

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY COMMENTS AND REPLY TO MARKETERS' MEMORANDA
CONTRA OCC'S MOTION TO PROTECT CONSUMERS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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TABLE OF CONTENTS

	PAGE
I. DISCUSSION	3
A. Reply to memoranda contra: The arguments opposing OCC’s Consumer Protection Motion are meritless.	3
1. OCC’s Motion was filed less than eight years after the 2013 Order, which included a new element of the Monthly Variable Rate program for residential consumers, and thus is timely filed under R.C. 4929.08(A)(2).	3
2. OCC’s Motion shows that the PUCO’s findings, regarding the Monthly Variable Rate program’s potential protections for consumers, are no longer valid. That’s an understatement!.....	4
3. Contrary to RESA/IGS’s assertions, residential consumers are harmed by the invalid findings of the 2013 Order and thus elimination of the Monthly Variable Rate program for residential customers is in the public interest.	7
4. The Monthly Variable Rate program is not in substantial compliance with state policy that protects consumers and thus may be abrogated under R.C. 4929.08(B), regardless of the eight-year limit on changes.	8
B. Reply to comments: Going forward, residential consumers who no longer are served by a marketer should be returned to the Standard Choice Offer until and unless they affirmatively choose a marketer’s service.	10
1. The PUCO Staff’s observations regarding the Monthly Variable Rate program in Dominion’s service territory show that the program is not working to protect consumers as the PUCO intended.	10
2. Dominion’s comments point out the basic flaw in the Monthly Variable Rate program – that consumers on the program can pay higher rates for natural gas because marketers do not have to compete for customers.	12
3. DES’s proposal could still harm consumers by randomly assigning them to a marketer without the consumers’ consent or knowledge, and at rates that are considerably higher than market rates.	14
II. CONCLUSION.....	16

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Ohio has intended that consumers benefit from competition for their electric and natural gas purchases, whether that benefit is from the utilities' competitive standard offers or from market offers. That intention has failed consumers in a big way regarding Dominion's Monthly Variable Rate program. The program randomly assigns consumers to gas marketers, without the consumers' consent, at a rate the marketer chooses – no matter how outrageous is the rate above a market price. This rip-off of a program that the state created, at industry urging, now should end. There should be prompt state (PUCO) action to protect Ohioans who every day are being price-gouged.

Dominion's program itself does not produce a competitive market for consumers. It produces supra-competitive profits for marketer rip-offs of Bob and Betty Buckeye. While there is shameful list of predator marketers in the program, a couple of the worst offending marketers, such as Verde Energy and North American Power and Gas, are preying on consumers at 300% above market. It's sick that this is happening to Ohioans. The PUCO Staff referred to the program as "unconscionable."¹

¹ PUCO Staff Comments at 11.

The Office of the Ohio Consumers' Counsel ("OCC") has asked the PUCO to eliminate the program for residential consumers.² The Akron Beacon Journal editorialized to end the program.³ Consumers should be returned to Dominion's Standard Choice Offer so they can once again shop for a gas supplier if they wish.

Under the procedural schedule established for this case,⁴ OCC filed Comments on October 11, 2019. Also filing comments were the PUCO Staff, Dominion, and a marketer, Dominion Energy Solutions ("DES"). The PUCO Staff recommends eliminating the Program and making Dominion's Standard Choice Offer the default service for all customers in Dominion's service territory.⁵ Dominion supports retaining a modified Monthly Variable Rate program that generally reflects market conditions and pricing, that has a pricing methodology easily understood by consumers, and that is easy to administer.⁶ DES, Dominion's affiliate, proposed a further modification of the Monthly Variable Rate program.⁷

In addition to the above comments, oppositions to OCC's Motion were filed by marketing interests – jointly by the Retail Energy Supply Association and Interstate Gas Supply, Inc. ("RESA/IGS"), and separately by Direct Energy⁸ and DES. The marketers

² See OCC Motion (August 15, 2019) ("OCC Motion"). See also Case No. 12-1842-GA-EXM, Motion (March 9, 2018). In a separate motion, Ohio Partners for Affordable Energy has asked the PUCO to reinstate the Standard Choice Offer for non-residential customers.

³ Beacon Journal/Ohio.com editorial board: Good advice from the Ohio Consumers' Counsel to the PUCO (June 5, 2018), available at <https://www.beaconjournal.com/akron/editorial/beacon-journal-ohio-com-editorial-board-good-advice-from-the-ohio-consumers-counsel-to-the-puco>.

⁴ See Entry (October 3, 2019), ¶18.

⁵ Staff Comments at 11.

⁶ Dominion Comments at 4.

⁷ DES Memorandum Contra/Comments at 5-6.

⁸ Direct Energy Business Marketing, LLC and Direct Energy Services, LLC.

each raise the same claim: that OCC's Motion is untimely under R.C. 4929.08 because the program began more than eight years ago.⁹ RESA/IGS and Direct Energy also make other arguments opposing OCC's Motion.

OCC now replies to the marketers' opposition and to the comments filed in this case. OCC explains why the marketers are wrong. The PUCO should follow the recommendations of the PUCO Staff and OCC and, at a minimum, eliminate the Monthly Variable Rate program for residential customers.

I. DISCUSSION

A. Reply to memoranda contra: The arguments opposing OCC's Consumer Protection Motion are meritless.

1. OCC's Motion was filed less than eight years after the 2013 Order, which included a new element of the Monthly Variable Rate program for residential consumers, and thus is timely filed under R.C. 4929.08(A)(2).

Under R.C. 4929.08, the PUCO may abrogate or modify any order granting a natural gas utility an exemption from rate provisions in the law or authority for alternative regulation only if two conditions are met. The first is that the PUCO 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.¹⁰ The second is that 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.¹¹

⁹ RESA/IGS Memorandum Contra at 6-9; Direct Energy Memorandum Contra at 5-7; DES Memorandum Contra at 4.

¹⁰ R.C. 4929.08(A)(1).

¹¹ R.C. 4929.08(A)(2).

The marketers claim that OCC's Motion was not timely filed under R.C. 4929.08(A)(2). They contend that the 2008 Order,¹² not the 2013 Order,¹³ actually triggers the eight-year window for applying R.C. 4929.08(A)(2). They assert that the Monthly Variable Rate program for residential customers was adopted in the 2008 Order and that the 2013 Order did not change the program for residential customers. The opponents of OCC's Motion are wrong.

For the first time, the 2013 Order determined when Dominion or the parties to the settlement in the 2013 case could seek Dominion's full withdrawal as a natural gas supplier to residential customers. This provision was not in the 2008 Order. It is significant because it brought a new element into the program for residential customers. Thus, the 2013 Order is the appropriate starting point for the eight-year timeframe in R.C. 4929.08(A)(2).

2. OCC's Motion shows that the PUCO's findings, regarding the Monthly Variable Rate program's potential protections for consumers, are no longer valid. That's an understatement!

RESA/IGS and Direct Energy both claim that OCC's Motion does not show why the PUCO's findings in the 2013 Order are no longer valid. Really? First of all, the showing of invalidity, necessary for abrogation or modification of an exemption or alternative rate plan under R.C. 4929.08(A)(1), is not required to be made in a motion initiating a proceeding. R.C. 4929.08(A) specifically provides that the PUCO make its determination regarding the validity of its previous findings only after notice and hearing.

¹² See *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, Case No. 07-1224-GA-EXM, Opinion and Order at 3 (June 18, 2008) ("2008 Order").

¹³ *In the Matter of the Application to Modify, in Accordance with Section 4929.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion East Ohio* in Case No. 07-1224-GA-EXM, Case No. 12-1842-GA-EXM, Opinion and Order (January 9, 2013) ("2013 Order").

The necessary showing should be made in other phases of the proceeding. In any event, the marketers are wrong.

OCC explained in the Motion (and further discussed in its Comments) that in the 2013 Order the PUCO determined that transitioning from the Standard Choice Offer to the Monthly Variable Rate would “encourage innovation” and that consumers “would be protected by the market.”¹⁴ The energy marketers sure invalidated that policy.

The PUCO also believed that customer education would protect consumers, stating that “with appropriate information and education, customers will be able to make informed decisions when the Standard Choice Offer service is discontinued.”¹⁵ That didn’t happen.

As OCC’s Motion noted, these findings led the PUCO to conclude that the 2013 modification to the exemption would provide for an “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.”¹⁶

In its Motion, OCC noted that the transition away from the Standard Choice Offer contradicts the PUCO’s 2013 findings.¹⁷ Consumers are obviously not properly educated or informed on the natural gas service offerings by Dominion that the PUCO predicted would lead to informed decision-making.¹⁸ It is telling about the state of marketing that

¹⁴ OCC Motion, Memorandum in Support at 4, citing 2013 Order at 15.

¹⁵ *Id.*

¹⁶ *Id.* at 5, citing 2013 Order at 14.

¹⁷ *Id.*

¹⁸ *Id.* at 6.

marketers want the PUCO to buy a premise that consumers are aware they're paying energy bills high above market prices but are okay with that for some reason. No way. More education is not the answer, contrary to what RESA/IGS contend,¹⁹ because education is being used as the false premise for justifying a rip-off of epic proportions. There are too many consumers than possible to reach with education and, even if reached, consumers don't have the time to devote to being educated about marketing when they have so many responsibilities to family and work. There is an answer that will work for consumers. The answer is to eliminate a program.

Some of the Monthly Variable Rate program rates cause average consumers to pay \$61 a month more for natural gas than they would through the Standard Choice Offer.²⁰ The PUCO Staff noted rates the program contains "unconscionable" rates²¹ and does not protect consumers as envisioned in the PUCO's 2013 Order.²² OCC's Motion shows that the PUCO's essential findings in the 2013 Order are not valid. The PUCO should reject the marketers' claims and eliminate the Monthly Variable Rate program in Dominion's service territory.

¹⁹ RESA/IGS Memorandum Contra at 11.

²⁰ *Id.* at 7.

²¹ Staff Comments at 11.

²² *Id.* at 8.

3. Contrary to RESA/IGS's assertions, residential consumers are harmed by the invalid findings of the 2013 Order and thus elimination of the Monthly Variable Rate program for residential customers is in the public interest.

RESA/IGS claim that OCC is not adversely affected by the 2013 Order.²³ They claim that the 2013 Order had nothing to do with residential customers, and thus did not adversely affect residential customers or OCC.²⁴ They are wrong.

In the 2013 Order, the PUCO concluded that “consumers” would be protected by the market and by education concerning the Monthly Variable Rate program.²⁵ The PUCO did not limit this finding to nonresidential consumers. It was speaking about protecting all consumers. OCC (and, as discussed below in Section I.B.1., the PUCO Staff) have determined that the findings in the 2013 Order are invalid for *all* consumers, including residential consumers. OCC’s determination is based on the adverse effects of the Monthly Variable Rate program on residential customers. The same is true, at least in part, for the PUCO Staff’s determination.²⁶

RESA/IGS also assert that the purpose of the program “is not to provide the lowest price to customers that are not making a choice.”²⁷ Do marketers think the purpose of the program was to gouge customers? The marketers had their chance and they blew it.

²³ RESA/IGS Memorandum Contra at 9-10.

²⁴ *Id.*

²⁵ 2013 Order at 14-15.

²⁶ *See* PUCO Staff Comments at 9-10.

²⁷ RESA/IGS Memorandum Contra at 11.

Further, and contrary to RESA/IGS's assertions,²⁸ OCC *has* shown that elimination of the Monthly Variable Rate program for residential customers is in the public interest. RESA/IGS focus on two state policies that are marketer-oriented.²⁹ They ignore the four consumer-oriented policies discussed below in Section I.A.4. Consumer-oriented policies are a critical part of the state's energy policy. Any support for retail natural gas competition should consider the effect of a program on consumers. RESA/IGS would have the PUCO ignore the needs of consumers. That is not in the *public* interest.

The marketers' arguments against OCC's Motion are without merit. The PUCO should reject those arguments.

4. The Monthly Variable Rate program is not in substantial compliance with state policy that protects consumers and thus may be abrogated under R.C. 4929.08(B), regardless of the eight-year limit on changes.

In addition to R.C. 4929.08(A), the PUCO may abrogate an exemption alternative rate plan under R.C. 4929.08(B). That statute provides that "no natural gas company shall implement the exemption or alternative rate regulation in a manner that violates the policy of this state specified in section 4929.02 of the Revised Code." The statute immediately goes on to say "**Notwithstanding division (A) of this section**, if the commission determines that a natural gas company granted such an exemption or alternative rate regulation **is not in substantial compliance with that policy**, ... the commission, after a hearing, may abrogate the order granting such an exemption or alternative rate regulation." (Emphasis added.) Thus, there is no eight-year limitation on

²⁸ *Id.* at 11-13.

²⁹ *Id.* at 12-13.

the PUCO's authority to review or abrogate a gas company's exemption or alternative rate plan that does not substantially comply with state policy.

Among the state policies identified in R.C. 4929.02(A) are:

- 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;.... (Emphasis added.)

The random assignment of customers to the Monthly Variable Rate program does not give consumers effective choices over the selection of their natural gas supplier.

Consumers also do not get to elect the supplier, price, terms, and conditions to meet their needs. Because the rates of most marketers in the program are significantly higher than the Standard Choice Offer rate, the program does not promote reasonably priced or cost-effective natural gas for consumers. Thus, the Monthly Variable Rate program for residential customers is not in substantial compliance with state policy.

Even if the PUCO determines that OCC's Motion is untimely under R.C. 4929.08(A), it should apply R.C. 4929.08(B). The PUCO should review and abrogate Dominion's Monthly Variable Rate program for residential customers.

B. Reply to comments: Going forward, residential consumers who no longer are served by a marketer should be returned to the Standard Choice Offer until and unless they affirmatively choose a marketer's service.

1. The PUCO Staff's observations regarding the Monthly Variable Rate program in Dominion's service territory show that the program is not working to protect consumers as the PUCO intended.

The PUCO intended the Monthly Variable Rate program to help consumers transition from Dominion to a marketer for their natural gas supply.³⁰ The PUCO also determined that consumers "would be protected by the market" in the transition away from the Standard Choice Offer to the Monthly Variable Rate.³¹ The PUCO Staff now notes that neither of these conditions exist in the Monthly Variable Rate program. The PUCO Staff recommends eliminating the program and making the Standard Choice Offer the default program for customers who no longer shop for natural gas.³²

The PUCO Staff stated that the number of nonresidential customers on the Monthly Variable Rate program has not significantly changed through the years.³³ Dominion reached a similar conclusion regarding the number of residential customers on the program.³⁴ This has occurred despite what the PUCO Staff determined to be significant consumer education efforts regarding the options available under the

³⁰ 2013 Order at 14.

³¹ *Id.* at 15.

³² PUCO Staff Comments at 11.

³³ *Id.* at 9.

³⁴ Dominion Comments at 2-3.

program.³⁵ According to the PUCO Staff, this, means that the program has failed to encourage market development as the PUCO had intended.³⁶

The PUCO Staff also found that customers in the Monthly Variable Rate program are being harmed in two ways. First, by the high rates charged by some marketers in participating in the program,³⁷ rates which the PUCO Staff termed “unconscionable.”³⁸ As the PUCO Staff noted, the Monthly Variable Rate is considerably higher than the Standard Choice Offer rate.³⁹ Because customers are randomly assigned to a marketer, they might not know what they’re paying for natural gas service until they get the first (or even second) bill under the marketer’s rates. This does not protect customers, as the PUCO Staff explained: “The [program] unreasonably allows suppliers an opportunity to bill the natural gas provided to their assigned [program] customers at a rate that is considerably higher than the same month’s SCO without incurring any marketing and other costs to acquire and maintain customers.”⁴⁰ This is unfair to other marketers, too.

Second, the program harms customers by creating customer confusion. In reviewing customer complaints to the PUCO’s call center, the PUCO Staff found that the program’s random assignment of customers to a marketer confuses customers about the marketer appearing on their bills.⁴¹ Customers wonder why they are served by a marketer they did not select, at a rate they did not agree to, and often at a rate considerably more

³⁵ PUCO Staff Comments at 8.

³⁶ *Id.* at 9.

³⁷ *Id.* at 6-7.

³⁸ *Id.* at 11.

³⁹ *Id.* at 7.

⁴⁰ *Id.* at 7-8.

⁴¹ *Id.* at 10.

than they were previously paying.⁴² That is an excellent question raised by consumers. Unfortunately, there is no good answer to consumers' question.

The PUCO Staff's comments are consistent with OCC's recommendation to eliminate the Monthly Variable Rate program for residential customers and make Dominion's Standard Choice Offer the default program for residential customers. The PUCO should adopt this recommendation.

2. Dominion's comments point out the basic flaw in the Monthly Variable Rate program – that consumers on the program can pay higher rates for natural gas because marketers do not have to compete for customers.

Dominion believes that the Monthly Variable Rate program has served its purpose, i.e., to prompt customer engagement in a competitive marketplace.⁴³ Dominion noted that the original purpose of the program was to give customers an incentive to find their own supplier rather than be assigned to one.⁴⁴ Dominion stated this has occurred because there are few customers on the program at any given time.⁴⁵ But shopping statistics for Dominion's service territory do not support Dominion's assertion.

As OCC's Comments pointed out, shopping among Dominion's residential customers has dropped by four percent in four years, from 72.4% in the first quarter of 2015 to 68.2% in the first quarter of 2019.⁴⁶ By contrast, in the same period natural gas shopping by residential customers statewide increased from 51.6% to 54.8%.⁴⁷ At best, it

⁴² *Id.*

⁴³ See Dominion Comments at 2.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ OCC Comments at 8-9.

⁴⁷ *Id.* at 9.

is questionable whether the Monthly Variable Rate program serves the purpose for which it was created.

The reason for this is the flaw in the program that Dominion discussed in its comments.⁴⁸ Dominion explained that each marketer's rates under the Monthly Variable Rate program are capped at the marketer's lowest variable rate on the Apples-to-Apples chart. This requirement for marketer participation in the program assumed that every marketer "would be competing aggressively to add more customers to their pool."⁴⁹ But that did not occur, to put it mildly. Instead, some marketers posted substantially higher rates for the Monthly Variable Rate program, as PUCO Staff states, "with the evident intent of reaping an inflated margin on rotationally assigned customers, for however long they remain with that supplier."⁵⁰ For example, Verde Energy (one of the worst marketer rip-off artists) has posted the same rate (\$9.25 per Mcf) every month, regardless of market prices.

The random nature of the Monthly Variable Rate program has likely contributed to the lack of pricing competition in the program. Pricing is irrelevant in the assignment of customers to a marketer. A marketer with exorbitant rates is just as likely to have a customer assigned to it as a marketer with more reasonable rates. A marketer whose business plan is to gouge customers can "succeed" because of the random assignment of customers in the Monthly Variable Rate program.

Further, the random assignment of customers to the Monthly Variable Rate program has increased the customer confusion described in the PUCO Staff's comments

⁴⁸ Dominion Comments at 3-4.

⁴⁹ *Id.* at 3.

⁵⁰ *Id.* at 4.

discussed above. This likely has caused some consumers to lose confidence in the Energy Choice program, despite the customer education programs by the PUCO, Dominion, OCC, and others.

OCC agrees with Dominion that the Monthly Variable Rate program needs fixing.⁵¹ But the solution is not in randomly assigning customers to a marketer, regardless of the pricing restrictions placed on marketers. Instead, the best solution is for customers who have dropped their supplier to return to the Standard Choice Offer until and unless they affirmatively choose another marketer. This would allay much of the customer harm associated with exorbitant rates and customer confusion.

3. DES's proposal could still harm consumers by randomly assigning them to a marketer without the consumers' consent or knowledge, and at rates that are considerably higher than market rates.

The marketer DES proposes changing the Monthly Variable Rate program by requiring marketers that participate in the program to meet one of two criteria. To participate in the program a marketer either must serve at least 1,000 customers who are not on the program or have its lowest posted monthly variable price be no greater than the median monthly variable rate on the Apples-to-Apples chart.⁵²

The DES⁵³ proposal does not eliminate the basic flaw in the Monthly Variable Rate program – the random assignment of customers to a marketer. Instead of returning customers to the Standard Choice Offer until they make their own choice of a new supplier, DES would continue the practice of customers being randomly assigned to a

⁵¹ *Id.* at 3-4.

⁵² DES Comments at 5.

⁵³ *Id.* at 6.

program marketer after two months on the Standard Choice Offer.⁵⁴ In addition, after one year with a Monthly Variable Rate marketer, customers would be reassigned to the “next-up” marketer,⁵⁵ at whatever rate that marketer would charge. This is in the name of providing an additional opportunity to notify customers of their options for natural gas.⁵⁶ Forcing a customer to take service from a marketer the customer did not choose and at a rate the customer did not agree to is not a good way to notify customers of available options. The marketer DES’s proposal retains the inherent flaws that currently exist in the Monthly Variable Rate program.

Further, DES’s proposal would still require consumers to pay considerably more for natural gas through a Monthly Variable Rate program marketer than through the Standard Choice Offer. Attachment 1 to OCC’s Comments contains a chart showing the prices for each marketer on the program for the September 13, 2019 to October 13, 2019 timeframe. At that time, there are 21 marketers on the chart, with rates ranging from the Standard Choice Offer price to 374% of the Standard Choice Offer. The median of those 21 marketers (Energy Cooperative) was 70% above the Standard Choice Offer. Even assuming that the highest-priced 11 marketers would be eliminated under DES’s proposal (which is not guaranteed because some of the highest-priced 11 marketers could meet one of DES’s proposed criteria), the median price of the bottom ten marketers would be 36.5% higher than the Standard Choice Offer.⁵⁷ This would continue the Monthly

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ The median of the ten lowest-priced marketers would be halfway between the fifth lowest-priced marketer’s price (Direct Energy at 32% higher than the Standard Choice Offer) and the sixth lowest-priced marketer’s price (Quake Energy at 41% higher than the Standard Choice Offer).

Variable Rate program's harm to customers and would not encourage customers to shop for a natural gas marketer.

DES's proposal also would not be easy for Dominion to administer. To determine which marketers would be eligible for the program at a given time, Dominion would have to verify that the marketer serves at least 1,000 non-program customers or determine the median rate of all the marketers on the program. How would Dominion determine whether a marketer drops below the threshold for non-program customers? And what would happen to that marketer's Monthly Variable Rate program customers? DES's proposal is too complex to be easily administered.

DES's proposal does not resolve the basic consumer protection issues surrounding the Monthly Variable Rate program. Further, DES's proposal would continue the Monthly Variable Rate program in violation of Ohio's energy policy. And the marketer's proposal would subject the program to further calls for consumer protection and for the PUCO to modify or abrogate the program. The PUCO should not be moved by proposals to fix the Monthly Variable Rate program. To protect consumers, the PUCO should eliminate the Monthly Variable Rate program for residential consumers **now**.

II. CONCLUSION

Consumers should be protected from exorbitant prices charged by price-gouging marketers for energy. Dominion's Monthly Variable Rate program has not protected residential consumers as the PUCO intended. Instead, the program has allowed for Ohioans in Dominion's service area to be ripped-off with exorbitant charges that are high above market prices. The PUCO should adopt OCC's recommendations and eliminate the

Monthly Variable Rate program for consumers. Consumers should be returned to the Standard Choice Offer until and unless they choose another natural gas supplier.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments was served via electronic transmission upon the parties this 25th day of October 2019.

/s/ Terry L. Etter

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