**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Joint Motion to | ) | |
| Modify the December 2, 2009 Opinion | ) | |
| and Order and the September 7, 2011 | ) | Case No. 12-2637-GA-EXM |
| Second Opinion and Order in | ) | |
| Case No. 08-1344-GA-EXM. | ) | |

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# OHIO PARTNERS FOR AFFORDABLE ENERGY'S BRIEF

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December 11, 2012

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**OHIO PARTNERS FOR AFFORDABLE ENERGY'S**
**BRIEF**

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## I. Introduction

Ohio Partners for Affordable Energy ("OPAE") hereby submits to the Public Utilities Commission of Ohio ("Commission") this brief in the matter of the Joint Motion to Modify the December 2, 2009 Opinion and Order and the September 7, 2011 Second Opinion and Order in Case No. 08-1344-GA-EXM. The matter was initiated by a joint motion and an accompanying stipulation and recommendation filed on October 4, 2012 by Columbia Gas of Ohio, Inc., ("Columbia"), the Staff of the Public Utilities Commission of Ohio ("Staff"), the Ohio Gas Marketers Group ("OGMG"), the Retail Energy Supply Association, and Dominion Retail, Inc. ("Dominion") (the latter three collectively, "Marketers"). The motion included a request to bifurcate the two sections of the motion; a request to extend Columbia's authority to contract for pipeline capacity for an additional five years; and a request to exit the merchant function for non-residential customers and related provisions.

A memorandum contra the joint motion was filed by Hess Corporation ("Hess") on October 9, 2012, followed on October 11, 2012, by a memorandum contra filed jointly by OPAE and the Office of the Office of the Ohio Consumers' Counsel ("OCC"). Both memoranda also requested a rational procedural schedule consistent with the requirements of due process.

An Entry was issued on October 18, 2012, establishing an extremely compressed procedural schedule as follows: 1) the filing of interventions and comments by November 5, 2012; 2) a November 12, 2012 deadline for reply comments and replies to memorandum contra, as well as testimony by the joint movants; 3) a November 26, 2012 deadline for intervenor testimony; 4) a hearing to commence on December 3, 2012; 5) briefs to be due three calendar days following the hearing; and, 6) no provision for reply briefs.

Subsequent to the October 4, 2012 filings, a second filing was made by the joint movants on November 27, 2012. This second filing was called an amended joint motion to modify the orders granting the exemption and an amended stipulation and recommendation. The amended filings are different from the original filings in certain ways, most notably that OCC signed the amended stipulation and now supports the Commission's adoption of the amended stipulation. OCC did not sign the amended joint motion.

Because of the anticipated new filing, a conference call with the attorney examiner was held Monday November 26, 2012, prior to the filing of the amended joint motion, to rearrange the procedural schedule. In an Entry issued later that day, the attorney examiner required any party opposing the amended joint motion and amended stipulation to file testimony by November 30, 2012, three days after the amended filings were made. (A significant component of the amended filings, the revised program outline, was not served on parties until 3:16 PM the following day, November 28. 2012.) OPAE and Hess accordingly filed testimony on November 30, 2012 opposing the amended filings. The hearing was held on December 5 and December 6, 2012. Briefs were required to be filed by December 11, 2012. Again, there was no provision for reply briefs.

Herein, OPAE explains that the amended joint motion to modify the exemption orders must be denied. The amended joint motion violates Ohio Revised Code ("R.C.") Sections 4929.04, 4929.08(A), and 4929.02(A); and Ohio Administrative Code ("O.A.C.") Rules 4901:1-19-04 and 4901:1-19-12. The Commission has no authority to violate Ohio law; therefore, the Commission has no authority to grant the amended joint motion, which must be denied along with the amended stipulation submitted concurrently.

If Commission considers the amended stipulation, in spite of the fatal statutory errors which underlie the filings, OPAE also explains why the amended stipulation must be rejected. The amended joint motion is not only unlawful, but the amended stipulation does not pass the Commission's three-part test for the consideration of stipulations. For these reasons, the Commission must reject the amended joint motion and the amended stipulation.

## II. Argument

### A. The Amended Joint Motion violates Ohio statues and administrative rules; therefore the joint motion must be denied.

#### 1. The amended joint motion violates Ohio Revised Code Section 4929.08(A).

Ohio Revised Code (R.C.) Section 4929.08(A) provides that the Commission may modify any order granting an exemption upon its own motion or upon the motion of any person adversely affected by such exemption, but only under certain conditions. The statute requires that the exemption order may be modified only if 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".* R.C. Section 4929.08(A) [*Emphasis added*.]. The amended joint motion does not comply with R.C. Section 4929.08(A) because it is not requesting a modification of an existing exemption order. The amended joint motion is requesting a new alternative regulation plan. If the proposal is filed at all, it should be filed under R.C. Section 4929.04 as discussed below.

To comply with R.C. 4929.08, which establishes the requirements for a modification of an existing exemption order, the joint movants first must describe how the Commission's past exemption orders are based upon Commission findings that are no longer valid. Second, the joint movants must describe how they are adversely affected by the now-invalid Commission findings. Third, the joint movants must explain how granting the requested modifications would be in the public interest.

Unfortunately for the joint movants, the joint motion is devoid of any grounds for a motion to modify an exemption order. The joint motion contains not one citation or reference to the Commission's 2009 Order granting the exemptions**;** it is impossible to satisfy the statute without reference to the underlying order the motion requests to modify**.** In fact, the joint motion does not actually request any modifications to the 2009 exemption order, but asks for a new term that will commence on April 1, 2013 and continue until March 31, 2018, during which Columbia may extend certain pipeline contracts**.** A request for a new term requires a new application; it does not meet the requirements of R.C. 4929.08(A) for a modification to an existing order.

There must be an allegation that the Commission's findings in the 2009 exemption order with regard to the three-year term established in the 2009 exemption order are now invalid. Yet the amended joint motion does not dispute the current term set in the 2009 exemption order in any way. The Commission's 2009 exemption order approved exactly the term that Columbia requested and provided for continuation of the Standard Choice Offer ("SCO") auctions and the revenue sharing from Off System Sales/Capacity Release ("OSS/CR") beyond March 31, 2013, absent an agreement by the Staff and OCC. In the event there is no agreement, a default revenue sharing mechanism is put into place. Case 08-1344-GA-EXM, Joint Exhibit 1 at 8. While the 2009 Stipulation provides for parties to the 2009 Stipulation to propose modifications at the end of the three-year term, any proposal for modification must, pursuant to R.C. 4929.08(A), allege that the assumptions underlying the current 2009 term are now invalid and individual parties are harmed or a proposal must be filed as a new application pursuant to R.C. 4929.04. No allegations to support a modification are made in the amended joint motion. Therefore, the current term of the 2009 stipulation cannot be modified. And, no application pursuant to R.C. 4929.04 has been filed to request a new term during which pipeline contracts with Columbia affiliates could be extended. Jt. Ex. 2, Amended Stipulation, Sec. 14(3) at Page 5. There is also no application under R.C. 4929.04 for a new term under which excess capacity from these purchases can be sold to Columbia affiliates if it is not needed to serve Ohio jurisdictional customers. Tr. at 16, Line 23. Simply, if the term of the 2009 exemption order is not now invalid and harmful to the joint movants, there is no basis for a modification to the 2009 exemption order. A request for a new term must be made under R.C. 4929.04.

The amended joint motion also notes that in the 2009 exemption case Columbia was initiating a new method of supplying gas by implementing an auction, and that the auction process is no longer new and that there is less uncertainty about the auction process, thus justifying a modification to the 2009 exemption order. Jt. Ex. 3 at 8. Again, no citations to the Commission's findings in the 2009 exemption order are made, and there is nothing substantive about saying that the 2009 exemption order is no longer new and that there is less uncertainty about the auction process that justifies modifying the current exemption by a motion pursuant to R.C. 4929.08. These irrelevant and trivial statements about the auction do not credibly allege that any Commission findings in the 2009 exemption are now invalid.

The amended joint motion further states that “the introduction of Marcellus shale gas into the marketplace has created greater uncertainty about Columbia’s best use of interstate pipeline capacity” and that it will take “several years to fully assess the full impacts of shale gas on Ohio markets.” Id. The joint motion also states that “the factual assumptions underlying Columbia’s capacity contracts have changed” and that the 2009 exemption order “provides for a peak day capacity portfolio that is not geared to meet Columbia’s needs” during the period after the 2009 exemption order. Id.

These statements do not cite to any Commission findings in the 2009 exemption order that are now invalid because of the new natural gas production from the Marcellus shale. If the present pipeline contracts no longer meet Columbia’s needs, the joint motion should at least describe the provisions in the Commission’s approved 2009 exemption order that are now invalid due to the Marcellus shale and Columbia’s peak capacity needs. Instead, the amended joint motion states that the modification “would permit Columbia to retain flexibility in a rapidly evolving marketplace” and that the “exact terms under which the exemption should continue involve interrelationships among complicated issues, including uncertainty as to how best to contract for interstate pipeline capacity in a changing marketplace.” Id. The amended joint motion asks that Columbia “retain flexibility.” Id. If the flexibility of the prior order is being ‘retained’, and if the existing 2009 exemption order does not prohibit ‘flexibility’, there is nothing in the 2009 exemption order that is now invalid.

Most telling is the testimony of Columbia witness Thomas J. Brown that "Columbia will continue the use of its existing annual design peak day calculation process" and "Columbia will retain its existing peak day capacity portfolio through March 31, 2018." Columbia Ex. 6 at 9. Any modification proposed in the amended joint motion is irrelevant to the current three-year term of the existing 2009 exemption order. This is a request for a new term, not for a modification of the existing 2009 exemption order. A modification cannot be made under the R.C. 4929.08(A) unless a finding of the Commission in an existing 2009 exemption order is now invalid. In fact, the amended joint motion 'retains' and 'maintains' the substance of the 2009 exemption order with regard to need for 'flexibility' in procuring pipeline capacity.

Another 'modification' requested is to the balancing fee, which is currently charged to suppliers and factored into suppliers' rates, and which, under the amended stipulation, will be charged directly to customers. An additional modification is to upgrade Columbia's computer systems to accommodate the marketers' desire to streamline switching and permit them to offer different types of contracts. There is no indication that these "modifications" are the result of any invalid Commission finding in the 2009 exemption order. No citation to the 2009 exemption order's now invalid findings has been made. Moreover, Columbia witness Brown noted that Columbia had received no customer complaints regarding its billing system, has no plans to change its billing system, and believes that the current billing system is adequate. Tr. Vol. 1 at 49.

The most critical issue addressed in this case, from OPAE's perspective, is Columbia's exit from the merchant function for non-residential customers. The exit means that Columbia's non-residential customers no longer have the option of buying natural gas from a utility-provided default service, in this case, the standard choice offer ("SCO"). The SCO is a market-based rate provided through an open auction process that has been successful in providing customers with a low-priced option for natural gas. Without the SCO, non-residential customers will be required to take service directly from one of the Marketers who signed the Stipulation or other marketers, even if those customers prefer the SCO option. Because OPAE's members, who are commercial customers, are helping Ohioans cope with a long-term economic decline which has left many with inadequate food, housing, and health care, even a small increase in utility costs are harmful. Moreover, anti-poverty agencies are not experts in natural gas markets, so forcing them into a marketplace controlled by companies that spend 365 days a year monitoring natural gas markets and setting prices in a manner that is not transparent, is contrary to sound public policy.

With regard to the proposed exit of the merchant function for commercial customers, the joint motion violates Revised Code Section 4929.08(A), because no findings in the 2009 exemption order have been cited as invalid. The Commission's 2009 exemption order limited modifications to the program outline to amendments that are non-substantive. Case No. 08-1344-GA-EXM, Joint Exhibit 1 at 8. Columbia stated in the 2009 stipulation, that it has "not expressed a present intent to, nor does this Agreement contemplate that Columbia seeks to, exit the merchant function." Id. at 9. The amended joint motion for a modification of the 2009 exemption order filed in this case states, "[s]ince then, some stakeholders believe such an exit may be warranted…, while some stakeholders believe an exit may not be warranted." The Exemption Orders do not, however, authorize Columbia to exit the merchant function. Jt. Ex. 3 at 8-9.

Columbia's request for this 'modification' of the 2009 exemption order does nothing more than violate the 2009 stipulation; it does not make the Commission's findings in the 2009 exemption order invalid nor does the amended joint motion in this case cite to any invalid Commission findings in the 2009 exemption order. OPAE was a signatory party to the 2009 stipulation. It agreed to enter into the 2009 stipulation based on the written commitments of Columbia not to modify the program substantively and not to propose to exit the merchant function as a part of the program. OPAE's faith in these commitments was clearly misplaced. This filing for a modification of the 2009 exemption order is in direct contravention of the commitments made by Columbia in the approved 2009 stipulation. Violating the 2009 exemption order should not be blessed as a modification to an exemption order.

A request for a modification of an existing exemption order under R.C. 4929.08(A) must also be in the public interest. The amended joint motion states that the requested 'modifications' would further the state's policies as outlined in R.C. 4929.02(A) and goes on to quote that statute without any discussion of how the requested 'modifications' would actually further the state's policies. Id. at 10.

The amended joint motion fails to comply with Ohio law. None of the triggers for a modification of an exemption order set forth at R.C. Section 4929.08(A) have been met. These are fatal flaws. The amended joint motion under R.C. 4929.08(A) has no lawful foundation. The joint movants are not requesting a modification to an existing exemption order. The current exemption order expires on March 31, 2013. The joint movants are requesting a new exemption order and a new term.

Ohio law provides for applications for exemption orders. The relevant statute is R.C. 4929.04, which states as follows:

> 4929.04 Exempting commodity sales service or ancillary service of natural gas company from other rate provisions.
>
> (A) The public utilities commission, upon the application of a natural gas company, after notice, after affording the public a period for comment, and in the case of a natural gas company with fifteen thousand or more customers after a hearing and in the case of a natural gas company with fewer than fifteen thousand customers after a hearing if the commission considers a hearing necessary, shall exempt, by order, any commodity sales service or ancillary service of the natural gas company from all provisions of Chapter 4905. with the exception of section 4905.10, Chapter 4909., and Chapter 4935. with the exception of sections 4935.01 and 4935.03 of the Revised Code, from Sections 4933.08, 4933.09, 4933.11, 4933.123, 4933.17, 4933.28, and 4933.32 of the Revised Code, and from any rule or order issued under those Chapters or sections, including the obligation under section 4905.22 of the Revised Code to provide the commodity sales service or ancillary service, subject to divisions (D) and (E) of this section, and provided the commission finds that the natural gas

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

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

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

(B) In determining whether the conditions in division (A)(1) or (2) of this section exist, factors the commission shall consider include, but are not limited to:

(1) The number and size of alternative providers of the commodity sales service or ancillary service;

(2) The extent to which the commodity sales service or ancillary service is available from alternative providers in the relevant market;

(3) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive prices, terms, and conditions;

(4) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

(C) The applicant shall have the burden of proof under this section.

(D) The commission shall not issue an order under division (A) of this section that exempts all of a natural gas company's commodity sales services from the chapters and sections specified in that division unless the commission finds that the company offers distribution services on a fully open, equal, and unbundled basis to all its customers and that all such customers reasonably may acquire commodity sales services from suppliers other than the natural gas company.

(E) An order exempting any or all of a natural gas company's commodity sales services or ancillary services under division (A) of this section shall prescribe both of the following:

(1) A separation plan that ensures, to the maximum extent practicable, that the operations, resources, and employees involved in the provision or marketing of exempt commodity sales services or ancillary

services, and the books and records associated with those services, shall be separate from the operations, resources, and employees involved in the provision or marketing of nonexempt commodity sales services or ancillary services and the books and records associated with those services;

(2) A code of conduct that governs both the company's adherence to the state policy specified in section 4929.02 of the Revised Code and its sharing of information and resources between those employees involved in the provision or marketing of exempt commodity sales services or ancillary services and those employees involved in the provision or marketing of nonexempt commodity sales services or ancillary services. The commission, however, shall not prescribe, as part of any such separation plan or code of conduct, any requirement that unreasonably limits or restricts a such separation plan or code of conduct, any requirement that unreasonably limits or restricts a company's ability to compete with unregulated providers of commodity sales services or ancillary services.

(F) Notwithstanding division (A)(2) of section 4929.08 of the Revised Code or any exemption granted under division (A) of this section, the commission has jurisdiction under section 4905.26of the Revised Code, upon complaint of any person or upon the complaint or initiative of the commission, to determine whether a natural gas company has failed to comply with a separation plan or code of conduct prescribed under division (E) of this section. If, after notice and hearing as provided in section 4905.26 of the Revised Code, the commission is of the opinion that a natural gas company has failed to comply with such a plan or code, the commission may do any of the following:

(1) Issue an order directing the company to comply with the plan or code;

(2) Modify the plan or code, if the commission finds that such a modification is reasonable and appropriate, and order the company to comply with the plan or code as modified;

(3) Abrogate the order granting the company's exemption under division (A) of this section, if the commission finds that the company has engaged in one or more material violations of the plan or code, that the violation or violations were intentional, and that the abrogation is in the public interest.

(G) An order issued under division (F) of this section is enforceable in the manner set forth in section 4905.60 of the Revised Code. Any violation of such an order shall be deemed a violation of a commission order for the purpose of section 4905.54 of the Revised Code.

Effective Date: 09-17-1996; 05-27-2005

Obviously, the problem is that the joint movants want a new exemption order and a new term without having to ask for one; they do not want a modification to the existing exemption orders, which expire on March 31, 2013. Despite the desires of the joint movants, a new filing for an exemption order must be made under R.C. Section 4929.04, an application for alternative regulation. This filing would be far more comprehensive and far more complex. The current procedural schedule is inadequate for such a filing, but a procedural schedule cannot modify a statute.

A filing under R.C. 4929.04 is the only lawful way for the joint movants to achieve the goals they seek. The request for modification is being made, but the current term of the existing exemption order is expiring, and the request is for a new term. This is exactly what Columbia requested in filing *In the Matter of the Application of Columbia Gas of Oho, Inc. for Approval of an Alternative Form of Regulation*, Case No. 11-5515-GA-ALT (May 8, 2012). Columbia submitted an application for approval of a second five-year accelerated pipeline replacement plan prior the current five-year period expiring; Columbia did not file to 'modify' the current term to get a new term. Id.

The amended joint motion to modify the existing 2009 exemption order does not meet the statutory criteria for modifications at O.R.C. 4929.08. There are no citations to invalid findings in the 2009 exemption order. There are no allegations that any party has been harmed by the Commission's findings in the

2009 exemption order. It is not in the public interest for the Commission to disregard Ohio statutes and the Commission's findings in the exemption orders. Nor is it in the public interest to allow Columbia to disregard the provisions of the 2009 stipulation it signed and the Commission approved. It is not in the public interest to ignore the policy of the state of Ohio embodied in R.C. 4929.02(A). The amended joint motion to modify the orders granting the exemption must be denied. The Commission has no authority to issue orders that violate Ohio law.

**2. The joint motion violates Ohio Administrative Code Rules 4901:1-19-04 and 4901:1-19-12.**

Ohio Administrative Code Rule 4901:1-19-12 sets forth the filing requirements for a modification of an exemption order. The rule states as follows:

> Abrogation or modification of an order granting an exemption.
>
> (A) A complainant shall provide at a minimum the following information with its application to modify or abrogate an order granting an exemption.
>
> (1) A detailed description of the exact nature of the violation.
>
> (a) Which portion(s) of the separation plan the applicant has failed to comply with and how the applicant has failed to comply.
>
> (b) Which portion(s) of the code of conduct the applicant has failed to comply with and how the applicant has failed to comply.
>
> (c) How the complainant has been adversely affected by such exemption.
>
> (d) Which findings of the order granting the exemption are no longer valid and why.

(e) How the modification or abrogation of the order granting the exemption is in the public interest.

(2) Supporting documentation for the complainant's allegation.

(3) The form of remedy requested.

(B) Such complaint shall be designated by the commission's docketing division using the acronym CSS.

(C) The docketing division of the commission shall serve the complaint upon the parties of record for the original exemption case which is the subject of the motion to modify or abrogate.

(D) The commission shall order such procedures as it deems necessary, consistent with these rules, in its consideration for modifying or abrogating an order granting an exemption.

Ohio Administrative Code Rule 4901:1-19-12.

The Commission has adopted rules setting the process for modifications to exemption orders. But, from a mere glance at the amended joint motion one would never know that there is an administrative code, let alone a rule for filings to modify exemption orders. There is no complaint that the findings of the exemption orders are no longer valid. The amended joint motion is not even a complaint. There is no detail about how the complainants are adversely affected by the Commission findings; about the public interest; about the code of conduct; about the corporate separation plan; or any of the other information that the rule requires. The rule for modifications of exemption orders is simply ignored.

There is also a process established by O.A.C. 4901:1-19-04 for the approval of alternative regulation plans. This rule states as follows:

4901:1-19-04 Filing requirements for applications filed pursuant to section 4929.04 of the Revised Code (exemption applications).

(A) Notice of intent

The applicant shall notify the commission staff by letter addressed to the directors of the utilities department and the consumer services department of its intent to file an application at least thirty calendar days prior to the expected date of filing.

(B) Form of an application

(1) An application shall be in a form substantially similar to the form contained in the appendix of this rule.

(2) All testimony supporting the application shall be filed with the application.

(3) An applicant shall file with the commission the original and ten copies of its application and supporting testimony.

(4) An applicant shall provide one copy of its application and supporting testimony to the office of the consumers' counsel and mail a copy to each party of record in its previous alternative rate plan or rate case proceeding. An applicant shall have available one copy of its plan in each principal business office for public inspection.

(5) An exemption shall be designated by the commission's docketing division using the acronym EXM.

(C) Exhibits to an exemption application

(1) The applicant shall fully demonstrate that it is in substantial compliance with the policy of this state specified in section 4929.02 of the Revised Code. The applicant shall also include a detailed discussion as to how the approval of the proposed exemption(s) will promote such policy. The applicant shall explain how granting the exemption(s) will affect the applicant's percentage of income payment plan customers, and if applicable, how any adverse impacts on these customers will be mitigated.

The applicant shall provide a discussion showing that the requested exemption(s) does not involve undue discrimination for similarly situated customers. The applicant shall provide a description of the internal process for addressing customer complaints and inquiries. The applicant shall also include the name of a contact person to work with the commission staff.

This person shall have the authority to resolve customer complaints and inquiries received by commission staff. The applicant shall also provide clear and accurate, written materials related to service and product offerings which promote effective customer choice and the provision of adequate customer service.

(2) The application shall include a detailed discussion of why the applicant believes it is currently subject to effective competition in the provision of each commodity sales service or ancillary service for which it is requesting an exemption and/or a detailed discussion of why the applicant believes the customers in the relevant market currently have reasonably available alternatives to each commodity sales service or ancillary service for which it is requesting an exemption. Detailed discussions shall include all supporting documentation which shall include empirical data. The detailed discussions of effective competition are required to demonstrate the degree of competitive behavior in the relevant market. The discussion shall include, but is not limited to, the following:

(a) The degree to which the product is of substantially the same quality provided by any or all of the sellers.

(b) The degree to which buyers and sellers are readily able to enter or leave the market and switch between sellers and buyers. (i.e., existence of entry and exit barriers and the discussion of any barriers which might exist).

(4) Applicants proposing to provide exempt services on an integrated company basis (as opposed to provision of exempt services by a separate affiliate or subsidiary company) shall, consistent with division (F)(E)(1) of section 4929.04 of the Revised Code, submit a proposed separation plan to ensure to the maximum extent practicable that operations, resources, and employees involved in providing marketing or exempt commodity sales services or ancillary services are operated and accounted for separate from nonexempt operations. The applicant shall provide a detailed discussion of its proposed separation plan and address how the proposed separation plan satisfies each item presented below or, alternatively, why these are not applicable.

(a) Describe how the plan is consistent with the policy of the state under section 4929.02 of the Revised Code.

(b) Describe how the plan will ensure maintenance of applicant's human resources and technical skills necessary to provide safe, reliable, and economic services to nonexempt tariff customers.

(c) Describe the applicant's organization structure and operating practices to physically separate its exempt and nonexempt operations. Applicant's organizational hierarchy and reporting relationships should maximize the functional independence of exempt and nonexempt services. Operating practices that would maximize separations include, but are not limited to, physical separation of operations, assuring protection of customer information maintained by the regulated services entity, assuring protection against undue discrimination in favor of exempt services, separate employees for exempt and nonexempt services, and uniform prices, terms, and conditions for contracted services.

(d) Describe how the separation plan provides safeguards and conditions to ensure that costs associated with exempt operations, resources, and employees are not borne by rate payers of regulated services. Describe specific policies, practices, procedures, and controls the applicant will have in place to prevent cross-subsidization by the applicant's regulated customers.

(e) Describe the applicant's accounting and cost allocation policies, practices, and procedures relating to exempt operations. describe all exempt operations, describe all transactions between exempt and nonexempt operations, and describe cost apportionment methodology. Address allocation procedures for office space, office equipment, administrative overhead, and support services. Explain the cost allocation of exempt and nonexempt revenues, expenses, and investment.

(5) The applicant shall submit a proposed code of conduct which governs both the applicant's adherence to the state policy specified in sections 4905.32 and 4929.02 of the Revised Code, and its sharing of information and resources between those employees involved in the provision or marketing of exempt commodity sales services or ancillary services, and those employees involved in the provisioning or marketing of nonexempt commodity sales services or ancillary services.

(6) Provide one scored copy each of all proposed tariff schedules where applicable (schedule E-1) which have all proposed changes underscored and current tariff schedules to which changes are proposed (schedule E-2). Designate in the margin the type of proposed change by using the following designation(s):

(C) – To signify changed regulations

(D) – To signify discontinued rate or regulation

(I) – To signify increased rate

(N) – To signify new rate or regulation

(R) – To signify reduced rate

(S) – To signify reissued matter

(T) – To signify a change in text, but no change in rate or regulation

Identify each page with schedule E-, page _ of _ in the upper right hand corner of the schedule.

(7) Provide the rationale underlying the proposed changes to the tariff (schedule E-3). Changes common to multiple rate forms need only be discussed once. Reference the appropriate current or proposed rate schedules to which the rationale is applicable. Use the proper schedule and page number.

(8) Provide a description of all dockets in which there are special arrangements with customers pursuant to section 4905.31 of the Revised Code, which customers may be affected by the application.

***Appendix***

*Before the Public Utilities Commission of Ohio*

*In the Matter of the Application of )*_____(1) )for Approval of a General Exemption of ) Certain Natural Gas Commodity Sales ) Services or Ancillary Services from ) Chapters 4905, 4909, and 4935 except ) Sections 4905.10, 4935.01, and 4935.03, ) and from specified sections of Chapter ) 4933 of the Revised Code. )

Case No. – GA-EXM

APPLICATION

*___ (2), the applicant in this proceeding, is a natural gas company providing service to __ (3) customers in the state of Ohio, of which approximately ___(4) are expected to be affected by this application.*

*Applicant submits this application pursuant to section 4929.04 of the Revised Code, for approval of an exemption from specified chapters and sections of the Revised Code for____(5). Exhibits _* through *__ are attached to this application and are incorporated herein*

*The Applicant requests the Commission to consider the facts and proposals set forth in this application and to approve the applicant's request for an exemption.*

*Respectfully Submitted,*

____

*President or Vice President*

---

*Secretary or Treasurer*

*Company Official to be Contacted ____ Regarding the Application*

*Mailing Address ____*

I, *________, President/Vice President and I, _______, Secretary/Treasurer of___* (Exact company name) (Exact company name) hereby verify that the information contained in this application is true and correct to the best of our knowledge.

---

President / Vice President

---

Secretary/Treasurer

Sworn and subscribed before me this __ *day of _, ___*.

Notary Public

My term expires:

(SEAL)

INSTRUCTIONS

(1) Place the total number of customers served by the applicant within Ohio in blank three and the approximate number of customers proposed to be affected by this application in blank four.

(2) Provide a brief descriptive title of any and all commodity sales service or ancillary service covered by the application, including the customer class(es) for whom the exempted service will be made available in blank five.

(3) The president or vice president, and the secretary or treasurer of the applicant shall sign the application form at blank six and provide the name, address, and telephone number of the person to be contacted regarding questions concerning the application. The verification on page two of the appendix to this rule shall also be completed.

Effective: 11/10/2006
R.C. 119.032 review dates: 08/22/2006 and 09/30/2011
Promulgated Under: 111.15
Statutory Authority: 4929.10
Rule Amplifies: 4909.04.

Obviously, the Ohio administrative code rules, like the Ohio statute upon which the administrative rules are based, are far too comprehensive with respect to an application for alternative regulation to allow for a finding in the accelerated time period in which this amended joint motion is being considered. The amended joint motion ignores the administrative code as it ignores the statute.

The joint movants are free to file anything they want to file. The Commission, however, is a creature of statute and is not free to issue any orders it likes. The Commission must follow the laws passed by the Ohio General Assembly and must deny the amended joint motion.

**3. The joint motion disregards Ohio's rule making process.**

Currently, the Commission has no administrative rules for natural gas public utilities seeking to exit the merchant function, the outcome the amended joint motion seeks to inflict on non-residential customers. The Commission is in the process of approving extensive new administrative rules for applications by natural gas utilities to exit the merchant function. *In the Matter of the Commission's Review of the Alternative Rate Plan and Exemption Rules Contained in Chapter 4901:1-19 of the Ohio Administrative Code,* Case No. 11-5590-GA-ORD.

The Commission has issued proposed rules which establish a procedure and define the burden of proof adequate to ensure there is complete consideration of the full range of issues associated with such a massive change in the regulatory compact which makes protecting consumers the goal of regulation, not an afterthought. The amended joint motion seeks to bypass these requirements. Extensive comments have been submitted by interested parties on the proposed rules and the Staff of the Commission has made its recommendations. The recommendations include extensive filing requirements for utilities seeking to exit the merchant function. Proposed Rule 4901:1-19-05. See *In the Matter of the Commission's Review of the Alternative Rate Plan and Exemption Rules Contained in Chapter 4901:1-19 of the Ohio Administrative*

*Code*, Case No. 11-5590-GA-ORD, Staff Recommendations and Summary of Comments, Attachment A to the July 2, 2012 Entry.

The amended joint motion disregards the effort to adopt administrative rules and set a process for an application by a public utility to exit the merchant function. The amended joint motion disregards all existing statutory and procedural requirements and also seeks to avoid all pending procedural requirements for an application to exit the merchant function. The rush to complete this case is clearly intended to avoid Columbia having to comply with any administrative code rules for exiting the merchant function for non-residential customers. This is unlawful, unfair to those who commented on the proposed rules, inefficient, and a waste of time.

Columbia witness Brown testified that if Columbia seeks an exit of the merchant function for the residential class, pursuant to the amended stipulation, Columbia will file an application “under the exemption provisions of 4929”, R.C. Sec. 4929.04. Tr. I at 48. To exit the merchant function for the residential class, the amended stipulation would require a new application and “it would require all of the filing requirements and elements of an exemption application.” Tr. I at 49.

Columbia is committing to follow the requirements of R.C. 4929.04 in the event that it requests an exit of the merchant function for the residential class. Mr. Brown did not dispute that the Commission has administrative rules pending for utilities seeking to exit the merchant function. He testified that if the new rules are approved when Columbia seeks to exit the merchant function for the residential class, Columbia would comply with the new rules. Id. Why non-residential customers are not deserving of the protections afforded by statute, current rules, and the proposed rules, is not made clear.

The Commission should dismiss the amended joint motion and require that a proper lawful filing be made under Ohio Revised Code Section 4929.04 and the Commission's rules adopted pursuant to the statute. The Commission should also require that Columbia await the adoption of the new rules for natural gas utilities to exit the merchant function for commercial customers as well as for residential customers.

### B. The amended stipulation fails the Commission's three part test for the reasonableness of stipulations.

#### 1. Introduction

The Ohio Supreme Court has considered whether a just and reasonable result was achieved with reference to the criteria adopted by the Commission in evaluating settlements. These criteria are:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

2. Does the settlement, as a package, benefit ratepayers and the public interest?

3. Does the settlement package violate any important regulatory principle or practice?

*Ohio Consumers' Counsel,* 64 Ohio St. 3d at 125.The amended stipulation and recommendation fails all three parts of the Commission's test for evaluating stipulations.

### 2. The stipulation is not the product of serious bargaining among capable, knowledgeable parties.

The amended stipulation and recommendation filed in this case are not the product of serious bargaining; therefore it fails the first part of the Commission's three-part test for the approval of stipulations. OPAE was excluded from the actual settlement negotiations. OPAE is an intervenor in this case representing not only low-income residential customers but also its member agencies who are non-residential customers. Non-residential customers are a customer class that were entirely excluded from the settlement negotiations, even though the stipulation filed in this case directly and adversely affects non-residential customers.

Under the first stipulation and the amended stipulation, the unrepresented non-residential customers are the victims of the settlement process. If 70% of non-residential customers shop for at least 3 consecutive months, Columbia exits the merchant function for non-residential customers. Columbia will file no application and no hearing will be held as required by statute. Non-residential customers will be denied the standard choice offer, the SCO. Non-residential customers' natural gas bills will go up because their choice will be limited to direct bilateral contract offers from suppliers. See OPAE Ex. 1, Exhibits SH-3 and SH-4. If a representative of non-residential customers had been in the room when settlement discussions were being held this disgraceful settlement would not have been reached.

For proof of this, the Commission need only consider what OCC, a participant in the settlement process, achieved for the residential class. Under the stipulation, if 70% of residential customers shop for at least three months and if non-residential customers have already been denied SCO service -- i.e., when Columbia has already exited the merchant function for non-residential customers for at least 22 months -- Columbia may file an application to exit the merchant function for residential customers. Jt. Ex. 1, Amended Stipulation at 6. There will be an application, a hearing, and local public hearings. In short, there will be at least two years to study the impact of the exit on the victims of the settlement process (the excluded non-residential customers) before Columbia can even file an application under R.C. Sec. 4929.04 to exit the merchant function for residential customers.

OCC witness Bruce Hayes testified that there needs to be a delay in the exit of the merchant function, and that the delay protects residential customers. Tr.I at 99.Only 40% of Columbia's residential customers are currently being served through bilateral contracts or government aggregations at this time, and OCC does not believe that residential customers are ready for Columbia's exit of the merchant function. Tr. I at 100.

Mr. Hayes admitted that OCC does not view residential customers who live in master-metered buildings as residential customers because their service is billed under commercial tariffs. Tr.I at 102. Therefore, OCC's narrow focus on residential customers that directly pay their own bills does not capture all residential customers who may rent, may pay bills based on sub-metering, but whose landlords have commercial accounts. The most recent monthly report issued by Columbia under the terms of the Case No. 08-1344-GA-EXM stipulation indicates that 41% of residential customers are served through bilateral contracts with marketers; 52% of non-residential customers are served through that option; and 26% of industrial customers have chosen bilateral contracts.  OPAE Ex. 1, Exhibit SH - 2. This means non-residential customers are shopping in greater numbers, making them more likely than residential or industrial customers to reach the 70% figure and lose their SCO service.

If OPAE had been invited to attend settlement negotiations, then at least some intervenor representing the non-residential customers would have been present.  Instead, because OPAE was likely to oppose the pre-ordained loss of SCO service for non-residential customers in the settlement process, OPAE was excluded. Such an exclusionary settlement process is contrary to sound public policy and also raises questions concerning the procedural due process rights of interested stakeholders.  In *Time Warner AxS v. Pub. Util. Comm*.. (1996), 75 Ohio St.3d 229, 233, footnote 2, the Supreme Court noted concern with the fact that the stipulation arose from "exclusionary settlement meetings."  See also The Ohio Consumers' Counsel's Application for Rehearing, *In the Matter of the Commission Consideration of a Settlement Agreement between the Staff of the Public Utilities Commission of Ohio, Columbus Southern Power Company and Ohio Power Company*, Case No. 03-2570-EL-UNC (February 20, 2004) at 6-7. Neither participating in a collaborative prior to settlement discussions being initiated nor being asked to comment on a completed stipulation equates to participation in settlement meetings.

The Commission should be concerned that none of the stipulating parties represent non-residential customers who will be adversely impacted by the stipulation. No one representing non-residential customers was involved in negotiations over the settlement itself. In the case of American Electric Power's ("AEP") standard service offer ("SSO") case, the Commission was belatedly forced to recognize that a stipulation resulted in "disproportionate rate impacts" for small commercial customers, who were not represented in the settlement process. The Commission stated:

> Due to the evidence that some commercial customers were going to receive significant total bill increases approaching 30%, we modified the shopping credits provision to provide additional relief to GS-2 customers in the form of an additional allocation of shopping credits to new shopping customers. However, the actual impacts suffered by a significant number of GS-2 customers appear to have vastly exceeded AEP-Ohio's representations at the hearing. Since we issued the Opinion and Order, numerous customers have filed, in the case record of this proceeding, actual bills containing total bill rate increases disproportionately higher than the 30 percent predicted by AEP-Ohio. The disproportionate rate impacts indicated by these bills undermine the evidence presented by the signatory parties [to the AEP Stipulation] that the MTR and LFP provide rate certainty and stability pursuant to Section 4928.143(B)(2)(d), Revised Code. We note that the parties seeking rehearing acknowledge that customers in the GS-2 class have received significant total bill rate increases and that it is appropriate to provide relief to these customers. However, the Commission is not persuaded that the actual total bill impacts inherent in the MTR and LFP can be cured by a phase-in of the LFP or an additional allocation of shopping credits as recommended by AEP-Ohio. We find that the Signatory Parties have not met their burden of proof of demonstrating that the MTR and LFP provisions meet the statutory requirement of Section 4928.143(B)(2)(d), Revised Code, to provide rate certainty and stability, and that the Signatory Parties have not demonstrated that the MTR and LFP benefit ratepayers and the public interest.

> Accordingly, pursuant to our three-part test for the consideration of stipulations, we must reject the Stipulation.
>
> Entry on Rehearing, Case No. 11-346-EL-SSO, et al. (February 23, 2012) at 11.

This eventual rejection of the stipulation occurred, of course, after the Commission had previously approved it as meeting the three-part test but before the Commission realized the impact to small commercial customers, who had no part in the settlement negotiations and no voice at the Commission. This situation should serve as a cautionary tale to the Commission even though the rate increases for commercial customers will not occur until a later date. Just as the Commission ultimately rejected the AEP stipulation, the Commission must reject this stipulation as well.

**3. The stipulation filed in this case does not, as a package, benefit ratepayers and the public interest.**

**a. The elimination of SCO service will reduce competition and competitive options available to customers.**

The stipulation fails to benefit ratepayers and the public interest because it reduces competition and eliminates competitive options available to consumers. OPAE witness Stacia Harper described the competitive options now available to commercial customers in Columbia's service area. There are price offers from competitive retail natural gas supplier ("CRNGS"), who offer customers direct bilateral contracts with variable or fixed rates, short or long terms, and various other features. OPAE Ex. 2 at 11-13. Customers may join a government aggregation, if one is available to them, under which CRNGS supply the natural gas sold to aggregation customers with a bidding or auction process establishing the competitive price. OPAE Ex. 2 at 13.

Another competitive option is the SCO. In the SCO, the price is established through an auction held by the natural gas utility where the winning bidders receive the same price. OPAE Ex. 2 at 13-14. The auction used to set the SCO is a competitive auction. At the close of Dominion East Ohio's 2011 SCO auction, Chairman Todd A. Snitchler stated, "The auction process has again yielded positive results for Dominion East Ohio customers . . . [t]he market continues to provide a competitive commodity price for natural gas." See: http://www.puco.ohio.gov/puco/index.cfm/media-room/media-releases/puco-approves-results-of-dominion-natural-gas-supply-auctions/.

In this case, the amended joint motion seeks to eliminate the SCO option. Once shopping has reached 70%, Columbia will exit the merchant function for the commercial class and the SCO, which is established through a competitive process, will be eliminated for commercial customers. Choice-eligible commercial customers who have not chosen to enter into a bilateral contract with a CRNGS or to be served through a government aggregation, if one is available, will be assigned to a CRNGS by Columbia through the monthly variable rate ("MVR") process at a variable rate determined by the CRNGS participating in the MVR process. This change would result in roughly 50% of all commercial customers losing their current choice, the competitively determined SCO. OPAE Ex. 2 at 15, 21.

The MVR to which SCO commercial customers will be assigned in the event of an exit of the merchant function is certainly inferior to the SCO in terms of price and conditions. The SCO price is the New York Mercantile Exchange ("NYMEX") monthly close plus the adder determined at the competitive auction. The SCO auction is an annual auction so that the SCO price is the monthly NYMEX close plus the annually-set adder. Hess witness Magnani testified that the MVR price is anything that the marketer wants it to be. Tr. II at 137. OGMG/RESA witness Parisi acknowledged that while the MVR can also be expressed as monthly NYMEX price plus an adder, the adder can change from month to month because of 'many variables'. Tr. II at 198. Thus, the MVR price is a price determined by the individual supplier, not by a competitive auction. The Commission certifies marketers but does not certify the process by which marketers set their MVR prices. The MVR price is not transparent to consumers.

In spite of the beneficial features of the SCO as a market-based offer determined by a transparent competitive auction, CRNGS are able to compete with the SCO option. Bilateral contracts may serve some customers' needs by offering various terms and conditions, such as long-term contracts or fixed-price contracts. OPAE Ex. 2 at 20-22. Roughly 50% of Columbia's commercial customers are served by competitive options other than the SCO. Id. The SCO is clearly not crowding out other competitive options. There is robust competition for natural gas service in Columbia's service area in the manner Ohio law seeks to promote. Revised Code 4929.02(A)(3) states that it is the policy of the state to promote a diversity of natural gas supplies and suppliers by giving consumers effective choices over the selection of supplies and suppliers. Bilateral contracts, government aggregation, and the SCO represent options that are consistent with the state's policy because they represent a diversity of competitive options. OGMG/RESA witness Parisi acknowledged "[u]nder Ohio law government aggregation is considered a choice." Tr. II at 201. Bilateral contracts and the SCO are also choices.

State policy also seeks avoid subsidies flowing to and from regulated and unregulated businesses, but there is nothing unfair about the SCO auction; it is simply a different approach to harnessing competition which obviates the need for regulation. Marketers are free to bid in the auction and all bidders are certified marketers. Through the auction, marketers get customers without having to incur any customer acquisition costs. In short, marketers themselves benefit from the auctions.

Marketers already provide the natural gas commodity to all the customers in Columbia's service area using various competitive mechanisms to set the price, but that apparently is not enough for the Marketers. Now, the Marketers want to eliminate a competitive option that keeps prices low. As witness Magnani, testifying on behalf of the marketer Hess Corporation, explains:

> If you take – with SCO in the marketplace, the other suppliers will tend to drive their prices as low as absolutely possible. Not that they could compete directly with the SCO, but at least they would be closer to it.
>
> If you take SCO out of the marketplace, then you would have competition but it wouldn't necessarily be driven to those lower levels.

Tr. II at 129.

The amended joint motion's purpose is to take away a competitive option that customers now have: the SCO. The point of this amended joint motion and attached stipulation is to squelch competition and harm commercial consumers. Ohio law does not limit the definition of competition to bilateral contracts. The authority for government aggregation makes clear that the General Assembly wants a diverse marketplace that harnesses competition in a variety of ways to the benefit of consumers. That is what the current market provides through the SCO and the other competitive choices now available. The amended stipulation would eliminate the SCO, which would harm customers and, as a result, is not in the public interest.

**b. The elimination of SCO service will increase the price of natural gas service in Columbia's service area.**

The impacts on customer bills should be the primary concern of the Commission as it reviews the amended joint motion. In testimony filed in Case No. 08-1344-GA-EXM, Richard A. Cahaan, testifying on behalf of OGMG, noted that "[t]he public interest responsibility of the PUCO, both analytically and historically, is to obtain the lowest supply price." Testimony of Richard A. Cahaan at Page 7, Line 13-14. The Commission recognized this as well when it noted in its Opinion and Order in Case No. 08-1344-GA-EXM, the substantial price benefits afforded to customers of the local distribution public utilities Dominion East Ohio and Vectren Energy Delivery as a result of their SCO auctions. See Case No. 08-1344-GA-EXM, Second Opinion and Order at 12.

While the SCO is determined by a competitive auction which produces price benefits, marketers' offers have not been so beneficial to customers. Since the inception of the Columbia's choice program in 1997, Columbia has maintained a shadow bill program that tracks both individual customer and total customer savings or losses by comparing the choice program rates to the alternative utility default service rates, i.e., the gas cost recovery ("GCR"), standard service offer ("SSO"), or standard choice offer ("SCO') rate. Most of the savings from shopping were in the early years of the program (1997 to 2001) with savings peaking in July 2001.To date, however, the shadow bill program shows that Columbia's customers have cumulatively paid $865 million more when shopping than they would have paid had they taken service under the alternative GCR, SSO, or SCO rate. See Columbia response to OCC Request to Produce No. 65. OPAE Ex. 2A; Exhibit SH-7. Columbia witness Brown testified that the shadow billing data is accurate. Tr. Vol. 1 at 53. During the period of the SSO/SCO those receiving service through bilateral contracts with marketers have paid $316,477,450 more than those on the SSO or SCO. In the six months since the SCO was implemented in April 2012, customers served by suppliers other than through the SCO, which operates on a level playing field with bilateral and government aggregations, have paid $37,200,878 million more, a figure that does not include any months falling during the winter heating season. OPAE Ex. 1 at 20. The shadow bill shows that on a monthly basis customers choosing bilateral contracts have paid higher rates; they may have gotten a fixed rate or some other term or condition they preferred, but they have been rewarded with a larger bill. OCC witness Hayes testified that the shadow billing data is useful in evaluating the choice program options. Tr. I at 102-103.

While low prices are not the only benefit of the SCO, price is very important to cash-strapped Ohio families and businesses. For some customers price may not matter; for others it is the only thing that matters. Price does matter to low-income consumers and to struggling small businesses. The exit of the merchant function will undermine attempts to stimulate Ohio's economy because it will reduce the dollars available to Ohio families and small businesses to purchase one of the necessities of life, natural gas service.

Price also clearly matters to industrial customers as only 25% have chosen bilateral contracts with 75% preferring the low prices provided by the SSO/SCO. OPAE Ex. 2 at 21. These are sophisticated customers, and in their sophistication they are opting for the competitive option that consistently provides the least expensive price. Id. The hundreds of thousands of Columbia customers that have chosen SCO service because of its low price should not be ignored. As Mr. Cahaan noted, as stated above, it is a fundamental public policy to ensure customers the lowest possible price.

Bilateral contracts are no substitute for the SCO, where the price is determined by a competitive auction and its terms and conditions transparent. Bilateral contracts vary greatly as to terms and conditions, and there may be early termination fees as high as several hundred dollars. OPAE Ex. 2 at 12. The terms of bilateral contracts are not generally known to the public or transparent in any way. Id. In addition, some marketers may offer bilateral contracts at prices that are not on the Commission's Apples to Apples chart. Id. at 13.The only way a customer would know about such an offer is to call an individual marketer or visit an individual marketer's website to obtain the information.

Bilateral contract prices are also higher than the SCO when compared over a twelve-month period to a 12-month average SCO price. OPAE Ex. 2A; Exhibit SH-4. Bilateral contracts simply cost more. Customers pay a premium for a fixed price contract over a variable price contract because there is more risk to marketers when offering a fixed price. The variable price offers from marketers also almost always exceed the price offered through the SCO, in part because of the customer acquisition costs associated with marketer offers. OPAE witness Harper testified that while there is occasionally an marketer price that is at or below the SCO price, the vast majority of marketer prices posted on the Commission's Apples to Apples chart are higher, often much higher, than the SCO price. OPAE Ex. 2A; Exhibit SH-3.Without the transparent SCO price set by an auction, there is a reduction in the efficiency of the competitive market. OPAE Ex. 2 at 18-19.

The SCO eliminates the CRNGS's customer acquisition costs, which is a significant barrier to entry into the competitive natural gas market of new CRNGS. In this sense, the SCO is comparable to a government aggregation where CRNGS are able to acquire customers without incurring significant acquisition costs. Customers without access to a government aggregation are able to obtain a similar competitive option through the SCO.

Hess witness Magnani testified that the SCO is simply the lowest price. Tr. II at 128. It is simply a lot cheaper to sell to a few large customers than to thousands of tiny customers. Id. With the SCO in the marketplace, non-SCO suppliers will try to drive their prices as low as possible, in order to at least be closer to the SCO. If the SCO is taken out of the market, the price would not be driven down to the lower levels. Tr. II at 128. Customers should get the lowest price that they are eligible for. Tr. II at 151; Hess Ex. 1 at 9. The lowest price is the SCO price. Tr. II at 153-154. On a sustained basis, the SCO price has to be lower than the bilateral contract price or the MVR price because the cost to serve a customer through the SCO is significantly less than the cost to serve a choice customer. Tr. II at 154. The SCO auction forces bidders to drop their price as low as possible and since the costs of SCO service are significantly lower than the choice supplier's cost, the SCO price will be lower. Id.

In response to questioning from Direct Energy, a marketer supporting the stipulation, Hess witness Magnani noted there may be situations where an introductory price or a one-month price is lower than the SCO, but over a sustained period of time, it is not possible for the bilateral contract price to be lower than the SCO. Tr. II at 155. There may be an introductory rate, which is discounted for two months, but this cannot be sustained for a year. It is merely a loss leader. Tr. II at 159. An introductory rate cannot be compared to a rate sustained over a year. A sustained rate over a year with lower costs to serve – the SCO -- will be lower. Tr. II at 158. Even once the SCO adder is included it is still not possible to get below the SCO price. Tr. II at 159. Only if a marketer is willing to supply service at a loss for a sustained period of time could it compete with the SCO rate. The SCO is lower priced, and customers who do not want bilateral contracts and who do not join a government aggregation should not be required to pay a higher rate. Tr. II at 160.

The Signatory Parties to the amended stipulation would have the Commission believe that there is some benefit to the amended stipulation's attempt to study the impact of the elimination of SCO service for commercial customers. This is nonsense. There is no value in sacrificing commercial customers for the purpose of conducting studies on how non-residential customers are harmed by the elimination of SCO service. SCO service will be a competitive option that commercial customers will no longer have if Columbia exits the merchant function for non-residential customers. It is also the lowest price competitive option. It defies logic and common sense to pretend that eliminating a customer choice, and the least-cost customer choice at that, might somehow require study to determine its impacts. The record established in this case makes clear that non-residential customers will lose SCO service and pay higher prices if the amended stipulation is approved and if Columbia exits the merchant function for non-residential customers. The analysis has been completed. There is nothing left to study. When the distribution utility exits the merchant function, customers pay higher rates. When a distribution utility exits the merchant function, marketers win and customers lose. The studies proposed in the amended stipulation have no value.

**c. The extensions of the pipeline contracts do not benefit ratepayers and the public interest.**

The amended stipulation extends Columbia's upstream pipeline interstate contracts, primarily contracts with Columbia's affiliates, for another five years. This is a blatant example of why the amended joint motion's request for 'modification' of existing exemption orders under R.C. 4929.08(A) is actually a request for a new five-year term which should be filed as a new alternative regulation plan application under R.C. 4929.04. While the amended joint motion states that over the past five years there have been dramatic changes to natural gas commodity prices and price declines attributable to the introduction of Appalachian shale gas in the market, the amended joint motion actually does nothing but request another five-year term. The amended stipulation permits Columbia to renew the upstream capacity contracts with Columbia's affiliate for almost 100% of the currently existing capacity under contract, while assuring that there will be no review of Columbia's capacity contracting during the new five year term.

The stipulating parties claim that it is in the public interest for the Commission to permit Columbia 'to maintain flexibility with regard to interstate pipeline capacity, while the market for shale gas develops, but the stipulating parties have agreed to extend the upstream interstate contracts, primarily Columbia's affiliate contracts, for a new five year term. This is not flexibility. Should the shale gas industry prosper, as numerous state officials including the Governor are contending, extension of the pipeline contracts will have two impacts. First, the existence of these contracts and their 'take or pay' nature will choke off the use of shale gas at a time when state policy is to promote markets for that commodity. Second, should marketers choose to 'pay' for unnecessary gulf pipeline capacity and access the shale resources, then Columbia will have even more excess capacity to market and will receive a huge financial boon by selling that capacity.

Extension of the pipeline contracts is anti-competitive. Marketers are forced to purchase capacity from Columbia, despite the fact that there is an open and competitive market for pipeline capacity. The stipulation denies marketers the opportunity to compete based on transportation costs and denies customers the benefits that could result from this additional level of competition. Eliminating competition for pipeline capacity limits competition. The fact that the transportation prices are competitively neutral as to the marketers does not rectify the anti-competitive impact of taking transportation prices off the table; the fact that marketers are willing to trade off potential pipeline margins for the huge returns resulting from Columbia's exit of the merchant function does not mean that the barriers to competition created by the agreement are consistent with state policy.

**d. Shifting the responsibility to pay balancing fees from marketers to customers does not benefit ratepayers and is not in the public interest.**

Shifting responsibility for balancing fees from marketers to customers also reduces the potential for competition. Sellers often discount prices of the various elements that make up product costs. If marketers are not paying the balancing fee it is yet another component of the costs that is not subject to competition because the balancing fees are no longer part of the bundled price that marketers can reduce to attract customers. A competitively neutral fee is, in effect, anti-competitive. Responsibility for balancing fees should remain with the marketers to ensure that competition determines the prices consumers ultimately pay.

OCC refers to a provision in the amended stipulation that would prevent customers from being charged twice for the balancing fee. OCC Ex. 1 at 7. However, the obvious problem with this provision is that there is no mechanism to enforce it. Tr. I at 104. If a customer is on a monthly variable rate that is not tied to any index or is on a fixed price contract, there is no way to know if the customer got the 32 cent credit or not. Id. OGMG/RESA witness Parisi was unwilling to even commit to reducing what is charged fixed rate customers currently under contract to reflect the shift of the responsibility for the balancing fee from marketers to customers. Tr. II at 187-188. He indicates that marketers may be actually discounting the balancing fee within their rates. Id. Ultimately, OCC witness Hayes opines that the competitive market will drive down the marketer's price to reflect that the balancing fee has been transferred from marketers directly to customers. Tr. I at 107. Marketers can reduce their variable rate to reflect the fact that the fee is now charged to customers directly, or they can choose not to do so. Tr. II at 187-188. Witnesses for OCC, OGMG/RESA, and Columbia all acknowledged that there is currently no mechanism to ensure the balancing fee currently embedded in marketers' rates is removed when payment responsibility is shifted to customers. Tr. I at 40, 55, 104; Tr. II at 188, 240. There is really only one way to resolve this mess; the responsibility for paying the balancing fee should remain with the marketers.

**e. The new fee to be imposed on SSO/SCO suppliers, which is not cost-based and undermines competition, does not benefit ratepayers and the public interest.**

The first stipulation included a provision that would impose a charge of $0.10/Mcf on SCO suppliers for no readily apparent reason. The second amended stipulation includes a provision that reduces the charge imposed on SCO suppliers to $0.06/Mcf, also for no apparent reason. The $0.06/Mcf fee has the potential to cost customers using 85 mcf per year an additional $5.10. Tr. I at 111-112. This would cost all SCO customers an additional $4.8 million per year. Id. The fee is ostensibly an extra security deposit charged to SCO suppliers, but since the unspent funds are not returned to the SCO suppliers paying the deposit, it is simply a fee. OCC witness Hayes testified that OCC disagrees with the rationale for the $0.10 fee and now the $0.06 fee. Hayes views the fees are an unnecessary cost to the SCO supplier. Tr. I at 110. And, the fee is discriminatory as it is charged only to SCO suppliers, and it is not charged to choice suppliers. Tr. I at 110. The extra $0.06 goes into the SCO supplier's SCO rate so that the SCO rate is $0.06 higher than it would be otherwise. Tr. II at 169. If there is no default, the unused fee would reduce the CHOICE/SCO Reconciliation Rider for *all* customers, a subsidy to customers receiving service through bilateral contracts or government aggregations who did not pay the fee in rates.

Hess witness Magnini also opposed the $0.06 cent additional security deposit provision in the stipulation. As Mr. Magnini testified there is already a security deposit that Columbia requests and there is no reason SCO suppliers should be made to pay an additional $0.06. The cost of an SCO supplier default falls back on the SCO suppliers who take that load and serve those customers. Tr. II at 168-169. If Columbia needs the extra $0.06 in security, Columbia can merely ask the suppliers to *deposit* it, rather than pay it as a fee. It should not exist because it is not necessary. Tr. II at 169. The charge either at $0.10 or $0.06 is still a ridiculous charge to force SCO suppliers to pay. Tr. II at 177-178.

Marketers supplying SCO service compete with marketers that sell gas via bilateral contracts. SCO customers are retail customers, just like customers in bilateral contracts. There is no apparent purpose for the new fee added to SCO service other than to make it possible for marketers selling bilateral contracts to better compete with the price set in an SCO.

There has never been a default by an SCO supplier. There have been defaults by marketers in bilateral contracts, so following the principal of cost causation the extra security requirement should be assessed on those marketers who could possibly fail. If Columbia is so concerned about defaults and its risk analysts are incapable of making sound judgments when they establish security deposits, Columbia should assess the extra deposit on all suppliers, thus ensuring a level playing field among all competitive options and competitive suppliers.

**f. Having customers subsidize marketers does not benefit ratepayers and is not in the public interest.**

Marketers may complain that the SCO is a subsidized offer because its price is established by a competitive auction conducted by the utility. However, the cost of the SCO auction is extremely small. The auction costs about $70,000 for the auction manager, platform and the people who are taking the bids. Tr. II at 132-134. This equates to $0.000058/Ccf. There are also bill inserts to explain the SCO price, but Columbia incurs similar costs regularly. Columbia uses the same computer system for billing. The costs of the auction are “insignificant”. Tr. II at 135.

Given that the cost of the SCO auction is insignificant, it is ridiculous that marketers complain about subsidies to the SCO when subsidies to marketers are much more prevalent in the Columbia system. Forcing customers to subsidize marketer costs is in direct contravention to the policy of the state of Ohio to harness competitive forces to price the commodity supply. O.R.C. Section 4929.02(A).

Columbia seeks to continue its CHOICE/SCO Reconciliation Rider ("CSRR"), which recovers the costs of implementing the CHOICE education program, the pre-exit-the-merchant-function education programs, and the billing system changes. Jt. Exhibit 1 at 12. Because all customers pay the CSRR, the rider subsidizes marketer efforts and violates the principle of cost causation.

Educating customers on choice and exiting the merchant function benefits only marketers. Modifying billing systems to the benefit of marketers is just that: a benefit to marketers. Columbia witness Caddell admitted that if a customer remains on the SCO, the billing system enhancements are not beneficial. Tr. I at 32-33. These costs should be borne by marketers and become a component of the marketer rates. Customers choosing the SCO option should not be forced to pay for choice-related costs that do not benefit them.

Blocking competition and subsidizing marketers and Columbia are the primary thrust of the amended joint motion and the attached stipulation. Limiting competition for transportation service benefits only Columbia. Shifting the balancing fee to customers reduces the provision of natural gas service subject to competition because marketers may or may not be fully charging customers the fee. Tr. II at 186-187. The new security deposit on SCO suppliers limits competition and subsidizes choice marketers at the expense of SCO suppliers. The subsidies to marketers caused by charging customers for education expenses and billing system modifications are also harmful. The Commission should recognize the amended joint motion for what it is: a deal that benefits only marketers and Columbia at the expense of customers. The stipulation does nothing to ensure that natural gas prices are just and reasonable and that competition is enhanced. Therefore, the stipulation does not benefit ratepayers and the public interest.

**4. The amended stipulation filed in this case violates important regulatory principles and practice.**

**a. The procedural schedule for the hearing on the Amended Joint Motion was so egregious and unreasonable that those parties opposing the stipulation have been denied due process.**

OPAE objects to the extremely compressed litigation schedule established for this case. For a small nonprofit organization with limited resources, complying with the schedule has been extremely challenging. The schedule is so compressed that OPAE has been denied a reasonable opportunity to challenge the stipulation.

OPAE first objected to the extremely compressed litigation schedule through an Interlocutory Appeal filed jointly with OCC on October 23, 2012, nineteen days after the motion was filed. By Entry dated October 31, 2012, the attorney examiner refused to certify the interlocutory appeal to the Commission. The attorney examiner found that the interlocutory appeal did not meet the administrative requirements for an interlocutory appeal. Given the denial of the interlocutory appeal filed jointly by OPAE and OCC, OPAE was forced to comply with the Commission's extremely compressed schedule because the issues in this case are too important to consumers, particularly low-income residential consumers not served through the Percentage Income Payment Plan ("PIPP") and the non-residential OPAE member anti-poverty agencies that OPAE represents.

The failure to certify an interlocutory appeal to the Commission does not end the matter of the unfair procedural process. After the denial of the interlocutory appeal, the amended filings were submitted on November 27, 2012, a mere 6 calendar days before the hearing was to begin; a major portion of the filing, the revised program outline, was not even submitted until the following day. The parties opposing the amended filings had an even more inadequate time period in which to complete their testimony (three days), participate in the hearing (four days), and file their briefs (five days).

The Commission should have slowed down the procedural schedule in this case to provide interested parties opposing the amended stipulation their due process rights. There is no rational explanation for expediting this case in order to give the stipulating parties the benefits of their bargain with each other and leave the non-stipulating parties on the outside to pay the costs of the amended stipulation in the form of higher natural gas commodity prices, additional fees, and additional subsidies to marketers. This is precisely the outcome of this case if the Commission approves the amended stipulation. The non-signatory parties to the amended stipulation were excluded from the settlement process; that alone casts doubt on the fairness of the process. For the Commission to then set a ridiculous procedural schedule that denies those opposing the amended stipulation the opportunity to present their case is beyond any concept of fair play imaginable.

The important regulatory practice of ensuring due process has been completely disregarded in this case. The amended stipulation cannot meet the Commission's test for the reasonableness of stipulations.

**b. Regulatory policy and practice are violated when the Commission approves a joint motion that violates Ohio statutory law, Ohio administrative law, and the past Commission's findings.**

As previously discussed, there is nothing in the exemption orders that can lawfully be modified as a result of the joint motion. The application does not conform to O.R.C. 4929.08(A). Therefore, the joint motion should be dismissed. Columbia is free to file an application for alternative regulation under O.R.C. 4929.04 seeking a new alternative rate plan. Such an application should conform to the Commission's rule adopted pursuant to O.R.C. 4929.04, specifically O.A.C. 4901:1-19-04. Because there are pending rules for utilities to exit the merchant function, Columbia should await the adoption of those rules to file an application for an exit of the merchant function. This is proper regulatory practice, and it has been grievously violated in this case.

**c. Regulatory policy and practice are violated when the Commission approves a stipulation that violates the policy of the state of Ohio.**

It is the policy of the state of Ohio to use diverse approaches to competition to provide customers with "…adequate, reliable, and reasonably priced natural gas services and goods." R.C. 4929.02(A)(1). To take away what has been the lowest cost option and to force customers to take what has been higher priced natural gas service violates the state's policy at R.C. 4929.02(A)(1) and is not in the public interest. The SCO provides just and reasonable prices to customers, as required by R.C. 4909.15 and 4929.02(A)(1). The elimination of SCO service will reduce competition, increase prices consumers pay, and maximize marketers' profits. The Commission should not eliminate the competitive SCO option and force consumers into higher-priced bilateral contracts, which minimize competition and maximize the marketers' profits. The promotion of state policy requires an SCO option that gives consumers a reasonable price for natural gas service set by the competitive market.

Eliminating a competitive option that customers choose does not conform to the state's policy at R.C. 4929.02(A)(2) to promote the availability of natural gas services that provide customers with the supplier, price, terms, conditions and quality options they elect to meet their respective needs. The amended joint motion offers customers nothing new, no new competitive option that customers do not already have. Instead, the amended joint motion's only purpose is to take away the availability of a competitive option that customers now have. That option is the SCO, the transparently-priced option determined by a competitive auction. Taking away that choice serves no one but the marketers.

The SCO also promotes diversity of natural gas supplies and suppliers and gives consumers choices over the selection of supplies and suppliers. R.C. 4929.02(A)(3). The SCO's contribution to the diversity of supply options complies with the state energy policy. The SCO also encourages innovation and market access for cost-effective natural gas services as required by R.C. 4929.02(A)(4).

The SCO also promotes an expeditious transition to the provision of natural gas services 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 under Chapters 4905 and 4909, Revised Code. R.C. 4929.02(A)(7). SCO customers have chosen not to choose an individual marketer. The elimination of the SCO service will force these SCO customers into higher-priced bilateral contracts, which minimize competition and maximize the marketers' profits.

Under the SCO, regulation is effectively minimized. The distribution company holds the SCO auction and the Commission certifies the results. This is not an onerous process, so regulation is reduced and minimized in accordance with the state policy. The SCO is not a vestige of traditional regulation; rather it is a manifestation of the Commission's promotion of innovative supply options in such a way that competition is harnessed to provide customers with the lowest competitive market price.

The state's energy policy is not to force unwilling customers to choose a marketer and certainly not to allow a utility to choose a marketer for them. Customers currently on the SCO are 'willing' customers. The SCO auction meets their needs by using competition to set a price that is, by and large, lower than anything available directly from marketers. Eliminating the SCO service option deprives customers of the choice to take natural gas commodity service at a competitive market price determined through an auction, and they are deprived of the choice not to choose a marketer. The Ohio General Assembly has not sanctioned raising prices for consumers by eliminating competitive market options.

The state of Ohio's energy policy is not so limited or blind that it excludes the needs and desires of consumers to make their own choices and to obtain competitive, fair, and reasonable prices. There should be no mistake: the requested modification to eliminate the SCO service takes away a competitive choice that customers currently have. It reduces competitive options. It is not consistent with the policy of the state of Ohio.

## IV. Conclusion

The criteria at Revised Code Section 4929.08(A) for a modification of an exemption order have not been met because no findings of the existing exemption orders are now invalid. In addition, the amended joint motion fails to follow the provisions of Ohio Administrative Code Rule 4901:1-19-12 for a modification for an existing exemption. To extend the pipeline contracts and impose an exit from the merchant function, an application for a new alternative rate plan for a new term must be filed under Revised Code Section 4929.04. All the filings required by Ohio Administrative Code Rule4901:1-19-04, should have been made. The Commission has no authority to violate or ignore Ohio law, nor is it in the public interest. The joint motion for a modification under Revised Code Section 4929.08(A) must be denied.

The joint motion violates the policy of the state of Ohio. R. C. 4929.02(A). Eliminating SCO service and requiring non-residential customers to choose a marketer or have Columbia choose a marketer for them conflict with the policy of the state of Ohio. There is no longer a transaction between a willing buyer and willing seller. By eliminating the SCO service option, customers are deprived of the choice to take natural gas commodity service at a competitive market price determined through an auction, and they are deprived of the choice not to choose a marketer. Opt-out government aggregations are considered a choice under Ohio law, and SCO service is identical in nature to a government aggregation.

The state's policy is not a one-way street benefiting marketers. The requested modification to eliminate the SCO service will raise prices choice-eligible non-residential customers pay, forcing those consumers to confront opaque and highly volatile markets alone without any benchmark to guide them, and taking away a competitive choice that customers currently opt for. The requested modification reduces competitive options. The evidence demonstrates that the SCO conforms to the state's energy policy and must not be eliminated for non-residential customers.

The stipulation should be rejected because it violates all three parts of the Commission's three part test for stipulations. First, the stipulation is not the product of serious bargaining. The only customer group adversely affected by the stipulation, the commercial customers of Columbia, was effectively excluded from the settlement negotiations. The bargaining parties worked together to harm commercial customers to their own benefit. There can be no serious bargaining when the customer group to be harmed is excluded from the settlement negotiations.

The second part of the three part test for evaluating stipulations has not been met. The stipulation, as a package, does not benefit ratepayers and the public interest. The stipulation will raise the prices for natural gas service for commercial customers who lose the SCO service. It requires customers to subsidize marketers in a variety of ways, and discriminates against SCO suppliers. It eliminates the ability of marketers to compete by discounting balancing fees by shifting them to customers, and all but stops competition based on transportation costs.

The third part of the test for stipulations has also not been met. The amended stipulation conflicts with regulatory policy and practice because it violates Ohio statutes and administrative rules in numerous ways. The procedural schedule for the hearing in this case was extremely accelerated in order to avoid a full consideration of the unlawful and unreasonable outcome of the amended joint motion and amended stipulation.

The Commission must deny the amended joint motion and reject the amended stipulation. However, in the event that the Commission does not deny the amended joint motion and stipulation, OPAE makes these recommendations: 1) commercial customers of Columbia should receive exactly the same protections as residential customers with regard to the retention of SCO service and a process for Columbia to exit the merchant function through an application filed by Columbia pursuant to Ohio Revised Code 4929.04 -- there should be no distinction between residential customers and commercial customers regarding the retention of SCO service and a possible exit of the merchant function; 2) the $0.06 fee SCO suppliers would pay should be eliminated; and, 3) balancing fees should continue to be the responsibility of marketers so recovery from customers is subject to competitive forces.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Ohio Partners for Affordable Energy was served electronically upon the parties identified below on this 11th day of December 2012.

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