument is overbroad. If the Commission's ability to waive rules in appropriate situations vitiates the protections of due process, then none of the Commission's rules provide due process.

The Commission's existing rules provide ample process to parties in contested cases. Whatever concerns OCC has in a specific exit case may be raised in that case, but it offers no sound reason to revise the rules.

**B. OCC's proposal is inconsistent with Ohio's policy in favor of sensible, streamlined procedural rules.**

OCC also critiques Staff's statement that "OCC's proposal to implement additional procedural rules would be inconsistent with the goals to streamline processes in Executive Order 2011-01K and Section 121.82, Revised Code." 11-5590 Entry, Att. A at 24 (July 2, 2012). According to OCC, Executive Order 2011-01K is "intended to reduce the impacts that governmental regulations may have on *small* businesses." (OCC Supp. Comments at 6 (emphasis sic).) In OCC's view, utilities are not small businesses, so these goals do not apply.

There are numerous problems with OCC's comments here. First, OCC mischaracterizes Executive Order 2011-01K. While the order addresses concerns specific to small businesses, it also addresses broader concerns regarding the efficiency of rules and their effect on the universal business community. For example, the order requires all "Commissions" to "[a]mend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, and needlessly burdensome, have negative unintended consequences, or unnecessarily impede business growth." Exec. Order 2011-01K at 3–4. This instruction is one of many that does not simply concern small businesses, and it directly supports Staff's rejection of OCC's duplicative proposals.

Moreover, even if OCC correctly interpreted the executive order, it ignored the other authority relied upon by Staff, namely, R.C. 121.82. That statute requires, among other things, that "draft rule[s] will not have an adverse impact on *businesses,*" R.C. 121.82(A) (emphasis added), not just small businesses.

Finally, regardless of the specific requirements of the authorities cited by Staff, OCC ignores a more fundamental question: what legitimate interest is served by forcing *any* business, large or small, to navigate duplicative and potentially conflicting and confusing regimes of rules? Staff properly rejected OCC's proposal.

### C. OCC's final comment essentially restates its first comment.

In its final comment, OCC again argues that the Commission should restate its general procedural rules, again arguing that the rules should "provide for adequate due process protections." (OCC Supp. Comments at 9.) The Companies would simply repeat their reply comments set forth above in Section II.A. As before, in the event the Commission waived a procedural requirement that OCC deemed necessary, OCC could raise its concerns in that case. But OCC has not justified any changes to the rules.

## III. REPLY TO OPAE'S COMMENTS

### A. Ohio law permits natural gas utilities to exit the merchant function.

OPAE's first comment is to deny the assumption on which the exit rules are founded—it asserts that Ohio law does not "allow[] natural gas utilities to 'exit the merchant function.'" (OPAE Supp. Comments at 2.)

This is plainly incorrect. Ohio law specifically permits the Commission to "exempt . . . any commodity sales service . . . of the natural gas company from all provisions of Chapter 4905 . . . including the obligation . . . to provide the commodity sales service." R.C. 4929.04(A). Proposed Rule 4901:1-19-01(O) defines "exit the merchant function" as the "transfer of the obligation to supply default commodity sales service for choice-eligible customers from a natural gas company to retail natural gas suppliers." Not only does this definition fall within the permissive scope of R.C. 4929.04, it is the one form of exemption specifically contemplated by the statute—an exemption from the obligation to provide commodity sales service.

OPAE argues that the Revised Code does not specifically use the term "exit the merchant function" (OPAE Supp. Comments at 3), but this is irrelevant. The General Assembly specifically permits the Commission to exempt an LDC from the duty "to provide . . .

commodity sales service," and that is exactly what the exit-the-merchant-function definition contemplates. The Commission does not exceed its proper authority by using a shorthand title.

OPAE then goes on to present a several-page "review of state policy" that amounts to an argument against commodity-sales-service exemptions. (OPAE Supp. Comments at 4–6.) These arguments might be relevant in a specific case reviewing a proposed exit. But policy arguments are pointless here. The General Assembly that announced state policy is the same one that specifically permits the exit of the merchant function, so it is absurd for OPAE to argue that an exit *by its very nature* violates state policy.

**B. OPAE's arguments in favor of the alternative-rate-plan rules lack merit.**

OPAE also supports Staff's proposed rules imposing rate-case-filing requirements on alternative rate plans. These are the same rules challenged by Companies in their joint application for rehearing. OPAE provides no sound defense of the challenged rules.

**1. OPAE's hypothetical only confirms that rate-case filing requirements should not be imposed as a matter of course.**

OPAE's lead argument is first to construct a single (and rather unlikely) situation in which a rate-case filing might be helpful in resolving an alternative-rate filing, and then to assert that a rate-case filing is necessary in every situation. OPAE states that utilities commonly "wait decades before filing a base rate case" and thus, without a rate-case filing, that "parties would be limited to trying to determine whether [an alternative rate] plan is just and reasonable by comparing it to a situation last visited more than ten years previously." (OPAE Supp. Comments at 7.) Based on this hypothetical situation, OPAE asserts that without a base-rate filing it "is impossible to determine whether an alternative rate plan under Section 4925.05, Revised Code, is just and reasonable." (*Id*.)

The extreme situation that OPAE must posit to justify the imposition of rate-case filing requirements indirectly proves the Companies' point. That there may be one situation where otherwise burdensome requirements could be helpful by no means shows that those requirements should be imposed as default requirements in every case. As the Companies stated before, if they fail to meet their burden of proof in a given case, there is an easy solution—deny the application. But it makes little sense to impose, as a matter of course, the most burdensome filing requirement known in utility regulation, particularly when the General Assembly recently and specifically eliminated it.

**2. The suggestion that a rate-case filing is not burdensome is incorrect.**

OPAE also comments that it "would not be burdensome" to make a "rate case filing" "if a utility has recently completed a rate case and the information provided as a part of that rate case filing is . . . accurate." (OPAE Supp. Comments at 7.) Presumably OPAE is not suggesting that a utility could satisfy the standard filing requirements by pointing to a "recent" filing and telling the Commission that the last filing is close enough. Unless by "recent" OPAE means the same test year and date certain, the Companies doubt such a horseshoes-and-hand-grenades-style approach would go over very well. Rate-case filings of their very nature require a great deal of labor and analysis to gather and present date-specific, time-sensitive data. They are burdensome and exacting filings. OPAE's attempt to diminish this point is almost whimsical.

**3. House Bill 95 does *not* require that utilities prove that their existing rates are just and reasonable.**

Finally, OPAE asserts that "[e]ven under HB 95, as the Staff points out, it remains necessary that the utility prove its existing rates are just and reasonable." (OPAE Supp. Comments at 8.) If this were true, OPAE would have a point against the Companies' rehearing application. But this is not true. After H.B. 95, R.C. 4929.05 does not require that the

Commission determine just and reasonable rates under R.C. 4909.15, and it does not require evaluation of present rates. Indeed, H.B. 95 specifically eliminated the requirement for analysis under R.C. 4909.15; all that is required now is that the Commission find "*[t]he alternative rate plan* is just and reasonable." R.C. 4929.05(A)(3). OPAE simply misstates the law in asserting otherwise.

## IV. CONCLUSION

None of OCC or OPAE's proposed changes to the rules has merit. And OPAE fails to identify any weakness in the Companies' challenge of the rules. The Companies respectfully request that the Commission revise the rules as proposed in their application for rehearing filed in this case on August 1, 2012.

Dated: September 11, 2012

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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