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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review of its Rules for Competitive Retail Natural Gas Service Contained in Chapters 4901:1-27 through 4901:1-34 of the Ohio Administrative Code.	:	Case No. 12-925-GA-ORD

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REPLY COMMENTS OF DOMINION RETAIL, INC.

By its entry of November, 7 2012, the Commission, pursuant to Section 119.032, Revised Code, and the Common Sense Initiative ("CSI") established by Executive Order 2011-01K, initiated a review of its rules governing competitive retail natural gas service ("CRNGS") as set out in Chapters 4901:1-27 through 4901:1-34, Ohio Administrative Code ("OAC"), and published, for comment by stakeholders, various amendments to those rules proposed by the Commission's staff ("Staff"). In addition, Attachment A to the entry posed certain questions relating to the provision of CRNGS in this state for the parties to address in their comments on the proposed amendments. Dominion Retail, Inc. ("Dominion Retail"), a Commission-certified CRNGS supplier, filed initial comments on January 7, 2013. In accordance with the Commission's November 7, 2012 entry, Dominion Retail hereby submits its reply comments.

Dominion Retail has reviewed all the comments filed by the stakeholders and believes that many of the suggestions contained therein have merit. In these reply comments, Dominion Retail will identify those stakeholder proposals that it endorses, as well as addressing those proposals with which it takes issue. We begin with some brief observations relating to certain stakeholder responses to the Attachment A questions.

ATTACHMENT A

1. *The Commission noted in In the Matter of the Complaint of Buckeye Energy Brokers, Inc., v. Palmer Energy Company, Case No. 10-693-GE-CSS (10-693), that there may be ambiguity in Chapter 4901:1-29, O.A.C. relative to distinguishing the activities of consultants and brokers. Specifically, in 10-693, the Commission stated our belief that it would be appropriate to further explore this issue in this case. One of the issues we identified to be incorporated within this examination is the manner in which entities are compensated for their services and whether they receive compensation notwithstanding the fact that an aggregator program may not actually commence or is short-lived. Another possible issue for consideration could be an analysis of what are the obligations of the consultant, to the extent that a supplier fails to provide the commodity required for the aggregation program. Are competitive retail natural gas service providers who conduct sales through agents that are compensated primarily or exclusively on a commission basis, incentivizing these agents to take unfair advantage of potential customers through deceptive sales practices? Would sales agents be less incentivized if they were employees of the seller and/or provided with some level of base salary?*

Dominion Retail agrees with the Ohio Gas Marketers Group and the Retail Energy Supply Association (OGMG/RESA) that the *Buckeye Energy Brokers* decision referred to in the question provides adequate and appropriate guidance for distinguishing between consultants and brokers and that no rule change is required in this regard.[1] Further, as discussed in Dominion Retail's initial comments, the Commission has no statutory authority to regulate consultants or to dictate the terms of arms-length business/compensation arrangements between governmental aggregators and consultants or brokers, nor does the Commission have authority to preclude suppliers from utilizing non-employee sales agents to market their services or to restrict the manner in which suppliers compensate either their employees or outside sales agents. Moreover, although the Commission does have the authority to address deceptive sales practices by agents or employees of a CRNGS provider, this authority derives from the Commission's jurisdiction over the CRNGS provider itself, which is the entity ultimately responsible for compliance with Rule 4901:1-29-05(C), OAC. As OGMG/RESA correctly point out, if a competitive supplier

[1] *See* OGMG/RESA Comments, 2.

fails to meet these standards, the Commission can suspend or revoke its certificate,[2] which provides a powerful incentive for competitive suppliers to ride herd on the activities of their agents and employees without the need for the Commission to overstep its statutory authority by attempting to regulate the method by which providers compensate these individuals.

In their respective comments, East Ohio Gas Company d/b/a Dominion East Ohio and Vectren Energy Delivery of Ohio ("DEO/VEDO") and the Office of the Ohio Consumers' Counsel ("OCC") opine that commission-based compensation of agents and employees may well incent sales personnel to engage in deceptive practices.[3] However, at least as we read the comments, these parties stop short of suggesting that the Commission has the authority to regulate the manner in which CRNGS providers compensate their agents and employees, which, as OGMG/RESA explain, is a matter that must be left to the business judgment of the provider.[4] Indeed, OCC emphasizes that CRNGS providers must be held accountable for the actions of the individuals that market their products regardless whether they are agents or employees,[5] which is entirely consistent with Dominion Retail's position on this issue. The Commission's role is to police provider marketing practices, not to make business decisions for suppliers.

2. *Rule 4901:1-28-04(A), O.A.C, provides opt-out disclosure requirements for governmental aggregators which require written notice to potential customers that include, among other things, a summary of the actions that the governmental entity took to authorize the aggregation. Should aggregation incentives, such as financial contributions to the community, be disclosed in these opt-out notices or is media coverage of aggregation incentives adequate?*

Dominion Retail, OGMG/RESA, and Northeast Ohio Public Energy Council ("NOPEC") agree that no legitimate purpose would be served by requiring governmental aggregators to

[2] *See* OGMG/RESA Comments, 3-4.
[3] *See* OCC Comments, 3.
[4] *See* OGMG/RESA Comments, 3.
[5] *See* OCC Comments, 4.

disclose any inducements the community has received for selecting a particular CRNGS provider to supply the aggregation.[6] However, OCC and Columbia Gas of Ohio, Inc. ("COH") take the position that the interests of transparency support such a requirement, with OCC going on to argue that a "critical component of Ohio law is the requirement that an aggregator prominently disclose rates, charges, and other terms and conditions related to the enrollment of customers."[7] Dominion Retail agrees that all inducements to the customer should be memorialized in the contract offer, but the point is that the inducement in question here is not an inducement to the customer, but an inducement offered to the governmental aggregator to select a particular provider to supply the aggregation. As Dominion Retail noted in its initial comments, when the opt-out notices go out, the supplier has already been selected and the pricing arrangement has been established. So, yes, the opt-out notice should provide the customer with all information necessary to make an informed decision as to whether to participate in the aggregation, remain on the utility's default service, or contract with a competitive supplier, but including information regarding any inducements offered by the supplier to the governmental aggregator would not assist customers in deciding whether to opt-out of an aggregation program.

As OGMG/RESA point out in their comments, opt-out notices are already lengthy, and adding this information would make them even more cumbersome, thereby increasing the potential for customer confusion and/or decreasing the chances that customers will actually read them in their entirety.[8] Dominion Retail agrees with NOPEC that incentives offered to governmental aggregators are typically well-documented in the media. Moreover, there is nothing that prevents the governmental aggregator from including this information in the opt-out notice if it so desires. Thus, this is a matter best left to the discretion of the aggregator.

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[6] *See* Dominion Retail Comments, 3-4; OGMG/RESA Comments, 4-5; NOPEC Comments, 7.
[7] *See* OCC Comments, 5; COH Comments, 2.
[8] *See* OGMG/RESA Comments, 4-5.

3. *It is the policy of the state, under Section 4929.02, Revised Code, to promote diversity of natural gas supplies and suppliers by giving consumers effective choices over the selection of those supplies and suppliers. Should the Commission's rules regulate the availability of certain lengths and types of contracts for certain customer classes. Should the Commission's rules require a supplier to disclose all inducements to contract?*

Taking these questions in reverse order, Dominion Retail notes that a review of the comments reveals that there is no stakeholder opposition to a requirement that all inducements offered to customers to contract with a supplier be disclosed in the offer and memorialized in the contract.[9] However, there is a difference of opinion between the commenting marketer stakeholders and OCC as to whether the Commission's rules should regulate the lengths and types of contracts available for certain customer classes.

Dominion Retail, OGMG/RESA, and Hess Corporation ("Hess") agree that it would be contrary to the state policy set forth in Section 4929.02, Revised Code, for the Commission to regulate the terms and conditions of provider offers, other than to assure that those terms and conditions are fully disclosed to customers.[10] A rule limiting the term of a contract would not only be inimical to customer choice, but would inhibit CRNGS providers from offering new and innovative services and could discourage market entry. The market should dictate the terms of contact offers. If a potential customer does not like the duration of the contract proposed in an offer, the customer will look elsewhere. Further, Dominion Retail shares OGMG/RESA's view that the Commission does not have the statutory authority to regulate the length of contracts for competitive retail gas supply service.[11] However, as discussed *infra*, it is important that marketing materials fairly represent the terms of the offer so that customers are not misled by

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[9] *See, e.g.,* COH Comments, 2.

[10] *See* Dominion Retail Comments, 4; OGMG/RESA Comments, 5-7; Hess Comments, 1-2. Hess goes on to suggest that, if there is to be limitation on the terms of contracts, such a rule should not apply to C&I customer contracts.

[11] *See* OGMG/RESA Comments, 6-7.

characterizations of offers as long-term "fixed price" contracts, when, in fact, the price will change over the term of the contract.

In urging the Commission to intrude into this area, OCC focuses on what it characterizes as "evergreen" contracts, which OCC defines as contracts that renew automatically if the customer fails to act. At the outset, Dominion Retail disagrees that contracts with automatic renewal provisions are aptly described as "evergreen" contracts. In normal industry parlance, an "evergreen" contract is one that continues in effect unless one party, on its own initiative, affirmatively notifies the other that it wishes to cancel the agreement. However, except in certain narrow circumstances, the Commission rules require CRNGS providers with contracts that have an automatic renewal feature to provide written notice in advance of the end of the current term – and two separate notices in certain situations – so that the customer is fully apprised of the conditions of the renewal and the action to be taken if the customer does not wish the agreement to renew for an additional term.[12] Leaving aside this definitional issue, Dominion Retail believes that OCC has not fully considered the ramifications of its recommendation.

If CRNGS providers are prohibited from including renewal provisions in their contracts, a contract will terminate at the expiration of the stated term. What happens to the customer if this occurs? Unless the customer enters into a new contract with its current supplier, the customer will automatically be returned to the utility's default service, where it will remain parked for a specified period before it can enroll with a new supplier. Then, once the customer chooses a new supplier, there will be an additional period before the customer actually begins to receive service at the new supplier's rate, all of which means that the customer may well be subject to a higher price for commodity service for an extended period than if the customer's contract had been permitted to renew.

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[12] *See* Rule 4901:1-29-10(E), OAC.

OCC states that "these contracts may be effective for CRNGS providers," but that "the potential harm for customers can be significant."[13] Contracts with automatic renewal features are, indeed, effective for CRNGS providers because they reduce customer acquisition costs, thereby allowing CRNGS suppliers to offer prices below what they would be if the supplier had to remarket a current customer by starting over with a new contract offer and incurring the costs associated with that effort. Moreover, all the trappings in the current rules that apply to contract renewals adequately protect customers from the "significant harm" to which OCC alludes. OCC suggests that customers may remain in contracts long after their initial decision to enter into an agreement with the supplier unaware of how their rate compares to the current utility default rate. Is it possible that a customer may stay with his/her current supplier simply because of inertia? Of course, just as many customers undoubtedly remain on the utility default service for this same reason. Paradoxically, OCC has argued elsewhere that remaining on utility default service is, in fact, an affirmative customer choice, but appears to suggest here that remaining with the selected competitive supplier after the expiration of the current contract term is not.

The key to the success of a competitive market is for customers to be engaged, and the fact that a customer has shopped indicates that such customer has, in fact, engaged. Automatic renewal provisions are commonplace in all sorts of contracts, not just CRNGS supply contracts. The Commission's role is to assure that there is full disclosure, not to presume, as OCC does, that customers do not know what they are doing. Accordingly, OCC's proposal that the Commission adopt a rule that prohibits automatic renewal provisions should be rejected.

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[13] *See* OCC Comments, 6.

4. *Rule 4901:1-29-06(E), O.A.C, requires competitive retail natural gas service providers, governmental aggregators, or independent third-party verifiers, to make a date- and time-stamped audio recording that verifies the customer's acceptance of the offer before enrolling a customer telephonically. Should the rule also require the sales pitch segment of the call to also be recorded? Should the rules be clarified to require greater customer protections?*

As noted in its initial comments, Dominion Retail's practice is to record the entire phone call. Thus, Dominion Retail has no problem with a rule change that would extend the recording requirement to cover the sales pitch segment of the call. DEO/VEDO, COH, and OCC also answered this question in the affirmative,[14] leaving OGMG/RESA as the only responding stakeholders that oppose such a rule change. After citing the burden rearranging equipment to capture the entire conversation would impose, OGMG/RESA point out that, to the extent this question is the product of a concern regarding sales tactics, such a concern would arise only in connection with outbound solicitations and not in instances where the customer initiates the call or has an existing business relationship with the supplier.[15] OGMG/RESA argue that the goal of the telephonic enrollment verification process is to assure that there is a truly independent agreement between buyer and seller based upon mutually understood terms and conditions and suggest that concerns regarding the sales pitch could be addressed more efficiently by expanding the scripted questions.[16] Although Dominion Retail agrees that the third-party verification process is intended to provide evidence confirming that the customer completely understands the deal, recording the entire call provides irrefutable evidence of the representations made to the customer as a part of the sales pitch, which is the relevant portion of the call in a subsequent complaint alleging deceptive marketing practices. Moreover, the knowledge that the entire call is being recorded would tend to inhibit sales personnel from utilizing unscrupulous, high-

[14] *See* DEO/VEDO Comments, 12; COH Comments, 3; OCC Comments, 6-7.
[15] *See* OGMG/RESA Comments, 7-8.
[16] *Id.*

pressure tactics. Thus, Dominion Retail agrees with OCC that recording the entire phone conversation would provide assurance that competitive products and services are being marketed with the level of integrity required by Ohio law and the Commission's rules.[17]

5. *It is the policy of the state, under Section 4929.02, Revised Code, to promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods. Are there best practices from other states that should be incorporated in the rules to facilitate this promotion? Other state commissions post supplier complaint data on their web sites identifying the numbers and types of consumer complaints received by the commission's call center. If normalized, should complaint data be added to the Apples to Apples Chart?*

As discussed in detail its initial comments, Dominion Retail has serious reservations regarding the posting of supplier complaint data on the Commission's website due, among other things, to the subjective nature of the determination of whether a call constitutes a complaint as opposed to an inquiry or misunderstanding on the part of the customer.[18] OGMG/RESA make this same point in their comments.[19] On the other hand, COH, OCC, NOPEC, and Ohio Partners for Affordable Energy ("OPAE") support posting supplier complaint information, arguing that this information is useful to the customer in evaluating supplier offers.[20] OCC goes so far as to suggest that a supplier's complaint history in other states should also be posted, while OPAE believes that, a` la Angies' List, there should also be space on the Commission website where individual customers can post comments about supplier behavior and prices.

Plainly, there are widely divergent views on this subject, and, as OGMG/RESA point out, the states that currently provide this type of information do so in a variety of formats. All this suggests that this is a subject that would lend itself to a collaborative workshop process if the

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[17] *See* OCC Comments, 6-7.
[18] *See* Dominion Retail Comments, 5-7.
[19] *See* OGMG/RESA Comments, 9-10.
[20] *See* COH Comments, 3; OCC Comments, 7; NOPEC Comments, 7; OPAE Comments, 18-20.

Commission determines that it wishes to continue to explore the concept. In the absence of a standardized definition of a "complaint" and the adoption of an appropriate recording metric, the potential for prejudice to a supplier is enormous, particularly because the information will be posted on a government agency website, which, unlike thumbs-up/thumbs-down social media ratings, would give it an inherent air of credibility. This is a matter that warrants further study and the Commission should not make a precipitous decision on this subject in this proceeding.

6. *Rule 4901:1-29-05(A)(2), O.A.C, identifies the information that must be included in variable-rate offers. In addition to or in substitution for this rule requirement, should "variable rate" be a defined term and include reference to the indices that the supplier is using as the basis for price, such as the NYMEX?*

A review of the comments indicates that only Dominion Retail, DEO/VEDO, and OGMG/RESA responded to this question. Dominion Retail and DEO/VEDO agree that "variable rate" should be a defined term,[21] while OGMG/RESA maintain that this is a matter that is adequately covered by the existing rule, which already requires a clear and understandable explanation of the factors that will cause the price to vary, including any related indices and how often the price can change.[22] Dominion Retail does not dispute that the information required by the existing rule adequately informs customers of the terms and conditions of variable rate offers. That is not the problem. Rather, the problem is that, with no standardized definitions of what constitutes "fixed rate" and "variable rate" offers, there is nothing to prevent a supplier from marketing an offer as a "fixed rate" offer when, in fact, the underlying contract terms provide for rate adjustments to pass through the impact of changes in various costs incurred by the supplier (*e.g.*, changes in capacity charges and the like). Customers that rely on the "fixed rate" label and fail to read the fine print may well believe that they will never see a rate increase over the term of

[21] *See* Dominion Retail Comments, 7; DEO/VEDO Comments, 12
[22] *See* OGMG/RESA Comments, 10.

the contract, when, in fact, there are cost components that are known to be variable at the time the contract is entered into. Dominion Retail believes it is extremely misleading to tout offers that permit adjustments for these types of cost changes as being fixed rate offers, particularly when an extended contract term in involved.

As noted in Dominion Retail's initial comments, the definitional issue will take on greater significance if and when non-shopping customers are assigned to suppliers under a monthly variable rate ("MVR") program upon an LDC's exit from the merchant function. At that point, it will be important that the derivation of the supplier's then-posted variable rates – the lowest of which will become the MVR – be clearly explained so that customers can make an informed decision as to whether to stay with the assigned supplier or switch to a different marketer. Thus, Dominion Retail joins with DEO/VEDO in recommending that there also be a standardized definition of a "monthly variable rate" offer.

7. *In issuing these rules for comment, there has been an attempt to harmonize the rules governing gas and electric suppliers. Are there additional revisions necessary?*

Uniformity in the gas and electric rules eases the administrative burden for suppliers like Dominion Retail that provide both gas and electric retail service. Further, as OPAE correctly points out in its comments, because the underlying objectives of the rules are the same, there is no reason that the two sets of rules should not be substantively identical.[23] In a perfect world, the two sets of rules would be organized and numbered in the same fashion as OPAE suggests,[24] but Dominion Retail recognizes that, at this stage of the game, this would be a very tedious, time-consuming undertaking and believes that the more important concern is that the corresponding substantive requirements be harmonized.

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[23] *See* OPAE Comments, 5.
[24] *Id.*

In commenting on the specific rule changes proposed by Staff, Dominion Retail identified certain differences between the proposed CRNGS rules and the proposed CRES rules now under consideration in Case No. 12-1924-EL-ORD. Dominion Retail would also note that there are differences between the Commission's CRNGS and CRES provider certification application forms and recommends that these forms also be reviewed by Staff and revised in the interests of uniformity.

8. *Are additional rules necessary to protect customers as local distribution companies begin to exit the merchant function?*

OCC prefaces its response to this question with the observation that no merchant function exits have yet been authorized and argues that default service should remain available because, according to OCC, default service has historically been a lower cost option than CRNGS.[25] Although not organized as responses to the specific questions posed by the Commission, OPAE's comments raise this same argument.[26] These assertions have, and will continue to be, debated in exit proceedings, and go far beyond the scope of this question, the focus of which is whether additional customer protection rules will be required in connection with merchant function exits.

OGMG/RESA and DEO-VEDO agree with Dominion Retail that no additional rule changes are necessary.[27] As Dominion Retail explained, all the customer protection provisions of existing Rule 4901:1-29-05(C), OAC, will continue to apply when non-shoppers are served pursuant to an MVR program. Although customers obviously need to be fully informed regarding the import of merchant function exits, the necessary customer education efforts can

[25] *See* OCC Comments, 7-8.
[26] *See* OPAE Comments, 15-17.
[27] *See* OGMG/RESA Comments, 10; DEO-VEDO, 13.

best be addressed on a company-by-company basis in the orders approving the exit. OCC suggests that additional rules will be required to provide for notice of local public hearings, an evidentiary hearing, and the opportunity to submit briefs. However, these are matters that are routinely addressed by the Commission on a case-by-case basis. Thus, although Dominion Retail agrees that there should be notice, hearings, and the opportunity to file briefs, Dominion Retail does not believe that there is a need to codify these features in new procedural rule specifically applicable to exit proceedings.

ATTACHMENT B
PROPOSED RULE CHANGES

CHAPTER 4901:1-27 CERTIFICATION OF GOVERNMENTAL AGGREGATORS AND RETAIL NATURAL GAS SUPPLIERS

Rule 4901:1-27-02 Purpose and scope.

Staff has proposed to replace existing Rule 4901:1-27-02(B), which governs waivers of rule requirements, with the following:

> (B) The commission may, upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute.

In their initial comments, OGMG/RESA suggest that language be added that would permit the Commission to waive a requirement of this chapter on its own motion and that a "good cause" standard be incorporated in the rule.[28] Dominion Retail agrees that a "good cause" standard should be included and notes that this would align this provision with corresponding rules in other chapters.[29] Dominion Retail is less sanguine about adding language that would allow the Commission to waive a requirement on its own motion, but, if such a provision is to be

[28] *See* OGMG/RESA Comments,
[29] *See, e.g.,* Rule 4901:1-15-02(B)(3), OAC.

included, this authority must also be subject to the "good cause" standard. Accordingly, Dominion Retail recommends that proposed Rule 4901:1-27-02(B) be revised as follows:

> (B) The commission may, **upon its own motion or** upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute~~.~~**, for good cause shown.**

Rule 4901:1-27-03 General prohibitions.

DEO/VEDO suggest in their comments that the Commission consider amending Rule 4901:1-27-03(A) to prohibit affiliated companies from holding separate CRNGS certificates, except in instances where the affiliate entities serve distinct customer classes.[30] DEO/VEDO assert that such a limitation would reduce customer confusion, provide greater transparency in the marketplace, and avoid duplicative administrative costs for the host distribution utility. So long as this proposed limitation is not construed as a prohibition against a supplier utilizing different trade names in different markets, Dominion Retail believes that there is merit in this proposal. Further, such a limitation will become critical in a post-merchant function exit environment to the extent customers are assigned to suppliers on a rotational basis under an MVR program. A supplier should not be permitted to game the MVR program by creating multiple paper business entities and securing certificates for each, thereby increasing the number of customers it would be assigned under a rotational allocation.

Rule 4901:1-27-04 Filing of an application.

Staff has proposed that existing Rule 4901:1-27-04, which sets out the application process for securing or renewing certification, be redesignated as Rule 4901:1-27-05 and that a new Rule 4901:1-27-04 be inserted, which would provide as follows:

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[30] *See* DEO-VEDO Comments, 1.

> Beginning on the effective date of this chapter, each application for certification or certification renewal shall be assigned a new case number in sequential order as the case is received, beginning with XX-7000 by the commission's docketing division.

As discussed in detail in its initial comments, Dominion Retail opposes this new rule.[31] Under the existing practice, certificate renewal applications are typically filed in the docket in which the initial certification was approved, which facilitates researching the certification history of a particular supplier, broker, or governmental aggregator. If the proposed rule is adopted, this easily-followed trail will disappear. Duke Energy Retail Sales, LLC ("DERS") also picked up on this problem in its comments, suggesting that, if renewal applications are to be assigned new case numbers, the Commission should modify the renewal application forms to provide for the entry of previous certification docket numbers so there will be a tool available to track a supplier's certification history short of a performing a DIS name search.[32] As Dominion Retail mentioned in its comments, attempting to retrieve a supplier's certification history by a DIS name search is not only tedious, but does not always yield complete results. Moreover, as DERS' comment suggests, if the subject supplier has undergone a name change subsequent to the issuance of the original certificate, the task of tracking the certification history through a DIS search becomes even more arduous.

Although DERS' proposal is certainly better than nothing, requiring the applicant's certification history to be included in renewal applications will not provide the same level of detail that is readily available in a one-stop visit to the suppliers' CRS docket under the current practice of filing renewal applications under the case number assigned to the original certification application. As Dominion Retail noted in its comments, the current system also makes it easy to keep tabs on the status of protective orders, a capability that will become

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[31] *See* Dominion Retail Comments, 9-10.
[32] *See* DERS Comments, 3.

increasingly important if the Staff's proposal to extend protection to certain application exhibits for a period of six years is adopted.

The November 7, 2012 entry provides no explanation for the proposed rule, but if there is an internal administrative reason for assigning a new case number to each renewal application, the Commission should weigh the administrative benefit against the inconvenience this rule would cause before approving this new practice. If the Commission does adopt the rule proposed by Staff, the Commission, in addition to implementing DERS' recommendation, should consider the possibility of creating a separate CRS docket for each supplier, broker, and governmental aggregator along the lines of the TRF dockets that are maintained for rate-regulated utilities so all the information relating to a supplier's certification history will still be available in one place.

For those reasons stated above, Dominion Retail urges the Commission to reject proposed Rule 4901:1-27-04. However, if the proposed rule is to be adopted, it should be revised as follows:

> Beginning on the effective date of this ~~**chapter**~~ **rule**, each application for certification or certification renewal shall be assigned a new case number **by the commission's docketing division** in sequential order as the case is received, beginning with XX-7000. ~~**by the commission's docketing division.**~~

Rule 4901:1-27-05 Application content.

As noted above, Staff has renumbered the existing rule governing certification applications and renewals as Rule 4901:1-27-05 to accommodate the insertion of the proposed case number assignment rule discussed above. Before addressing the stakeholder comments regarding this rule, Dominion Retail would again point out that there is an inherent flaw in the structure of this rule.

Proposed Rule 4901:1-27-05(A) continues to require that applications be made on forms authorized by the Commission and generally describes the information that the forms are intended to elicit, while proposed Rule 4901:1-27-05(B) continues to require that the applicant complete the appropriate application form in its entirety and supply all required attachments, affidavits, and evidence of capability specified in the form. However, subparagraphs (B)(1), (B)(2), and (B)(3), which apply, respectively, to marketers, aggregators/brokers, and governmental aggregators, after repeating the requirement that the applicant "shall file general, technical, managerial, and financial information as set forth in the application" (emphasis added), then provide that "(t)his information" – *i.e.*, the information specified in the application form – "includes, but is not limited to" the information identified in the various subparagraphs of the rule. In fact, the application forms require substantially more information than the items specifically identified in these subparagraphs, which present what is, at best, an incomplete, shorthand list describing some of the information required by the instructions in the application forms. Further, the application forms are not organized in the same manner as the subparagraphs of the rule and, in numerous instances, use language that is far different from the language in the rule describing the information to be provided.

For example, subparagraphs (B)(1)(c) and (B)(2)(c) refer to the application including "balance sheets, credit ratings and other relevant financial information," but Section C of the application forms, headed "Applicant Financial Capability and Experience," requires nine separate exhibits (Exhibits C-1 through C-9), which are to include, respectively, annual reports, SEC filings, financial statements, financial arrangements, forecasted financial statements, credit rating, credit reports, bankruptcy information and merger information. Further, while these subparagraphs of the rule mention only "balance sheets," the instructions for Exhibit C-3, the

"Financial Statements" portion of the applications, require the applicant to submit, as financial statements, balance sheets, income statements, and cash flow statements for the most recent two-years. Further, under the revised version of the rule proposed by Staff, new subparagraphs B(1)(c)(i-iii) and(B)(2)(c)(i-iii) specifically require applications to include "Financial Exhibit 1," "Financial Exhibit 2," and "Financial Exhibit 3," which are terms that do not appear anywhere in the application forms.

Under these circumstances, subparagraphs (B)(1), (B)(2), and (B)(3) of Rule 4901:1-27-05 not only serve no purpose, but also create the potential for confusion because the terms are not the same as those used in the application forms. Rules are intended to prescribe or proscribe certain conduct by those subject to them. However, in this instance, these subparagraphs do not provide notice to applicants of what is actually required. Indeed, in view of the way the rule is structured, the only purpose of these subparagraphs appears to be to tell the Commission itself what it can require applicants to provide. Plainly, the rule is meaningless from the standpoint of the applicant for a certificate because, pursuant to Rule 4901:1-27-05(B), the applicant must provide all the information identified in the application form in any event. The instructions in application forms are – as they should be – detailed and straightforward and stand by themselves. Surely, no one would suggest that an applicant should have to go to a rule to interpret the instructions on an application form.

Rule 4901:1-27-05(A) already provides notice to applicants of the type and general purpose of the information that the application forms are intended to elicit and, thus, there is no need for subparagraphs (B)(1), (B)(2), and (B)(3). Accordingly, Dominion Retail recommends that subparagraphs (B)(1), (B)(2), and (B)(3) of Rule 4901:1-27-05 be eliminated in their entirety and that, to the extent the Commission wishes to require applicants to submit information beyond

that identified in the current versions of the application forms, it do so by revising the instructions contained in the forms effective as of the date of the order in this case.

Rule 4901: 1-27-05(A)

OGMG/RESA propose three changes to this rule.[33] Dominion Retail agrees that the reference to "forms authorized by the commission" should be changed to "forms provided by the commission" to make the reference consistent with a similar reference in proposed Rule 4901:1-27-09(A)[34] and that "adopted pursuant to Chapter 4929. of the Revised Code" should be added to the end of the sentence to align this provision with corresponding proposed CRES rule. Dominion Retail also agrees with OGMG/RESA that the reference to "regulated sales service" should be eliminated from the description of the purpose of the financial assurances because the financial assurances are intended to protect all customers, not just non-shoppers. In this connection, Dominion Retail would also note that, technically, the financial assurances do not protect customers and the host utility "from default" and that the more apt language would be "from the consequences of default." Thus, proposed Rule 4901:1-27-05(A) should be revised as follows:

> (A) An application for certification or certification renewal shall be made on forms **provided** ~~**authorized**~~ by the commission. The application forms shall provide for sufficient information to enable the commission to assess an applicant's managerial, financial, and technical capability to provide the service it intends to offer, its ability to provide reasonable financial assurances sufficient to protect ~~**regulated sales service**~~ customers and natural gas companies from **the consequences of** default, and its ability to comply with commission rules or orders **adopted pursuant to Chapter 4929. of the Revised Code**.

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[33] *See* OGMG/RESA Comments, 11.

[34] In so stating, Dominion Retail notes that the corresponding CRES rule, Rule 4901:1-24-04(A), refers to "forms supplied by the commission." Dominion Retail is indifferent to which term – "provided" or "supplied" – is used, but the same term should be used in both sets of rules.

Rule 4901: 1-27-05(B)(1)(f)

Staff has proposed including an additional requirement in the rule governing applications that the application disclose "if there is pending legal action against the applicant or past rulings finding against the applicant." Thus, proposed Rule 4901:1-27-05(B)(1)(f) provides as follows:

> (f) Statements as to whether the applicant has ever been terminated from any choice program; if applicant's certification has ever been revoked or suspended; if applicant has ever been in default for failure to deliver; or if there is pending legal action against the applicant or past rulings finding against the applicant.

Dominion Retail agrees that this information should be provided in certification and renewal applications, but, for those reasons set forth above, believes that this requirement, along with the other requirements set forth in subparagraphs (B)(1), (B)(2), and (B)(3), should be set forth as an instruction in the application form rather included in the rule itself. Indeed, the instructions for application Exhibit B-4 already require even more information than that described in proposed subparagraph (B)(1)(f) of the rule:

> **Exhibit B-4 "Disclosure of Liabilities and Investigations,"** provide a description of all existing, pending, or past rulings, judgments, contingent liabilities, revocations of authority, regulatory investigations, or any other matter that could adversely affect applicant's financial or operational ability to provide the services it is seeking to be certified to provide.

Dominion Retail would again emphasize that, pursuant to Rule 4901:1-27-05(B), applicants are required to provide the information identified in the application form, irrespective of the language used in the subparagraphs (B)(1), (B)(2), and (B)(3) to couch, in shorthand form, some of the information to be submitted in the application. Thus, although Dominion Retail agrees with RESA's criticism that the additional language proposed by Staff is overly broad,[35] refining the language of the rule itself will not change the information that the applicant must

[35] *See* OGMG/RESA Comments, 11-12. As OGMG/RESA point out, the new Staff language would cover all sorts of things that have nothing to do with the provision of CRNGS.

provide because, under the structure of the rule, the requirements of the application form control. The same can be said for OCC's assertion that the proposed language is not broad enough.[36] Under the structure of the rule, the language of subparagraph (B)(1)(f) is irrelevant. The instructions for completing application Exhibit B-4 do not limit the information required to Ohio information, which appears to be one of OCC's primary concerns. And, although Dominion Retail disagrees with OCC that mere allegations raised in other jurisdictions should be reported in applications, adding an new subparagraph to the rule will have no effect on the current requirements because the requirements are dictated by the application form, not the rule.

The fix for all this is to eliminate all the subparagraphs of Rule 4901:1-27-05(B) and to revise the instructions for completing Exhibit B-4 of the application to read as follows:

> **Exhibit B-4 "Disclosure of Liabilities and Investigations,"** provide a description of all existing, pending, or past rulings, judgments, contingent liabilities, revocations **or suspensions** of authority **(including any terminations from choice programs),** regulatory investigations, or any other matter that could adversely affect **or call into question** applicant's **managerial,** financial, or **technical ~~operational~~** ability to provide the services it is seeking to be certified to provide **in accordance with the requirements of Chapter 4929 of the Revised Code and Chapters 4901:1-27 through 4901:1-34 of the Administrative Code.**

If the Commission rejects Dominion Retail's proposal to eliminate the subparagraphs of Rule 4901:1-1-27-05(B) in their entirety, the Commission should, at minimum, remove proposed subparagraphs (B)1(f)(i-iii) because, as previously noted, the numbered "Financial Exhibits" referred to therein are undefined and do not appear in the application forms. Dominion Retail also notes that, if the subparagraphs of proposed Rule 4901:1-1-27-05(B) are retained, there will be an overlap between existing subparagraph (B)(1)(b), which refers to "prior regulatory or judicial actions," and the additional subparagraph (B)(1)(f) language proposed by Staff, which refers to "pending legal action against the applicant or past rulings finding against the applicant."

[36] *See* OCC Comments, 9-11.

To eliminate this duplication, the subparagraph (B)(1)(b) reference to regulatory or judicial actions should be removed. If the Commission does not eliminate the subparagraphs, it should consider replacing the reference subparagraph (B)(1)(b) to regulatory and judicial actions with a requirement that the applicant identify all jurisdictions in which it is authorized to provide competitive retail services, which is precisely what the application form itself actually requires in the instructions in the "Managerial Capability and Experience" section.

Rule 4901: 1-27-05(B)(2)

DEO-VEDO point out in their comments that this subparagraph, which applies to applications by retail natural aggregators and retail natural gas brokers, does not contain a provision parallel to the Rule 4901:1-27-05(B)(1)(f) requirement relating to the disclosure of terminations, revocations, suspensions, and legal or regulatory actions.[37] Dominion Retail agrees that this requirement should also apply to aggregator and broker applications, but notes that, as a practical matter, the fact there is currently no such provision in Rule 4901:1-27-05(B)(2) makes no difference because the instructions for Exhibit B-4 are identical in the marketer and the aggregator/broker application forms (*i.e.*, an applicant for certification as an aggregator or broker certification must supply this information even though the requirement is not mentioned in the rule.) This is yet another example of why the subparagraphs of Rule 4901:1-27-05(B) are both meaningless and confusing. Obviously, DEO-VEDO's concern goes away if the Commission adopts Dominion Retail's proposal that these subparagraphs be eliminated. However, if the Commission does not do so, Dominion Retail would agree that a parallel provision should be inserted as an additional subparagraph of Rule 4901:1-27-05(B), and would also agree with

[37] *See* DEO-VEDO Comments,

DEO-VEDO that the order of the subparagraphs in Rule 4901:1-27-05(B)(1) and (B)(2) should be the same.

Rule 4901:1-27-06 Affidavits.

Existing Rule 4901:1-27-06 sets out the process applicable to the approval or denial of applications. Staff has proposed to move this subject to proposed Rule 4901:1-27-10, and to insert in its place the current rule specifying the contents of affidavits to be submitted with certification applications. Because the affidavits must be submitted on forms prescribed by the Commission, which presumably will include all the statements that must be attested to by the affiant, Dominion Retail questions the need for this rule. However, in this instance, the forms are actually consistent with the rule, so Dominion Retail does not oppose its adoption, subject to the modification discussed below.

Rule 4901:1-27-06(D)

Dominion Retail agrees with OGMG/RESA that the reference to "Title XLIV of the Revised Code" in this paragraph should be replaced with a reference to "Title 49 of the Revised Code."

Rule 4901:1-27-08 Protective orders.

Rule 4901:1-27-08(A)

As indicated in its initial comments, Dominion Retail supports Staff's proposal to allow financial exhibits to certification and renewal applications to be filed under seal without the need for an accompanying motion for a protective order. Dominion Retail also endorses Staff's proposal to extend the protection for six years from the date the certificate or renewal certificate is issued, which eliminates the need to file multiple motions for protection of the same

confidential financial information as the previous protective orders expire under the otherwise applicable timetable. However, there are three problems with the Staff's version of the proposed rule.

First, as previously discussed, the designations "Financial Exhibit 1," "Financial Exhibit 2," and "Financial Exhibit 3" that appear in proposed Rule 4901:1-27-08(A) are not consistent with designations used on the application forms for the exhibits that contain historical and projected financial information. Thus, either the rule should refer to the exhibit designations specified in the application forms – which is how this is handled in the proposed CRES rules now under consideration – or there should be a generic description of the exhibits containing confidential financial information. DERS makes a similar point in its comments, and proposes that the application exhibit designations be used in the rule.[38]

Second, the Staff's proposed language appears to contemplate that there would be three financial exhibits that would be automatically accorded protection, whereas, in practice, most applicants typically seek protection for only two exhibits: Exhibit C-3, which contains copies of the applicant's financial statements for the two most recent years, and Exhibit C-5, which contains projected financial statements for the next two years. Based on the fact that, in the corresponding proposed CRES rule, proposed Rule 4901:1-24-08(A), Staff has included Exhibit C-4 as a third exhibit that would be entitled to automatic protection, Dominion Retail assumes that this is other "Financial Exhibit" the Staff had in mind in its version of proposed Rule 4901:1-27-08(A). However, although Exhibit C-3 and Exhibit C-5 are routinely accorded confidential treatment for obvious reasons, it is not clear to Dominion Retail why Exhibit C-4 should automatically be afforded protection. Under the instructions in the application form, Exhibit C-4, which is titled "Financial Arrangements," is to include copies of the applicant's

[38] *See* DERS Comments, 4.

financial arrangements to conduct CRES as a business activity, such as guarantees, bank commitments, contractual arrangements, credit agreements, and the like. It is doubtful that all this information would qualify for confidential treatment under the Rule 4901-1-24(D), OAC, criteria for protective orders. Accordingly, Dominion Retail believes that there should be no statement or implication in the rule that Exhibit C-4 is among the financial exhibits that will automatically be accorded confidential status. Of course, if an applicant believes it can make the case for confidential treatment of all or some of these financial arrangements, the applicant would still be free to apply for a protective order pursuant to proposed Rule 4901:1-27-08(B).

Finally, although Dominion Retail assumes that the proposed rule is intended to apply to financial exhibits filed in connection with both initial certification applications and renewal certification applications, because this rule appears before the rule relating to renewal applications and refers only to the issuance of a "certificate," there could be some confusion in this regard. Thus, Dominion Retail suggests that the rule be revised to clarify that it applies to both initial and renewal certification applications.

Consistent with the foregoing discussion, Dominion Retail recommends that proposed Rule 4901:1-27-08(A) be revised as follows:

> (A) An applicant may file **copies of required historical financial statements (Exhibit C-3) and required projected financial statements (Exhibit C-5)** ~~**(Financial Exhibit 1, Financial Exhibit 2, and Financial Exhibit 3)**~~ under seal. If these exhibits are filed under seal, they will be afforded protective treatment for a period of six years from the date of the certificate **or renewal certificate** for which the information is being provided.

Rule 4901:1-27-09 Certification renewal.

OGMG/RESA suggest that the Commission should consider doing away with the current certificate renewal process and, instead, make supplier certificates "evergreen," by providing

that they will not expire so long as the CRNGS provider periodically updates the supporting information.[39] More specifically, OGMG/RESA propose that, instead of requiring a CRNGS provider to file a certification renewal application every two years, the provider would submit an update each year to reflect material changes, and would file an update reflecting all other changes every two years. Although Dominion Retail supports measures that ease the administrative burden on providers of competitive retail service, Dominion Retail is not persuaded that OGMG/RESA proposal would have that effect.

First, under Rule 4901:1-27-10 (renumbered as Rule 4901:1-27-11 in the proposed rules), certificate holders are required to file notices of material changes in their business in their current certification docket within thirty days of the change. Material changes must also subsequently be reported in certification renewal applications, which, under the current and proposed rules, are to be filed every two years. Because the notice of a material change would already be in the docket, there does not appear to be any advantage associated with OGMG/RESA's proposal to make annual filings to memorialize previously reported intervening material changes while making biennial filings to update other information included in the initial certification application.

Second, it is not entirely clear what OGMG/RESA mean by "an update of all other (non-material) changes,"[40] but Dominion Retail assumes that what is contemplated is that certificate holder would replace any application exhibit for which the information has changed with a new exhibit containing the updated information. This would certainly include a number of the Section C exhibits, such as the annual reports and the historical and projected financial statements, but could also include minor changes in the information entered into the electronic

[39] *See* OGMG/RESA Comments, 12.
[40] *Id.*

application form itself. Reporting these changes separately, either by completing only the relevant section of the application form or by submitting a separate, stand-alone document, w0uld mean that Staff – or anyone else that wished to review the certificate holder's current information – would have to shuffle through multiple documents to get all the information that is now readily available in the certification renewal application. Thus, Dominion Retail does not believe that the OGMG/RESA proposal would appreciably reduce the burden on certificate holders, and it could well increase the burden on Staff and other interested parties.

Dominion Retail is also mindful of the concerns expressed by OPAE in its comments regarding the automatic certification renewal process.[41] Although Dominion Retail disagrees with OPAE's criticism – OPAE makes it sound as though Staff tosses certificate renewal applications in a drawer and simply spits out the renewal certificate thirty-one days later – by the same token, having a complete renewal certification application before it certainly facilitates Staff's review to determine if the application should be suspended rather than proceeding on the automatic approval track. Accordingly, Dominion Retail opposes the process proposed by OGMG/RESA.

Rule 4901:1-27-09(A)

Dominion Retail supports the additions to the rule governing certification renewals proposed by Staff and applauds Staff's proposal to change the window for filing certification renewal applications in Rule 4901:1-27-09(A) from 30 to 120 days prior to the expiration of the current certificate to 30 to 60 days, a measure Dominion Retail has advocated in previous rulemaking proceedings.

[41] *See* OPAE Comments, 30-31.

Rule 4901:1-27-10 Application approval or denial.

Apart from renumbering the rule (currently Rule 4901:1-27-06) and a minor change to the first paragraph to clarify that it applies to both initial and renewal certification, Staff has not proposed any changes to this rule. However, OGMG/RESA have suggested several revisions.

Rule 4901: 1-27-10(A)(1)

Dominion Retail agrees with OGMG/RESA that the reference in this provision to the Commission's authority to suspend its "consideration" of an application should be replaced, but questions OGMG/RESA's suggestion that the better reference would be to the suspension of the "automatic approval" of an application[42] because that term implies that the automatic approval process could resume at some point, which is not what happens under the rule. Thus, Dominion Retail would suggest that the reference be to the suspension of the "application," which is a well-understood concept in the industry and which is consistent with the terminology used is subparagraph (A)(2) of the rule. Alternatively, the reference could be to the suspension of the "approval," which is the term used in the underlying statute.[43]

Dominion Retail also questions the use of "(u)pon good cause shown" as the trigger for suspending the application, as that term seems to imply that a third-party would have to seek the suspension, whereas the intent is to authorize the Commission or the attorney examiner to suspend the application if it/he/she finds that the application may be defective in either form or substance. In this same vein, "(u)pon good cause shown" also implies that the decision-maker, be it the Commission or an attorney examiner, would have a burden to demonstrate that good cause existed for the suspension, which is obviously not the case. In Dominion Retail's view,

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[42] *See* OGMG/RESA Comments, 12-13.
[43] *See* Section 4929.20(A), Revised Code.

"for good cause" represents a better trigger for suspending an application. Accordingly, Dominion Retail proposes that Rule 4901:1-27-10(A)(1) be revised as follows:

(1) ~~Upon good cause shown, the~~ **The** commission, or an attorney examiner appointed by the commission, may suspend ~~its consideration of~~ an application **for good cause**.

Rule 4901:1-27-10(A)(2)

OGMG/RESA have also proposed certain changes to subparagraph (A)(2), the which sets out the process to be followed if an application is suspended.[44] Dominion Retail agrees with OGMG/RESA's proposed changes in concept, but believes that some additional revisions would improve this provision. Accordingly, Dominion Retail proposes that Rule 4901-27-10(A)(2) be amended as follows:

(2) If the commission~~,~~ or **the** ~~an~~ attorney examiner ~~appointed by the commission, act acts~~ to suspend an application~~, it will~~:

(a) **The commission or the attorney examiner shall docket** ~~Docket~~ **the** ~~its~~ decision **setting forth** ~~and notify the applicant of~~ the **reason(s)** ~~reasons~~ for such suspension. **The decision** ~~and~~ may direct the applicant to furnish any additional information ~~as~~ the commission **or the attorney examiner deem** ~~deems~~ necessary to evaluate the application.

(b) **The docketing division shall serve a copy of the decision upon the applicant.**

(c) **The commission or the attorney examiner** ~~At its discretion,~~ may set the matter for hearing**, either as a part of the decision suspending the application or by subsequent entry, if a hearing is deemed necessary.**

(d)~~(b)~~ **The Commission shall act** ~~Act~~ to approve or deny the application within ninety days from the date ~~that~~ the application was suspended **as required by Section 4929.20(A) of the Revised Code.**

[44] *See* OGMG/RESA Comments, 13.

Rule 4901:1-27-10(B)

Rule 4901:1-27-10(B) sets out the information the Commission is to consider in evaluating certification applications:

> (B) In evaluating an application, the commission will consider the information contained in the application, supporting evidence and attachments, evidence filed by any interested parties, and recommendations of its staff.

OGMG/RESA have proposed two changes to this provision that would serve to limit participation by third parties and qualify the type of evidence the Commission can consider. Dominion Retail understands where OGMG/RESA are coming from with these proposed changes, and agrees that, if application is suspended and moves into an adjudicative phase, the process should not be open to those that do not have a real and substantial interest in the matter. However, the problem with this paragraph is that it makes no distinction between applications that are proceeding on the automatic approval track and applications that have been suspended and which, therefore, must be affirmatively approved or denied by the Commission.

In the case of the former, the Commission should be free to consider anything it wishes to take into account in determining if there is cause to suspend the application. Although the Commission's focus would typically be on the application itself (including all required exhibits and attachments) and any informal input from Staff, the Commission could also take into account things such as media reports or letters/comments filed in the docket. In this context, it makes no difference what third party supplies this information, because the information is not "evidence" and the Commission is making no formal, adjudicative determination. Rather, the Commission is simply making a call as to whether there is reason to believe that the application should not proceed on the Rule 4901:1-1-27-10(A) automatic approval track, a decision that rests within the discretion of the Commission and is not subject to review

to review or challenge by either the applicant or a third party. Thus, OGMG/RESA's suggestion that the rule provide that the evidence be "credible" has no application in this context.

On the other hand, far different considerations are at work once the application has been suspended and the Commission must affirmatively decide whether to approve or deny the application. At this stage, the proceeding may become adversarial, in which case participation by third parties should be governed by the standards set forth in the Commission's intervention rule as OGMG/RESA suggest. In this context, there is no need for the "credible" evidence requirement proposed by OGMG/RESA because all the evidence presented will be governed by the rules of evidence and will be accorded whatever weight the Commission deems appropriate.

The question then becomes how to embody these concepts in the rule. Dominion Retail proposes the following revisions to Rule 4901:1-27-10(B) to accomplish this:

> (B) In evaluating **whether to suspend** an application, the commission **or the attorney examiner** will consider the information contained in the application, **including all supporting exhibits and attachments, and any other information the commission or the attorney examiner deems relevant. In determining whether to approve or deny an application, the Commission will consider the record in the proceeding, including all filings made by parties to the case and any recommendations of its staff, and, if an evidentiary hearing is held, all testimony and exhibits admitted into evidence at the hearing and the post-hearing briefs, if the presiding hearing officer permits the filing of post-hearing briefs.** ~~**upporting evidence and attachments, evidence filed by any interested parties, and recommendations of its staff.**~~

Rule 4901:1-27-10(C)(3)

Dominion Retail agrees with OGMG/RESA that the phrase "the regulated sales service" should be deleted from subparagraph (C)(3) of the rule.[45]

[45] *Id.*

Rule 4901:1-27-10(E)

Consistent with its position with respect to OGMG/RESA's proposal to do away with the current renewal certification process, Dominion Retail opposes the modifications to Rule 4901:1-1-27(E) proposed by OGMG/RESA.[46] Dominion Retail also disagrees with OPAE's suggestion that the terms of all certificates and renewal certificates must have the same fixed duration.[47] Dominion Retail can envision scenarios in which the Commission could appropriately utilize the flexibility under the rule to establish a shorter term. Thus, the language providing that certificates and renewal certificates are valid for two years "(u)nless otherwise specified by the commission" should be retained.

Rule 4901:1-27-11 Material changes in business.

Rule 4901:1-27-11(A)

COH notes in its comments that, although Rule 4901:1-27-11(A)(2) sets out the consequences of a Commission determination that a reported material change adversely affects the supplier's ability to fulfill its obligations, there is no provision that spells out the procedure to be followed in connection with reported material changes that do not have adverse effects.[48] Thus, COH suggests adding, as new subparagraph (A)(3), language stating that, if the Commission does not act upon the notice of material change within ninety days of the filing date " the certification with the material changes shall be deemed automatically approved on the ninety-first day after the official filing date." Dominion Retail would respectfully suggest that this recommendation reveals a fundamental misunderstanding of the process.

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[46] *See* OGMG/RESA Comments, 13-14.
[47] *See* OPAE Comments, 30.
[48] *See* COH Comments, 1-2.

Although a notice of material change is to be filed in the supplier's certification docket, the Commission does not "approve" the notice or the material change reported in the notice, nor does the material change somehow become part of the "certification." Thus, there is no need for the automatic approval process proposed by COH. The Commission "acts upon the notice" only if determines that the reported material change may adversely affect the supplier's ability to fulfill its obligations. Otherwise, nothing happens. And, although the material change must again be reported in the next renewal certification application pursuant to Rule 4901:1-27-09(C), those applications are subject to the approval process set out in Rule 4901:1-27-10, not the process set out in Rule 4901:1-27-11.

Rule 4901:1-27-11(B)(3)

Staff proposes to insert a new subparagraph in the renumbered rule covering material changes in certificate holders business (currently Rule 4901:1-27-10) that would provide that the "(a)ssignment of a portion of the customer base and contracts of a retail natural gas supplier or governmental aggregator to another public utility in this state" would constitute a material change. Dominion Retail agrees with OGMG/RESA that this provision does not make sense and should be eliminated.[49] In the first place, competitive suppliers and governmental aggregators are not public utilities, and there is no scenario in which a marketer would assign a contract to an LDC. However, if the actual intent was to address the assignment of contracts to another marketer, OGMG/RESA's points are well taken. Contract assignments are already reported to the Commission pursuant to Rule 4901:1-29-l0(D)(1)(a), OAC, and requiring a second filing containing the same information would be inconsistent with the CSI. Further, as Rule 4901:1-27-11(A)(2), makes clear, material changes are reported so that the Commission can determine if

[49] *See* OGMG/RESA Comments, 14.

the change will adversely affect the fitness and/or ability of the supplier or governmental aggregator to provide the services for which it is certified. The assignment of a few contracts to another supplier would not rise to this level. Finally, although the assignment of a considerable portion of a marketer of governmental aggregator's the customer base to another supplier would certainly represent a material change, the material changes identified in the subparagraphs of Rule 4901:1-27-11(B) are not an exclusive list of the changes that must be reported. Dominion Retail believes that it is highly unlikely that a certificate holder would fail to report a development of this type as a material change and subject itself to the array of sanctions the Commission could impose.

Rule 4901:1-27-11(B)(9)

As noted in its comments in Case No. 1924-EL-ORD, Dominion Retail believes that the changes defined as "material changes" in the CRES and CRNGS rules should be identical. Accordingly, Dominion Retail agrees with the revisions to this subparagraph proposed by OGMG/RESA to align this provision with the corresponding provision of the CRES rules.[50]

Rule 4901:1-27-12 Transfer and abandonment of a certificate.

Rule 4901:1-27-12(B)

Dominion Retail agrees with OGMG/RESA that phrase "operation(s) it provided" replaced with "services it provides," and joins with OGMG/RESA in urging the Commission to examine other terms used in this rule to be sure that they are aligned with the terms of the corresponding CRES rule.[51]

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[50] *Id.*

[51] *See* OGMG/RESA Comments, 14-15.

Rule 4901:1-27-12(B)(3)

Dominion Retail also endorses OGMG/RESA's proposed revisions to this subparagraph of the rule to distinguish between abandonments in which existing contract will be fulfilled or assigned and abandonments in which the customers will be returned to the utility's default service if they do not select another competitive provider.[52]

Rule 4901:1-27-13 Certification Suspension, Rescission, or Conditional Rescission

Rule 4901:1-27-13(B) and (C)

OGMG/RESA argue in their comments that the provisions of these paragraphs that prohibit a supplier whose certificate has been suspended or conditionally rescinded from engaging in advertising run afoul of constitutional limitations on a regulatory agency's authority to regulate commercial speech.[53] Thus, OGMG/RESA suggest that the advertising prohibition should extend only to advertising that is unfair, misleading, deceptive, or unconscionable and not to all advertising. Dominion Retail does not agree that this prohibition raises a commercial free speech issue.

Under the rules, a supplier whose certificate has been suspended or conditionally rescinded is not permitted to offer to serve or contract to serve potential customers. To solicit potential customers through advertising when the supplier cannot serve them would, of itself, be misleading, and the Commission has a valid interest in preventing the customer confusion that would result from a supplier advertising a service it cannot provide. Further, suppliers are already prohibited from engaging in unfair, misleading, deceptive, or unconscionable marketing practices, so a provision limiting the advertising prohibition in the manner proposed by OGMG/RESA would be a meaningless sanction.

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[52] *See* OGMG/RESA Comments, 15.
[53] *See* OGMG/RESA Comments, 16.

Rule 4901:1-27-13(E)(2) and (3)

Dominion Retail agrees with OGMG/RESA that the references to "intrastate receipts" in these subsections should be replaced with "intrastate gross receipts" to conform to the underlying statute and match the terms used in the corresponding proposed CRES rule.[54]

Rule 4901:1-27-14 Financial security.

Rule 4901:1-27-14(D)

Consistent with its previous comments on this subject, Dominion Retail agrees with OGMG/RESA that "the regulated sales service" should be deleted from this paragraph.

CHAPTER 4901:1-29 MINIMUM STANDARDS FOR COMPETITIVE RETAIL NATURAL GAS SERVICE.

Rule 4901:1-29-05 Marketing and solicitation.

Duke Energy Ohio, Inc. ("Duke") proposes that a provision be added to the rule governing marketing and solicitation that would require competitive suppliers to provide advance notice to the utility prior to commencing a mass marketing campaign so that the utility can gear up its call center to handle the large number of customer inquiries that these campaigns often generate .[55] Dominion Retail understands the problem, but, as marketer representatives explained at the workshop, the timing of such efforts and the contents of the material to be distributed represent highly competitively-sensitive information, the premature disclosure of which could adversely affect the supplier. Dominion Retail would have no problem with a requirement that copies of the marketing materials be provided to the utility contemporaneously with their publicly dissemination, but opposes any requirement that the timing of the campaign or the materials be provided to the utility in advance.

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[54] *See* OGMG/RESA Comments, 15.
[55] *See* Duke Comments, 1-2.

Rule 4901:1-29-06 Customer enrollment and consent.

As things now stand, when a customer applies to the gas utility for distribution service, the customer is automatically placed on the utility's default commodity service. In its comments, COH advocates that a new customer have the opportunity to enroll with a CRNGS provider prior to the commencement of distribution service.[56] Dominion Retail wholeheartedly endorses this pro-competition proposal, but believes that the mechanics of the process should be spelled out to assure that the opportunity is presented in a competitively-neutral manner. There may be various ways to handle this, but the best option would appear to be for the utility to provide the customer with a written notice along with the application form indicating that the customer has the option of selecting CRNGS provider to supply natural gas service and directing the customer to the Apples to Apples chart on the Commission's website. Rather than setting out the specific language in the rule, Dominion Retail would suggest the proposed form of the notice be submitted to Staff for approval.

Rule 4901:1-29-06(D)(6)(d)

In its initial comments, Dominion Retail pointed out that title of this provision – "Uniform" – has nothing to do with the subject matter, which is the requirement that door-to-door solicitors display a valid photo identification of the CRNGS supplier or governmental aggregator he or she represents. Thus, Dominion Retail suggested that the heading of this subparagraph be changed to "Photo Identification." DEO/VEDO make the same observation in their comments, and suggest that "Identification" would be a more appropriate title, or that, alternatively, the rule be stated without a heading.[57] Dominion Retail notes that the current version of the rule does include headings at this subparagraph level, so this provision should be

[56] *See* COH Comments, 2.
[57] *See* DEO/VEDO Comments, 7.

renamed either "Photo Identification" or "Identifications" to preserve this format. In this connection, Dominion Retail would point out that new Staff-proposed subparagraphs (D)(6)(e) and D(6)(f) do not have headings, which is an omission the Commission may wish to address in the final version of the rule in the interest of stylistic consistency.

Rule 4901:1-29-13 Coordination between natural gas companies and retail natural gas suppliers and governmental aggregators.

Rule 4901:1-29-13(C)

In its comments, Interstate Gas Supply, Inc. ("IGS") proposes that customer account numbers be included along with the other information contained in the eligible-customer lists natural gas companies must make available to Commission-certified CRNGS providers and governmental aggregators pursuant to this provision.[58] Dominion Retail vigorously pursued a similar proposal the last time the CRNGS rules were before the Commission for review in Case No. 06-423-GA-ORD and agrees with everything IGS has to say on this subject. Indeed, the inability to obtain customer account numbers remains one of the largest barriers competitive suppliers face in attempting to sign up customers. As IGS points out, customers typically do not know their account numbers, so, unless a customer happens to have a bill on hand at the time he or she is ready to accept a supplier offer, the enrollment process comes to a screeching halt and can only resume after the customer has secured the number from the LDC. Not only does this inconvenience the customer – often to the point that the customer loses interest – but the need to reconnect with the customer to complete the transaction adds to the supplier's costs, which, in turn, leads to higher prices than would otherwise be the case. In addition to facilitating enrollments and reducing delay, providing customer account numbers will also cure the very real problem of customer error in providing the account number, which also leads to delay and to

[58] *See* IGS Comments, 4-5.

disgruntled customers when the customers ultimately discover that they are not getting the pricing for which they thought they had signed up.

Obviously, including account numbers as part of the information provided in connection with eligible-customer lists would require the removal of account numbers from the information the utility is prohibited from disclosing without the customer's consent under Rule 4901:1-29-09(C)(1), OAC. Although the current nondisclosure requirement is apparently the product of privacy concerns, disclosure of account numbers is on a different footing than the disclosure of social security numbers, where the concern is exposure to the risk of identity theft. The more relevant question with respect to the disclosure of account numbers is whether the disclosure would lead to an increase in slamming. There is no evidence to suggest that this would be the case. As IGS reports, Pennsylvania has recognized that making account numbers available to competitive suppliers facilitates enrollment by reducing costs and errors and generally provides for better customer service. There has been no increase in slamming in that state as a result of this measure. Moreover, Virginia has also provided for the disclosure of account number to competitive suppliers for many years. Any lingering concerns the Commission may have that making account numbers available could increase slamming should be ameliorated by the multi-step enrollment verification process in Ohio, which will catch slammers red-handed and subject them to sanctions, including the possible rescission of their certification. Moreover, the fact that the rules permit disclosure of account numbers for PIPP and governmental aggregation customers should lead the Commission to revisit its prior decision with respect to this issue.

As an alternative to making account numbers available, OGMG/RESA suggest that the Commission authorize the use of some other method of identifying customers in the enrollment process, such as birthdates or driver's license numbers. Another approach would be the option

Dominion Retail advanced in Case No. 06-423-GA-ORD, which was to have the LDCs assign a unique enrollment identifier to each customer account, with such identifiers to be made available to CRNGS suppliers upon request. The Commission rejected this proposal, but the problem is still with us, and something should be done to address it.

Although admittedly beyond the scope of this rulemaking proceeding, one measure that would facilitate enrollment and reduce errors in the face of the rule prohibiting the disclosure of account numbers would be a requirement that customer bills prominently display the account number so that customer can readily identify it and distinguish it from other numbers, such as meter numbers, that also appear on the bill. However, this would only be a partial fix. Plainly, the best solution by far is for the Commission to adopt the revision to Rule 4901:1-29-13(C) proposed by IGS and to make the necessary corresponding change to Rule:1-29-09(C)(1).

Rule 4901:1-29-13(D)(2), (3), and (4)

In proposed Rules 4901:1-29-13(D)(2), (3), and (4), Staff has replaced the current references to a customer's return to "regulated sales service" with the phrase "a natural gas company's applicable tariff service." As noted in its initial comments, Dominion Retail believes this new language is somewhat ambiguous. Dominion Retail renews its suggestion that the better terminology would be a reference to a return to "a natural gas company's default commodity service."

CHAPTER 4901:1-34 NONCOMPLIANCE

Rule 4901:1-34-05 Stipulations.

Rule 4901:1-34-05(A)

Staff has proposed to replace the references in Rule 4901:1-34-05(A) to "settlement agreements" resolving issues raised by Rule 4901:1-34-03 Staff notices of probable noncompliance with references characterizing these agreements as "stipulations." No other stakeholder addressed this proposed change in its comments, but, for those reasons set out in its initial comments, Dominion Retail continues to believe that these two terms are not interchangeable, and that the existing language should be retained. In addition, Dominion Retail noted that the Staff's rewrite of this rule is extremely awkward. Thus, Dominion Retail recommends that the Rule 4901:1-35-04 be retitled "Settlement Agreements" and that paragraph (A) be revised to read as follows:

> (A) A natural gas company, retail natural gas supplier, or governmental aggregator that has received a notice of noncompliance issued by staff pursuant to rule 4901:1-34-03(A) of the Administrative Code may enter into a settlement agreement with staff with respect to the violation of any provision of chapters 4901:1-13, 4901:1-27, 4901:1-28, or 4901:1-29 of the Administrative Code or Chapter 4929. of the Revised Code, the corrective action or remedy for such violation, and/or the amount of forfeiture or other payment for such violation. Such settlement agreements shall be in writing and shall be signed by an officer of the company or its attorney and the assistant attorney general who serves as legal counsel to the staff. Except as otherwise provided in paragraph (B) of this rule, the settlement agreement shall not be effective until filed with and approved by an order of the commission.

ADDITIONAL RECOMMENDATION

As Dominion Retail discussed in its initial comments, there are several rules before the Commission for review in this proceeding that prescribe the exact language that must be included in notices to customers. However, to comply Legislative Service Commission OAC

style requirements, the prescribed language uses lower case for words that would normally be capitalized – *e.g.*, the public utilities commission of Ohio rather than the Public Utilities Commission of Ohio – and presents business hours in words rather than numerals – *e.g.*, eight a.m. to five p.m., rather than 8:00 a.m. to 5:00 p.m. These OAC conventions are fine for the rules, but, to put it simply, using the OAC style in the actual notices themselves produces odd-looking results.

COH raised this issue in connection with the bill format rules approved in Case No. 11-4910-AU-ORD, by filing a motion seeking a waiver so as to permit it to use the more customary method of displaying these names and hours on its bills. The Commission granted the motion and went on to find that any utility wishing to make the same changes could do so without the need to file a separate motion so long as the departure from the form specified in the rule "is strictly limited to changes in capitalization and numeric references, which do not change the intent, application, or structure of the required language." Dominion Retail urges the Commission to grant a similar blanket waiver in its order in this case so that, subject to the same restrictions, companies may utilize the more typical format in notices required by these rules without the need to file individual motions for waivers.

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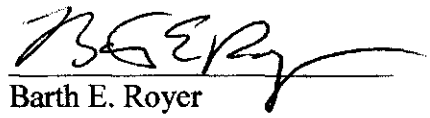
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by regular U.S. mail, postage prepaid and/or by electronic mail this 6th day of February 2013.



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