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**

MEMORANDUM CONTRA OF THE OHIO GAS MARKETERS GROUP AND RETAIL ENERGY SUPPLY ASSOCIATION

I. INTRODUCTION

Pursuant to Rule 4901-1-35 of the Ohio Administrative Code ("OAC"), the Ohio Gas Marketers Group ("OGMG") and Retail Energy Supply Association ("RESA") submit this memorandum contra to the January 25, 2013 application for rehearing of intervenor Ohio Partners for Affordable Energy ("OPAE"). OPAE filed an application for rehearing from the Commission's January 9, 2013 Opinion and Order granting Dominion East Ohio ("DEO") and the OGMG's (collectively the " Joint Movants") motion to modify the Commission's 07-1224-GA-EXM Exemption Order ("2008 Exemption Order"). OGMG and RESA submit that the Commission's Opinion and Order addressed all of the issues, was reasonable and lawful, and was based on the record before it. Thus, OGMG and RESA respectfully request that the Commission deny this application for rehearing.

II. ARGUMENT

A. The Commission properly found that the motion to modify the 2008 Exemption Order met the statutory requirements of R.C. Section 4929.08(A).

1. The Commission did not unlawfully re-write the 2008 Exemption Order to find it invalid and justify its modification.

In its application for rehearing, OPAE argues that the Commission unlawfully rewrote the 2008 Exemption Order to justify its modification of the Order. (OPAE Application for

Rehearing p. 7). The Commission did not unlawfully rewrite the 2008 Exemption Order. The Commission directly quoted the language of the 2008 Exemption Order so OPAE's argument is not that the Commission misstated its 2008 Order, only misinterpreted it. The quote at issue is:

> "Specifically, in 07-1224, the Commission found that phase two represents a reasonable structure through which to further the potential benefits of market-base pricing of the commodity sales by the Company." (emphasis added)

(12-1842 Opinion & Order p. 8 emphasis added). The Commission then goes on to state:

> "find that phase two no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services." (12-1842 Opinion & Order p. 8).

OPAE places a great deal of emphasis on the closing prepositional phrase contained in the 2008 Exemption Order "by the Company" quoted above. See page 8 of OPAE Application for Rehearing. OPAE claims that since the sentence ends with "by the Company" the Commission meant that the "potential benefits of market-based pricing" was to be limited to whether Dominion East Ohio will benefit any less in 2013 than it did in 2008 from the benefits of market pricing. The clear reading of the sentence is that the Commission is looking to see if the public is enjoying all the potential benefits of market based pricing. The closing phrase "by the Company" is merely to indicate that the sale is taking place pursuant to the Dominion East Ohio's tariff.

OPAE's construction of the sentence is not only a strained interpretation of the Commission's order, it is illogical. The Company cannot enjoy the benefits of market-based pricing because Dominion East Ohio is required to sell the commodity for the cost that it acquires the commodity. So Dominion East Ohio should be indifferent to the price. That is not a new development, natural gas distribution utilities have been barred from profiting on the sale of natural gas commodity since the introduction of the Gas Cost Recovery clause Section 4905.302,

Revised Code in the early 1970s. Further, under the Alternative Rate treatment approved in the last and in this Alternative Rate order, the Company cannot benefit from the sale of natural gas commodity. Finally, OPAE's interpretation would be in violation of the State's energy policy established in Section 4929.02, Revised Code which looks to extend the benefits of market based pricing for the retail customers, not the utility.

The point of this is that under the policy of this state, the Commission must consider whether the current phase two situation represents a reasonable structure through which to further the potential benefits of market-based pricing for the retail public as required by Section 4929.02, Revised Code. Furthering the expiration of the benefits of market-based pricing of natural gas service for the public should be and was the key for the Commission in approving the Stipulation in Case No. 12-1842-GA-EXM. OPAE's argument that the Commission is somehow limited to considering only sales by the Company is illogical and contrary to the energy policy of this state. OPAE's argument must be rejected.

2. The Commission lawfully modified the 2008 Exemption Order because the 2008 Exemption Order's findings are invalid.

The record of the hearing in the matter at bar is replete with compelling evidence that circumstances have changed in the four years since the 2008 Order was issued, which supports amendment. Both DEO witness Murphy and OGMG/RESA witness Parisi explained why certain 2008 Exemption Order findings are no longer valid. DEO witness Murphy testified that the Commission specifically noted in its 2008 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 2008 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 2008 Exemption Order at p. 20, which set forth this expectation.

If Phase 2 had ended in March 2011, as was expected in the 2008 Exemption Order, DEO would have been able to move towards exiting the merchant function and the formation of a more competitive natural gas commodity market in Ohio. However, Phase 2 did not end in March 2011 and the March 2010 SCO service auction was not the last. Circumstances have changed, and those changes have invalidated certain Commission findings in the 2008 Exemption Order. Therefore, this requirement of Section 4929.08(A), Revised Code was satisfied and the Commission rightfully modified the 2008 Exemption Order.

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

> 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.)

In sum, 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.

3. The Commission properly found that DEO is not required to file a separate application to modify the 2008 Exemption Order.

OPAE argues that DEO must file a separate application to move to a full commodity choice service. (OPAE Application for Rehearing p. 10). Contrary to OPAE's argument, the Commission, by adopting the Stipulation in Case No. 12-1842-GA-EXM, is not going to a full choice commodity service. Instead, the Commission is removing barriers to competition by changing the terms of default service. The testimony of Mr. Murphy, Mr. Parisi, and Ms. Ringenbach explain why such a change is in the public interest. When the requirements of Section 4929.08, Revised Code are met, it provides a statutory mechanism for the Commission to modify the 2008 Exemption Order without filing an application as OPAE suggests.

B. The Commission lawfully and reasonably found that certain findings of the 2008 Exemption Order are invalid and the evidentiary record demonstrates that certain findings in the 2008 Exemption Order are invalid.

OPAE argues that the Commission unlawfully and unreasonably found that the certain findings of the 2008 Exemption Order are invalid and asserts that the evidentiary record does not support a finding that the 2008 Exemption Order is invalid. (OPAE Application for Rehearing p.

13). As argument A2 on page 2-3 of this memorandum shows, Mr. Murphy and Mr. Parisi have given the Commission ample evidence demonstrating that certain findings of the 2008 Exemption Order are no longer valid. The Commission appropriately considered the evidence before it and lawfully and reasonably found that the certain findings of the 2008 Exemption Order are invalid.

C. The Commission lawfully and reasonably found that, absent modification, the 2008 Exemption Order adversely affects DEO and customers.

In its Application for Rehearing, OPAE argues that "the joint motion and the Commission in its 2013 Order completely disregard the Commission's rule." (OPAE Application for Rehearing p. 17). However, both the Commission and the motion to modify considered and met the elements of OAC 4901:1-19-12. Subsections (B), (C), and (D) of the rule, all prescribe obligations for the Commission's docketing division or the Commission itself. Subsections (A)(1)(a) and (b) are not applicable because there is no claim in the Joint Motion that DEO had failed to comply with its separation plan or its code of conduct. As the rule requires, the Joint Movants have demonstrated in their Joint Motion, Stipulation and testimony how they will be adversely affected by such exemption if it is not modified, the findings of the Commission's Exemption Order which are no longer valid and why, and the modifications of the Exemption Order that will be in the public interest. The Joint Movants have provided testimony supporting these allegations and the form of the remedy requested. Furthermore, the Commission has given proper consideration to the rule. In the 12-1842 Order, the Commission found that the Joint Movants will be adversely affected, that certain findings of the Commission's 2008 Exemption Order are invalid, and that the modifications to the 2008

Exemption Order will be in the public interest. Therefore, both the Joint Motion and the Commission have given proper consideration to the rule.

Additionally, OPAE argues that "DEO is not adversely affected by the 2008 Order" and OGMG is only adversely affected "to the extent that one of its members does not place a winning bid at the SCO auction or convince customers to take its commodity at a higher price than that provided by the SCO." (OPAE Application for Rehearing p. 18). As the Commission stated in its 12-1842 Order, DEO witness Murphy testified that if the 2008 Exemption Order is not modified, 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. (12-1842 Opinion & Order p. 7; DEO Ex. 1.0 p. 6). As for the interest of OGMG and RESA, both organization, as stated in their initial and reply briefs, are pledged to the development of robust retail market.

OPAE also asserts that the Commission improperly found that Ohioans will be adversely affected if the 2008 Exemption Order stays in effect. (OPAE Application for Rehearing pp. 20-21). Contrary to OPAE's argument, the Commission properly determined that suppliers and customers will be adversely affected unless the Commission modifies the 2008 Exemption Order. As stated previously, DEO witness Murphy testified that if the 2008 Exemption Order is not modified, there is a core of non-residential customers who will continue to rely on the SCO rate and thereby hinder the formation of a more competitive natural gas commodity market. (DEO Ex. 1.0 p. 6.). This adversely affects not only DEO, but all Ohioans who lose out when the energy policy objectives of the state are not met. Additionally, Mr. Parisi explained that customers that receive the auction-driven SCO service do so without paying the full cost of the auction. The cost of the auction is subsidized and paid by all customers as part of East Ohio's

base rates. (OGMG/RESA Ex. 3 p. 6.). OPAE witness Harper testified that subsidies can disrupt markets and that one cannot have perfect competition if subsidies exist. (TR. 116.). Everyone is adversely affected by such subsidies. Thus, the Commission has properly determined that DEO, the suppliers, and Ohioans will be adversely affected if the 2008 Exemption Order is not modified. (12-1842 Opinion & Order pp. 8,16).

D. The Commission lawfully found that modifying the 2008 Exemption Order will advance public interest objectives set forth in R.C. Section 4929.02.

OPAE asserts that the Commission unlawfully found that modifying the 2008 Exemption Order will advance the public interest objectives set forth in R.C. Section 4929.02. OPAE's argument does not give credence to the facts of this case and the findings of the Commission. It is Ohio's policy objective to "recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment" and to "encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods." R.C. 4929.02(A)(6) & R.C. 4929(A)(4).

The Commission found that modifying the 2008 Exemption Order would promote the public interest because "discontinuing SCO service to nonresidential customers will directly increase the entrance of customers into the market, spurring market entry by CRNGS providers, the continued development of the competitive market, and will lead to an overall increase in competition." (12-1842 Opinion & Order p. 12 (referencing DEO Ex. 1.0 pp. 6-7)). Additionally, modifying the 2008 Exemption Order will advance the public interest because "in a fully-competitive marketplace, suppliers will constantly search for more efficient ways of supplying natural gas and will also provide more varied products for consumers to choose from." (12-1842 Opinion & Order p. 12 (referencing OGMG/RESA Ex. 2 pp. 5-6)). Furthermore, the

Commission found that "with expansion of the competitive market, will come greater involvement in communities by CRNGS providers....suppliers will have offices in Ohio, creating jobs and tax revenue, and will also have people invested in local communities." (12-1842 Opinion & Order p. 12 (referencing OGMG/RESA Ex. 2 pp. 5-6)). Therefore, the Commission lawfully and reasonably used the evidence in the record before it to find that modifying the 2008 Exemption Order was in the public interest and advanced the policies of the state set forth in R.C. Section 4929.02.

E. The commission lawfully and reasonable found that the Stipulation and recommendation filed with the joint motion as Joint Exhibit 1 resolved the contested issues in this contested proceeding.

In its Opinion and Order, the Commission granted the motion to modify the 2008 Exemption Order. (12-1842 Opinion & Order p. 18). The Commission also found that the standard of review for considering the reasonableness of a Stipulation has been met because (1) the settlement was a product of serious bargaining among capable, knowledgeable parties, (2) the settlement, as a package, benefits ratepayers and the public interest, and (3) the settlement package does not violate any important regulatory principle or practice. (12-1842 Opinion & Order pp. 11-16). Consequently, the Commission approved and adopted the Stipulation entered into by the parties. (12-1842 Opinion & Order p. 18).

In its Application for Rehearing, OPAE reiterates 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. (OPAE Application for Rehearing pp. 36-40).

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 Ilium. Co.,* Case No. 88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records (Zimmer Plant),* Case No. 84-11 87-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 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 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, OPAE, 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 OPAE 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 OPAE had ample opportunity to participate but chose

not to. (DEO Ex. 1.0 p. 10; TR. 90-91.) Therefore, despite OPAE's argument that the first element for considering the reasonableness of a Stipulation is not met, the Commission reasonably determined that all three elements were met as is supported by the record.

III. CONCLUSION

The Commission reasonably and lawfully found that the modification of the 2008 Exemption Order meets the statutory requirements of Section 4929.08(A). Certain findings of the 2008 Exemption Order are invalid, it is in the public interest to modify the Order, and various stakeholders will be adversely affected if the Commission does not modify the 2008 Exemption Order. Therefore, the Commission should deny each of the grounds for rehearing raised by OPAE in its Application for Rehearing in this case.

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 4th day of February, 2013:

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