

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Commission’s** )  
**Review of Chapter 4901:1-19 of the Ohio** ) **Case No. 17-1945-GA-ORD**  
**Administrative Code** )

## **REPLY COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION**

## I. INTRODUCTION

The Retail Energy Supply Association (“RESA”)<sup>1</sup> submits the following reply comments to certain comments submitted by the Office of the Ohio Consumers’ Counsel (“OCC”) and the Ohio Partners for Affordable Energy (“OPAE”) in this proceeding. OCC’s and OPAE’s initial comments show a continued objection to the advancement of Ohio’s competitive markets even though this State’s policy is to promote the development of the competitive markets. For example, OPAE seeks to abolish the ability of a utility to exit-the-merchant function for any and all customer types (an argument contrary to Public Utilities Commission of Ohio (“Commission” or “PUCO”) and Supreme Court of Ohio precedent). Likewise, OCC seeks to abolish a utility’s ability to exit-the-merchant function for residential customers. The Commission should reject OCC’s and OPAE’s attempts to unilaterally limit and restrict the development of the competitive markets through the exit-the-merchant function, as well as reject other comments of OCC, all of which are discussed below by RESA.

<sup>1</sup> The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at [www.resausa.org](http://www.resausa.org).

## II. REPLY COMMENTS

### A. The Commission Should Reject OPAE's Request to Abolish Merchant Exits.

OPAE initial comments consist solely of recommending that the Commission eliminate “all provisions of Chapter 4901:1-19 that provide for exit-the-merchant-function plans.”<sup>2</sup> In making this broad request, OPAE ignores that:

- The Supreme Court of Ohio has stated in a case in which OPAE was the appellant: “[R.C. 4929.04] requires that upon the application of a natural gas company, after notice, a period for public comment, and a hearing, the PUCO shall exempt any commodity sales service of a natural gas company from certain provisions of Chapters 4905 and 4909 if the PUCO finds that the natural gas company substantially complies with the state policy specified in R.C. 4929.02.”<sup>3</sup>
- This Commission has granted and approved the implementation of exit-the-merchant-function exemptions under R.C. 4929.04 for Ohio utilities,<sup>4</sup> and that the Supreme Court of Ohio has affirmed the Commission's grant and approval of exit-the-merchant-function exemptions.<sup>5</sup>
- The policy of this state codified at R.C. 4929.02(A)(6) is to “[r]ecognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment[.]”

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<sup>2</sup> OPAE initial comments at page 1.

<sup>3</sup> *Ohio Partners for Affordable Energy v. PUC*, 115 Ohio St. 3d 208, 2007-Ohio-4790, ¶21.

<sup>4</sup> See *In re 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*, January 9, 2013, Opinion and Order at 16-17; *In re to Modify, in Accordance with Section 4928.08, Revised Code, the Exemption Granted Columbia Gas of Ohio, Inc. in Case No. 08-1344-GA-EXM*, January 9, 2013, Opinion and Order at 20.

<sup>5</sup> See *Ohio Partners for Affordable Energy v. Pub. Util. Comm'n (In re East Ohio Gas Co.)*, 144 Ohio St. 3d 265 (2015) (affirming Commission order approving DEO commercial exit from merchant function)

Ohio law is well established that exit-the-merchant-function exemptions are allowable – and the Commission has properly established rules for such plans. If OP&E objects to an exit-the-merchant-function proposal, it can raise those objections in that proceeding for consideration by the Commission under R.C. 4924.04. OP&E’s attempt to disallow the exit–the-merchant function in Ohio through this rule proceeding is misplaced and should be rejected. The development of competitive markets necessitates exit-the-market functionality and a complete ban of such a mechanism by rule is contrary to that goal. Rather, as appropriately established, each proposed exit should follow the established rules and be evaluated on its own merits as the General Assembly intended.

**B. The Commission Should Reject OCC’s Request to Abolish Residential Merchant Exits.**

Like OP&E, OCC also seeks to abolish exit-the-merchant-function plans – but only for the residential consumers that OCC represents. While RESA appreciates OCC’s statement at page 2 of its initial comments that “[c]ommercial and industrial customers generally have considerable experience in the procurement of natural gas and the information about market pricing to make informed natural gas supply choices,” RESA objects to OCC’s request to use the Commission’s rules to preclude a residential consumer exit simply because OCC does not believe the residential customer base has the ability to make informed shopping decisions.

Indeed, contrary to OCC’s implication, residential customers in Ohio are capable of making informed choices – and are shopping today for both electric and natural gas services. As to OCC’s requested rule changes (see page 3 to page 5 of OCC’s initial comments), this Commission cannot limit exit-the merchant-function plans to commercial customer exits only. As noted above, both the Commission and the Supreme Court of Ohio have authorized exit-the-merchant-function programs for commercial customers under R.C. 4929.04. Any rule that would

disallow a residential exit would run counter to prior Commission precedent and the operation of R.C. 4929.04. OCC will have the opportunity to oppose any proposed exit for residential customers that is before the Commission and present its policy arguments at that time. OCC's current requested rule change should be rejected.

**C. The Commission Should Reject OCC's Attempt to Replace the MVR with the SCO.**

OCC's attempt to replace in Rule 4901:1-19-10(A) the monthly variable rate ("MVR") assignment mechanism with the standard choice offer ("SCO") should also be rejected. A fundamental flaw in OCC's rationale is a lack of understanding that the monthly variable rate assignment is not intended to be a default option for consumers electing to not shop (as opposed to the standard choice offer), but rather, a way of inducing a small group of customers (choice-eligible coming off non-renewal in shopping contracts or out of their aggregation programs) that have previously shopped with suppliers or been in shopping aggregations to continue to shop for natural gas and provide a window in which they may explore their shopping options. And as this Commission has noted, "[o]nce a customer is switched to an MVR, that customer is immediately free to: switch to a different CRNGS provider, enter into a different rate plan with the same supplier, or participate in opt-out government aggregation, without any type of termination fee."<sup>6</sup>

In conjunction with using the supplier assignment for these customers to promote continued shopping, the Commission adopted Rule 4901:1-19-10 to provide protections for choice-eligible consumers that have been assigned. For example, Rule 4901:1-19-10(A) (which OCC wants to change) currently requires that a natural gas supplier charge such a customer no "...more than the retail natural gas supplier's posted standard variable rate, which the supplier

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<sup>6</sup> *In re 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 at 15 (January 9, 2013).*

shall submit to the commission and which the commission shall post on its web site.” The Commission approved a further price limitation in the Dominion East Ohio service territory in Case No. 10-2469-GA-ATA whereby the lowest posted rate was required to be used.<sup>7</sup>

Now, OCC seeks to either abolish the MVR assignment mechanism or to change the limitation through this rule-making such that the MVR assignment price can be no more than the standard default choice offer. Neither of OCC’s proposals should be accepted. First, by seeking to abolish the MVR via this rulemaking, OCC is attempting to either predetermine or short-circuit its pending motion to eliminate the Dominion Energy Ohio MVR program.<sup>8</sup> RESA opposed that motion and explained that OCC’s request in that docket was not properly filed.<sup>9</sup> RESA also noted its expectation that OCC would engage stakeholders in discussions regarding the MVR assignment before unilaterally seeking a modification(s),<sup>10</sup> which has not yet happened.

Second, OCC’s attempt to eliminate the MVR here is not consistent with state policy. Ohio Revised Code Section 4929.02(A)(7) states that it is the state policy 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 to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905. and 4909. of the Revised Code.” OCC’s proposed change for Rule 4901:1-19-10(A) does not comport. It also does not comport with OCC’s statutory mandate under R.C. 4911.02 that

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<sup>7</sup> *In re Application of The East Ohio Gas Company d/b/a/ Dominion East Ohio to File Revised Tariffs Concerning its Monthly Variable Rate Commodity Service and Standard Choice Offer Commodity Service*, Case No. 10-2469-EL-ATA, Finding and Order (November 22, 2010).

<sup>8</sup> *In re Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company, d/b/a Dominion Energy Ohio*, Case No. 12-1842-GA-EXM, OCC Motion to Modify filed March 9, 2018.

<sup>9</sup> *Id.*, Joint Memorandum Contra of RESA, Direct Energy Services, LLC, and Direct Energy Business Marketing LLC filed March 30, 2018.

<sup>10</sup> *Id.* at 5.

obligates OCC to follow this policy and other policies in Chapter 4929 that involve supporting retail natural gas competition.

Third, capping the MVR assignment price at the SCO default price as OCC suggests would mandate that a supplier use a *wholesale auction* price that is established once a year (based on aggregated volumes and assurances of long-term supply obligations), rather than using a retail price (based on a one-month supply of gas with no long-term supply obligation). This issue illustrates the importance of avoiding blanket prohibitions or unrealistic price caps as suggested by OCC. The OCC proposal should not be adopted. Instead, the proper course, as RESA has suggested in response to OCC's pending motion in the Dominion Energy Ohio case,<sup>11</sup> is for OCC to engage stakeholders in discussions regarding the MVR assignment before unilaterally seeking a modification.

OCC's proposed revisions to Rule 4901:1-19-10(A) should be rejected.

**D. The Commission Should Reject OCC's Attempt to Insert a Standard not in the Governing Statute.**

OCC seeks to modify the definition of "alternative rate plan" in Rule 4901:1-19-01(A) to include a "just and reasonable" rate standard, to limit charges for service to only natural gas, and to modify the placement of the phrase "revenue decoupling mechanism." Doing so, however, will modify the definition in a way so that it does not track with the statute. OCC's changes to the rule should not be made.

R.C. 4929.04 states in relevant part (emphasis added):

"Alternative rate plan" means a method, alternate to the method of section 4909.15 of the Revised Code, **for establishing rates and charges**, under

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<sup>11</sup> *In re Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company, d/b/a Dominion Energy Ohio*, Case No. 12-1842-GA-EXM, OCC Motion to Modify filed March 9, 2018 and Joint Memorandum Contra of RESA, Direct Energy Services, LLC, and Direct Energy Business Marketing LLC filed March 30, 2018.

which rates and charges may be established **for a commodity sales service or ancillary service** that is not exempt pursuant to section 4929.04 of the Revised Code or for a distribution service. Alternative rate plans may include, but are not limited to, methods that provide adequate and reliable natural gas services and goods in this state; minimize the costs and time expended in the regulatory process; tend to assess the costs of any natural gas service or goods to the entity, service, or goods that cause such costs to be incurred; afford rate stability; promote and reward efficiency, quality of service, or cost containment by a natural gas company; provide sufficient flexibility and incentives to the natural gas industry to achieve high quality, technologically advanced, and readily available natural gas services and goods at just and reasonable rates and charges; or **establish revenue decoupling mechanisms**. Alternative rate plans also may include, but are not limited to, automatic adjustments based on a specified index or changes in a specified cost or costs.

As shown below, Staff's proposed rule (emphasis added) closely tracks the statutory definition:

"Alternative rate plan" means a method, alternate to the method provided in section 4909.15 of the Revised Code, **for establishing rates and charges** for a distribution service or **for a commodity sales service or ancillary** that is not exempt pursuant to section 4929.04 of the Revised Code. Alternative rate plans may include, but are not limited to, methods that provide adequate and reliable natural gas services and goods in this state; minimize the costs and time expended in the regulatory process; tend to assess the costs of any natural gas service or goods to the entity, service, or goods that cause such costs to be incurred; afford rate stability; promote and reward efficiency, quality of service, or cost containment by a natural gas company; or provide sufficient flexibility and incentives to the natural gas industry to achieve high quality, technologically advanced, and readily available natural gas services and goods at just and reasonable rates and charges, or **establish revenue decoupling mechanisms**. Alternative rate plans also may include, but are not limited to, automatic adjustments based on a specified index or changes in a specified cost or costs.

OCC seeks to modify the rule by inserting the phrase "just and reasonable" before the bolded phrase "rates and charges" above. OCC also asks to insert the phrase "of natural gas" after the bolded phrase "commodity sales service or ancillary service." OCC would also delete the bolded phrase "or establish revenue decoupling mechanisms" and insert the phrase "revenue decoupling mechanism after the phrase "limited to" and before "automatic adjustments."

OCC's edits to Staff's proposed rule would read as follows:

"Alternative rate plan" means a method, alternate to the method provided in section 4909.15 of the Revised Code, for establishing just and reasonable rates and charges for a distribution service or for a commodity sales service or ancillary of natural gas that is not exempt pursuant to section 4929.04 of the Revised Code. Alternative rate plans may include, but are not limited to, methods that provide adequate and reliable natural gas services and goods in this state; minimize the costs and time expended in the regulatory process; tend to assess the costs of any natural gas service or goods to the entity, service, or goods that cause such costs to be incurred; afford rate stability; promote and reward efficiency, quality of service, or cost containment by a natural gas company; or provide sufficient flexibility and incentives to the natural gas industry to achieve high quality, technologically advanced, and readily available natural gas services and goods at just and reasonable rates and charges, ~~or establish revenue decoupling mechanisms~~. Alternative rate plans also may include, but are not limited to, revenue decoupling mechanisms and automatic adjustments based on a specified index or changes in a specified cost or costs.

As the above comparisons show, all of OCC's edits would not track the statute - and should be rejected by the Commission. First, the statutory definition does not impose an overall just and reasonable standard as sought by OCC. Rather, the statute as written, allows alternative rate plans to include, but not be limited to, a variety of methods for "providing adequate and reliable natural gas services and goods" which include "readily available natural gas services and goods at just and reasonable rates[.]"

Second, as indicated in the language just quoted, both services and goods may be included in an alternative rate plan - so OCC's attempt to limit rates and charges to only the provision of natural gas run counter to the statute. Third and last, Staff's addition of the phrase "or establish revenue decoupling mechanisms" simply tracks the statute. OCC's change, on the other hand, would result in the rule being written in a manner different than the statute. The Staff's proposal is the better proposal, is consistent with the statute and should be accepted. All of OCC's proposed edits to Rule 4901:1-19-01(A) should be rejected.



**E. The Commission Should Reject OCC's Attempt to Use the Commission's Rules to Require an Applicant Contact Person to Work with the OCC.**

OCC asks this Commission to modify Rule 4901:1-19-03(C)(4) to imply that the contact person for an applicant must work with the OCC in addition to Staff in order to resolve customer complaints and inquires. Specifically, OCC wishes to modify the rule as follows:

The applicant shall provide a discussion showing that the requested exemption(s) does not involve undue discrimination for similarly situated customers. The applicant shall provide a description of the internal process for addressing customer complaints and inquiries. The applicant shall also include the name of a contact person to work with the commission staff and the Ohio consumers' counsel. This person shall have the authority to resolve customer complaints and inquiries received by commission staff and the consumers' counsel. The applicant shall also provide clear and accurate, written materials related to service and product offerings which promote effective customer choice and the provisions of adequate customer service.

OCC claims that R.C. 4911.021 requires this result. That statute reads:

[t]he consumers' counsel shall not operate a telephone call center for consumer complaints. However, for any calls received by the consumers' counsel concerning consumer complaints, the consumers' counsel may assist consumers with their complaints or forward the calls to the public utilities commission's call center.

Contrary to OCC's claim, R.C. 4911.021 does not require the Commission to modify Rule 4901:1-19-03(C)(4). The statute only addresses consumer complaint calls received by OCC (even though it cannot operate a call center), and only allows the OCC to either assist the consumer with the complaint or forward the call to the Commission's call center. The statute **does not** mandate or imply that a utility or any entity must work with the OCC to resolve the consumer's complaint. Instead, it only gives OCC the authority to (i) try and assist the consumer when the consumer calls the OCC office or (ii) forward the complaint to the Commission's call center.

OCC's proposed edit to Rule 4901:1-19-03(C)(4) goes well beyond what the General Assembly allows OCC to do under R.C. 4911.021. Under OCC's version, OCC would replace the Staff as the state body to work with a utility on consumer complaints related to exemptions. Another reading of OCC's proposed rule change would require that OCC be involved with Staff in working with the contact to resolve the complaint. Both results are nonsensical and run counter to the fact that the Commission is the body with regulatory oversight over public utilities – and not OCC. OCC's proposed change should be rejected.

### **III. CONCLUSION**

The Commission must ensure that its rules follow and adhere to the Commission's governing statutes, and what OCC and OPAE propose in their comments would result in rules that are contrary to the Commission's governing statutes. Accordingly, the Commission should reject OCC's and OPAE's proposals. Doing so will allow Ohio to continue on the path of developing the competitive market for natural gas choice.

Respectfully Submitted,

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## **CERTIFICATE OF SERVICE**

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned hereby certifies that a copy of the foregoing document is also being served (via electronic mail) on the 27th day of July 2018 upon the persons listed below.

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