

**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.)	

**JOINT MEMORANDUM CONTRA
TO OCC's MOTION TO MODIFY THE 2013 ORDER
BY
THE RETAIL ENERGY SUPPLY ASSOCIATION
AND INTERSTATE GAS SUPPLY, INC.**

October 11, 2019

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I. INTRODUCTION

Contrary to OCC’s characterizations, the 2013 Order did not implement the random assignment of choice-eligible residential customers to suppliers at the suppliers’ monthly variable rates (“MVR”). In fact, the 2013 Order did not address residential customers at all. Instead, the 2013 Order focused solely on the discontinuation of standard choice offer (“SCO”)

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service as an option for choice-eligible **nonresidential** customers. It was five years earlier, on June 18, 2008, in Case No. 07-1224-GA-EXM (the “2008 Order”) that the Commission approved and implemented the MVR assignment mechanism for choice-eligible customers.²

OCC tries to avoid that fact because by law the Commission cannot modify an exemption order without utility consent if eight years has passed since the issuance of the order. OCC’s motion is well over eight years from the 2008 Order, and therefore is untimely. And even if timely (which it is not), OCC has not met the other requirements of R.C. 4929.08 because OCC has made no showing that it is a “person adversely affected,” that the Commission findings are no longer valid, or that OCC’s requested modification is in the public interest.

II. APPLICABLE LAW

OCC asks the Commission to eliminate the monthly variable rate and re-establish the SCO as the default service for certain residential customers pursuant to R.C. 4929.08(A). The Commission, however, must follow the requirements of R.C. 4929.08(A) prior to any abrogation or modification. That statute states:

[T]he commission, upon its own motion or upon the **motion of any person adversely affected** by such exemption * * * may abrogate or modify any order granting such an exemption or authority **only under both of the following conditions**:

- (1) The commission determines that the findings upon which the order was based **are no longer valid** and that the abrogation or modification **is in the public interest**;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

(Emphasis added.) As discussed later in this memorandum contra, OCC fails to address all of the requirements of the statute including the fact that the Commission by statute only has the

² See 2008 Order at page 14 summarizing the establishment of the monthly variable rate for Choice-eligible customers.

authority to abrogate or modify an order without utility consent within eight years of issuance of the order.

III. BACKGROUND ON RELEVANT EXEMPTION ORDERS

The MVR program, and DEO's ongoing process of exiting the merchant function for both residential and non-residential customers pursuant to R.C. Chapter 4929, has been the subject of litigation, negotiation, stipulations, and Commission findings in three separate proceedings. First, the general contours of what would later become the MVR program were first adopted in Case No. 05-0474-GA-ATA through a May 26, 2006 Order (the "2006 Order"). Second, the MVR program for both residential and non-residential customers was adopted on June 18, 2008, in Case No. 07-1224-GA-EXM (the "2008 Order"). Third, the Commission discontinued the SCO for non-residential customers in its January 9, 2013 Opinion and Order (the "2013 Order") in Case No. 12-1842-GA-EXM. Each of these orders is discussed below.

A. The 2006 Order set an exit of the merchant function into motion

In the 2006 Order, the Commission adopted a stipulation approving of phase 1 of DEO's request "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." (2006 Order at 2). The Commission noted that "[t]he objective of Phase 1 is to change the way DEO procures and prices its natural gas commodity service by changing from the current [gas cost recovery] mechanism to a competitively bid mechanism (the SSO)." (2006 Order at 4). The Commission described phase 1 as "a measured progression in the regulatory changes experienced since implementation of the gas choice programs in Ohio." (*Id.* at 17). The Commission found that "the record demonstrates that non-choice consumers would benefit from the purer market pricing of commodity service, thereby promoting more

informed shopping, consumption and conservation choices by all end users in DEO's territory.”
(*Id.* at 19).

B. The 2008 Order implemented the exit of the merchant function and established the MVR program

Following phase 1 as authorized in the 2006 Order, and as a continuance of the measured progression identified in the 2006 Order, DEO requested the Commission allow it to implement the second phase of its plan to exit the merchant function. (2006 Order at 6).

On June 18, 2008, the Commission adopted a stipulation entered into by a number of parties, including OCC, to implement phase 2. The stipulation required, in part, that:

Choice-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 under the terms of the SCO service in DEO's tariff.**

2008 Order at 14 (Emphasis added).

Thus, through the 2008 Order, the MVR program was established for both residential and nonresidential customers. That is an **important fact** in this proceeding because both Ohio Partners for Affordable Energy (“OPAE”) and OCC seek to change the 2008 Order in this proceeding – not the 2013 Order as they claim.

C. The 2013 Order discontinued the SCO for nonresidential customers in DEO's territory and did not modify the MVR program

In the 2013 Order, the Commission modified the exemption in the 2008 Order. In so doing, the Commission found that “phase two no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services [and that] **continuation of SCO service is adversely affecting DEO and is negatively affecting all**

Ohioans by hindering the development of a fully-competitive marketplace.” (2013 Order at 8).

In the 2013 Order, the Commission adopted a stipulation entered into by DEO, OCC and the Ohio Gas Marketers Group (“OGMG”). (2013 Order at 8). Relevant to OCC’s Motion, the stipulation as approved by the Commission required that:

“[C]hoice-eligible GSS-NR, LVGSS, ECTS-NR, and LVECTS customers (collectively, **nonresidential** customers) may no longer default into, or have an option to receive, SCO commodity service ... New **nonresidential** customers establishing service with DEO for the first time, relocating within DEO's service territory and whose energy choice or governmental aggregation agreement is not portable, or restoring service more than 10 days after being disconnected for nonpayment will receive at least one standard service offer (SSO) bill, after which they may enroll with a [competitive retail natural gas service “CRNGS”] provider or participate in an opt-out governmental aggregation program. If they do not do so, such **nonresidential** customers will, after their second SSO bill, be assigned to a CRNGS provider that has agreed to accept customers at its posted MVR rate

2013 Order at 8-9 (Emphasis added).

The **only** reference to residential customers in the 2013 Order was a commitment in the stipulation that no request would be made for DEO to exit the merchant function for residential customers prior to April 2015. (2013 Order at 9).

In approving the stipulation in the 2013 Order, the Commission found that the stipulation was in the public interest because it:

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 ... 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 provider, enter into a different rate plan with the same supplier, or participate in opt-out government aggregation, without any type of termination fee ... The Commission believes that, with appropriate information and education, customers will be able to make informed decisions when SCO service is discontinued.

2013 Order at 14-15.

The Commission also found that the stipulation did not violate any important regulatory practice or principle. (2013 Order at 16). In fact, the Commission found that “the Stipulation furthers state policy by increasing customers access to competitively provided products and services and by increasing the diversity of products available to customers.” (2013 Order at 16). Finally, the Commission noted in the 2013 Order that “the Commission is permitted to abrogate or modify **the exemption provided for in this order** within eight years after the effective date of this order, without DEO's consent.” (2013 Order at 17, Emphasis added).

IV. ARGUMENT

A. OCC's Motion to Modify is Untimely because the 2013 Order Does Not Apply to Residential Customers

R.C. 4929.08 generally allows for modifications to exemptions, but the Commission's authority is limited. The Commission, as a state agency, can only exercise that authority which has been specifically delegated to it by the General Assembly.³ R.C. 4929.08 allows for modifications only to situations in which the “modification is not made more than eight years after the effective date of the order, unless the affected natural gas company consents.” R.C. 4929.08(A)(2).

The modification requested in this matter by OCC for residential customers relate to the MVR program established by the Commission's 2008 Order, as detailed below. The 2008 Order was entered June 18, 2008, over eleven years ago. Additionally, OCC has presented no argument or evidence that DEO consents to the modification requested by OCC in this proceeding. Thus, OCC's motion is untimely and should be denied.

³ *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, citing *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 620 N.E.2d 835; *Pike Natural Gas Co. v. Pub. Util. Comm.* (1981), 68 Ohio St.2d 181, 22 O.O.3d 410, 429 N.E.2d 444; *Consumers' Counsel v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 152, 21 O.O.3d 96, 423 N.E.2d 820; and *Dayton Communications Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 18 O.O.3d 478, 414 N.E.2d 1051.

OCC cannot seek to modify the residential MVR assignment in this proceeding because residential customers were not part of the 2013 Order. That aspect of the exemption granted to DEO was the subject of the Commission's 2008 Order. At page 14 of the 2008 Order, the Commission summarized the April 10, 2008 stipulation provision regarding the assignment of certain customers to a supplier at the supplier's posted MVR:

- (iii) **Choice-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 under the terms of the SCO service in DEO's tariff.**

OCC was a signatory party to the April 10, 2008 stipulation, which the Commission approved in June 2008 without modification. DEO submitted tariff sheets in compliance with the Commission's approval, and the MVR assignment mechanism for residential customers has been in place since then.⁴

OCC drafted its Motion and Memorandum in Support to create the appearance that the Commission approved the residential customer assignment mechanism in the 2013 Order. For example, OCC claims at page 1 of its Memorandum in Support that "[i]n the 2013 Order, the

⁴ The Commission approved an application by DEO in Case No. 10-2469-EL-ATA to limit the MVR price a supplier can charge to that posted on the Apples-to-Apples chart. *See 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*, Finding and Order dated November 22, 2010.

PUCO adopted, with modifications, a settlement that continued phase two of Dominion's plan, including the assignment of choice-eligible residential customers to the Monthly Variable Rate." But the actual issue in the 12-1842 proceeding that resulted in the 2013 Order was the modification of the 2008 Order to allow DEO to discontinue SCO service **to non-residential customers (and did not involve residential customers)**.

Another example is at page 2 of its Memorandum in Support where OCC implies that the June 15, 2012 stipulation in Case No. 12-1842 included provisions whereby residential customers with expiring supply contracts or expiring aggregation contracts would be assigned to a supplier with an MVR if the customer does not make an affirmative election. OCC is wrong, as those provisions were included in the April 10, 2008 stipulation signed by OCC and approved in the 2008 Order. OCC also points to statements the Commission made in the 2013 Order, claiming those findings are no longer valid and justify why the residential customers should not be assigned to a supplier's MVR. (OCC Motion at 4-7).

But the Commission's statements in the 2013 Order were about **non-residential customers** (not residential customers). Indeed, OPAE made that point in the 2013 Order proceeding. *See* OPAE Comments, Case No. 12-1842-GA-EXM, August 30, 2012. In its comments, OPAE noted that:

"The stipulation and recommendation only refers to residential customers to assure that they will not be affected by the desired modification of the June 18, 2008 Opinion and Order. * * * While OCC has negotiated to protect residential customers from any impact of the modification, that does not render OCC a party of interest in a matter that only affects non-residential customers."

OPAE Comments at 10 (Emphasis added).

OCC even goes so far as to claim at page 9 of its Memorandum in Support that "[t]he PUCO's 2013 Order also included the random assignment of choice-eligible residential customers to the Monthly Variable Rate which is unjust and unreasonable to customers."

Tellingly, OCC does not provide a citation to support that baseless statement and it cannot because it was the 2008 Order and not the 2013 Order that implemented the random MVR assignment for choice-eligible residential customers. Looking past OCC's misleading drafting, it is evident that OCC is asking the Commission to modify the 2008 Order.

Thus, OCC's Motion is untimely and must be denied.

B. OCC Fails to Demonstrate that it is an Adversely Affected Party, that the Commission's Previous Findings are no Longer Valid, or that the Modification Requested is in the Public Interest

Even if OCC's motion was found to be timely (which it is not) and if it were found that DEO has consented to OCC's modification (which it has not), OCC's motion still must be denied because it fails to meet all remaining statutory and regulatory requirements. R.C. 4929.08(A) and Ohio Admin. Code Rule 4901:1-19-11(A) require that "[t]he commission may ... **upon the motion of any person adversely affected** by an exemption, exit-the-merchant-function plan, ... modify or abrogate any order granting the exemption, exit-the-merchant-function plan, [if] (1) **[t]he commission determines that the findings upon which the order was based are no longer valid and that the modification or abrogation is in the public interest.**" OAC 4901:1-19-11(A) (Emphasis added).

Following those directives, OCC must allege and show that OCC is adversely affected by the 2013 Order, that the findings underlying the 2013 Order are no longer valid, and that the modification OCC seeks is in the public interest. OCC has not met its burden on any of these three items.

1. OCC is not Adversely Affected by 2013 Order

OCC is empowered to act only on behalf of residential customers. R.C. 4911.02. As addressed above, the 2013 Order had nothing to do with residential customers. In fact, the **only** reference to residential customers in the 2013 Order was a commitment in the stipulation that no

request would be made for DEO to exit the merchant function for residential customers prior to April 2015. (2013 Order at 9). OCC is not challenging this portion of the 2013 Order in its Motion. OCC has made no showing that residential customers are at all affected by the 2013 Order, and therefore has made no showing that OCC itself is affected.

2. The Findings in the 2013 Order Remain Valid

Even if the 2013 Order had any relevance to residential customers (which it does not), OCC has made no demonstration that its findings are no longer valid. First, the MVR program 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.⁵ Second, a residential customer assigned to the MVR is still immediately free to switch to a different CRNGS provider, enter into a different rate plan with the same supplier, or participate in opt-out governmental aggregation.⁶ Third, with appropriate information and education, residential customers will be able to make informed decisions when SCO service is discontinued.⁷

The only other basis for OCC's claim to modify the 2013 Order is pricing using the Commission's Apples to Apples data versus SCO pricing.⁸ This information, however, does not demonstrate how the Commission's 2013 Order eliminating the SCO as an option for **non-residential customers** is no longer valid.

In making its argument that residential customers are paying substantially higher rates under the MVR program than they otherwise would, OCC claims, without citation to any evidence, that "many residential customers appear to have not been properly educated or

⁵ 2013 Order at 14.

⁶ *Id.* at 15.

⁷ *Id.*

⁸ OCC confusingly, and erroneously, appears to rely on Commission data regarding small commercial natural gas pricing as support for its argument regarding the prices paid by residential customers. (OCC Motion at 6, FN 22) (citing "Small Commercial Apples to Apples Comparison Charts.")

informed on the natural gas service offerings by Dominion that the [Commission] predicted would lead to informed decision making.” (OCC Motion at 5-6). **Indeed, even if this were true, it would be an argument for additional education and information, not elimination of the MVR program, as OCC has requested through its Motion.**

OCC’s unsupported claim about “the many competing priorities for Ohioans’ time making it difficult to understanding natural gas pricing ...” does not support the conclusion that the SCO should be re-established as the default for residential customers. (OCC Motion at 6). Neither does OCC’s reliance on **Columbia Gas** shadow-billing data, nor OCC’s citation to a white paper regarding **electricity** pricing. (OCC Motion at 6 and FN 23). OCC provides no actual information about DEO’s MVR program, including the number of customers that are affected, why customers may be choosing to not move off the MVR to another CRNGS supplier, or any information whatsoever about the DEO MVR program. For that reason alone, OCC has failed in meeting its burden.

3. The Modification Requested by OCC is Not in the Public Interest

OCC has made no showing that the modification it requests is in the public interest. Although the SCO may currently be lower than the MVR for some suppliers, there is no guarantee that will be true in future periods. Moreover and importantly, the purpose of the MVR is not to provide the lowest price to customers that are not making a choice. Rather, the MVR should and is acting as an incentive for residential customers coming out of shopping contracts or out of aggregations to make a choice between shopping, returning to an aggregation or going to the SCO. That additional engagement in the competitive market (making a choice) is in the public interest, because increased competition will lead to overall lower natural gas supply costs.⁹

⁹ The Commission has acknowledged that increased competition leads to “downward price pressure.” *In re Vectren Energy Delivery of Ohio*, Case Nos. 18-0049-GA-ALT, 18-0298-GA-AIR, 18-0299-GA-ALT, Opinion and Order (Aug. 28, 2019) at ¶87.

DEO is also concerned about OCC's and OPAE's motions. DEO has indicated that granting both motions would "impose administrative costs and burdens on DEO" (DEO Motion to Intervene at 2). Placing additional administrative burden on DEO by eliminating the MVR assignment program weighs against OCC's request. Especially as it could lead to additional costs that are passed on to ratepayers in the future. Rather than impose that burden on DEO, OCC should consider outreach to the residential customers that have been assigned to the MVR to educate those customers about their choices.

OCC's request also violates the state's energy policy, and is therefore not in the public interest. *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, 2015-Ohio-3627, 42 N.E.3d 707, ¶ 29 ("The General Assembly determined that the commission must consider state energy policy in deciding whether a proposed modification is in the public interest under R.C. 4929.08(A).")

Among the principles of the state's energy policy, R.C. 4929.02(A) instructs the Commission to 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." R.C. 4929.02(A)(7). The Commission itself has acknowledged that "progress toward a more competitive environment in the supply of natural gas services is consistent with [R.C. 4929.02]." *In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted Columbia Gas of Ohio, Inc., in Case No. 08-1344-GA-EXM*, Case No. 12-2637-GA-EXM, Opinion and Order at 45 (January 3, 2013).

The General Assembly has also recognized "the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory

treatment” as an integral part of state's energy policy. R.C. 4929.02(A)(6). The 2013 Order follows that policy by providing for flexible regulatory treatment of non-residential customers. The Commission is also required to honor the state’s energy policy when "exercising [its] respective authorities relative to sections 4929.03 to 4929.30 of the Revised Code." R.C. 4929.02(B).

The Ohio Revised Code also precludes a natural gas company from implementing an exemption in a manner that violates the state’s energy policy. *See* R.C. 4929.08(B). If OCC’s motion were granted (which it should not be), DEO would limit options, not promote supplies and suppliers, or facilitate choices, all in violation Ohio’s energy policy and this too is contrary to the public interest. R.C. 4929.02(A)(3), (7) and (11).

The use of the SCO is also counter to the use of the MVR assignment process to incentivize residential customers who have shopped to make a conscious choice – continue to shop or return to the SCO. Imposing the SCO as a default for residential customers does not further this goal and it also does not further Ohio’s energy policy to “[p]romote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods.” R.C. 4929.02(A)(2).

Finally, the Revised Code is clear that OCC “... shall follow the policies of the state as set forth in Chapter 4929. of the Revised Code that involve **supporting retail natural gas competition.**” R.C. 4911.02(C) (emphasis added). In filing its Motion, OCC has done just the opposite. OCC seeks **more regulation** of natural gas services and goods and in its Motion shows no interest in educating Ohio residential customers about their market choices. While OCC seems to only want residential customers to have one choice – the SCO, state law, including the laws that govern OCC, mandate otherwise.

V. CONCLUSION

The MVR assignment was part of the April 10, 2008 stipulation which the Commission approved in the 2008 Order. Now, more than 11 years later, OCC seeks to modify the 2008 Order by eliminating the MVR program for residential customers. OCC's Motion, without DEO's consent, is untimely. Additionally, OCC's motion is deficient because it fails to include all of the required fundamental information necessary to invoke the Commission's review; specifically, OCC does not demonstrate that it or the residential customers it represents are adversely affected by the 2013 Order, that the Commission's findings in the 2013 Order are no longer valid, and that the modification requested by OCC is in the public interest. For all of these reasons, OCC's motion should be denied.

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 certifies that a courtesy copy of the foregoing document is also being served upon the persons below via electronic mail this 11th day of October, 2019.

/s/ Michael J. Settineri

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