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 POST-HEARING BRIEF OF THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

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I. INTRODUCTION

Over the past seven years, the Commission has approved several incremental steps proposed by The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO") towards its exit of the merchant function and towards a fully competitive natural-gas commodity market. In 2005 and 2008, the Commission approved default service mechanisms that allowed marketers to bid for the right first to serve tranches of DEO's wholesale load and then to serve individual retail customers. For a time, these auction-based offers successfully fostered the growth of the competitive market. But it now appears that these offers may be holding that growth back.

In this proceeding, DEO, the Ohio Gas Marketers Group ("OGMG"), and the Office of the Ohio Consumers' Counsel ("OCC") recommend that the Commission approve a stipulation that will take a logical, cautious, and incremental next step: remove the default, auction-based mechanism for a small subset of DEO's customers—that is, non-shopping, Choice-eligible, non-residential customers—that is no longer advancing towards a more fully competitive market. DEO believes, with record support, that this step will promote the growth of a fully competitive commodity market, a goal that has been expressly set by the General Assembly. But DEO also recognizes that only time and experience will tell whether this is so. For that reason, DEO has limited this next step to a relatively small group of customers, and it has committed to allow several years to pass before proposing any residential exit. This will give the Commission and other parties ample opportunity, at minimal risk, to evaluate whether a full exit promotes Ohio policy and how it affects DEO's customers.

For these reasons, as set forth in detail below, DEO respectfully requests that the Commission grant its motion and approve the stipulation.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Past Proceedings.

This proceeding represents another step in the continued progression of DEO's decision to exit the merchant function, a process that began in 2005. That year, DEO sought approval of Phase 1 of its transition plan to exit the merchant function, based on its desire to focus on its fundamental role as a local distribution company. (Murphy Dir. at 3.) In its application, DEO sought to procure its natural gas supply using an auction in which suppliers bid for the right to provide tranches of DEO's load. These auctions established the standard-service-offer ("SSO") rate. Despite the opposition of several parties, including Ohio Partners for Affordable Energy ("OPAE"), the Commission approved Phase 1. *See* Case No. 05-474-GA-ATA, Opin. & Order (May 26, 2006).

About a year and a half later, in December 2007, DEO filed an application for approval of Phase 2. *See* Case No. 07-1224-GA-EXM. Under that application, DEO proposed providing standard-choice-offer ("SCO") service for Choice-eligible customers, while retaining SSO service for non-Choice-eligible customers. Suppliers who prevailed in the auction for SCO commodity service were to supply commodity to specific Choice-eligible customers, as opposed to tranches of wholesale load as had occurred under Phase 1, and SCO customers' bills were to inform them which supplier provided their commodity. The Commission approved Phase 2 on June 18, 2008. (As modification of the 07-1224 Order is the subject of the present proceeding, DEO will refer to it as "the Exemption Order.")

In the Exemption Order, the Commission noted that DEO expected that the auction covering the period ending March 31, 2011, would "be the final auction and that, once this term expires, choice-eligible customers will be required to enter into a direct retail relationship with a supplier or aggregator to receive commodity service." Exemption Order at 8–9. This did not

occur, however. While over 80 percent of DEO's non-residential customers (or approximately 64,000) have chosen a competitive retail natural gas ("CRNG") supplier or participate in an opt-out governmental aggregation program, about 20 percent (or approximately 14,000) continue to receive SCO service. (Murphy Dir. At 5.) In fact, "[a]fter 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." (*Id*. at 6.) Thus, an additional SCO auction was held on March 1, 2011, and a combined SSO-and-SCO auction was held on February 12, 2012, with service to continue until March 31, 2013. *See* 07-1224 Order at 3 (Feb. 29, 2012).

B. The Present Proceeding.

This leads up to the present proceeding. On June 15, 2012, DEO and OGMG filed a Joint Motion to Modify Order Granting Exemption ("the Joint Motion"). Attached to the Joint Motion was a stipulation signed by the joint movants as well as OCC.

The stipulation's major step is to propose that, beginning in April 2013, SCO service no longer be available for Choice-eligible non-residential customers. Any such customers who have not selected a CRNG supplier will be assigned to one at the supplier's monthly variable rate ("MVR"), which may be no greater than any of the supplier's posted monthly variable rates. (Ringenbach Dir. at 4.) These customers will retain the right to enter into a new arrangement with the same or another CRNG supplier, or they may participate in an opt-out governmental aggregation program. (*See* Murphy Dir. at 1; Stip. at 2–3.)

The stipulation did not propose any change to SCO service for residential customers, but it contained several provisions related to them. Among other things, OCC and OGMG agreed not to file a request for DEO to exit the merchant function for residential customers with an effective date prior to April 1, 2015, and DEO agreed not to file any request to exit the merchant

function for residential customers before that date. (Stip. at 3–4.) Were DEO to later file such a request, the stipulation required the Company to provide advance notice as well as a transition that included an additional one-year SSO/SCO auction that would give residential customers the option to receive SCO service for the year over which the auction results are approved. (*Id*.) DEO also agreed to provide OCC with information to enable OCC to analyze the impact of the proposed exit on non-residential customers. (*Id*. at 4–5.)

Several parties intervened in the case, including OPAE, which also filed a motion to dismiss. After a round of comments and responses, the case was heard on October 16 and 17 at the Commission.

III. ARGUMENT

A. Under R.C. 4929.08, the Commission should modify Exemption Order.

R.C. 4929.08(A) states that the commission "upon its own motion or upon the motion of any person adversely affected by [an] exemption . . . may abrogate or modify any order granting such an exemption" if two conditions are met. Only the first is at issue in this case, and it breaks down into two parts.[1] First, the Commission must determine "that the findings upon which the order was based are no longer valid." R.C. 4929.08(A)(1). Second, it must determine "that the abrogation or modification is in the public interest." *Id*. Both determinations should be made in this case.

1. Certain findings of the Exemption Order are no longer valid.

As discussed, the Commission must determine that "findings upon which the order was based are no longer valid." *Id*. This condition is satisfied here, as at least two findings underlying the Exemption Order are no longer valid.

[1] No one disputes that the second condition has been met. The modification will not have been "made more than eight years after the effective date of the order," which was June 18, 2008. R.C. 4929.08(A)(2).

a. The expectation that SCO service would end in March 2011 has not come to pass.

First, the Commission specifically noted DEO's 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." Exemption Order at 8–9. While it is true that this expectation was held by DEO and expressed in the 07-1224 application, the Commission expressly relied on such statements—that is, those made in DEO's "application, the stipulation, and the testimony on record"—in approving the stipulation. Exemption Order at 20.

Despite the expectation that Phase 2 would end in March 2011, it is becoming increasingly apparent that a substantial portion of non-residential customers will simply remain enrolled in the default SCO rate—which will prevent DEO's exit of the merchant function and the formation of a more competitive natural gas commodity market. Indeed, it appears that DEO's competitive market has reached a plateau. As noted by DEO witness Jeffrey Murphy, "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." (Murphy Dir. at 6.) Rather than come to its own end, as expected, it appears that Phase 2 will continue indefinitely.

b. Phase 2 no longer represents a reasonable structure through which to further the potential benefits of market-based commodity pricing.

The second finding that is invalid is "that phase 2 represents a reasonable structure through which to further the potential benefits of market-based pricing of the commodity sales by the company." Exemption Order at 20. It now appears that the availability of SCO service is hindering the continued development of the market.

Numerous witnesses testified to this point. As already noted, Mr. Murphy explained that SCO enrollment has held steady for three years at approximately 20 percent. (Murphy Dir. At 5.) He pointed out that, structurally, the presence of a *required* offer into the market prevents full competition from developing and "potentially distorts the market by virtue of being a default pricing mechanism." (Tr. 98.) The SCO, he explained, "introduce[es] a potential distortion into the marketplace that will preclude its development as a fully competitive marketplace." (Tr. 83.) As he explained on cross-examination, "The auction process at one point did spur the competitive market . . . . [T]he number of suppliers [has] grown significantly since we began that process. And . . . the number of SCO customers declined initially." (Tr. 69.) But, "particularly in the nonresidential side . . . for the last two years [customer] participation [in the market] has been stable. It has leveled off. It has reached a plateau." (*Id*.) In other words, the evidence shows that the market has evolved to the point that "the auctions may be impeding the development of a fully competitive marketplace." (Tr. 70.)

In short, while the SSO and SCO offers were both significant steps *towards* "the goal line of a fully competitive market" for the natural gas commodity—moving DEO "across mid field" and into "the red zone"—those offers now appear to prevent the process from *crossing* the goal line. (Tr. 64 & 44.)

2. The proposed modifications to the Exemption Order are in the public interest.

The other determination that the Commission must make to approve the stipulation is "that the abrogation or modification is in the public interest." R.C. 4929.08(A)(1). The General Assembly has established what "is in the public interest," *id*., by setting forth an express state energy policy in R.C. 4929.02. And under R.C. 4929.02(B), the Commission must honor that policy when "exercising [its] respective authorities relative to sections 4929.03 to 4929.30 of the

Revised Code." Granting the requested modification will directly further a number of provisions of Ohio's energy policy.

a. Modification will encourage innovation and market access.

One provision of Ohio's energy policy is to "[e]ncourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods." R.C. 4929.02(A)(4). Modification would further this goal.

Mr. Murphy explained that "[d]iscontinuing 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." (Murphy Dir. at 6–7.) He explained on cross-examination that the SCO has the potential to distort and preclude the full development of the marketplace. (Tr. 83.) He also explained that "the structure of the marketplace" could "stop[] a marketer or supplier" from "providing innovative terms for a contract." (Tr. 66.) Likewise, RESA witness Teresa Ringenbach pointed out that in fully competitive markets, suppliers "constantly . . . search[] for more efficient ways of supplying natural gas on a daily basis" and "there are more varied products available." (Ringenbach Dir. at 5.)

Even OPAE's witness acknowledged that SCO service creates a disincentive for suppliers to offer lower prices. She explained that the effect of the required SCO offer was to *limit* lower-priced offers: "[t]he SCO auction price effectively acts as a price floor, the minimum price at which providers are willing to supply service," which creates "little incentive for CRNGS providers to provide a price much lower than this . . . ." (Harper Dir. at 14.) She confirmed on cross-examination that "just in terms of sheer economics, you have a published price, [and] you don't have much reason to offer a price below that . . . ." (Tr. 144–45.)

In sum, modification would tend to encourage innovation and market access.

b. Modification will foster the continuing emergence of competitive natural gas markets.

R.C. 4929.02(A)(6) states that Ohio's policy is to "[r]ecognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment." Modification would also further this goal.

While SCO service was an important step in the direction of a fully competitive market, it now appears to be *hindering* the continuing emergence of competitive natural gas markets. (DEO explained this point more fully above, *see supra* § III.A.1.b.) And given that vigorous competition already exists on DEO's market (*see* Murphy Dir. at 7), removal of this obstacle should only increase the flow of competitive offers into DEO's market (*see id*. at 6; Ringenbach Dir. at 5). As the market is "restructure[d]" to be made "more fully competitive," it may "draw yet more marketers into the northeast Ohio market behind Dominion East Ohio, [and] that may well create more diverse options for customers." (Tr. 67.)

c. Modification will promote the transition to transactions between willing buyers and willing sellers.

R.C. 4929.02(A)(7) requires the Commission to "[p]romote 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." Modification will do this, too.

As Mr. Murphy explained, "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." (Murphy Dir. at 7.) Eliminating the auction will "encourage customers and suppliers to enter into direct retail relationships." (*Id*.) That is because when SCO service is discontinued, "customers . . . will understand that they are subject to the process of being assigned to a supplier and that price will not be an auction price any longer. As a result, the customer should be incented to more carefully and thoroughly review the

options available in the marketplace and come to their own determination of what type of bilateral agreement would suit them best." (Tr. 73.) Even OPAE's own witness conceded that a customer, now motivated to seek the lowest price, could speak with a marketer directly and achieve a price lower than either the SCO or any price posted on the Apples-to-Apples website. (Tr. 129–30.)

d. Modification will provide a measured opportunity to evaluate the effects of the exit.

In addition to furthering state policy, there are other benefits to be achieved by granting the Joint Motion. All along, DEO's approach to exiting the merchant function has been circumspect and cautious. This step is no different. The signatory parties crafted the stipulation to "directly affect only a relatively small subset of DEO's customers, namely, non-shopping, non-residential Choice-eligible customers, which account for 1.2 percent of DEO's total customer base." (Murphy Dir. at 8.) Moreover, the parties have taken steps to ensure that the Commission and interested stakeholders have ample opportunity to evaluate the impact of this step. The parties have agreed on time limitations before a comparable application could be filed with respect to residential customers (*see* Stip. at 3–4), and "DEO has agreed to provide OCC with information to enable it to study and examine the effects of the proposed non-residential exit" (Murphy Dir. at 8). These provisions, and other information that will be learned from this measured step, will give the Commission both the time and information to evaluate the effect of the non-residential exit.

For the foregoing reasons, the Commission has authority under R.C. 4929.08(A) to grant the Joint Motion and modify the Exemption Order to approve the stipulation. In order to further the goals of Ohio's energy policy, DEO respectfully requests that the Commission do so.

B. The Commission's three criteria for approving a stipulation are met in this case.

The Commission should also determine that the stipulation complies with the applicable standards. To evaluate the reasonableness of a stipulation, the Commission has used the following three criteria: (*1*) whether it is a product of serious bargaining among capable, knowledgeable parties; (*2*) whether, as a package, it benefits ratepayers and the public interest; and (*3*) whether the settlement package violates any important regulatory principle or practice. *See, e.g.*, *In re Application of Duke Energy Ohio*, Case No. 11-4393-EL-RDR, Opin. & Order at 10 (Aug. 15, 2012). The stipulation complies with all three criteria.

1. The stipulation is the product of serious bargaining among capable, knowledgeable parties.

First, the stipulation is a product of serious bargaining among capable, knowledgeable parties. As the Commission knows, and as Mr. Murphy testified, "each of the signatory parties [DEO, OGMG, and OCC] has a history of active participation in Commission proceedings and is represented by experienced and competent counsel." (Murphy Dir. at 9.) He explained that negotiations "required numerous meetings and took place over several months, resulting in numerous concessions, as evidenced by the Stipulation." (*Id*.) These parties represent the interests of a large LDC, of a statewide consortium of marketers and suppliers, and of the official statewide representative of residential customers. And Mr. Murphy explained that "other groups and representatives of other customer classes—including Staff, [OPAE], and Industrial Energy Users-Ohio—had the opportunity to participate in settlement negotiations and to review drafts of the Stipulation." (*Id*. at 10.)[2]

[2] OPAE asserted in an earlier pleading that it was "excluded from the negotiations that led to the Stipulation filed in this case." (OPAE Mot. to Dismiss, Memo. in Supp. at 8.) The record refutes OPAE's assertion. Mr. Murphy explained that DEO "repeatedly invited OPAE to review drafts of the Stipulation and to participate in negotiations" and that he "personally contacted"

2. The stipulation, as a package, benefits ratepayers and is in the public interest.

Second, the stipulation, as a package, benefits ratepayers and is in the public interest. DEO has already explained above that granting the requested modification is in the public interest. (*See supra* § II.A.2.) The settlement directly furthers several provisions of state policy, and 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. If the Commission finds that it may modify the Exemption Order as requested, then it follows that the stipulation satisfies this criterion.

3. The stipulation does not violate any important regulatory principle or practice.

Third, and finally, approving the stipulation would not violate any important regulatory principle or practice. On the contrary, as explained above, the stipulation would promote several provisions of state policy and provide other benefits as well. Moreover, DEO agrees that the Commission would retain authority to modify or abrogate the order in this case to the extent a non-residential exit were found to pose any problems. (*See* Murphy Dir. at 10.)

Therefore, the Commission should find that the stipulation satisfies its three-part criteria and approve the stipulation as filed.

C. The proper response to any concerns raised by OPAE is not to deny the Joint Motion but to carefully evaluate its impact.

DEO recognizes that OPAE opposes the step proposed in this proceeding, and the Company will respond in its reply brief to whatever arguments OPAE raises. At this time, it would simply make one point. When DEO proposed an auction mechanism back in 2005, no

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OPAE representatives to invite discussion on the stipulation. (Murphy Dir. at 10.) While OPAE chose not to participate, it had the opportunity.

one could have known precisely what impact that step would have, and several parties (including OPAE) vigorously opposed it, even pursuing an appeal to the Ohio Supreme Court. Seven years later, where do these parties stand? Vigorously supporting the auctions. DEO is not attacking OPAE's change in position—OPAE had a right to argue against the SSO process, and if anything, it may be commended for changing its position in light of experience. The point here is that no one knew how the SSO process would turn out, but it was a measured risk, safely taken. That risk turned out exceedingly well, confirming that the competitive markets were ready to provide commodity for DEO's customers. And had it not turned out well, no one can doubt that the Commission would have responded appropriately.

The same holds true today. There is good reason, as there was in 2005, to believe that the markets are ready to step up and perform, but whether and how they *will* can only be determined by giving them the chance. DEO and the stipulating parties have taken numerous steps to minimize risk, to provide transparency, and to allow full evaluation of the impacts of this exit. Some of OPAE's concerns cannot be dismissed as unreasonable in themselves—but the proper response to such concerns is not to reject any further development of competitive markets, but to take the step carefully and examine its impacts judiciously.

IV. CONCLUSION

For the foregoing reasons, DEO requests that the Commission grant the Joint Motion, approve the stipulation, and provide any authority necessary to implement its provisions.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of DEO's Initial Post-Hearing Brief was served by electronic mail this 13th day of November, 2012 to the following:

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Summary: Brief Initial Post-Hearing Brief electronically filed by Mr. Andrew J Campbell on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio