

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Motion to Modify)	
the June 18, 2008 Opinion and Order in Case)	Case No. 12-1842-GA-EXM
No. 07-1224-GA-EXM.)	

**MEMORANDUM CONTRA OHIO PARTNERS
FOR AFFORDABLE ENERGY’S MOTION TO DISMISS ON BEHALF
OF THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO**

I. INTRODUCTION

On June 15, 2012, The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO”) and the Ohio Gas Marketers Group (“OGMG”) (collectively, “the Joint Movants”) filed a Joint Motion to Modify Order Granting Exemption. About two weeks later, the Ohio Partners for Affordable Energy (“OPAE”) responded with a Motion to Intervene and to Dismiss.

The motion to dismiss must be denied. First, it is procedurally improper. Rather than accept the allegations in the challenged pleadings as true, OPAE contests them at every point. While that may be appropriate in a post-hearing brief, it is improper when one is seeking to dismiss a pleading preemptively. Beyond its dispute of the fact- and merits-based issues, OPAE articulates no basis for dismissal. And not only do OPAE’s arguments fail to justify dismissal, they are simply incorrect.

II. ARGUMENT

A. OPAE’s motion to dismiss is procedurally improper because it disputes the allegations of the Joint Motion rather than accept them as true.

None of OPAE’s arguments, even if they had merit, would justify dismissing this case. “[W]hen a motion to dismiss is being considered, all material allegations must be accepted as true and construed in favor of the non-moving party.” *K&D Group, Inc. v. Cleveland Thermal Steam Dist.*, Case No. 11-898-HT-CSS, 2012 Ohio PUC LEXIS 531, Entry at *11 (May 30,

2012). But rather than “accept . . . as true” the allegations in the Joint Motion, *id.*, OPAE openly contests them. Although disagreeing on all counts may serve OPAE’s editorial purposes, it is counterproductive in a motion to dismiss.

None of the grounds put forth by OPAE establish that this case should be preemptively dismissed. OPAE’s first ground for dismissal is that DEO and the Marketers have not “demonstrated that [they are] adversely affected by the current alternative regulation plan.” (OPAЕ Memo. at 4.) DEO disagrees with that assertion and with the interpretation of law behind it. But even were OPAE correct as to both, the lack of a “demonstrated” fact at this stage of the proceedings would not call for dismissal, but for a hearing and an opportunity to make the demonstration.

OPAЕ’s second ground is that the “motion is based on a false premise that the findings upon which the June 18, 2008 exemption order was based are no longer valid.” (*Id.* at 4.) Again, OPAE is plainly not “accepting as true” this factual allegation in the Joint Motion. Whether a given “premise” is “false” is a factual, merits issue, not a basis for cutting short the proceeding.

The same goes for OPAЕ’s third ground, in which OPAE disputes the Joint Movants’ assertion that the Joint Motion will further state policy. (*Id.* at 8.) Again, disputing how the law applies to certain facts is eminently appropriate during a hearing and in post-hearing briefs; but such a dispute is an improper ground for dismissal.

OPAЕ’s fourth and final ground for dismissal is that the stipulation “is not the product of serious bargaining among interested groups.” (*Id.* at 9.) Once again, this is a question of fact, not a ground for preemptive dismissal.

While OPAE's motion succeeds in registering OPAE's views, it fails to provide any basis for dismissing the case. OPAE has not shown that this case does not belong before the Commission. However the issues in this case are ultimately resolved, they should proceed for resolution.

B. OPAE's arguments lack merit.

OPAE's arguments do not justify dismissal; they are also incorrect.

1. The Joint Movants are eligible to file the Joint Motion.

Relying on R.C. 4929.08(A), OPAE asserts that the Joint Movants are not "eligible" to file the motion because they are not "adversely affected" by the exemption order. (OPAE Memo. at 3–4.)

First, OPAE misconstrues this language of the statute. R.C. 4929.08(A) authorizes the Commission to modify any exemption order "upon its own motion or upon the motion of any person adversely affected by such exemption," after notice and hearing. As a structural matter, this clause does not operate as a *limit* on the Commission. Rather, this is *authorizing* language, clarifying that the Commission's authority may be exercised on "its own" or in response to a motion by "any person adversely affected." The phrase "any person" does not suggest narrowness, and, logically, any party asking the Commission to *modify* an order must find it "adverse" in some regard. Proving the point, the statute elsewhere sets forth two mandatory conditions, but an "adverse effect" finding is not one of them. *See* R.C. 4929.08(A)(1) & (2). In short, this language authorizes action; it does not limit the Commission.

Moreover, even if an independent "adverse effect" showing were required, it has been shown. The Joint Movants, each one an active participant in the state's natural gas markets and each one directly affected if retail competition fails to thrive, explained in detail that the current system is hindering the development of full retail competition. (*See* Joint Mot. at 4-5.) Indeed,

OPAE *concedes* an adverse effect elsewhere in its filing. It admits that granting the Joint Motion will further “[t]he interest of marketers” to serve “more customers” than under the existing order. (OPAE Memo. at 7–8.) This plainly acknowledges that a moving party is adversely affected by the current order, which even under OPAE’s misconstrual of R.C. 4929.08(A) is sufficient to allow the motion to proceed.

OPAE’s first ground lacks merit and should be rejected.

2. OPAE has not shown that the findings on which the Exemption Order was based remain valid.

For its second ground, OPAE asserts that none of the findings in the June 18, 2008 Exemption Order are invalid. (OPAE Memo. at 4–7.) It has not made this showing.

Before the Commission may modify an exemption order, it must “determine[] that the findings upon which the order was based are no longer valid.” R.C. 4929.08(A)(1). This does not mean that the Commission must be able to quote some sentence in the order that has been conclusively refuted. While that would be sufficient, it is not necessary. The statute speaks more broadly to the findings *underlying* the order (those “upon which the order was based”), and it does not require that these findings be expressly stated. If those findings *were* required to be express, it would significantly limit the Commission’s ability to exercise continuing jurisdiction to modify orders.

In the Joint Motion, the movants cited DEO’s application and testimony in Case 07-1224, which demonstrated an expectation that SCO service would end sometime in 2010. OPAE criticizes DEO’s citation of the application and testimony as not reflecting findings of the Commission, but the Commission *expressly* relied on both in issuing the exemption order. The stipulation recommended “approval of the Application as filed” (Case 07-1224 Stip. at 3), and the Commission specifically relied on “this application, the stipulation, and the testimony on

record” in approving the stipulation. Case 07-1224 Order at 20. The expectations set forth in those documents, however, have not materialized, which is why modification is necessary.

OPAE also notes that the stipulation in Case 07-1224 required further proceedings before moving beyond SCO service. Based on this, OPAE argues that the Commission “did not find that there would be no SCO service after 2011.” (OPAE Memo. at 6.) OPAE then equates this lack of a finding with an affirmative finding that SCO service would continue past 2011. (*Id.*) Thus, OPAE concludes, the “finding” that SCO service would continue remains valid, and the requested modification is improper.

It takes a severely tortured argument to insist that the very language *calling for* additional proceedings requires *dismissing* them. Indeed, the logic of OPAE’s argument would render modification impossible in every case. The Joint Movants are seeking to modify the part of the Exemption Order that allows SCO service to continue indefinitely. If OPAE is correct that the very provision of the order to be modified is deemed a “finding,” and that the need to modify that provision proves the finding’s validity, then there can *never* be a modification. But the entire, plain point of the law is to permit modification of exemption orders. Because OPAE’s argument would nullify that law, it must be rejected. *See* R.C. 1.47(B) (“The entire statute is intended to be effective”).

The fact that the Case 07-1224 stipulation called for additional proceedings before ending SCO service is why the Joint Movants are here. It is not a basis for dismissing the case.

3. OPAE’s policy argument is unsupported and misses the point of the Joint Motion.

OPAE argues that the “joint motion does not comport with the state of Ohio’s energy policy.” (OPAE Memo. at 7.) But its policy argument boils down to the assertion that

“[c]ustomers who have not chosen a marketer clearly do not want to choose a marketer,” and that “promotion of competition requires an SCO option.” (*Id.* at 7–8.)

First, OPAE’s competing policy argument is not, in fact, an argument. It is a flat statement of its views, containing neither any citation of legal authority nor any argument based on those authorities. While OPAE may have an opportunity to develop those arguments later, they are conclusory and undeveloped, and they provide no basis for any action at present—other than denying OPAE’s motion.

Moreover, OPAE’s argument misses the point of the Joint Motion entirely. Whether Ohio’s pro-competitive policy is advanced or hindered by DEO’s continuing presence in the supply market is precisely the matter to be explored by yet another cautious, incremental step towards full retail competition. As the Joint Movants explained, “The consequences of a fully-competitive market need to be understood before there is any further movement toward a fully-competitive residential market.” (Joint Memo. at 4.) And the “information gleaned from a full exit for [non-residential] customers will provide valuable insight into whether it would be appropriate to fully exit the merchant function for [all] customers.” (*Id.* at 1.) OPAE has reflexively opposed this course from the beginning. Had OPAE’s views been heeded, none of the significant benefits accomplished by Phase 1 and those that followed would have been realized. That should be borne in mind as OPAE cries wolf yet again.

OPAE’s third ground in opposition to the motion should be disregarded.

4. OPAE was *not* “excluded from the negotiations that led to the Stipulation filed in this case.”

Finally, OPAE argues that “the Commission should be concerned that one of the three signatories to the Stipulation [meaning OCC] has no interest in this case.” (OPAE Memo. at 8.) In passing, OPAE suggests that it was “excluded from the negotiations.” (*Id.*)

First, simply reading the stipulation disproves the notion that OCC “has no interest in this case.” (*Id.*) In the stipulation, OCC negotiated several concessions in the event of any future *residential* exit. (*See* Stip. at 3.) Moreover, as just discussed, granting the Joint Motion will provide valuable insight into the operation of a post-SCO market, and this will help OCC understand the issues better in the event a residential exit is proposed. And to that end, OCC secured provisions in the Stipulation to enable it to study and examine certain data pertaining to the proposed non-residential exit. (*See id.* at 4–5.)

Whether *OPAE* has a significant interest in this case is open to question. It asserts that “OPAE members are non-residential ratepayers of Dominion.” (OPAE Memo. in Support of Mot. to Intervene at 2.) But it provides no examples of such ratepayers. Its website suggests that its ratepayer constituency is limited to households. It states that OPAE “advocate[s] for affordable energy policies for *moderate and low-income Ohioans*” and that its member agencies provide certain “services to over 400,000 *households* statewide annually.” (Ohio Partners for Affordable Energy Homepage, <http://www.ohiopartners.org> (last visited July 13, 2012) (emphases added).) The terms “household” and “moderate to low-income Ohioan” do not generally call to mind commercial interests.

Given these facts, it is unclear whether OPAE has standing to represent the interests of non-residential ratepayers in this case. “To have standing, the general rule is that a litigant must assert its own rights, not the claims of third parties.” *Util. Serv. Partners v. Pub. Util. Comm.*, 124 Ohio St. 3d 284, 2009-Ohio-6764, ¶ 49 (internal quotations and citations omitted). Depending on the procedural entry ultimately issued by the Commission, DEO may seek discovery to determine whether OPAE in fact represents non-residential ratepayers to determine whether it may appropriately take certain positions and raise certain arguments in this case.

Finally, OPAC's assertion that it was "excluded from negotiations" is simply and demonstrably false. First, as the e-mail attached to this memorandum as Attachment A shows, OPAC (through David Rinebolt) made clear early on that it had no interest in being part of settlement negotiations:

Although OPAC was not able to attend the meeting on the 15th, I want to make our position clear. OPAC will oppose any effort to exit the merchant function. The difference between the SSO and SCO was too fine a line to make a decent legal argument. Full exit opens a wide array of legal options and we will use them.

(Attachment A (e-mail from Mr. Rinebolt to numerous recipients, dated April 21, 2010).)

Nevertheless, DEO kept OPAC in the loop and circulated a draft stipulation to it on January 17, 2012, roughly five months before the final stipulation was filed. (*See* Attachment B (e-mail from Melissa Thompson, counsel for DEO, to Ms. Mooney, counsel for OPAC, and other recipients).) Again, OPAC did not avail itself of any opportunity to participate in settlement negotiations.

These are not the only instances in which DEO attempted to involve OPAC in the negotiation process, but they suffice to refute OPAC's assertion that it was "excluded."

III. CONCLUSION

In conclusion, none of OPAC's arguments for dismissing the Joint Motion have merit.

The motion should be denied.

Dated: July 13, 2012

Respectfully submitted,

/s/ Mark A. Whitt

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CERTIFICATE OF SERVICE

I hereby certify that a copy of DEO's Memorandum Contra OPAC's Motion to Dismiss was served by electronic mail this 13th day of July, 2012 to the following:

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/s/ Melissa L. Thompson
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Subject: FW: April 15, 2010 DEO Energy Choice Stakeholder Meeting

Date: Thursday, July 12, 2012 10:54:18 AM Eastern Daylight Time

From: Melissa Thompson

To: Melissa Thompson

From: Dave Rinebolt [<mailto:drinebolt@ohiopartners.org>]

Sent: Wednesday, April 21, 2010 4:59 PM

To: Anthony M. Sanabria (Energy - 5); whitt@carpenterlipps.com; Katie.Dawson@constellation.com; heidi.nolan@constellation.com; bryan.robinson@constellation.com; john.shearer@constellation.com; BFerguson@deltaenergyllc.com; Bgardiner@deltaenergyllc.com; Teresa.Ringenbach@directenergy.com; Thomas J. Butler (VirginiaPower - 4M); Walt Marria (VirginiaPower - 4); David K Meyers (VirginiaPower - 4M); GBehr@EnergyServicesGroup.net; tony.bunker@exeloncorp.com; Erik.Haley@Exeloncorp.com; KReddinger@gasearch.net; ewright@gasearch.net; rmagnani@hess.com; drednik@hess.com; BEARHART@IGSENERGY.COM; vparisi@igsenergy.com; tscarpitti@igsenergy.com; KSKarrasch@integrysenergy.com; mllaudeurdale@integrysenergy.com; farina@lakeshoreenergy.com; galvin2@lakeshoreenergy.com; SGuthorn@mxenergy.com; serio@occ.state.oh.us; hayes@occ.state.oh.us; sauer@occ.state.oh.us; jacob.nicodemus@puc.state.oh.us; Steve.Puican@puc.state.oh.us; roger.sarver@puc.state.oh.us; scott.mosley@southstarenergy.com; steven.white@southstarenergy.com; LFriedeman@Vectren.com; TRWilson@Vectren.com; JHorsley@volunteerenergy.com; MHPetricoff@vorys.com; 'Colleen Mooney'

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Subject: RE: April 15, 2010 DEO Energy Choice Stakeholder Meeting

Jeff -

Although OPAE was not able to attend the meeting on the 15th, I want to make our position clear. OPAE will oppose any effort to exit the merchant function. The difference between the SSO and SCO was too fine a line to make a decent legal argument. Full exit opens a wide array of legal options and we will use them.

Hate to throw cold water on this - well, not really. This is not Georgia and we will not see poor people or those who are payment troubled ghettoized.

For every talent that poverty has stimulated it has blighted a hundred.

John W. Gardner

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Subject: April 15, 2010 DEO Energy Choice Stakeholder Meeting

Dominion East Ohio ("DEO") appreciates the attendance at the April 15 Stakeholder meeting to discuss the future of the company's Standard Choice Offer ("SCO") and Standard Service Offer ("SSO") auctions and process. Attendees included representatives of Energy Choice suppliers and aggregators, the Public Utilities Commission of Ohio, and the Ohio Consumers Counsel.

As indicated at the meeting, DEO is willing to consider alternatives to the existing SSO and SCO commodity

service structure, but believes that suppliers are in the best position to propose those alternatives. Regardless of the alternative implemented, the company's primary focus is on minimizing confusion for customers. DEO appreciates the interaction, proposals and comments offered at the meeting. Several follow-up items were identified:

- OCC will summarize its concerns about the current SCO structure and any further movement toward an exit from the merchant function.
- Representatives of the Retail Energy Supply Association will provide further details on the proposal summarized by Teresa Ringenbach of Direct Energy.
- Suppliers and other stakeholders may provide feedback on the draft supplier complaint log introduced by DEO at the meeting.
- Suppliers and other stakeholders may provide any further comments or specific proposals regarding future direction to DEO for distribution to the broader stakeholder group.

DEO is willing to convene smaller working groups to discuss specific issues as requested by suppliers. Those issues can range from specific operating procedures to broader topics such as customer lists. We encourage parties to discuss issues with the entire stakeholder group, but we are willing to discuss issues one-on-one if preferred.

Although we want to identify and evaluate alternatives for the future direction of DEO's Energy Choice program and the SSO/SCO structure, the stakeholder group should be mindful of Staff's comment that there is a high hurdle to obtaining Commission approval of a full merchant function exit at this time. If we are to make any changes, those changes will need to continue the methodical process that has served us well in the past and place customer needs at the forefront.

We would appreciate it if parties would provide additional feedback at their earliest convenience. As always, we thank you for your participation in this important process.

Jeff Murphy

Anthony Sanabria

Project Manager

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Subject: Case No. 07-1224-GA-EXM Stipulation

Date: Tuesday, January 17, 2012 10:53:16 AM Eastern Standard Time

From: Melissa L. Thompson

To: Stephen Reilly, Devin Parram, Joseph P. Serio, LARRY SAUER, Kyle Kern, Colleen L. Mooney, Samuel C. Randazzo, Joseph E. Olikier, Frank P. Darr, M. Howard Petricoff, Stephen M. Howard, cgoodman@energymarketers.com, 'O'Brien, Thomas', BarthRoyer@aol.com, steve.puican@puc.state.oh.us, roger.sarver@puc.state.oh.us, barb.bossart@puc.state.oh.us

CC: Jeff Murphy, Mark A. Whitt

All –

Attached please find a draft stipulation representing an agreement among Staff, various gas marketers and OCC concerning additional modifications to the stipulation in Case No. 07-1224-GA-EXM. As a party in that proceeding, we are sending you this draft for your review and comment. We would appreciate your input at your earliest convenience.

Regards,
Melissa Thompson

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in

Case No(s). 12-1842-GA-EXM

Summary: Memorandum Contra Ohio Partners for Affordable Energy's Motion to Dismiss on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio electronically filed by Ms. Melissa L. Thompson on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio