

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)
Review of the Alternative Rate Plan) **Case No. 11-5590-GA-ORD**
and Exemption Rules Contained in Chapter)
4901:1-19 of the Ohio Administrative Code)

**MEMORANDUM CONTRA OF THE OHIO GAS MARKETERS
GROUP AND THE RETAIL ENERGY SUPPLY ASSOCIATION**

I. INTRODUCTION

On January 11, 2013, the Office of the Ohio Consumers' Counsel ("OCC") filed an Application for Rehearing to the Commission's Opinion and Order modifying the rules governing an application by a natural gas company for alternative rate making authority and exemptions Chapter 4901:1-19 of the Ohio Administrative Code. The OCC does not dispute the suggested amendments promulgated by the Commission to Chapter 4901:1-19, but believes that the Commission is legally compelled to hold a second evidentiary hearing to explore a decision to Exit the Merchant Function in addition to the hearings which are statutorily required of all natural gas companies over fifteen thousand customers to have alternative rate programs Section 4929.04, Revised Code, or to amend an existing plan Section 4929.08, Revised Code. Thus, the OCC requests a rule modification that would proscribe a second additional hearing should a natural gas utility propose outsourcing its default gas supply operation completely (exiting the merchant function) in addition the hearing that must be held to adopt the alternative program or amend the program. The current rules and the proposed rules do not exclude a second hearing; instead, they leave the determination of the administrative process, including whether another hearing is needed, to be decided on a case-by-case determination. This flexibility the OCC finds unjust,

unreasonable, and unlawful because the possibility that the Commission may not require a second hearing arguably fails to protect consumers' due process rights. Pursuant to Rule 4901-1-35 of the Ohio Administrative Code, the Ohio Gas Marketers Group and the Retail Energy Supply Association ("Suppliers") submit this Memorandum Contra to the OCC's January 11, 2013 Application for Rehearing.

The Suppliers believe that the Amended Chapter 4901:1-19 rules provide due process protections. The rules do not mandate hearings when they are not needed, the rules are more efficient than what the OCC proposes, and the rules will not place unnecessary costs on parties including the OCC to conduct an unnecessary hearing. Nothing in the rules prohibit hearings; thus, the Suppliers request the Commission deny the OCC's Application for Rehearing.¹

II. ARGUMENT

A. The OCC raises no new arguments in its application for rehearing and the Commission fully considered OCC's arguments in reaching its decision.

The OCC repeatedly argued in its comments that the Commission must provide for notification, discovery, and a hearing after an exit-the-merchant-function application is filed.² The Suppliers argued in their comments that these OCC suggestions were not warranted or appropriate.³ The Commission acknowledged the OCC's arguments, but did not accept them.⁴ The OCC has presented nothing new in its application for rehearing and, therefore, nothing warrants a change in the Commission's decision on this point.

¹In this Memorandum Contra, the Suppliers have chosen to address only this argument raised in the OCC's Application for Rehearing because it is important. The Suppliers' decision not to address other arguments raised on rehearing should not be construed as support for or agreement with any of those other arguments.

²See, e.g., the OCC's initial comments at pages 21-27 and its first reply comments at pages 13-14.

³See, the Supplier's reply comments at page 12 (February 2012) and reply comments at page 6 (September 2012).

⁴Finding and Order at 28-29.

B. It is lawful for the Amended Rules to allow a company to exit the merchant function without another Commission hearing because the Ohio statute does not require an “exit-the-merchant-function hearing” and procedural due process is a flexible concept that does not require a hearing in every circumstance.

The OCC states that due process requires a “meaningful opportunity to be heard” and asserts that the Commission must conduct a hearing with discovery in order to satisfy this due process requirement in exit the merchant function cases.⁵ Further, the OCC argues that to comport with due process, the procedural requirements for an exit-the-merchant-function case should be the same as the procedural requirements for an exemption case.⁶ Ohio law does not support either of the OCC’s legal arguments.

The Ohio Supreme Court has “repeatedly held that there is no constitutional right to notice and hearing in rate-related matters if no statutory right to a hearing exists.”⁷ In other words, “absent express statutory provisions, a ratepayer has no right to notice and hearing under the Due Process Clauses of the Ohio and United States Constitutions.”⁸ While Sections 4929.04 and .08, Revised Code, require a hearing for alternative rate and exemption applications or tariff amendments, there is no statutory requirement for an additional hearing on top of the hearings for an alternative plan or amendment to the plan because the plan or amendment involves an exit of the merchant function by the utility. Since no statutory right to a second hearing exists, the Commission is not compelled to conduct such a hearing, though it may if such is requested and the request has merit.

⁵Application for Rehearing by the Office of the Ohio Consumers’ Counsel, page 4 (January 11, 2012).

⁶*Id.* at 12.

⁷*Ohio Consumers' Counsel v. PUCO*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶20.

⁸*Office of Consumers' Counsel v. PUCO*, 70 Ohio St.3d 244, 248, 638 N.E.2d 550 (1994).

The Ohio Supreme Court has consistently found that the law does not require an agency such as the Commission to hold a hearing in every circumstance. The High Court rather than bureaucratically mandating hearings every time a plaintiff claims a right has taken the position that “due process is flexible and calls for such procedural protections as the particular situation demands.”⁹ In an exit-the-merchant-function case, it is not necessary for a full Commission hearing in all instances because the Commission can more efficiently and effectively address an exit the merchant function using procedures that “it deems necessary” to assure that parties are afforded due process.¹⁰ Consequently, Ohio law does not support the OCC’s argument that a hearing is required for an exit-the-merchant-function case.

C. It is reasonable for the Amended Rules to allow a company to exit the merchant function without another Commission hearing because procedures exist that would satisfy due process more effectively and efficiently than a Commission hearing.

The Commission’s goal in reviewing OAC 4901:1-19 as part of its five-year review is to eliminate or amend overly burdensome, costly, and redundant rules.¹¹ A rule requiring a Commission hearing in all exit-the-merchant-function cases would be overly burdensome. For example, while an evidentiary hearing may be necessary for cases that are certain to present questions of fact, such a hearing may be unnecessary in exit-the-merchant-function cases where the facts are stipulated or not in controversy. Additionally, it is this state’s policy to promote the expeditious transition to fully competitive retail natural gas markets.¹² The OCC’s proposed

⁹*Lyle Constr., Inc. v. Ohio Dep't of Natural Resources, Div. of Reclamation*, 34 Ohio St. 3d 22, 25, 516 N.E.2d 209 (1987).

¹⁰Finding and Order at Attachment A page 8 (December 12, 2012).

¹¹*See*, R.C. Section 119.032(C) and Executive Order 2011-01K.

¹²R.C. Section 4929.02(A)(7).

additional procedural requirements to exit the merchant function would unnecessarily increase the cost and expense for all parties involved and discourage the process of exiting the merchant function. The Commission can more adequately determine what procedures are necessary to ensure due process rights are protected in an exit the merchant function case while encouraging efficiency and effectiveness in the administrative process. Therefore, it is reasonable that the Amended Rules do not require a Commission hearing in every exit-the-merchant-function case. Finally, it should be noted once again that while the rules do not mandate a hearing, they also do not prohibit one.

III. CONCLUSION

For the reasons set forth above, the Ohio Gas Marketers Group and the Retail Energy Supply Association respectfully requests that the Commission deny in its entirety the January 11, 2013 Application for Rehearing of the Office of the Ohio Consumers' Counsel.

Respectfully submitted,



M. Howard Petricoff (0008287)
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
614-464-5414
614-719-4904 (fax)
mhpetricoff@vorys.com

*Attorneys for the Ohio Gas Marketers Group and the
Retail Energy Supply Association*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum Contra was served via electronic mail this 22nd day of January, 2013 on the individuals listed below.



M. Howard Petricoff

Amy.spiller@duke-energy.com
Jeanne.kingery@duke-energy.com
Carys.cochern@duke-energy.com
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
sauer@occ.state.oh.us
bingham@occ.state.oh.us
mallamee@occ.state.oh.us
sseiple@nisource.com
bleslie@nisource.com
bmoss@nisource.com
cmacdonald@nisource.com
Cmooney2@columbus.rr.com
William.wright@puc.state.oh.us
cmoore@porterwright.com
mandy.willey@puc.state.oh.us
serio@occ.state.oh.us
egallon@porterwright.com
cblend@porterwright.com
devin.parram@puc.state.oh.us
cmooney@ohiopartners.org

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PETRICOFF on behalf of Ohio Gas Marketers Group and Retail Energy Supply Association