BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application to Modify, in Accordance with Section 4928.08, Revised Code, the Exemption Granted to The East Ohio Gas Company d/b/a Dominion Energy Ohio.	)))))	Case No. 12-1842-GA-EXM

REPLY TO FILINGS THAT WOULD HARM CUSTOMERS BY MAINTAINING THE RANDOM ASSIGNMENT OF CUSTOMERS TO THE MONTHLY VARIABLE RATE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

This case was initiated on March 9, 2018, when the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Protect Residential Consumers ("Motion to Protect Consumers") of Dominion Energy Ohio ("Dominion") from unreasonably high natural gas prices that some marketers are charging customers randomly assigned to them through the Monthly Variable Rate ("MVR"). In its Motion, OCC noted that the number of customers on the MVR may be few, but the harm to those customers assigned to a high-marketer rate could be great. While OCC is pro-markets, the MVR will not provide consumers a market solution to the inherent price gouging problem.

OCC requested that the MVR needs to end and should be replaced with the competitively bid standard offer. Particularly, OCC asked the PUCO to modify the exemption it granted in its January 9, 2013 Order ("2013 Order")[1] and re-establish Dominion's competitively-bid Standard Choice Offer ("SCO") as the default service for all choice-eligible residential customers. OCC asked the PUCO to eliminate the MVR as a program for assigning residential

[1] Opinion and Order (January 9, 2013).

customers to a natural gas marketer when they end service with a marketer.[2] OCC noted that the use of the MVR as the default program for assigning residential customers could substantially harm consumers, estimating that the difference between the use of the MVR and the use of the SCO could be as much as $51 per month for a single customer.[3]

On March 30, 2018, the Retail Energy Supply Association ("RESA") and Direct Energy Services, LLC and Direct Energy Business Marketing, LLC ("Direct Energy") (jointly referred to as "Marketers") filed a Joint Memorandum Contra to OCC's Motion to Protect Consumers ("Joint Memo Contra").[4] That same day, Dominion filed a Response to the Motions filed by OCC and Ohio Partners for Affordable Energy ("OPAE").[5] In its response, Dominion stated that while it does not support the PUCO granting the Motions at this time, it appreciates "the motive and concerns behind them" and wishes to collaborate with the parties to address these issues.[6] OCC hereby submits its Reply to the Joint Memo Contra filed by Marketers and the Response filed by Dominion.

II. RECOMMENDATIONS

A. Marketers do not contest that the use of the Monthly Variable Rate, harms residential customers.

In the Joint Memo Contra, Marketers only on a cursory level address the merits of OCC's central contention: that modification of the 2013 Order is necessary to protect customers from

[2] Motion to Protect Consumers at 3.

[3] *Id.* at 7.

[4] Joint Memorandum Contra to OCC's Motion to Modify the 2013 Order (March 30, 2018).

[5] *See* Response to the Motions to Modify of the East Ohio Gas Company d/b/a Dominion Energy Ohio (March 30, 2018.)

[6] *Id*. at 2.

unreasonably priced natural gas service under the MVR.[7] Rather than discuss the MVR and the effect it has on Ohio's residential customers, Marketers erroneously contend that OCC's position does not further state policy. Specifically, the Joint Memo Contra argues that OCC is charged with following the directive in R.C. 4929.02 to promote a transition to effective competition to reduce or eliminate the need for regulation of natural gas services and goods rather than advocate for the return to the SCO as a default service.[8]

This argument is defective for two reasons. First, this is exactly what OCC is doing. OCC *is* supporting the policy to promote *effective competition.* Second, the argument fails to acknowledge any of the other state policies set forth in R.C. 4929.02, including the state policy to "[p]romote the availability to consumers of adequate, reliable, *and reasonably priced* natural gas services and goods."[9]

The Joint Memo Contra does not provide a shred of evidence for its contention that OCC is failing to promote effective competition. In making this claim, Marketers completely ignore the portions of OCC's Motion to Protect Consumers that directly address that very policy. OCC plainly stated that if the MVR ended and the SCO reinstated, "consumers would be protected *without making the market less competitive*."[10] OCC also pointed out that the SCO is competitively bid, providing for *effective competition* in the market for natural gas services.[11] OCC further contended that if gas marketers were forced to compete with the competitively-bid SCO rather than the MVR, they would be better incentivized to lower their rates and/or improve

---

7 *See* Joint Memo Contra at 6.

8 *Id*.

9 R.C. 4929.02(1) (emphasis added).

10 Motion to Protect Consumers at 8 (emphasis added).

11 *Id*.

their service, thus achieving the objectives intended by the Ohio Legislature – promoting *effective competition* in natural gas services market.[12] In fact, as OCC stated in its Motion to Protect Consumers, it is actually the MVR that is hindering competition in Dominion's service territory by allowing gas marketers to serve customers (by default) at prices that are not competitively bid. [13]

Furthermore, the Joint Memo Contra does not address any of the other state policies set forth in R.C. 4929.02, including the policy to ensure that customers have access to *reasonably priced* natural gas services and goods.[14] OCC discussed, at great length, the unreasonable prices charged to customers as a result of the use of the MVR rather than the SCO as the default for choice-eligible residential customers.[15] Residential customers can unwittingly be sent to a random gas marketer's MVR, with no protection to ensure that their gas marketer has the lowest MVR rate at that time or even a competitive rate. This essentially ensures that at least some residential customers will be paying unreasonable prices for their natural gas services.[16] OCC noted that, in some cases, a residential customer could end up paying an additional $51 in a single month under the MVR instead of the SCO.[17] This unreasonable, uncompetitive rate directly contradicts the state policy articulated in R.C. 4929.02(1).

Marketers also fail to recognize that R.C. 4929.02(2) promotes the availability of unbundled and *comparable* natural gas services and goods that provide wholesale and retail consumers with the supplier, price, terms, conditions, and quality options *they elect* to meet their

---

[12] *Id*. at 8-9.

[13] *Id*. at 9.

[14] R.C. 4929.02(1).

[15] Motion to Protect Consumers at 8.

[16] *See id*.

[17] *Id*. at 7.

respective needs. R.C. 4929.02(3) also encourages innovation and market access for *cost-effective* supply- and demand-side gas services and goods. R.C. 4929.02(8) promotes *effective competition* by prohibiting subsidies. By forcing customers to take service from a gas marketer at a considerably higher rate, the MVR does not further these state policies. On the other hand, OCC directly supports all of these state policies through its Motion to Protect Consumers.

B. OCC's Motion to Protect Residential Consumers is timely under R.C. 4929.08(A).

The Joint Memo Contra does not seem to dispute that the modification OCC requested is in the public interest and the underlying findings on which the exemption was created and continued for residential customers are no longer valid. Instead, the bulk of the Joint Memo Contra is devoted to the procedural argument that OCC's filing is untimely because it asks the PUCO to modify a 2008 Order.[18] Thus, the Joint Memo Contra contends, the Motion to Protect Consumers is not permitted under R.C. 4929.08(A)(2).[19]

This argument however, misstates the scope of the 2013 Order, which OCC seeks to timely modify. Like the 2008 Order, the 2013 Order approved a continuation, albeit modified, of Dominion's exit from the merchant function.[20] The June 15, 2012 Stipulation approved by the PUCO in the 2013 Order addressed Dominion's exit from the merchant function with regard to residential customers.[21] The 2013 Order specifically notes that the Ohio Gas Marketers' Group ("OGMG") and RESA supported the proposed modification to the exemption as the modification would benefit all customers, not just non-residential customers:

---

[18] *See In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, Case No. 07-1224-GA-EXM, Opinion and Order (June 18, 2008) ("2008 Order") at 2.

[19] *See* Joint Memo Contra at 1-5.

[20] 2013 Order at 9.

[21] *Id.* at 9-10.

> Specifically, Mr. Murphy testified that a core of *nonresidential* customers have [sic] continued to rely on the SCO, thereby, hindering both DEO's ability to fully exit the merchant function, and hindering the development of a more competitive market. OGMG and RESA argue that this adverse effect not only affects DEO, but *all customers* who could potentially be losing out.[22]

Additionally, when the PUCO approved the modification of Dominion's plan for exiting the merchant function with regard to non-residential customers, it reaffirmed the remaining portions of that plan, including the random assignment of choice-eligible residential customers to the MVR, first articulated in the 2008 Order.[23] Indeed, in the 2013 Order, the PUCO stated that it was not precluded from reestablishing the SCO if it determined that Dominion's exit was "unjust or unreasonable *for any customer class*."[24]

R.C. 4929.08(A) permits the PUCO to modify an exemption granted to a natural gas company within eight years if the findings upon which the order was based are no longer valid and that the modification is in the public interest.[25] The PUCO's statement, discussed above, explicitly provides that the 2013 Order was concerned with the effects of Dominion's exit from the merchant function on all customer classes.

OCC filed its Motion to Protect Consumers on March 9, 2018, five years and two months after the 2013 Order was issued and OCC has demonstrated that the rationale for providing an exemption with regard to residential customers is no longer valid and that the modification is in the public interest. For these reasons, OCC has complied with R.C. 4929.08(A), and its Motion to Protect Consumers is timely.

---

[22] *Id*. at 7 (emphasis added).

[23] 2008 Order at 14.

[24] 2013 Order at 16-17 (emphasis added).

[25] *See* Joint Memo Contra at 5.

C. OCC's Motion to Protect Residential Consumers is also timely under R.C. 4929.08(B).

Even if the PUCO agrees with the Joint Memo Contra that OCC's Motion to Protect Consumers is untimely, R.C. 4929.08(B) gives the PUCO authority to reinstate the SCO as the default mechanism for the assignment of choice-eligible residential customers who do not select a gas marketer on their own. R.C. 4929.08(B) provides:

> After receiving an exemption or alternative rate regulation under section 4929.04 or 4929.05 of the Revised Code, no natural gas company shall implement the exemption or alternative rate regulation in a manner that violates the policy of this state specified in section 4929.02 of the Revised Code. *Notwithstanding division (A) of this section*, if the commission determines that a natural gas company granted such an exemption or alternative rate regulation *is not in substantial compliance with that policy*, that the natural gas company is not in compliance with its alternative rate plan, or that the exemption or alternative rate regulation is affecting detrimentally the integrity or safety of the natural gas company's distribution system or the quality of any of the company's regulated services or goods, the commission, after a hearing, may abrogate the order granting such an exemption or alternative rate regulation.[26]

As discussed above, the effects of Dominion's implementation of the exemption that allows it to default choice-eligible residential customers into the MVR, rather than the competitively-bid SCO, violates the state policy specified in R.C. 4929.02. OCC's Motion to Protect Consumers covered the myriad of ways that this practice violates state policy under R.C. 4929.02. To summarize, the continued use of the MVR as the default mechanism for assigning choice-eligible residential customers violates the state policy in the following ways:

- Defaulting choice-eligible residential customers into the MVR, especially given that those customers may not even receive the

[26] R.C. 4929.08(B) (emphasis added).

benefit of the lowest available MVR, results in unreasonable prices for natural gas service.[27] This violates the policy articulated in R.C. 4929.02(1).

- Natural gas marketers are not forced to innovate because they are "competing" only with the more-expensive MVR and not the competitively-bid SCO, which lessens their incentive to provide better prices and/or service.[28] This violates R.C. 4929.02(4).
- Because natural gas marketers are "competing" with the more-expensive MVR, they are not encouraged to provide cost-effective information to customers,[29] thus violating R.C. 4929.02(5).
- Failure to force natural gas marketers to compete in a truly competitive market hinders effective competition, and random assignment of residential customers to a gas marketer's MVR does not create a transaction between a willing buyer and a willing seller. This violates R.C. 4929.02(7).
- Natural gas marketers are guaranteed the opportunity to supply gas to a choice-eligible residential customer at their MVR every time their turn in the random assignment rotation comes up. This acts as a subsidy to suppliers who would be likely be unsuccessful in

[27] OCC Motion to Protect Consumers at 7-8.

[28] *Id.* at 8-9.

[29] *Id*.

offering those same inflated prices in a truly competitive market, thus violating R.C. 4929.02(8).

Regardless of the time limitations in 4929.08(A), these violations of state policy provide justification for the PUCO, after a hearing, to modify its prior order and reinstate the SCO under R.C. 4929.08(B). If the PUCO finds that 4929.08(A) is not satisfied, it should still schedule a hearing and, after the taking of evidence, modify its prior order under R.C. 4929.08(B) and reinstate the SCO as OCC recommends.

D. Dominion's Response correctly advocates for addressing consumer protection issues necessitated by the Monthly Variable Rate.

OCC agrees with Dominion's contention that the issues at stake in this matter are serious and have a significant impact.[30] As such, OCC does not oppose Dominion's suggestion that the PUCO should set a procedural schedule to establish a path for resolving this matter.[31]

If Dominion's approach were followed to the letter, however, it would not sufficiently protect residential customers from unreasonable charges for natural gas service. Dominion recommends a collaborative process between the parties, but states that the matter should only proceed to litigation if that process fails.[32] Every month, residential consumers are paying excessive amounts for natural gas service as a result of the exemption that allows Dominion to assign choice-eligible residential customers to the uncompetitive MVR. OCC is certainly willing to work with interested stakeholders to address this problem, but does not support the process Dominion advances in its Response because it does not adequately protect customers who could be harmed as this matter lingers.

---

[30] Dominion Response at 2.

[31] *Id*.

[32] *Id*.

Rather than adopting the collaboration-followed-by-litigation approach Dominion suggests, the PUCO should set an expedited procedural schedule for the litigation of this matter and simultaneously allow the parties to work on a collaborative solution. This approach would allow for the collaborative approach Dominion suggests while also avoiding the unnecessary delay that would be caused by commencing litigation of this issue only after collaboration fails. The PUCO should also consider staying the MVR until this matter is resolved.

E. Direct Energy's joint motions with RESA are further evidence that its untimely intervention request should be denied should be denied.

As OCC explained, at length, in its Memorandum Contra, Direct Energy's untimely Motion to Intervene does not meet the requirements for intervention established by R.C. 4903.221 and Ohio Adm. Code 4901-1-11.[33] In particular, OCC opposes Direct Energy's intervention because Direct Energy failed to show that its interest is not already being adequately represented by existing parties, i.e., RESA or OGMG.

The recent joint filings that Direct Energy has made with RESA[34] help prove OCC's point. Despite Direct Energy's claims that it has "a unique business model and its interests and perspective are unique,"[35] its interests are common enough with RESA's interests to allow Direct Energy to file numerous (3) joint pleadings with RESA.

Direct Energy has not met the statutory requirements for intervention in this case. Its intervention was not timely. Nor did Direct Energy show that its interests were not being adequately represented by existing parties. The PUCO should deny Direct Energy's request to participate as a full party of record in this proceeding. Direct Energy instead should be ordered to

---

[33] Memorandum Contra Direct Energy's Motion to Intervene (March 30, 2018).

[34] *See* Joint Motion (March 26, 2018); Joint Memorandum Contra to OPAE's Motion to Modify the 2013 Order, (March 30, 2018); Joint Memorandum Contra to OCC's Motion to Modify the 2013 Order, (March 30, 2018).

[35] Direct Energy's Motion to Intervene (March 23, 2018) at 4.

participate through its membership with RESA and OGMG. Such participation is consistent with the recent approach Direct Energy has pursued, evidenced by the three joint pleadings it filed in this case with RESA.

III. CONCLUSION

The MVR results in Ohioans paying charges for natural gas service that are often inflated far beyond what an effective competitive market would provide. OCC urges the PUCO to eliminate the MVR to end the gouging of Dominion's choice-eligible residential customers who are randomly assigned to the MVR. OCC respectfully requests that the PUCO grant OCC's Motion to Protect Consumers, and modify the 2013 Order and reestablish the competitively-bid SCO as the default service for residential customers.

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Larry S. Sauer
Larry S. Sauer (0039223), Counsel of Record
Deputy Consumers' Counsel
Terry L. Etter (0067445)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-3485
Telephone [Sauer]: (614) 466-1312
Telephone [Etter]: 614-466-7964
Larry.sauer@occ.ohio.gov
Terry.etter@occ.ohio.gov
(willing to accept service by e-mail)

Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
bojko@carpenterlipps.com
(willing to accept service by e-mail)

Outside Counsel for the
Office of the Ohio Consumers' Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply was served on the persons stated below via electronic transmission this 6th day of April 2018.

/s/ Terry L. Etter
Assistant Consumers' Counsel

thomas.lindgren@ohioattorneygeneral.gov

Attorney Examiner:
Megan.addison@puc.state.oh.us
Douglas.jennings@puc.state.oh.us

BarthRoyer@aol.com
campbell@whitt-sturtevant.com
cgoodman@energymarketers.com
fdarr@mwncmh.com
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com
cmooney@ohiopartners.org
joliker@igsenergy.com
mswhite@igsenergy.com
sdismukes@eckertseamans.com
sstoner@eckertseamans.com
dclearfield@eckertseamans.com
kmarsilio@eckertseamans.com
natarafeller@fellerenergylaw.com
twilliams@snhslaw.com
mjsettineri@vorys.com