BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY COMMENTS
BY
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I. INTRODUCTION

Rules of the Public Utilities Commission of Ohio ("PUCO") allow natural gas utilities to adopt a variety of plans for charging consumers for natural gas service. Some rules even allow natural gas utilities to withdraw from providing a standard offer of natural gas to Ohio consumers, known as "exiting the merchant function." If their natural gas utility exits the merchant function, consumers are left only with offers by marketers or government aggregators. But residential customers should always have available to them, including as their default service, a standard offer for natural gas that is offered through their utility. There should be no rule allowing a natural gas utility to end the offering of a "standard choice offer" for selling natural gas to residential consumers.

In response to a PUCO Entry seeking comment on the PUCO Staff's proposed changes to the rules, the OCC recommended that the PUCO not allow natural gas utilities to exit-the-merchant-function for residential customers. OCC also suggested several other rule changes to improve consumer protection and the PUCO's process for considering alternative rate plans for consumers. The PUCO should adopt OCC's proposed changes to the rules.

Also filing comments were Ohio Partners for Affordable Energy ("OPAE"), the Retail Energy Supply Association ("RESA"), and East Ohio Gas Company d/b/a Dominion Energy Ohio ("Dominion"). OCC files these Reply Comments that respond to several of the arguments presented by the other commenters. OCC agrees with OPAE that the exit-the-merchant-function should be eliminated, at least as it applies to residential customers. OCC disagrees with several of RESA's recommendations, as discussed herein. OCC takes no position concerning RESA's other suggestions and the single issue raised by Dominion regarding proposed Ohio Adm. Code 4901:1-19-06(C)(1).[1] To protect consumers from potential unnecessary additional charges, the PUCO should adopt the recommendations made in OCC's Comments, including OCC's recommendation regarding proposed Ohio Adm. Code 4901:1-19-06(C)(1).[2]

II. RECOMMENDATIONS

A. Residential customers should have a standard offer from utilities available to them, so any exit-the-merchant-function plan should not apply to residential customers.

OPAE urges the PUCO to eliminate all provisions of Chapter 4901:1-19 that provide for exit-the-merchant-function plans.[3] OPAE notes that there is no statutory basis for allowing natural gas companies to exit-the-merchant function.[4] OPAE also argues that the PUCO's exit-the-merchant-function rules violate state policies that ensure the availability of adequate, reliable, and reasonably priced natural gas service that meets

[1] OCC's absence of a position on any issue raised in the other comments should not be construed as OCC's acquiescence to the position taken by the other commenters.

[2] OCC Comments at 11-12.

[3] OPAE Comments at 1.

[4] *Id.* at 2-3.

consumers' needs.[5] And, according to OPAE, the exit-the-merchant-function rules are contrary to state policy because the rules do not achieve competition between willing buyers and willing sellers.[6] As OPAE notes, consumers affected by exit-the-merchant-function plans are not "willing" buyers,[7] but instead are assigned to a marketer they might not know or want, and often at higher-than-market prices.[8]

OCC concurs with OPAE's position to preserve the standard offer, at least as it applies to residential customers. As OCC's Comments noted, residential customers might not have the necessary background, experience in procuring natural gas, or access to sufficient market information to make informed choices in obtaining their natural gas supply from a marketer.[9] Residential consumers should always have available to them as their default service a standard offer from their utilities for natural gas. The PUCO should adopt the recommendations supported by OPAE and OCC that would require that residential customers always be offered a standard offer for natural gas through their natural gas utility.

B. The PUCO should not approve a utility's exit from the merchant function, but if it does, any costs associated with the exit should not be paid by customers, but rather should be paid by marketers.

Rule 4901:1-19-05(E) allows an applicant to request cost recovery of its "reasonable costs of exiting the merchant function." RESA contends that proposed Ohio Adm. Code 4901:1-19-05(E) should be changed to require that all costs associated with a

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[5] *Id.* at 3, citing R.C. 4929.02(A)(1) and (A)(2).

[6] *Id.* at 4, citing R.C. 4929.02(A)(7).

[7] *Id.*

[8] *Id.* at 4-7.

[9] OCC Comments at 2.

natural gas utility's exiting the merchant function be collected from "choice-eligible default customers" who choose to remain on the utility's default service.[10] RESA claims that it would be unfair to collect any of the costs associated with exiting the merchant function from shopping customers or marketers.[11] RESA also asserts that "following principles of cost-causation, those customers electing to not shop and driving the level of costs of the exemption process (such as the amount of customer education) should bear the costs."[12] RESA's position is without merit.

If there is an exit (which there should not be for residential customers) the reasonable costs of exiting the merchant function should be charged to marketers based upon their relative market share. It should not be charged to choice-eligible customers who stay with their natural gas utility's default service, as RESA suggests. Because, if there would be an exit (which OCC opposes for residential customers), there would likely be no choice-eligible customers left on the utility's default service to charge such exit costs. Further, the marketers would be the primary beneficiary of any exit-the-merchant-function plan. If the PUCO allows the utility to collect such costs, OCC recommends that marketers should be responsible for paying the costs associated with exit-the-merchant-function plans.

The PUCO should reject RESA's proposed change to Ohio Adm. Code 4901:1-19-05(E).

[10] RESA Comments at 3.

[11] *Id.*

[12] *Id.*

C. RESA's recommended changes to proposed Ohio Adm. Code 4901:1-19-05(D)(5) are unnecessary, potentially harmful for consumers, and the PUCO should not adopt RESA's suggestion.

RESA takes issue with proposed Ohio Adm. Code 4901:1-19-05(F), which states: "The commission shall order such procedures as it deems necessary, consistent with these rules, in its consideration of an application to exit the merchant function." RESA claims that the rule should be changed because it contains language not authorized in the underlying statute.[13] To "ensure compliance," RESA proposes that the rule be revised as follows: "[t]he commission shall order such procedures as it deems necessary, consistent with *section 4924.04* [sic] *of the Revised Code and* these rules, in its consideration of an application to exit the merchant function."[14] RESA's proposed change is erroneous and unnecessary.

RESA claims that the rule contains language "not authorized" under R.C. 4929.04 and thus is unlawful.[15] But RESA does not identify any language in the proposed rule that is not included in the statute. To be sure, the language in the rule is consistent with, if not verbatim from, the statute. Instead, RESA only suggests that language referring to the statute be *added* to the rule. This does not cure the supposed defect in the rule, i.e., that the rule goes beyond the authority the General Assembly has granted the PUCO.[16] The PUCO has general supervisory responsibility over the public utilities for the purpose of protecting the public. RESA's argument is flawed.

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[13] RESA Comments at 4.

[14] *Id.* (emphasis in the original). RESA's proposed change refers to R.C. 4924.04, however, there is no chapter 4924 in the Ohio Revised Code. RESA apparently is referring to R.C. 4929.04.

[15] *Id.*, referencing *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87.

[16] *Id.* at 3.

As for the contention that the proposed language "ensures compliance" with the statute, RESA has not shown the rule is inconsistent with the statute. Adding the language proposed by RESA would add nothing to the rule. The PUCO should reject RESA's proposal.

D. Contrary to RESA's argument, there is a statutory basis for proposed Ohio Adm. Code 4901:1-19-05(F) and (G)(1), and the PUCO should not change these rules as RESA suggests.

Ohio Adm. Code 4901:1-19-05(D)(5) requires that an applicant seeking to exit-the-merchant-function show that its application satisfies R.C. 4929.04 and is just and reasonable. Ohio Adm. Code 4901:1-19-05(G)(1) places the burden on the applicant to show that its application satisfies R.C. 4929.04 and is just and reasonable. Without this standard of review, there would be no basis for the PUCO to decide an exemption case.

RESA claims that the "just and reasonable" requirement is not in the underlying statute (R.C. 4929.04), and thus the rule goes beyond what is allowed in the statute.[17] RESA proposes that the "just and reasonable" language be deleted from the rules. But there is a statutory basis for retaining the "just and reasonable" requirement.

R.C. 4929.02 specifically describes the state policy as to natural gas services and goods: "It is the policy of this state to…promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods."[18] R.C. 4929.05(A)(3) includes a "just and reasonable" requirement for the review of such alternative rate plans like exit-the-merchant. The definition of "alternative rate plan" under R.C. 4929.01(A) requires that the rates and charges for natural gas service under

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[17] *Id.* at 4.

[18] R.C. 4929.02 (A)(1).

the plan must be just and reasonable. Thus, there is a very good basis for including the "just and reasonable" requirement in proposed Ohio Adm. Code 4901:1-19-05(D)(5) and (G)(1); the requirement is state policy. The PUCO should reject RESA's suggestion.

If anything, there should be *more* support required in the rules for protection of residential consumers under the just and reasonable standard that RESA would eliminate. For example, the rules should require each utility to continually compare (in the aggregate) what marketers' consumers actually pay to what they would have paid had they used the utility's standard offer. This information would be a valuable resource for consumer education and protection, based on consumer experience, regarding choices available to them in the natural gas market. Such a comparison is sometimes known as "shadow-billing."

E. RESA's suggested change to Ohio Adm. Code 4901:1-19-08(A)(2) goes beyond the clear language of the statute and thus should not be adopted.

Although RESA reminded the PUCO that its rulemaking authority is limited to the statutes regarding the three rules just discussed, RESA submits a proposal that goes beyond the statutory language for withdrawing an alternative rate plan. Ohio Adm. Code 4901:1-19-08(A)(2) provides that a utility may withdraw an exemption, exit-the-merchant-function plan, or alternative rate plan if it is modified by the PUCO. RESA expressed its concern that the rule allows an applicant to withdraw an exemption, exit-the-merchant-function plan or alternative rate plan upon even the slightest modification by the PUCO.[19] To avoid this result, RESA proposes inserting the word "substantially" before the word "modifies" in the rule, so that it reads as follows: "Withdraw the

[19] RESA Comments at 4-5.

exemption, exit-the-merchant-function plan, or alternative rate plan application if the commission *substantially* modifies or does not approve the application as filed." But what RESA proposes is unlawful.[20]

R.C. 4929.07(A)(2) gives applicants the right to withdraw an alternative rate plan if modified by the PUCO. The language is specific:

> (A) Within thirty days after the date of issuance of an order approving an exemption or alternative rate plan under section 4929.04 or 4929.05 of the Revised Code or within twenty days after the issuance of a rehearing entry pursuant to section 4903.10 of the Revised Code, whichever is later, the natural gas company shall do either of the following:
>
> (1) File with the public utilities commission a notice of its intention to implement the exemption or alternative rate plan as directed by the commission in its order, and a copy of its revised rate schedules;
>
> (2) Withdraw its exemption application or alternative rate plan request if the commission modifies or does not approve as filed the exemption application or the alternative rate plan request.

The word "substantially" is not included in the statute. Thus, RESA would have the PUCO change statutory language, which it cannot lawfully do.

Further, inserting the word "substantially" into Ohio Adm. Code 4901:1-19-08(A)(2) as RESA suggests would change the meaning of the rule and make it vague. The rule (consistent with the statute) allows withdrawal of an alternative rate plan if the PUCO makes *any* modification to the plan. But requiring that a modification be "substantial" raises the question: What is a "substantial" modification?

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[20] *See Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87.

The PUCO cannot lawfully change Ohio Adm. Code 4901:1-19-08(A)(2) as suggested by RESA. The PUCO should reject RESA's proposal.

F. RESA's suggested change to proposed Ohio Adm. Code 4901:1-19-10 would make the rule vague and could put consumers' personal information at risk.

Ohio Adm. Code 4901:1-19-10 provides protections for choice-eligible consumers who are assigned to a marketer when their natural gas utility is granted an exemption or is allowed to exit-the-merchant-function. The rule limits the rate the consumers may be charged by a marketer, prohibits termination fees if consumers find another supplier, prohibits a minimum stay requirement, and protects the consumers' personal information.

RESA proposes that this rule should only apply to the period during which a marketer is assigned the choice-eligible consumer, and not during the period when the consumer may be voluntarily contracting with the marketer. RESA proposes the following change to the rule's first sentence: "*During the period a retail* ~~Retail~~ natural gas supplier *is* assigned a choice-eligible customer*, the retail natural gas supplier* shall:…."[21] The PUCO should not adopt this change.

First, the proposed change is vague. It does not define what is meant by the period that the customer is assigned to the marketer. Further, it is not limited to situations where customers switch to another marketer. Thus, it would appear to allow termination fees in this circumstance.

Second, the proposal would affect all the provisions of the rule, including the protection of customer information in Ohio Adm. Code 4901:1-19-10(D). The obligation

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[21] RESA Comments at 5.

to protect customer information would seem to go away when the customer is no longer assigned to the marketer, e.g., if the customer chooses another marketer. In that Marketers have significant amounts of data and information on their consumers, there should be no relaxation of requirements currently in place to protect such data and information. RESA's recommendation, if adopted by the PUCO (which it should not) could put consumers at risk.

RESA's proposed language is flawed. The PUCO should not make the change suggested by RESA.

G. RESA's recommended changes to Ohio Adm. Code 4901:1-19-01(O) and 4901:1-19-05(D) are unnecessary, can result in higher costs for consumers, and the PUCO should not adopt RESA's suggestions.

Ohio Adm. Code 4901:1-19-01(O) defines "exit the merchant function" as the complete transfer of the obligation to supply default service for choice-eligible customers from a natural gas company to marketers without the occurrence of a competitive retail auction. Ohio Adm. Code 4901:1-19-05(D) requires a natural gas company seeking to exit the merchant function to demonstrate that the marketers providing default service to the natural gas company's choice-eligible customers have done so reliably for at least two consecutive heating seasons through a competitive retail auction process. RESA suggests that the phrase "competitive retail auction" be replaced with the phrase "competitive bidding process" in the above rules.[22] RESA argues that the suggested changes will "simplify the rules" and allow for competitive procurement options, such as a request for proposals ("RFP"), other than a competitive retail auction.[23] It is not clear how RESA's

[22] *Id.* at 2.

[23] *Id.*

suggested change will "simplify the rules" and RESA does not offer any support for this argument. And competitive retail auctions have resulted in natural gas being supplied at lower costs for Ohio consumers.

RESA also does not offer any reasons why it is necessary or beneficial to broaden the scope of competitive procurement options beyond the current practice of competitive retail auctions. RESA cites the PUCO's approval of an RFP process, besides a competitive auction, for *choice-ineligible and PIPP enrolled customers* to support its suggestion for a similar rule for *choice eligible customers*.[24] Because choice-eligible customers may shop, their situation differs substantively from choice-ineligible customers and PIPP customers where the procurement process involves significantly fewer customers. Thus, the process of providing default service to choice-eligible customers is not analogous to the process for providing default service to choice-ineligible and PIPP customers. The PUCO should not broaden the procurement options for choice-eligible customers as RESA suggests.

A competitive retail auction, as the only gas commodity procurement option, has served choice-eligible customers well as a low-priced option for receiving default natural gas service. There is no reason to believe other procurement options, such as an RFP process, will yield lower prices or improve the gas commodity procurement process. There is no reason to change an existing process that is working well for customers. No change is warranted in these rules. No procurement options, other than the competitive retail auction, should be included in the rules.

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[24] *Id.*

III. CONCLUSION

Consumers need to be protected in the application process for and the implementation of an alternative rate plan for their natural gas utility. Residential consumers should not be subjected to exit-the-merchant-function plans that would eliminate the opportunity to choose the utility's standard offer. The changes proposed by RESA that are discussed in these Reply Comments would diminish consumer protections. Some are unnecessary or unlawful. The PUCO should reject them. The recommendations in OCC's Comments and Reply Comments will give millions of residential natural gas consumers in Ohio the protection that they need by preserving the standard offer. The PUCO should adopt OCC's recommendations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of these Reply Comments was served on the persons stated below via electronic transmission, this 27th day of July 2018.

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