

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO'S  
MEMORANDUM CONTRA  
THE APPLICATION FOR REHEARING OF  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

**I. INTRODUCTION**

In accordance with Ohio Adm. Code 4901-1-35(B), The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO") files its memorandum contra the application for rehearing filed by the Office of the Ohio Consumers' Counsel ("OCC") on January 11, 2013.

**II. ARGUMENT**

In its rehearing application, OCC essentially resubmits the arguments presented in OCC's earlier comments. It continues to allege that the proposed rules will not provide adequate due-process protections in an exit-of-the-merchant-function case. This is not true.

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

OCC's basic argument continues to be that the Commission should set forth an independent set of procedural rules to govern exit cases, in addition to those contained in Ohio Admin. Code Chapter 4901-1. It continues to argue 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 Rehg. App. at 6.)

First, while OCC's due-process arguments 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. OCC complains that the Commission has “the right to waive” certain requirements which “leaves consumers vulnerable.” (OCC Rehg. App. at 6.) 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. The only procedures that OCC argues are needed are already required by law.**

Moreover, OCC identifies no due process requirements that are not already required by law. It identifies only three requirements required by due process—namely, notice, discovery, and a hearing. (See OCC Rehg. App. at 4 (“in addition to notice and a hearing, [due process] also includes parties and intervenors being given ‘ample rights of discovery’”) (quoting R.C.

4903.082); *id.* at 11 (criticizing exit rules for “omit[ting] notice requirements and an evidentiary hearing in an Exit Case”).)

DEO finds it a bit hard to believe that the Commission would allow an exit to occur without notice, discovery, and a hearing. But if OCC has any doubts, it should take comfort from the Revised Code, which already imposes these requirements. The challenged rule governs “applications to exit the merchant function filed pursuant to section 4929.04 of the Revised Code,” *see* Finding & Order, Attachment A at 7 (Dec. 12, 2012), and that statute only permits the Commission to act “after notice” and (for larger LDCs) “after a hearing.” R.C. 4929.04(A); *see id.* (hearing permitted in Commission’s discretion for LDCs with less than 15,000 customers); *see also* R.C. 4929.08 (requiring notice and hearing in application to modify an exemption order). As for discovery, OCC’s own quotation of R.C. 4903.082 confirms that the Commission is already under an obligation (when appropriate) to provide parties and intervenors with “ample rights of discovery.” In other words, the only things that OCC claims are needed are already required.

OCC also argues that there are opportunities to “improv[e] due process” by requiring certain forms of notice. (OCC Rehg. App. at 6.) OCC seems to suggest that a public notice in a specific, recent case should have mentioned “the opportunity to present public testimony on a day that was originally scheduled for the first day of an evidentiary hearing at the PUCO’s offices in Columbus.” (*Id.* at 6–7.) DEO is not entirely sure what OCC is saying the notice should have provided, but to some extent that is irrelevant. In both recent exit cases, the LDCs filed systemwide public notices. (*See* Case No. 12-1842-GA-EXM, Proof of Publication (Oct. 8, 2012); Case No. 12-2637-GA-EXM, Proof of Legal Notice (Nov. 30, 2012).) And to the extent

OCC believes that any particular notice was defective in any way, that was an issue for *that* case, and an issue that could have been raised there.

At all events, this issue does not call for a revision to the rules; it calls for speaking up in the particular case. Confirming that point, OCC's proposed rules do not include any provision that would even address the concern regarding the contents of the notices (*see* OCC Rehg. App. at 12–14)—which only confirms that it has not justified its proposed revisions to the rules. OCC's proposals should be rejected.

### **III. CONCLUSION**

None of OCC's arguments has merit, nor do any of its proposed changes to the rules. DEO respectfully requests that the Commission deny OCC's application for rehearing.

Dated: January 22, 2013

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum Contra OCC's Application for Rehearing was served by electronic mail on the 22nd day of January, 2013, to the following:

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