

**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 OPAE'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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Contrary to OPAE's characterizations, the 2013 Order did not implement the random assignment of choice-eligible nonresidential customers to suppliers at the suppliers' monthly variable rates, and did not address residential customers at all. Instead, the 2013 Order focused solely on the discontinuation of standard choice offer ("SCO") 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

OPAE 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. OPAE's motion is well over eight years from the 2008 Order, and therefore is untimely. And even if timely (which it is not), OPAE has not met the other requirements of R.C. 4929.08 because OPAE has made no showing that it is a "person adversely affected," that the Commission findings are no longer valid, or that OPAE's requested modification is in the public interest.

OPAE's motion is improper under R.C. 4929.08 and Ohio Admin. Code Rule 4901:1-19-11, and should be denied.

II. APPLICABLE LAW

OPAE asks the Commission to eliminate the monthly variable rate and re-establish the SCO as the default service 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

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

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(1) The commission determines that the findings upon which the order was based **are no longer valid** and that the abrogation or modification **is in the public interest;**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 joint memorandum contra, OPAE's motion fails to address all of the requirements of the statute including the fact that the Commission by statute only has the 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 monthly variable rate ("MVR") program, and DEO's ongoing process of exiting the merchant function for both residential and non-residential customers pursuant to 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 GCR 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 stipulation³ entered into by a number of parties 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 non-residential customers. That is an **important fact** in this proceeding because both OPAE and OCC seek to change the 2008 Order in this proceeding – not the 2013 Order as they claim.

³ OPAE did not oppose the stipulation the Commission approved in the 2008 Order. (2008 Order at 12). DEO, Staff, OCC and others signed the stipulation.

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, Ohio Consumers Counsel (“OCC”) and the Ohio Gas Marketers Group (“OGMG”). (2013 Order at 8). Relevant to OPAE’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.

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. OPAE's Motion to Modify is Untimely because the Motion Actually Seeks to Modify the 2008 Order, not the 2013 Order

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.⁴ 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).

⁴ *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.

The modification requested in this matter by OP&E relates 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, OP&E has presented no argument or evidence that DEO consents to the modification requested by OP&E in this proceeding. Thus, OP&E's motion is untimely and should be denied.

1. As to Nonresidential Customers: The 2008 Order, not the 2013 Order, established the MVR as the Default Nonresidential Customer Rate

OP&E cannot seek to modify the nonresidential MVR assignment because that assignment of choice-eligible nonresidential customers to a supplier's posted MVR was 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.**

The Commission approved the stipulation in 2008 without modification. DEO submitted tariff sheets in compliance with the Commission's approval, and the MVR assignment mechanism has been in place since then.⁵

OPAE incorrectly implies that the nonresidential MVR assignment was a consequence of the 2013 Order. Specifically OPAE states in its motion:

After the Commission eliminated the SCO option for non-residential customers, non-residential customers no longer had a price established through a competitive auction. Choice-eligible non-residential customers who had not chosen to enter into a bilateral contract with a supplier or to be served through a governmental aggregation were assigned a supplier by Dominion through the MVR process....

OPAE Motion at 6. Contrary to OPAE's insinuation that the 2013 Order implemented the MVR process, choice-eligible nonresidential customers were first assigned a supplier by DEO through the MVR process following the 2008 Order, not the 2013 Order.

Additionally, OPAE relies heavily on a motion filed by the Office of the Ohio Consumers' Counsel ("OCC") on March 9, 2018, in a different proceeding, Case No. 12-1842-GA-EXM. (OPAE Motion at 3-5). The OCC motion, however, mischaracterizes the history of the MVR and should not be relied upon in consideration of OPAE's motion. Looking past OPAE's incorrect characterization of the 2013 Order and reviewing the history of the MVR program, **it is evident that, with respect to nonresidential customers, OPAE is asking the Commission to modify the 2008 Order. Without DEO's consent, this motion is untimely and cannot be granted.**

⁵ 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.

2. As to the Residential Customers: The 2013 Order has no Bearing on Residential Customers

OPAE also cannot seek to modify the 2013 Order with respect to residential customers because the 2013 Order had no relevance to residential customers. OPAE acknowledged as much in comments filed on the motion which led to the 2013 Order. *See* OPAE's 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). Thus, with respect to residential customers, OPAE's Motion, without DEO's consent, is untimely and must fail.

B. OPAE fails to demonstrate that it (or its members) is an adversely affected party, that the Commission's previous findings are no longer valid, and that its modification is in the public interest

Even if OPAE's motion was found to be timely (which it is not) and if it were found that DEO has consented to OPAE's modification (which it has not), OPAE'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.**" Ohio Adm. Code Rule 4901:1-19-11(A) (Emphasis added).

Following those directives, OPAE must allege and show that OPAE is adversely affected by the 2013 Order, that the findings underlying the 2013 Order are no longer valid, and that the

modification OPAE seeks is in the public interest. OPAE has not met its burden on any of these three items.

1. Neither OPAE nor its Members is Adversely Affected by the 2013 Order

OPAE's Motion contains no information as to how it or its members are adversely affected by the 2013 Order, which, as discussed above, has no relevance to residential customers and did not implement the MVR program that OPAE seeks to end. OPAE allegation in its motion to intervene filed August 23, 2019, that "OPAE includes as members non-profit organizations such as community action agencies located in the service area that will be affected by this matter"⁶ is not sufficient to show specific harm. Likewise, OPAE's claim that "OPAE members are also non-residential ratepayers of [DEO]," is not sufficient to show that any members are participating in the MVR or are being impacted by the MVR program. (OPAE Motion to Intervene at 3).

Importantly, OPAE's motion does not discuss or even contend that it or a single one of the non-profit organization or non-residential customer members have actually been assigned to a supplier at a MVR rate because they have neglected to select a supplier. Moreover, in discovery, OPAE stated that it does not know how many OPAE members were assigned a supplier under the MVR program in any year 2013-2019 and it does not know if any OPAE members were assigned to a supplier under the MVR program since 2013. *See* Attachment, OPAE responses to RESA Interrogatories INT-1-6 and INT-1-7.

OPAE has not made a showing that it or its members have been adversely affected. For that reason alone, its motion should be denied.

⁶ OPAE Motion to Intervene at page 2-3 (footnote omitted), Case No. 18-1419-GA-EXM (August 23, 2019). OPAE's website notes that it is a membership organization and its members are agencies that "provide essential energy services, including bill payment assistance, weatherization and energy efficiency, and housing services." *See* <http://www.ohiopartners.org/index.php?page=about-ohio-partners-for-affordable-energy>, (accessed October 10, 2019).

2. The Findings in the 2013 Order Remain Valid

OPAE also has failed to point to any specific findings by the Commission that are no longer valid, and only cites to OCC's March 2018 Motion in a separate docket (Case No. 12-1842-GA-EXM) for support. To the extent OPAE is relying on the OCC statements, OCC's March 2018 Motion in Case No. 12-1842-GA-EXM incorrectly refers to the 2013 Order, which did not involve the MVR program as explained earlier. The mischaracterizations about the 2013 Order also provide no demonstration that the Commission's 2008 findings are no longer valid.

Importantly, the specific findings in the 2013 Order remain valid.⁷ First, the elimination of the SCO for nonresidential customers 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.⁸ Second, a nonresidential 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.⁹ Third, with appropriate information and education, nonresidential customers will be able to make informed decisions when SCO service is discontinued.¹⁰

The only other basis for OPAE's claim to modify the 2013 Order (which is not the correct order at issue) is pricing using the Commission's Apples-to-Apples data versus SCO pricing. This information does not demonstrate how the Commission's 2013 findings are no longer valid. The remaining claims in OPAE's motion are merely a description of the MVR and SCO and Ohio's natural gas policy. Those as well are not sufficient to abrogate or modify the 2013 Order (which had nothing to do with the MVR).

⁷ Again, the findings in the 2013 Order have no relevance to residential customers whatsoever.

⁸ 2013 Order at 14.

⁹ *Id.* at 15.

¹⁰ *Id.*

OPAE's motion in this proceeding provides no argument that the 2013 Order findings are invalid, and therefore the motion must be denied.

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

OPAE 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. Additional engagement in the competitive market is in the public interest, because increased competition will lead to overall lower natural gas supply costs.¹¹ In addition, DEO has indicated that granting OPAE's motion would "impose administrative costs and burdens on DEO" (DEO Motion to Intervene at 2). These additional costs could be passed on to ratepayers in the future, leading to higher natural gas bills.

OPAE'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*

¹¹ 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, 18-298-GA-AIR, and 18-0299-GA-ALT, Opinion and Order at ¶ 87 (August 28, 2019).

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 nonresidential 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).

Lastly, the Ohio Revised Code 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 OPAE’s motion is 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 Commission appropriately followed Ohio’s statutory policies in the 2013 Order, and the Commission’s findings in that order remain valid today. The Commission should deny OPAE’s request to modify the 2013 Order.

V. CONCLUSION

The MVR assignment was part of the April 10, 2008 stipulation that the Commission approved in the 2008 Order. Now, more than 11 years later, OPAE seeks to modify the 2008 Order by eliminating the MVR program. OPAE’s motion, without DEO’s consent, is untimely. Additionally, OPAE’s motion is deficient because it fails to include all of the required fundamental information necessary to invoke the Commission’s review; specifically, OPAE does

not demonstrate that it or its members 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 OP&E is in the public interest. For all of these reasons, OP&E's motion should be denied.

Respectfully Submitted,

/s/ Michael J. Settineri

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

**OHIO PARTNERS FOR AFFORDABLE ENERGY'S RESPONSES TO
THE RETAIL ENERGY SUPPLY ASSOCIATION'S
FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION
OF DOCUMENTS AND REQUESTS FOR ADMISSIONS
October 2, 2019**

Ohio Partners for Affordable Energy (“OPAE”) herein responds to the Retail Energy Supply Association’s (“RESA”) First Set of Interrogatories and Requests for Production of Documents.

INT 1-1. Do any members of OPAE take natural gas distribution service from Dominion Energy Ohio as commercial customers?

Yes.

INT 1-3. Do any members of OPAE take residential natural gas distribution service from Dominion Energy Ohio?

RESPONSE:

Objection. This interrogatory requests information that would not lead to evidence in this proceeding. Without waiving this objection, OPAE has no knowledge if any OPAE members take residential natural gas distribution service from Dominion.

INT 1-4. If the answer to INT 1-3 is yes, please list the name and service address of those OPAE members that are residential customers of Dominion Energy Ohio.

RESPONSE:

Not applicable.

INT 1-5. How many members did OPAE have as of August 1, 2019?

RESPONSE:

51 nonprofit and governmental agencies.

INT 1-6. Have any OPAE members been assigned to a supplier under the Dominion Energy Ohio MVR program since April 2013?

RESPONSE:

OPAE is currently developing this information and will supplement this response when the information is available to OPAE.

INT 1-7. How many OPAE members were assigned to a supplier under the Dominion Energy Ohio MVR program in each of the following years: 2013; 2014; 2015; 2016; 2017; 2018 and 2019.

RESPONSE:

Objection. This interrogatory is overly burdensome. Without waiving this objection, OPAE does not have the requested information.

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Case No(s). 18-1419-GA-EXM

Summary: Memorandum Joint Memorandum Contra to OP&E's Motion to Modify the 2013 Order by The Retail Energy Supply Association and Interstate Gas Supply, Inc. electronically filed by Mr. Michael J. Settineri on behalf of Retail Energy Supply Association and Interstate Gas Supply, Inc.