

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Motion to Modify the)
Exemption Granted to The East Ohio Gas) Case No. 18-1419-GA-EXM
Company d/b/a Dominion Energy Ohio.)

**MEMORANDUM CONTRA MOTIONS OF THE OFFICE OF THE OHIO
CONSUMERS' COUNSEL AND OHIO PARTNERS FOR AFFORDABLE ENERGY
BY DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS
MARKETING, LLC**

I. INTRODUCTION

Pursuant to Ohio Revised Code (“R.C.”) 4929.08, Ohio Administrative Code (“O.A.C.”) 4901:1-19-11, and the August 16, 2019 Entry in the above-captioned proceeding, Direct Energy Services, LLC and Direct Energy Business Marketing, LLC (collectively, “Direct Energy”) hereby file this Memorandum Contra the August 16, 2019 Motion of the Ohio Consumers’ Counsel (“OCC”) and the September 14, 2018 Motion of the Ohio Partners for Affordable Energy (“OPAE”). In their motions, OCC and OPAE both seek modification of the current steps that The East Ohio Gas Company d/b/a Dominion Energy Ohio (“DEO” or “Company”) is taking toward shifting its commodity supply obligation to the competitive market. As detailed below, R.C. 4929.08(A)(2) prevents the Public Utilities Commission of Ohio (“Commission” or “PUCO”) from addressing these motions unless it determines whether they seek modification of an order from within the last eight years, unless DEO consents to the modification. To the extent OCC’s and OPAE’s motions are valid under R.C. 4929.08(A)(2), Direct Energy files this Memorandum Contra to correct their characterizations of the “findings upon which the [Commission’s] order was based,” a question central to the Commission’s consideration of a potential modification of such an order under R.C. 4929.08(A). Ultimately, OCC and OPAE fail

to justify modification of the Commission’s approach to shopping for DEO customers because their arguments rest on assertions about what choices customers should be making to save money, rather than the state policy favoring independent customer shopping in a fully competitive market that provided the original basis for the Commission orders at issue here.

II. BACKGROUND

A. Legal Background

Ohio law sets forth state policy that strongly favors customer choice among a wide range of available competitive options as a mechanism to provide natural gas supply service to customers. R.C. 4929.02 relevantly provides that “[i]t is the policy of this state to,” *inter alia*:

(1) Promote the *availability* to consumers of adequate, reliable, and reasonably priced natural gas services and goods;

(2) Promote the availability of unbundled and comparable natural gas services and goods that provide wholesale and retail consumers with the supplier, price, terms, conditions, and quality options *they elect* to meet their respective needs;

(3) Promote diversity of natural gas supplies and suppliers, by giving consumers *effective choices* over the selection of those supplies and suppliers;

(4) Encourage *innovation and market access* for cost-effective supply- and demand-side natural gas services and goods;

(6) Recognize the continuing emergence of *competitive natural gas markets* through the development and implementation of flexible regulatory treatment;

(7) Promote 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; [and]

(11) Facilitate *additional choices* for the supply of natural gas for residential consumers, including aggregation[.]

R.C. 4929.02(A) (emphases added). The Commission must follow the policies set forth in this provision in implementing its authority over natural gas companies under R.C. 4929.03-4929.30. R.C. 4929.02(B).

Consistent with these longstanding state policies, R.C. 4929.04 provides the option for a natural gas company to “exit the merchant function” in favor of the competitive market by applying for an exemption from the obligation to provide commodity sales service. The Commission “shall” approve such an application as long as it finds:

that the natural gas company is in substantial compliance with the policy of this state specified in section 4929.02 of the Revised Code and that either of the following conditions exists:

(1) The natural gas company is subject to effective competition with respect to the commodity sales service or ancillary service;

(2) The customers of the commodity sales service or ancillary service have reasonably available alternatives.

R.C. 4929.04(A). This provision also sets forth several relevant considerations for the Commission in making its determination on these issues, primarily centering on the “availability” of services “at competitive prices, terms, and conditions” from alternative providers. R.C. 4928.04(B).

Once the Commission authorizes an exemption under R.C. 4929.04, any subsequent abrogation or modification is governed by R.C. 4929.08. Pursuant to that provision, the Commission “may abrogate or modify any order granting such an exemption . . . *only*” if

(1) The commission determines that the findings upon which the order was based are no longer valid and that the abrogation or modification is in the public interest;

(2) The abrogation or modification is not made more than eight years after the effective date of the order, unless the affected natural gas company consents.

R.C. 4929.04(A) (emphasis added).

B. DEO's Existing Plan Under R.C. 4929.04

DEO has reached the current phase of its plan to move away from providing commodity sales service through several incremental steps over the last thirteen years.

The Company filed its initial application in 2005, Case No. 05-474-GA-ATA, and the Commission then approved a stipulation beginning “Phase 1” of DEO’s transfer of commodity sales service to the competitive market: supply through a wholesale auction “standard service offer” (“SSO”). *In the Matter of the Application of DEO for Approval of a Plan to Restructure Its Commodity Service Function*, Case No. 05-474-GA-ATA, Opinion and Order (May 26, 2006). In that phase, DEO remained as an intermediary in providing gas at the final auction price to end-use customers, rather than competitive suppliers having a direct relationship with the retail customer.

In 2007, DEO sought Commission authorization to implement “Phase 2” of its exit-the-merchant-function plan: having customers directly receive gas supply from a competitive supplier, at a “standard choice offer” (“SCO”) price determined through the same auction process implemented in Phase 1. *In the Matter of the Application of DEO for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services (“Phase 2 Case”)*, Case No. 07-1224-GA-EXM, Opinion and Order (June 18, 2008) (“*Phase 2 Case Order*”) at 5-7. At hearing, the parties submitted an uncontested stipulation laying out an amended version of Phase 2. Relevantly, the stipulation provided that all

[c]hoice-eligible customers whose energy choice or opt-out governmental aggregation contract expires without renewal may 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 SCO auction. If they do not do so, after their second SSO bill, they will be assigned to an energy choice supplier at the supplier’s posted monthly variable rate [“MVR”] under the terms of the SCO service in DEO’s tariff.

Id. at 14. The Commission approved that stipulation in an order dated June 18, 2008.

DEO then filed a 2012 motion, jointly with the Ohio Gas Marketers Group (“OGMG”), seeking Commission authorization under R.C. 4929.04 to implement “Phase 3” of its exit from the commodity services market. *In the Matter of the Joint Motion to Modify the June 18, 2008 Opinion and Order in Case No. 07-1224-GA-EXM* (“Phase 3 Case”), Case No. 12-1842-GA-EXM, Joint Motion to Modify Order Granting Exemption (June 15, 2012). This motion was followed by a stipulation, signed by DEO, OCC, and OGMG, that proposed to eliminate SCO commodity service for choice-eligible non-residential customers, while preserving the options for such non-residential customers to: (1) shop with a competitive supplier; (2) participate in an opt-out governmental aggregation; or (3) default to assignment to a competitive supplier from a list maintained by DEO at the supplier’s monthly variable rate. *Phase 3 Case*, Opinion and Order (Jan. 9, 2013) (“Phase 3 Case Order”) at 8. In that stipulation, DEO agreed not to file any request for Commission approval to exit the merchant function for residential customers before April 1, 2015. *Id.* at 10. The Commission approved the *Phase 3 Case* stipulation on January 9, 2013.

C. The Current Proceeding

In March 2018, OCC and OPAE filed motions in the *Phase 3 Case* seeking various changes to DEO’s implementation of the above Commission orders under R.C. 4929.08. The September 13, 2018 Entry in that docket directed both parties to refile their motions in this new docket – OPAE on September 14, 2018 (“OPAE Motion”), and OCC on August 16, 2019 (“OCC Motion”).

III. ARGUMENT

A. The Motions’ Arguments Regarding Default Service for DEO’s Residential Customers Are Untimely Under R.C. 4929.08

Consistent with OCC’s role as an advocate for Ohio residential ratepayers, its motion focuses on the implementation of Phase 2 of DEO’s plan with respect to residential customers, requesting that the Commission “re-establish Dominion’s competitively bid Standard Choice Offer

as the default service for all choice-eligible residential customers.” OCC Motion at 1. OPAE’s motion similarly asks for restoration of the SCO as a default for choice-eligible residential customers. OPAE Motion at 4-5. However, such a request is untimely. R.C. 4929.08(A) plainly states that the Commission “may abrogate or modify any order granting such an exemption” from a natural gas company’s commodity supply service obligation “*only*” if “[t]he abrogation or modification is not made more than eight years after the effective date of the order, unless the affected natural gas company consents.” (Emphasis added.)

Neither motion identifies any specific element of any order issued by the Commission within the last eight years that addresses the current default service arrangement for DEO’s choice-eligible residential customers. In fact, OCC and OPAE effectively seek modification of the approach to residential customer default service approved in the *Phase 2 Case* in 2008. DEO has not supplied its consent to the belated modification of that order more than ten years after the fact. Accordingly, the Commission lacks authority to address OCC’s motion under R.C. 4929.08.

Permitting OCC to attack the *Phase 2 Case* stipulation through bootstrapping its challenge to a subsequent order regarding completely different aspects of DEO’s transition away from commodity sales service would ignore R.C. 4929.08(A)’s plain language. As a practical matter, allowing OCC’s motion to move forward would open the door to endless litigation based on belated arguments about facts from decades ago, and would create significant uncertainty regarding DEO’s progress toward unconstrained customer choice among competitive options consistent with R.C. 4929.02. It is far preferable for the Commission to abide by the provision of R.C. 4929.08(A)(2) allowing late-filed motions to modify only when a natural gas company consents, in order to encourage a cooperative approach in which stakeholders seek to make any

needed adjustments to an R.C. 4929.04 exemption through a collaborative process that balances all relevant considerations and policies.

B. Neither OCC's Nor OPAE's Arguments Address the Findings Upon Which the Challenged Commission Orders Were Based.

Putting questions of timing aside, the Commission's main substantive task in addressing OCC's and OPAE's motions under R.C. 4929.08 is to determine whether the findings upon which any order at issue "was based are no longer valid and that the abrogation or modification is in the public interest." R.C. 4929.08(A)(1). Neither motion can survive this analysis because neither party fully addresses the range of considerations cited by the Commission in support of its orders in the *Phase 2* and *Phase 3 Cases*.

In the original *Phase 2 Case* order approving the MVR as a default option for DEO's residential customers, the Commission agreed squarely with DEO's arguments that the stipulation "complies with and supports the policy of the State of Ohio." *Phase 2 Case* Order at 20. As summarized by the Commission, DEO explained that the Phase 2 proposal – including using the MVR as the default rate for choice-eligible residential customers – would carry out state policy of facilitating customer choice, competition, and innovation consistent with R.C. 4929.02:

DEO further submits that its proposal for phase 2 will expand consumer options, provide additional choices for the supply of natural gas for residential consumers, promote effective consumer choice of gas supplies, and provide consumer education in accordance with Section 4929.02, Revised Code. DEO explains that, by continuing to enable consumers to make apples-to-apples comparisons, a level playing field will be maintained and marketers will have incentives to offer competitive prices, options, and value-added services. According to DEO, it is also expected that the transparency of having the supplier's name on the bill will facilitate the selection of suppliers by choice-eligible customers who have not yet entered the choice program. In addition, DEO explains that additional choices are available for residential customers because the proposal allows SCO customers to leave the SCO service without penalty at any time by enrolling with an individual supplier or in a governmental aggregation program. . . .

DEO offers that, in accordance with Section 4929.02, Revised Code, this proposal encourages innovation and market access for the supply- and demand-side natural gas goods and services. DEO explains that, by promoting market-based pricing and preventing price distortions, price-induced conservation will be facilitated and the demand for providers of conservation and energy efficiency services will be increased. In addition, DEO avers that its proposal invites flexible regulatory treatment and fosters transactions between willing buyers and willing sellers.

Phase 2 Case Order at 18-19.

The *Phase 3 Case Order*, which concerned a contested stipulation, delved further into the specific benefits of fostering competition by removing the SCO (in that case, for non-residential customers). The Commission found that:

the Stipulation provides for 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. Moreover, the Commission believes that the Stipulation allowing DEO to exit the merchant function for nonresidential customers will encourage innovation, both in how services are provided and in the variety of available products. The Commission further believes that customers will be protected by the market during this transition. Once a customer is switched to an MVR, that customer is immediately free to: switch to a different CRNGS [certified retail natural gas supplier] provider, enter into a different rate plan with the same supplier, or participate in opt-out government aggregation, without any type of termination fee.

Phase 3 Case Order at 14-15. The Commission reiterated that these impacts of the *Phase 3 Case* stipulation would “further[] state policy by increasing customers access to competitively provided products and services and by increasing the diversity of products available to customers.” *Id.* at 16. Conversely, the Commission determined that “continuation of SCO service is adversely affecting DEO and is negatively affecting all Ohioans by hindering the development of a fully-competitive marketplace.” *Id.* at 8.

Ohio’s policy of fostering competition, customer choice, and market innovation to produce customer value has not changed in the intervening years. Yet discussion of these policies is not evident anywhere in OCC’s and OPAE’s motions. OCC argues in favor of mandating the SCO as

the default rate for residential customers based on the (unproven) assertions that “customers could generally be expected to pay lower rates under the competitively-bid Standard Choice Offer” and that it would serve the interest of “protecting customers from marketing.” OCC Motion at 7, 8. This proposed move *away* from promoting customer shopping directly with competitive suppliers thus rests on OCC’s view of the best strategy to get a low price for natural gas, even if that strategy limits customer participation in the market. OCC fails to account for Ohio’s state policy in favor of robust market competition as the best approach to realize value for customers, including a full transition to “effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods.” R.C. 4929.02(A)(7). The Commission carefully considered those legislatively enacted policies in reaching its decisions in the *Phase 2 Case* and *Phase 3 Case*, and OCC’s lack of discussion of the Commission’s full rationale renders its motion insufficient under R.C. 4929.08(A)(1).

OPAE likewise takes the position that the Commission should act because, in its view “[t]he SCO saves customers money as opposed to the MVRs.” OPAE Motion at 5; *see also id.* at 6. Again, the orders in the *Phase 2 Case* and *Phase 3 Case* did not rest on the Commission’s prediction of what particular offer would result in the lowest price and best value for any given customer. Rather, the Commission sought to carry out Ohio policy favoring market competition and innovation as the best way to encourage customers to make their *own* choices between the MVR, a different competitive supplier offer, participation in a government aggregation, and (for residential customers) enrollment in the SCO. *Phase 3 Case* Order at 15. Whatever the merits of its arguments about costs, OPAE never addresses why the Commission should abandon its reading of state law as favoring market choice, as required by R.C. 4929.08(A)(1).

The deficiencies in these motions represent more than a technicality. Both OCC and OPAE rest heavily on the assertions that there are a few bad actors in the market offering high MVRs. OCC Motion at 6-7; OPAE Motion at 4-5. They fail to acknowledge that the *Phase 2 Case* Order and the *Phase 3 Case* Order never suggested that a market would eliminate all bad actors, but rather found that a robust competitive market would promote customer choice among a range of suppliers and rates in accordance with R.C. 4929.02(A). The Commission decided to eliminate the SCO based on a determination that it was hindering the development of such a market for non-residential customers, *Phase 3 Case* Order at 8 – not as a mechanism to impose a particular price for those customers – and OCC and OPAE fail to address that central issue.

Direct Energy is certainly willing to discuss whether to adjust the implementation of the Commission’s orders in the *Phase 2 Case* and the *Phase 3 Case*, but under the current procedural schedule all parties must now focus their attention on litigating on an all-or-nothing basis. On that front, OCC and OPAE have not provided a valid basis under R.C. 4929.08(A)(1) to “throw out the baby with the bathwater” by radically altering the Phase 2 and Phase 3 market-based approaches approved by the Commission consistent with state policy.

IV. CONCLUSION

This case should not be a venue for drastic changes to DEO’s Phase 2 and Phase 3 approaches where there are at best minor implementation questions that can be addressed through collaborative efforts to resolve OCC’s and OPAE’s concerns. The eight-year time limit in R.C. 4929.08(A)(2) in fact bars such modifications with respect to the residential MVR default approved in the *Phase 2 Case* Order without DEO’s consent. With respect to DEO’s treatment of non-residential customers under the *Phase 3 Case* Order, the Commission must reject OCC’s and OPAE’s arguments to the extent they disregard the Commission’s original rationale that

introducing customers to a fully competitive market would best effectuate state policy better than an *ex ante* mandate for customers to default to the SCO.

October 11, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was electronically filed with the Commission on October 11, 2019. The e-filing system of the Public Utilities Commission of Ohio 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. Courtesy copies are also being served this date by electronic mail to the following:

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Summary: Memorandum Contra Motions of the Office of the Ohio Consumers' Counsel and Ohio partners for Affordable Energy by Direct Energy Services, LLC and Direct Energy Business Marketing, LLC electronically filed by Ms. Madeline Fleisher on behalf of Direct Energy Services, LLC and Direct Energy Business Marketing, LLC