

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application to Modify, in :  
Accordance with Section 4929.08, Revised Code, : Case No. 12-1842-GA-EXM  
the Exemption Granted to The East Ohio Gas :  
Company d/b/a Dominion Energy Ohio :

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**REPLY OF DIRECT ENERGY BUSINESS MARKETING, LLC  
AND DIRECT ENERGY SERVICES, LLC  
TO THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
MEMORANDUM CONTRA MOTION TO INTERVENE  
OF DIRECT ENERGY BUSINESS MARKETING, LLC, AND  
DIRECT ENERGY SERVICES, LLC**

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Pursuant to Rule 4901-1-12(B)(2) of the Ohio Administrative Code, Direct Energy Services, LLC and Direct Energy Business Marketing, LLC (collectively, “Direct Energy”) submit this Reply to the Office of the Ohio Consumers’ Counsel (“OCC”) Memorandum Contra Direct Energy’s Motion to Intervene in this proceeding. As explained below, Direct Energy has a real and substantial interest in this proceeding. Direct Energy’s Intervention at this stage in the proceeding is timely, in consideration of prior practices of the Public Utilities Commission of Ohio (“PUCO”). Moreover, even if the PUCO finds that Direct Energy’s Intervention is not timely, the long-standing litigation in this case and the history of PUCO establishing a new procedural schedule at every phase of litigation create “extraordinary circumstances” which warrant late intervention. Direct Energy’s interests are not adequately represented by any existing party, as Direct Energy has a unique business model and its interests and perspective are unique. Further, Direct Energy’s intervention will not unduly prolong or delay the proceeding. As such, Direct Energy’s Motion to Intervene should be granted, and Direct Energy should be permitted independent, full-party intervention.

## I. BACKGROUND

The procedures that OCC challenges in this case stem from long-standing litigation that began in 2005, when The East Ohio Gas Company d/b/a Dominion Energy Ohio (“Dominion”) filed an Application with PUCO “to restructure its commodity service obligation to expand retail choice options for its customers and to maximize the pool of customers receiving commodity service from competitive retail natural gas suppliers.”<sup>1</sup> On August 18, 2005, the Attorney Examiner established a procedural schedule in the Phase 1 Application proceeding.<sup>2</sup> On May 26, 2006, PUCO issued an Order approving Phase 1 of Dominion’s Application, as modified by the Order and the stipulation<sup>3</sup> filed in that case.<sup>4</sup>

On April 8, 2005, Dominion filed an Application, seeking an exemption under R.C. 4929.04 (relating to exemptions of natural gas companies for certain rate provisions) to implement Phase 2 of its plan to “exit the merchant function.”<sup>5</sup> The Attorney Examiner issued an Entry on February 6, 2008, establishing a procedural schedule in the Phase 2 Application proceeding, which set forth, among other things, a deadline for interventions.<sup>6</sup> On June 18, 2008, PUCO issued an Order approving Dominion’s Application, as modified by the stipulation filed in that case,<sup>7</sup> to implement Phase 2 of its plan to “exit the merchant function.”<sup>8</sup> PUCO’s

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<sup>1</sup> See In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a Plan to Restructure Its Commodity Service Function, Case No. 05-474-GA-ATA, Opinion and Order at 1 (May 26, 2006) (May 26, 2006 Order).

<sup>2</sup> Entry (August 18, 2005).

<sup>3</sup> The following were signatory parties to the stipulation approved in the May 26, 2006 Order: Dominion; the Ohio Oil and Gas Association; MXEnergy, Inc.; and Direct Energy Services, LLC; Interstate Gas Supply, Inc.; Shell Energy Services, LLC; Vectren Retail, LLC (collectively, Ohio Gas Marketers Group). OCC was a party to the case, but did not sign the stipulation. May 26, 2006 Order at 2, 4.

<sup>4</sup> Id. at 30.

<sup>5</sup> See In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services, Case No. 07-1224-GA-EXM, Opinion and Order (June 18, 2008).

<sup>6</sup> Entry (February 6, 2008).

<sup>7</sup> The following were signatory parties to the stipulation approved in the June 18, 2008 Order: Dominion; PUCO staff; OCC; Integrys Energy Services, Inc.; Ohio Gas Marketers Group (comprised of Interstate Gas Supply, Inc.; Direct Energy Services, LLC; and Vectren Retail LLC d/b/a Vectren Source); MXEnergy, Inc.; National

June 18, 2008 Order allowed Dominion to implement a Standard Choice Offer (“SCO”), wherein suppliers bid for the right to supply gas in tranches to choice-eligible customers at a retail level.<sup>9</sup>

On June 15, 2012, Dominion and Ohio Gas Marketers Group (“OGMG”) filed a Joint Motion to modify the June 18, 2008 Order pursuant to R.C. 4929.08(A) (related to PUCO’s authority to modify an order granting an exemption).<sup>10</sup> The Attorney Examiner established a procedural schedule on July 27, 2012 “to facilitate the Commission’s timely review of the joint motion, as well as the stipulation.”<sup>11</sup> In accordance with the procedural schedule, on August 30, 2012, Direct Energy filed a timely Motion to Intervene. On October 2, 2012, however, Direct Energy withdrew its Motion to Intervene, prior to being ruled upon by the Attorney Examiner in the case, indicating that it would participate in the case through its memberships in the Retail Energy Supply Association (“RESA”) and OGMG.<sup>12</sup> Dominion, OGMG, and OCC subsequently filed a Stipulation and Recommendation to resolve all outstanding issues in the

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Energy Marketers Association; Northeast Ohio Public Energy Council; and Dominion Retail, Inc. June 18, 2008 Order at 3.

<sup>8</sup> In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services, Case No. 07-1224-GA-EXM, Opinion and Order (June 18, 2008) (June 18, 2008 Order).

<sup>9</sup> See Id. at 6-9. Under Phase 2, choice-eligible customers would receive their commodity from a specific supplier selected via the SCO auction process approved by PUCO. Id. at 7. SCO service would be provided as an energy choice commodity service, rather than a Dominion-provided sales service. Id. at 13. The June 18, 2008 Order enabled choice-eligible customers, whose energy choice or opt-out governmental aggregation contract expired, to enroll with an energy choice supplier, participate in an opt-out governmental aggregation program, or elect to be assigned to an energy choice supplier at the price established in the SOC auction. Id. at 14. If they do not choose one of these options, the June 18, 2008 Order provided that these consumers would be assigned to an energy choice supplier at the supplier’s posted Monthly Variable Rate under the terms of the SCO service in Dominion’s tariff. Id.

<sup>10</sup> In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio in Case No. 07-1224-GA-EXM, Case No. 12-1842-GA-EXM, Opinion and Order (January 9, 2013) (January 9, 2013 Order).

<sup>11</sup> Entry (July 27, 2017).

<sup>12</sup> Notice of Withdrawal (October 2, 2012).

proceeding.<sup>13</sup> PUCO approved the Joint Motion and Stipulation via Order entered January 9, 2013.<sup>14</sup>

Litigation ensued following the January 9, 2013 Order, including multiple requests for rehearings and an appeal by the Ohio Partners for Affordable Energy (“OPAE”), wherein the Ohio Supreme Court affirmed PUCO’s January 9, 2013 Order. In the midst of this continuing litigation, on April 8, 2015, Direct Energy, among others, filed a Motion for Limited Intervention in the case for the purpose of requesting a protective order as to confidential information and additional days to provide redacted copies of confidential reports.<sup>15</sup>

On March 9, 2018, the Office of the Ohio Consumers’ Counsel (“OCC”) filed a Motion to Protect Residential Consumers by Re-Establishing the Standard Choice Offer as Default Service and Eliminating the Monthly Variable Rate (“Motion”) with the Public Utilities Commission of Ohio (“PUCO”). Specifically, OCC requests that PUCO “modify the exemption granted in its January 9, 2013 Order” and re-establish Dominion’s SCO as the default service for all choice-eligible residential customers.<sup>16</sup> In its Motion, OCC further requests that PUCO

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<sup>13</sup> See January 9, 2013 Order at 2, 8.

<sup>14</sup> Id. at 18-19. In the January 9, 2013 Order, PUCO authorized Dominion to discontinue the availability of SCO service to choice-eligible, non-residential customers. Id. at 8-9. The January 9, 2013 Order did not modify the procedure as related to residential customers, except to set guidelines for any future proceeding seeking approval of Dominion’s exit of the merchant function for residential customers. See Id. at 9-10. The OCC reserved the right to challenge any request or application filed with PUCO for a Dominion exit of the merchant function for residential customers. Id. at 9

<sup>15</sup> The Ohio Partners for Affordable Energy (“OPAE”) and Dominion filed Applications for Rehearing on January 25, 2013 and February 5, 2013, respectively. Ohio Partners for Affordable Energy’s Application for Rehearing (January 25, 2013); see also Application for Rehearing of Dominion (February 5, 2013). PUCO denied OPAE’s Application, but granted Dominion’s Application, which was filed for the limited purpose of clarifying obligations and procedures under the January 9, 2015 Order. Entry on Rehearing (March 6, 2013). On April 5, 2013, OGMG and RESA filed a Joint Application for Rehearing and Request for Clarification of the March 6, 2013 Order, which was denied by PUCO on May 1, 2013. Entry on Rehearing (May 1, 2013). Following PUCO’s denial of OPAE’s Application for Rehearing, OPAE appealed to the Ohio Supreme Court. In re Application to Modify, in accordance with R.C. 4929.08, the Exemption Granted to E. Ohio Gas Co., 144 Ohio St. 3d 265 (September 2015) (Ohio Supreme Court Order).

<sup>16</sup> Motion at 1.

eliminate the monthly variable rate as a program for assigning residential consumers to a natural gas marketer when they end service with a marketer.<sup>17</sup>

On March 23, 2018, Direct Energy filed a Motion to Intervene, in which it identified its substantial and direct interest in the outcome of the Motion filed by the OCC. On March 30, 2018, OCC filed a Memorandum Contra Direct Energy's Motion to Intervene (Memo Contra), arguing that Direct Energy's Motion to Intervene should be denied as untimely and contrary to applicable standards. OCC asserts that should PUCO grant full intervention to Direct Energy, PUCO should require Direct Energy to consolidate its case with RESA and OGMG.

Direct Energy hereby files this Reply to OCC's Memorandum Contra. In support of its Reply, Direct Energy provides the following:

## **II. ARGUMENT**

### **a. Direct Energy's Motion to Intervene was timely filed.**

In its Memo Contra, OCC recommends that PUCO deny Direct Energy's Motion to Intervene, because it was not timely filed. Specifically, OCC argues that the intervention deadline was August 30, 2012, in accordance with the procedural schedule established as a result of the Joint Motion filed by Dominion and OGMG.<sup>18</sup>

As discussed in detail in Section I, above, OCC's Motion stems from longstanding litigation. At every phase of the litigation, the Attorney Examiner established a new procedural schedule and allowed interested parties to intervene, regardless of whether they had participated in related, prior proceedings. Of particular importance, when Dominion and OGMG filed a Joint Motion to modify the June 18, 2008 Order pursuant to R.C. 4929.08(A), the Attorney Examiner allowed interested parties to intervene. Similarly, here, nearly ten years later, OCC is seeking a

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<sup>17</sup>

Id.

<sup>18</sup>

OCC Memo Contra at 3-5.

modification of the June 18, 2008 Order pursuant to R.C. 4929.08.<sup>19</sup> Thus, consistent with prior PUCO practices, it is appropriate for PUCO to allow interested parties to intervene at this stage of the proceeding.

Moreover, the Entry establishing the procedural schedule that the OCC relies upon expressly states that the procedural schedule is adopted “**to facilitate the Commission’s timely review of the joint motion [filed by Dominion and OGMG], as well as the stipulation.**”<sup>20</sup>

The Joint Motion proceeding initiated by Dominion and OGMG was fully litigated up through an appeal to and Order of the Ohio Supreme Court. Of note, in affirming PUCO’s January 9, 2013 Order, the Ohio Supreme Court held, “Any effort by Dominion to implement the next step in its planned exit from the merchant function [...] will require independent justification based on the merits of that future proposal.”<sup>21</sup> While Dominion is not seeking to implement the next step in its plan to exit the merchant function, OCC is seeking modifications that will completely alter Dominion’s current practices related to choice-eligible, residential customers. OCC’s new proposal requires independent justification, and all interested parties should be permitted to intervene.

Thus, OCC’s attempt to rely on a previous procedural schedule to exclude interested parties from participating in a proceeding in which OCC has made a new proposal and seeks to change procedures that have been in place for many years should be denied. OCC cannot simply

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<sup>19</sup> See Joint Memorandum Contra to OCC’s Motion to Modify the 2013 Order by the Retail Energy Supply Association, Direct Energy Services, LLC and Direct Energy Business Marketing LLC (March 30, 2018). While OCC asserts that it is seeking to modify PUCO’s January 9, 2013 Order, said Order only modified the June 18, 2008 Order as it applied to choice-eligible, **non-residential** customers. See January 9, 2013 Order at 8-10. The January 9, 2016 Order did not modify the June 18, 2008 Order as it relates to choice-eligible, residential customers, except to set guidelines for any future proceeding seeking approval of Dominion’s exit of the merchant function for residential customers. See *Id.* at 9-10. Since OCC’s Motion relates solely to the treatment of residential customers, the OCC’s Motion actually seeks to modify the June 18, 2008 Order.

<sup>20</sup> Entry (July 27, 2017).

<sup>21</sup> Ohio Supreme Court Order at 275-276.

file its Motion under an existing case number in an attempt to circumvent PUCO's prior practices of establishing a new procedural schedule in these circumstances.

Moreover, even if Direct Energy's intervention is not timely, it has met the "extraordinary circumstances" requirement and should be permitted late intervention at this time.<sup>22</sup> Specifically, given the long-standing litigation in this case and the history of establishing a new procedural schedule at every phase of litigation, Direct Energy had reason to believe that it could intervene at this stage in the proceeding. Of note, Dominion also filed a Motion to Intervene, even though it was involved in all preceding litigation related to this matter. In its Motion to Intervene, Dominion noted:

Rather than file their motions to modify in a new docket, OCC and [the Ohio Partners for Affordable Energy] filed in an existing docket. [Dominion] previously participated in that docket as a party, and although the docket has remained open, it has been to receive administrative filings and tariff updates. In these circumstances, it is not clear whether intervention is necessary or whether [Dominion] is already considered a party.<sup>23</sup>

Thus, it is clear that the circumstances in this case are unusual in terms of intervention and have caused some ambiguity as to the necessity for intervention and the appropriate timeframe for filing a motion to intervene. As such, even if Direct Energy's intervention is not timely, it has met the "extraordinary circumstances" requirement and should be permitted late intervention at this time.<sup>24</sup>

**b. Direct Energy meets the statutory and administrative requirements for intervention in this case and, as such, should be granted independent, full-party status in this case.**

Next, OCC asserts that Direct Energy does not meet the statutory and administrative requirements for intervention in this case, because Direct Energy's interests are adequately

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<sup>22</sup> See Ohio Admin. Code 4901-1-11(F).

<sup>23</sup> Dominion Intervention at 1.

<sup>24</sup> See Ohio Admin. Code 4901-1-11(F).

represented by RESA and OGMG.<sup>25</sup> OCC argues that if PUCO does not reject Direct Energy's Motion to Intervene, it should allow Direct Energy only limited intervention rights.<sup>26</sup>

Contrary to OCC's assertions, however, Direct Energy has met the statutory and administrative requirements for intervention, as discussed in detail in its Memorandum in Support of its Motion to Intervene. Direct Energy hereby incorporates its March 23, 2018 Memorandum in Support of its Motion to Intervene into this Reply. As a third party supplier in Ohio, Direct Energy has a substantial and direct interest in the outcome of OCC's pending Application. Direct Energy is a party familiar to this Commission whose interests are well known and who has continually been granted intervention to participate in Commission proceedings. Direct Energy's real and substantial interest in this proceeding is evident, unchallenged by OCC<sup>27</sup> or any other party, and its Motion to Intervene should be granted.

OCC's assertion that RESA and OGMG adequately represent the interest of Direct Energy is baseless. Direct Energy has a unique business model and its interests and perspective are unique. Direct Energy has different products and target markets than other suppliers who may be members of RESA or of OGMG. In fact, throughout this long-standing litigation related to Dominion exiting the merchant function, RESA and OGMG have consistently acknowledged that the positions taken by those respective parties may not represent the views of any particular member of those organizations.<sup>28</sup> By its very nature, a trade organization such as RESA will have different goals and objectives than a single supplier that has particular product offerings and target markets.

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<sup>25</sup> See OCC Memo Contra at 5-7.

<sup>26</sup> See OCC Memo Contra at 7-8.

<sup>27</sup> OCC challenges only the timeliness of Direct Energy's Motion to Intervene and that its interests are adequately represented by RESA and OGMG.

<sup>28</sup> See e.g. Joint Memorandum Contra to OCC's Motion to Modify the 2013 Order by RESA and Direct Energy at 1, FN 1 (March 30, 2018); See also RESA Motion to Intervene at 1, FN 1 (August 30, 2012); see also Dominion/OGMG Joint Motion at 1, FN 1 (June 15, 2012).



Although Direct Energy filed a Joint Memorandum Contra with RESA in this proceeding, Direct Energy is seeking separate, full-party status so that it may adequately represent its unique interests. While Direct Energy's current position aligns with that of the RESA, Direct Energy's position may diverge from RESA's at some point during this proceeding. Consequently, no other party can adequately represent Direct Energy's interests in this case.

Further, intervention by individual members of associations or groups is common at PUCO.<sup>29</sup> Additionally, PUCO precedent establishes its policy "to encourage the broadest possible participation in its proceedings."<sup>30</sup> Further, when reviewing a PUCO decision to deny an OCC Motion to Intervene, the Ohio Supreme Court held:

[I]ntervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO. The Consumers' Counsel explained her interest in the cases in her motions to intervene and also explained that her views would not be adequately represented by the existing parties. In the absence of some evidence in the record calling those claims into doubt or showing that intervention would unduly prolong or delay the proceedings, intervention should have been granted.<sup>31</sup>

Here, Direct Energy has a direct and substantial interest in the outcome of the proceeding, its interests are not adequately represented by any existing party, and Direct Energy's intervention will not unduly prolong or delay the proceeding. As such, Direct Energy's Motion to Intervene should be granted, and Direct Energy should be permitted independent, full-party intervention.

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<sup>29</sup> For example, Direct Energy intervened in prior electric security plan ("ESP") / market rate offer ("MRO") cases without opposition, even though it also participated as a member of RESA. See American Electric Power-Ohio ESP, PUCO Case Nos. 11-346-EL-SSO, *et al.*; FirstEnergy ESP, PUCO Case No. 12-1230-EL-SSO; Dayton Power and Light MRO, PUCO Case Nos. 12-426-EL-SSO, *et al.*; Duke Energy Ohio ESP (PUCO Case Nos. 11-3549-ELSSO, *et al.*

<sup>30</sup> See e.g. Cleveland Elec. Illum. Co., PUCO Case No. 85-675-EL-AIR, Entry at 2 (January 14, 1986).

<sup>31</sup> Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 384, 388 (2006).

### III. CONCLUSION

For the reasons expressed above, Direct Energy Services, LLC and Direct Energy Business Marketing, LLC respectfully request that PUCO deny OCC's Memorandum Contra, grant Direct Energy's Motion to Intervene, and allow Direct Energy to participate as a full party of record.

Respectfully submitted,

/s/ Scott R. Dismukes

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Date: April 6, 2018

Counsel for Direct Energy Services, LLC and Direct  
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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Reply was served via electronic transmission upon the parties this 6<sup>th</sup> day of April 2018.

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Memorandum Contra Direct Energy's Motion to Intervene electronically filed by Mr. Scott R.  
Dismukes on behalf of Eckert Seamans Cherin & Mellott, LLC and Clearfield, Daniel Mr. and  
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