BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM CONTRA THE APPLICATION FOR REHEARING OF OHIO PARTNERS FOR AFFORDABLE ENERGY ON BEHALF OF THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

I. INTRODUCTION

In accordance with Rule 4901-1-35(B), The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO") hereby files its memorandum contra the application for rehearing filed by Ohio Partners for Affordable Energy ("OPAE") on January 25, 2013. The Commission should deny OPAE's application for rehearing for the reasons that follow.

II. ARGUMENT

For the most part, OPAE's application for rehearing sets forth the same arguments that the Commission already rejected in the January 9, 2013 Opinion and Order ("Order"). None of OPAE's arguments warrants revisiting any aspect of the Order.

A. The Commission complied with R.C. 4929.08.

OPAE's first assignment of error is that the "Commission unlawfully disregarded the statutory requirements" of R.C. 4929.08(A). (OPAE Rehg. Appl. at 7.) It raises several different arguments under this heading, all pertaining to the Commission's interpretation of the June 18, 2008 Opinion and Order in Case No. 07-1224-GA-EXM (which DEO refers to as "the Exemption Order" and OPAE as the "2008 Exemption Order").

1. The Commission did not mischaracterize the Exemption Order.

OPAE argues that the "2008 Exemption Order did not find that phase two provides potential for further exploration of the benefits of market-based pricing for natural gas services." (*Id*.) According to OPAE, the Commission "deliberately mischaracterized the 2008 finding in the 2008 Exemption Order by referring simply to 'market-based pricing for natural gas service' and deleting from the actual 2008 finding 'market-based pricing of commodity sales by the company.'" (*Id*. at 8.)

OPAE's accusation that the Commission mischaracterized the 2008 Exemption Order hinges on the notion that there is a material difference between "market-based pricing of commodity sales by the company" and "market-based pricing for natural gas services." There is not, and OPAE's argument misses the point entirely. The issue is not whether "commodity sales" are somehow different than "natural gas services." The issue is whether the current structure supports "market-based pricing" in such a way as to "promote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition" in accordance with the State of Ohio's energy policy set forth in R.C. 4929.02. Despite OPAE's attempt to show otherwise, it appears that the Commission is merely using different terms to convey the same meaning.

OPAE's attempt to make a definitional mountain out of a molehill should be viewed for what it is—a desperate attempt to find a fatal flaw where none exists.

2. No one in this case is claiming that the Exemption Order authorized any exit of the merchant function—that is why the joint motion was filed.

OPAE also asserts that the "the 2008 Exemption Order [provided] that Phase 3 would not be accomplished under the 2008 Exemption Order." (OPAE Rehg. Appl. at 9.) OPAE has raised this argument numerous times, and it continues to miss the point.

No one disputes that the Exemption Order did not authorize an exit of the merchant function. Further action was necessary in order for that to occur, and further action was taken in this case. As the docket in this case confirms, the joint movants did not unilaterally implement a non-residential exit under the authority of the Exemption Order, but asked the Commission for authority to do so in a contested proceeding involving notice, discovery, and a hearing. If the Exemption Order had already provided the necessary authority, this proceeding would not have occurred. It is precisely *because* the Exemption Order does not provide for a fully competitive market that this case was filed.

3. The Exemption Order did *not* specify that any particular kind of application was required in this case.

OPAE's next argument simply misrepresents what the Exemption Order says. OPAE contends that "the 2008 Exemption Order states" that "the Commission would have entertained an application for an exemption under Revised Code Section 4929.04 for an exit of the merchant function." (OPAE Rehg. Appl. at 10.) This is wishful thinking, not legal argument. As the lack of quotation marks in OPAE's sentence implies, these words do not appear in the Exemption Order, which did not require any particular type of future filing. Given all OPAE's complaints that DEO and others misconstrued the Exemption Order, this misrepresentation holds a certain irony.

Not only does OPAE misrepresent the Exemption Order, it does not identify a single substantive showing or procedural opportunity that it would have received under a different form of application than it received in this case. Thus, even if OPAE had shown some error (which it has not), it has not demonstrated any prejudice from the alleged error. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, ¶ 12 ("this court will not

reverse a commission order absent a showing by the appellant that it has been or will be harmed or prejudiced by the order").

In sum, none of the arguments set forth in OPAE's first assignment of error has merit.

B. OPAE identifies no findings in the Order that lack evidentiary support.

OPAE's second assignment of error is that "the evidentiary record does not support a finding that the 2008 Exemption Order is now invalid." (OPAE Rehg. Appl. at 13.) But this argument takes aim at a straw man seen many times before—namely, the assertion that DEO and OGMG claimed that "the 2008 Exemption Order is invalid because it did not accomplish . . . the exit of the merchant function." (*Id*. at 13.) Because no one has made the challenged claim, OPAE's argument is irrelevant.

As far as record support is concerned, the post-hearing briefs have already explained in detail how the evidence and the Exemption Order supported both findings required by R.C. 4929.08(A): that certain findings in the Exemption Order are no longer valid (*see, e.g.*, DEO Br. at 4–6), and that the requested modification will further the public interest (*see, e.g.*, *id*. at 6–9).

The weight of the evidence supports the Order, and OPAE has not shown otherwise. The Commission should reject the second assignment of error.

C. Even if an "adverse effect" finding is required by R.C. 4929.08(A), it was properly found in this case.

OPAE's third assignment of error is that there was no "evidence of record" to support the finding that "the continuation of SCO service is 'adversely affecting DEO and is negatively affecting all Ohioans by hindering the development of a fully-competitive marketplace.'" (OPAE Rehg. Appl. at 16 (quoting Order at 8 & 16).) OPAE makes clear that this argument is just a continuation its first two arguments: it asserts that there is no evidence of an adverse effect because "no one can be adversely affected by Commission findings that were never made." (*Id*.)

This argument has already been dealt with many times over. Certain findings in the Exemption Order *were* invalid.

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

This is not OPAE's only misinterpretation. OPAE also asserts that a movant must show that it is "adversely affected *by* the actual Commission findings." (OPAE Rehg. Appl. at 18 (emphasis added).) But this causal connection—that the "adverse effect" must *arise from* findings—is an invention of OPAE's. The statute does not state or imply this, and it is not clear how a "finding," in and of itself, could adversely affect anyone. That curiosity need not be resolved because, under any interpretation, R.C. 4929.08 does not require this showing.

Even if an independent "adverse effect" showing were required, it has been shown. The Joint Movants, each one an active participant in the state's natural gas markets and each one directly affected if retail competition fails to thrive, explained in detail that the current system is hindering the development of full retail competition. (*See* Joint Mot. at 4–5.) Moreover, OPAE has already *conceded* an adverse effect in this case. In its original motion to dismiss, OPAE

admitted that granting the Joint Motion will further "[t]he interest of marketers" to serve "more customers" than under the existing order. (OPAE Memo. in Support of Mot. to Dismiss at 7–8.) This plainly acknowledges that a moving party is adversely affected by the current order, which even under OPAE's misconstrual of R.C. 4929.08(A) is sufficient to allow the motion to proceed.

Finally, if there were any remaining doubt as to this argument's lack of substance, the Commission can modify the Exemption Order "upon its own motion." R.C. 4929.08(A). In other words, the Commission's power to grant the modification is not limited in any way by the status of the movants. The Commission is empowered to act on its own.

OPAE's third assignment of error should be rejected.

D. The joint movants showed that granting the joint motion is in the public interest.

OPAE's fourth assignment of error contains several arguments, but once again, none of them has merit.

1. The stipulation need not contain legal argumentation.

First, OPAE asserts that, "[c]ontrary to the findings of [the Order], the 'stipulation' filed in this case does not address and is in fact completely devoid of any provision regarding the public interest or the policy of the state of Ohio." (OPAE Rehg. Appl. at 22.)

If DEO understands this argument correctly, it strikes DEO as very tiresome. OPAE seems to suggest that the stipulation *itself* should "make[] . . . reference . . . to the public interest [and] the policy of the state of Ohio." (*Id*. at 22–23.) But such issues (compliance with state policy and satisfaction of statutory standards) are *legal* issues and should be addressed in the hearing and in the briefs. Reciting such legal arguments in a stipulation would do nothing but waste paper.

2. The Order is supported by sufficient evidence.

OPAE also argues that that the "record supports a finding that the public interest will be thwarted by the joint motion and does not support the 2013 Commission finding that the public interest will be advanced." (OPAE Rehg. Appl. at 22.) It then embarks on a ten-page discussion of the record, with more than a few mischaracterizations of the evidence.

But it is not necessary to respond to these points in kind and correct all the mischaracterizations. That is because even on the assumption that the evidence shows what OPAE claims it does, the fact that *some* evidence supports OPAE is irrelevant. It would be an unusual contested case in which there were no conflicting evidence, and of course conflicting evidence was presented. But the Commission need not have unanimous record support—that would be an impossible standard to satisfy in a contested case, and would essentially give veto power to an opposing party. For that reason, the pertinent legal standard only requires that "sufficient probative evidence . . . show that the commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, ¶ 13; *see also, e.g.*, *Util. Serv. Partners v. Pub. Util. Comm.*, 124 Ohio St. 3d 284, 2009-Ohio-6764, ¶ 35 ("Evidence before the commission pointed both ways, and mostly in favor of the commission. USP, in essence, asks us to reweigh the evidence. But that is outside the scope of our function on appeal.").

OPAE's evidence was far from compelling, but the critical point is that it has not identified any holes in the supporting evidence. As both DEO and OGMG explained in detail in their post-hearing briefs, the Order is supported by more than enough evidence on every point. That is all that is needed.

OPAE's fourth assignment of error should also be rejected.

E. None of the arguments in OPAE's fifth and final assignment of error compel revisiting the Order.

OPAE's fifth and final assignment of error is also hard to understand. Quite a few disparate claims are made, with little connecting them, and some are fairly puzzling.

1. OPAE does not explain how the stipulation is "completely irrelevant" in this case.

The most puzzling argument is the first. OPAE asserts that "[t]he stipulation did not address the contested issues in this case," and more than that, that "the stipulation is *completely irrelevant* to the contested proceeding." (OPAE Rehg. Appl. at 33 (emphasis added).) That assertion is self-evidently incorrect. At the least, it begs for an explanation, but OPAE does not provide one before it moves on to the next issue.

2. The stipulation was the product of serious bargaining among capable, knowledgeable parties.

Rather than explaining how the stipulation is irrelevant to this case, OPAE discusses whether "the stipulation is the product of serious bargaining among capable, knowledgeable parties." (*Id*. at 36.) It asserts that the stipulation is "not the product of serious bargaining because no bargaining took place with respect to the joint motion." (*Id*. at 37.) The record flatly contradicts this assertion.

DEO witness Jeffrey Murphy explained that "[n]egotiations required numerous meetings and took place over several months, resulting in numerous concessions, as evidenced by the Stipulation." (DEO Ex. 1.0, Murphy Dir. at 9.) He explained that "each of the signatory parties has a history of active participation in Commission proceedings and is represented by experienced and competent counsel." (*Id*.) "The Signatory Parties," he explained, represent diverse interests—those "of an LDC, of marketers and suppliers, and of residential customers." (*Id*. at 9–10.) And critically, "other groups and representatives of other customer classes—

including Staff, Ohio Partners for Affordable Energy ('OPAE'), and Industrial Energy Users-Ohio—had the opportunity to participate in settlement negotiations and to review drafts of the Stipulation." (*Id*. at 10.)

Specifically regarding OPAE, Mr. Murphy explained that "DEO through counsel repeatedly invited OPAE to review drafts of the Stipulation and to participate in negotiations," that he "personally contacted David Rinebolt, one of the counsel for OPAE, to follow-up on a draft Stipulation distributed on January 17, 2012, nearly five months before the final version was filed with the Commission," that "[t]here was never an intent to exclude any party from participating in negotiations," and that "OPAE had ample opportunity to participate." (Murphy Dir. at 10.) OPAE has presented nothing but empty assertions to the contrary.

3. The AEP Ohio electric-security-plan case is irrelevant here.

OPAE next tries to parallel this case with a failed stipulation resolving one of AEP-Ohio's electric security plans. (OPAE Rehg. Appl. at 38–40.) That case has no relevance to this one.

The problem in the AEP case was not that small commercial customers had not joined the stipulation—it was that no one represented the interests of small commercial customers in the initial hearing, period. Here, in contrast, non-residential customers voices have been heard. For example, the Council of Smaller Enterprises, "a support organization for small businesses located in Northeast Ohio," filed a letter in "support [of] the Joint Motion" on "behalf of its 14,000 members." (*See* Letter in Support of the Joint Motion to Modify (Nov. 13, 2012).) And other groups representing non-residential customers, such as Industrial Energy Users-Ohio, had notice of these proceedings. Moreover, OPAE itself has worn the mantle of non-residential customers in this case, has actively litigated the case, and has certainly made its views known. Even OPAE acknowledges that this fact distinguishes the two cases. (*See id*. at 40 ("The

parallels between this case and the AEP case are clear, except that OPAE[] represent[ed] non-residential customers").

Given OPAE's participation from start to finish, if there were any meritorious objection to the joint motion, it surely would have been heard by now.

4. The Commission cannot share OPAE's inflexible opposition to an exit.

Finally, OPAE derides the goal of using the proposed incremental step to study and reflect upon the impact of full exit: "this appeal of studies . . . is all nonsense," given that OPAE believes "[t]here is no value in sacrificing non-residential customers for the purpose of conducting a study on how non-residential customers will be harmed by the elimination of SCO service." (*Id*. at 40.)

This simply reflects OPAE's inflexible opposition in principle to any exit, regardless of Ohio's laws or policies. As DEO explained before, whatever else may be said for OPAE's position, it cannot be taken by the Commission. OPAE's policy position directly contradicts the state of Ohio's. The General Assembly has instructed the Commission to "[p]romote" and "[r]ecognize the continued emergence of" competitive markets, and it has left no doubt that this may include a complete exit of the merchant function. *See* R.C. 4929.02(A)(6)–(8); R.C. 4929.04(A) (exemption may include "the obligation under section 4905.22 of the Revised Code to provide . . . commodity sales service"). And the legislature has made explicit that the Commission must follow this policy. R.C. 4929.02(B). While the Commission must consider whether the appropriate showings have been made in this case, it cannot (like OPAE) refuse an exit simply because it *is* one.

The fifth assignment of error, like the rest, lacks any merit.

III. CONCLUSION

For the foregoing reasons, the Commission should reject OPAE's application for rehearing in its entirety.

Dated: February 4, 2013

Respectfully submitted,

/s/ Mark A. Whitt

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CERTIFICATE OF SERVICE

I hereby certify that a copy of DEO's Memorandum Contra OPAE's Application for Rehearing was served by electronic mail this 4th day of February, 2013 to the following:

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Summary: Memorandum Contra the Application for Rehearing of Ohio Partners for Affordable Energy electronically filed by Mr. Andrew J Campbell on behalf of The East Ohio Gas Company d/b/a Dominion East Ohio