

IN THE SUPREME COURT OF OHIO

In The Matter Of The Application To Modify,) Case No. 2013-0433
 In Accordance With Section 4929.08, Revised)
 Code, The Exemption Granted To The East)
 Ohio Gas Company d/b/a Dominion East) Public Utilities Commission of Ohio
 Ohio In Case NO. 07-1224-GA-EXM) Case No. 12-1842-GA-EXM

**MERIT BRIEF OF INTERVENING APPELLEES
 THE OHIO GAS MARKETERS GROUP AND
 THE RETAIL ENERGY SUPPLY ASSOCIATION**

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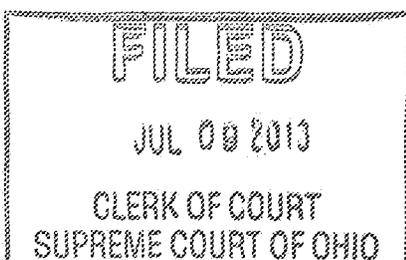


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INTRODUCTION

Contrary to Appellant's arguments, the Commission had before it evidence to support its findings in the matter at bar. For example, the Commission heard the testimony of Jeffrey Murphy, the Managing Director of Commercial Operations for the East Ohio Gas Company d/b/a Dominion East Ohio, on how the Commission's June 18, 2008 Opinion and Order issued in Case No. 07-1224-GA-EXM (the "2008 Exemption Order") was no longer valid and how it was affecting both Dominion East Ohio ("Dominion", "DEO" or "Dominion East Ohio"), competitive gas suppliers and the development of the competitive market in Ohio. Vincent Parisi, the General Counsel and Regulatory Affairs Officer for Interstate Gas Supply, Inc. and Teresa Ringenbach, the Senior Manager of Government and Regulatory Affairs for Direct Energy LLC, provided similar testimony. The Commission relied on this testimony to find that certain findings in its 2008 Exemption Order were no longer valid and, absent modification of that order, would adversely affect Dominion and negatively affect all Ohioans by hindering the development of a fully-competitive market. (Appx. at pp. 14, 22, January 9, 2013 Opinion and Order at pp. 8, 16.) Importantly, the Commission did not end Dominion's standard choice offer ("SCO") program as Appellant would lead this Court to believe. The Commission simply modified the SCO program in a manner that it believed would continue to further the development of a fully-competitive market, which is central to Ohio's state energy policy codified at Section 4929.02, Revised Code. Appellant may disagree with the Commission's interpretation of its own orders and the weighing of the evidence, but that is not sufficient to overturn the Commission's January 9, 2013 Opinion and Order. The Commission's January 9, 2013 Opinion and Order should be affirmed in all respects.

STATEMENT OF FACTS

OGMG and RESA adopt the Commission's presentment of the proceedings for its Statement of Facts. Citations to OGMG and RESA's supplement are in the form of "OGMG/RESA Supp. Appx". Citations are made to the Appellant's appendix ("Appx.") as indicated.

ARGUMENT

STANDARD OF REVIEW

Section 4903.12 of the Ohio Revised Code provides that "a PUCO order shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, ¶12 (citation omitted.) "This court will not reverse or modify a PUCO decision as to questions of fact when the record contains sufficient probative evidence to show that the Commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *Id.* "The appellant bears the burden of demonstrating that the PUCO's decision is against the manifest weight of the evidence or is clearly unsupported by the record." *Id.* "Furthermore, this court will not reverse a commission order absent a showing by the appellant that it has been or will be harmed or prejudiced by the order." *Id.* This is the standard of review that applies to all of Appellant's propositions of law, as Appellant raises issues with the sufficiency of the record in all five of its propositions of law.

RESPONSE TO PROPOSITION OF LAW NO. 1

The Commission did not unlawfully re-write the 2008 Exemption Order.

In its first proposition of law, Appellant claims that the Commission "unlawfully ignored, mischaracterized, and re-wrote the 2008 Exemption Order to justify the modification sought by

Dominion and the Marketers.” (Appellant’s Merit Brief at 4.) To support its claim, Appellant argues that nothing in the 2008 Exemption Order is invalid and therefore the Commission could not rely on Section 4929.08(A) to modify the 2008 Exemption Order. (Appellant’s Merit Brief at 8.) As a result, Appellant argues that Dominion was required to file a separate application to achieve an exit from the merchant function. (Appellant’s Merit Brief at 7.)

Appellant’s arguments are not supported by the record. First, it is undisputed that Section 4929.08, Revised Code, provides the Commission with authority to abrogate or modify any order granting an exemption such as the 2008 Exemption Order. The statute provides, in pertinent part, that:

- (A) The public utilities commission has jurisdiction over every natural gas company that has been granted an exemption or alternative rate regulation under section 4929.04 or 4929.05 of the Revised Code. As to any such company, the commission, upon its own motion or upon the motion of any person adversely affected by such exemption or alternative rate regulation authority, and after notice and hearing and subject to this division, may abrogate or modify any order granting such an exemption or authority only under both of the following conditions:
 - (1) The commission determines that the findings upon which the order was based are no longer valid and that the abrogation or modification is in the public interest;
 - (2) The abrogation or modification is not made more than eight years after the effective date of the order, unless the affected natural gas company consents.

(ORC § 4929.08(A).)

The Commission appropriately followed Section 4929.08 when issuing its order in this proceeding. In the 2008 Exemption Order, the Commission authorized Dominion to proceed with phase 2 of its exit from the merchant function, as structured in the stipulation reviewed and approved by the Commission in that proceeding. (Appx. at p. 58, Case No. 07-1224-GA-EXM, June 18, 2008 Opinion and Order at p. 20.) Specifically, the Commission stated that “[w]e further find that phase 2 represents a reasonable structure through which to further the potential

benefits of market-based pricing *of the commodity sales by the company.*” (*Id.*, emphasis added.)

The Commission subsequently, in its January 9, 2013 Opinion and Order in Case No. 12-1842-GA-EXM, determined that its finding in the 2008 Exemption Order was no longer valid. In that order, the Commission stated that:

... in 07-1224, the Commission found that phase two represents a reasonable structure through which to further the potential benefits of market-based pricing of the commodity sales by the company. We now find that phase two no longer provides any potential for further exploration of the benefits of market-based pricing *for natural gas services*. Further, the Commission is persuaded that continuation of SCO service is adversely affecting DEO and is negatively affecting all Ohioans by hindering the development of a fully-competitive marketplace.

(Appx. at p. 14, January 9, 2013 Opinion and Order at p. 8 , emphasis added.)

Notably, as the above quote shows, the Commission did not ignore the finding it made in the 2008 Exemption Order. The Commission accurately represented its 2008 Exemption Order finding, and then found that phase two of the exit-the-merchant function “... no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services.” (*Id.*) Appellant’s issue is not that the Commission misstated its 2008 Exemption Order, but rather that the Commission’s use of the phrase “pricing for natural gas services” was an incorrect interpretation of the Commission’s use of the phrase “commodity sales by the company” in the 2008 Exemption Order. (*See* Appellant’s Merit Brief at 4.)

The Commission correctly rejected this argument when it found that putting Appellant’s semantic concerns aside, the benefits of market-based pricing accrue to customers, not Dominion. (Appx. at p. 30, March 6, 2013 Entry on Rehearing at p. 5.) Appellant places a great deal of emphasis on the closing prepositional phrase contained in the 2008 Exemption Order “by the company” quoted above. (Appellant’s Merit Brief at pp. 4-5.) Appellant claims that since

the sentence ends with “by the company” the Commission meant that the “potential benefits of market-based pricing” was to be limited to whether Dominion will benefit any less in 2013 than it did in 2008 from the benefits of market pricing. The clear reading of the sentence is that the Commission is looking to see if the public is enjoying all the potential benefits of market-based pricing. The closing phrase “by the company” merely indicates that the sale is taking place pursuant to Dominion East Ohio’s tariff.

Appellant’s construction of the sentence is not only a strained interpretation of the Commission’s order, it is illogical. The Company cannot enjoy the benefits of market-based pricing because Dominion East Ohio is required to sell the commodity for the cost that it acquires the commodity. So Dominion East Ohio should be indifferent to the price. That is not a new development, natural gas distribution utilities have been barred from profiting on the sale of natural gas commodity since the introduction of the gas cost recovery clause in Section 4905.302 (4905.30.2), Revised Code in 1976. Further, under the alternative rate treatment approved in the 2008 Exemption Order and in the alternative rate order issued by the Commission in this matter, the Company cannot benefit from the sale of the natural gas commodity. Finally, Appellant’s interpretation would be in violation of the State’s energy policy established in Section 4929.02, Revised Code, which looks to extend the benefits of market based pricing for the retail customers, not the utility.

The point is that under the policy of this state, the Commission was required to consider whether the phase two situation created in the 2008 Exemption Order represented a reasonable structure through which to further the potential benefits of market-based pricing for the retail public as required by Section 4929.02, Revised Code. Furthering the expiration of the benefits of market-based pricing of natural gas service for the public should be and was the key for the

Commission in approving the stipulation in Case No. 12-1842-GA-EXM. Appellant's argument that the Commission is somehow limited to considering only sales by Dominion East Ohio is illogical and contrary to the energy policy of this state.

Appellant's argument is also contrary to its own statements in its merit brief. To support its argument that Dominion is not affected by the 2008 Exemption Order, Appellant states that Dominion East Ohio "does not provide commodity service." (Appellant's Merit Brief at 13.) Appellant's statement is contrary to its interpretation of the 2008 Exemption order, and supports the Commission's determination that the phrase "commodity sales by the company" in the 2008 Exemption Order relates to natural gas services. The Commission correctly interpreted its 2008 Exemption Order, and its action to modify the 2008 Exemption Order under Section 4929.08 was appropriate.

Appellant's last attempt to bolster its first proposition of law is to argue that Dominion was required to file a separate application to move to a full commodity choice service. (Appellant's Merit Brief at p. 6.) Contrary to Appellant's argument, the Commission, by adopting the stipulation in Case No. 12-1842-GA-EXM, is not going to a full choice commodity service. Instead, the Commission is removing barriers to competition by changing the terms of default service, a change supported by the testimony of Mr. Murphy, Mr. Parisi, and Ms. Ringenbach in the proceeding. When the requirements of Section 4929.08, Revised Code are met, it provides a statutory mechanism for the Commission to modify an exemption order, such as the 2008 Exemption Order, without requiring a new application as Appellant suggests.

Appellant's first proposition of law is without merit and should be rejected.

RESPONSE TO PROPOSITION OF LAW NO. 2

The record contains sufficient evidence supporting the Commission's decision to modify the 2008 Exemption Order.

In its second proposition of law, Appellant continues its semantic argument over the Commission's use of the phrase "pricing for natural gas services" in its January 9, 2013 Opinion and Order versus the Commission's use of the phrase "commodity sales by the company" in the 2008 Exemption Order. (*See* Appellant's Merit Brief at 9.) Appellant argues that there was no factual basis for the Commission's decision to modify the 2008 Exemption Order, claiming that Dominion's witness Jeffrey A. Murphy misquoted the 2008 Exemption Order in his testimony by leaving out the phrase "commodity sales by the company." (*Id.* at p. 9.) Appellant also claims that Ohio Gas Marketers' witness Teresa Ringenbach contributed to the "false testimony." (Appellant's Merit Brief at 10.)

The Commission correctly rejected this argument upon reviewing Appellant's application for rehearing. In its March 6, 2013 Entry on Rehearing, the Commission found that it was "disingenuous of [Appellant] to argue that there is no evidentiary support for our finding that phase two no longer represents a reasonable structure through which to further the potential benefits of market-based pricing of natural gas commodity sales." (Appx. at p. 31, March 6, 2013 Entry on Rehearing at p. 6.) The Commission cited to Dominion witness Murphy's explanation that the presence of the SCO potentially distorts the market and precludes the development of a fully-competitive market marketplace. (*Id.*; *see also* OGMG/RESA Supp. Appx. at pp. 1-6, DEO Ex. 1 at p. 6.) The Commission also looked to RESA/OGMG witness Parisi, who pointed out that customer migration has stalled out, and is hindering continued development of the competitive marketplace. (*Id.*; *see also* OGMG/RESA Supp. Appx. at pp. 7-9, OGMG/RESA Ex. 3 at pp. 5-6.)

Indeed, the record is replete with compelling evidence that circumstances have changed in the four years since the 2008 Order was issued. Dominion witness Murphy testified that the Commission specifically noted in its 2008 Exemption Order the expectation that the March 2010 auction would “be the final auction and that, once [its] term expires, choice-eligible customers will be required to enter into a direct retail relationship with a supplier or aggregator to receive commodity service[.]” (OGMG/RESA Supp. Appx. at p. 2, DEO Ex. 1 at p. 5; Appx. at pp. 46-47, Case 07-1224-GA-EXM, June 18, 2008 Opinion and Order at pp. 8-9.) Mr. Murphy also testified that the Commission expressly relied on Dominion’s “application, the Stipulation, and the testimony of record” in approving Phase 2, citing the 2008 Exemption Order at p. 20, which set forth this expectation. (OGMG/RESA Supp. Appx. at p. 2, DEO Ex. 1 at p. 5; Appx. at p. 58, June 18, 2008 Opinion and Order at 20.)

If Phase 2 had ended in March 2011, as was expected in the 2008 Exemption Order, Dominion would have been able to move toward exiting the merchant function and the formation of a more competitive natural gas commodity market in Ohio. (OGMG/RESA Supp. Appx. at p. 3, DEO Ex. 1 at p. 6.) However, phase two did not end in March 2011, and the March 2010 SCO service auction was not the last. (*Id.*) Circumstances changed, and those changes invalidated certain Commission findings in the 2008 Exemption Order. Therefore, the requirements of Section 4929.08(A), Revised Code were satisfied, and the Commission rightfully modified the 2008 Exemption Order.

OGMG/RESA witness Parisi also testified regarding the changes in certain conditions since June 18, 2008. (OGMG/RESA Supp. Appx. at pp. 8-9, OGMG/RESA Ex. 3.) He stated:

In large measure, the most notable change in circumstances since the last Order is the continuing load migration which is the result of the success of the transition efforts thus far. At this point, in terms of load, less than two percent of the through-put into the East Ohio system is being served by the SCO. More than

80% of the choice-eligible residential and non-residential customers are being served by competitive retail natural gas suppliers. The residual SCO load has reached a plateau over the last few years. It is my opinion that this leveling reflects the recalcitrance of the remaining small portion of the market that simply does not respond. Further, the customers that receive the auction-driven SCO service do so without paying the full cost of the auction. The cost of the auction is socialized and paid by all customers as part of East Ohio's base rates. When such few residual non-migrated customers remain, it is fair to ask whether there is a more efficient method of supplying the default natural gas load that is consistent with the statutory directive to move to market-based pricing and service. Simply stated, the more efficient method is to apply the MVR. When switching all the default service to the MVR was suggested, there was concern raised by some of the stakeholders that residential customers would need more time and that if the non-residential customers went first, potential problems that arise from that transfer could be addressed before the more numerous and less sophisticated residential customers are moved. The Suppliers do not agree with those concerns, but as a part of the Stipulation the Suppliers were willing to pledge that they would not petition the Commission to transfer residential customers to the MVR prior to June 2015, so that lessons learned by the non-residential transfer could be applied.

(OGMG/RESA Supp. Appx. at pp. 8-9, OGMG/RESA Ex. 3 pp. 5-6.)

In sum, contrary to any argument that Appellant may make, the record clearly demonstrates that the findings the Commission made in its 2008 Exemption Order as to phase two were no longer valid. Phase two was no longer furthering the benefits of a competitive market. The Commission appropriately weighed the testimony before it to find that the “[e]vidence presented at the hearing demonstrated that phase two no longer provides its intended benefits and has resulted in stalled market development.” (Appx. at p. 31, March 6, 2013 Entry on Rehearing at p. 6.) Appellant’s second proposition of law is without merit and should be rejected.

RESPONSE TO PROPOSITION OF LAW NO. 3

The record supports the Commission’s factual finding that Dominion and suppliers and ultimately customers could be adversely affected absent modification of the 2008 Exemption Order.

Appellant argues in its third proposition of law that there was no evidence in the record supporting the Commission’s finding that absent modification of the 2008 Exemption Order, “DEO, the suppliers, and ultimately, the customers could be adversely affected.” (Appellant’s Merit Brief at p. 12.) To the contrary, the record fully supports the Commission’s finding.

Appellant first claims that Dominion “is not adversely affected by the 2008 Exemption Order” and that the OGMG is only adversely affected “to the extent that some of them do not place a winning bid at the SCO auction or do not convince customers to take commodity service through a bilateral contract at a higher price than provided by the SCO auction.” (Appellant’s Merit Brief at 13.) As the Commission stated in its January 9, 2013 Opinion and Order, Dominion witness Murphy testified that if the 2008 Exemption Order is not modified, there is a core of non-residential customers who will continue to rely on the SCO rate and thereby hinder Dominion’s exit of the merchant function and the formation of a more competitive natural gas commodity market. (Appx. at p. 13, January 9, 2013 Opinion and Order at p. 7; OGMG/RESA Supp. Appx. at p. 3, DEO Ex. 1.0 at p. 6.)

The Commission also recognized the testimony of Vincent Parisi that “under the current structure, customers taking SCO service are having the cost of procurement subsidized by all customers, which has an adverse effect on customers not benefitting from the auction pricing, but paying the cost of the auction.” (Appx. at p. 13, January 9, 2013 Opinion and Order at p. 7; OGMG/RESA Supp. Appx. at p. 9, OGMG/RESA Ex. 3 at p. 6.) The Commission relied on the above testimony to conclude that “phase two no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services. Further the

Commission is persuaded that continuation of SCO services is adversely affecting DEO and is negatively affecting all Ohioans by hindering the development of a fully-competitive marketplace.” (Appx. at p. 14, January 9, 2013 Opinion and Order at p. 8.)

The above quoted language refutes Appellant’s argument that the Commission found that customers “could” be adversely affected rather than “be” adversely affected. (Appellant’s Merit Brief at p. 16.) The language in the Commission’s January 9, 2013 Opinion and Order makes it clear that the Commission believed that continuing the SCO services as set forth in the 2008 Exemption Order was adversely affecting Dominion’s ability to exit the merchant function and hindering the development of a fully-competitive market. (Appx. at p. 14, January 9, 2013 Opinion and Order at p. 8.)

Appellant also argues that the “Joint Motion and the PUCO 2013 Order completely disregard Rule 4901:1-19-12 of the Ohio Administrative Code.” (Appellant’s Merit Brief at 18.) The record is clear, however, that the Commission and the motion to modify considered and met the elements of OAC 4901:1-19-12. Subsections (B), (C), and (D) of the rule are not relevant to Appellant’s argument, as all prescribe obligations for the Commission’s docketing division or the Commission itself. Subsections (A)(1)(a) and (b) are not applicable because there was no claim or issue in the motion to modify that DEO had failed to comply with its separation plan or its code of conduct. The remaining subsections, (A)(1)(c), (d) and (e) were all addressed in the joint motion and stipulation. For example, the stipulation attached to the motion to modify expressly stated that “[t]he continued existence of default SCO service for Non-Residential customers prevents a fully-competitive market from developing.” (OGMG/RESA Supp. Appx. at p. 36, Stipulation at p. 4.) The stipulation also stated that modification of the 2008 Exemption Order was necessary to fulfill the original expectations of that order. (*Id.*) The stipulation also

explained why modification of the order would further state energy policy. (OGMG/RESA Supp. Appx. at pp. 36-37, Stipulation at pp. 4-5.)

The moving parties demonstrated in the motion to modify and the stipulation how they would be adversely affected by such exemption if it was not modified, the findings of the Commission's 2008 Exemption Order which were no longer valid and why, and the modifications of the 2008 Exemption Order that will be in the public interest. In addition, the moving parties provided testimony supporting these allegations and the form of the remedy requested (which was approval of the stipulation.) (See OGMG/RESA Supp. Appx. at pp. 1-6, DEO Ex. 1 and OGMG/RESA Ex. 3.) Furthermore, the Commission's January 9, 2013 Opinion and Order gave consideration to the rule. In the January 9, 2013 Opinion and Order, the Commission expressly found that Dominion and OGMG would be adversely affected, that certain findings of the Commission's 2008 Exemption Order were invalid, and that the modifications to the 2008 Exemption Order will be in the public interest. (Appx. at pp. 14, 20-21, January 9, 2013 Opinion and Order at pp. 8, 14-15.) Therefore, a review of the motion, the attached stipulation and the Commission's January 9, 2013 Opinion and Order show that the rule was properly considered.

Lastly, Appellant asserts that the Commission improperly found that Ohioans will be adversely affected if the 2008 Exemption Order stays in effect. (Appellant's Merit Brief at p. 16.) Contrary to Appellant's claim, the Commission properly determined that suppliers and customers will be adversely affected unless the Commission modifies the 2008 Exemption Order. As stated previously, Dominion witness Murphy testified that if the 2008 Exemption Order is not modified, there is a core of non-residential customers who will continue to rely on the SCO rate and thereby hinder the formation of a more competitive natural gas commodity

market. (Appx. at p. 13, January 9, 2013 Opinion and Order at p. 7; OGMG/RESA Supp. Appx. at p. 3, DEO Ex. 1 at p. 6.) This adversely affects not only Dominion East Ohio, but all Ohioans who lose out when the energy policy objectives of the state are not met. Additionally, Mr. Parisi explained that customers that receive the auction-driven SCO service do so without paying the full cost of the auction. The cost of the auction is subsidized and paid by all customers as part of East Ohio's base rates. (OGMG/RESA Supp. Appx. at p. 9, OGMG/RESA Ex. 3 at p. 6.) OPAE witness Harper testified that subsidies can disrupt markets and that one cannot have perfect competition if subsidies exist. (OGMG/RESA Supp. Appx. at p. 22, TR. 116.) Everyone is adversely affected by such subsidies. Thus, the Commission properly determined that Dominion East Ohio, the suppliers, and Ohioans will be adversely affected if the 2008 Exemption Order is not modified. (Appx. at pp. 14, 22, January 9, 2013 Opinion and Order at pp. 8,16.)

RESPONSE TO PROPOSITION OF LAW NO. 4

The record supports the Commission's factual finding that modification of the 2008 Exemption Order will advance the public interest objectives set forth in Section 4929.02, Revised Code.

For its fourth proposition of law, Appellant asserts that the evidence in the record does not support the Commission's finding that modifying the 2008 Exemption Order will advance the public interest objectives set forth in Section 4929.02 of the Revised Code. Appellant's assertion goes to the weight of the evidence, and does not give credence to the facts of this case and the findings of the Commission.

Section 4929.02(A) sets forth the policy of this state as to natural gas services and goods. That statute states:

- (A) It is the policy of this state to, throughout this state:
 - (1) Promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods;

- (2) Promote 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 respective needs;
- (3) Promote diversity of natural gas supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers;
- (4) *Encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods;*
- (5) Encourage cost-effective and efficient access to information regarding the operation of the distribution systems of natural gas companies in order to promote effective customer choice of natural gas services and goods;
- (6) *Recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment;*
- (7) *Promote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905. and 4909. of the Revised Code;*
- (8) Promote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated natural gas services and goods;
- (9) Ensure that the risks and rewards of a natural gas company's offering of nonjurisdictional and exempt services and goods do not affect the rates, prices, terms, or conditions of nonexempt, regulated services and goods of a natural gas company and do not affect the financial capability of a natural gas company to comply with the policy of this state specified in this section;
- (10) Facilitate the state's competitiveness in the global economy;
- (11) Facilitate additional choices for the supply of natural gas for residential consumers, including aggregation;
- (12) Promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation.

(ORC § 4929.02(A), emphasis added.)

The Commission found that modifying the 2008 Exemption Order as set forth in the stipulation would promote the public interest. The Commission, after providing a summary of the evidence presented in the record stated:

In particular, the Commission finds that the Stipulation provides for an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods. Moreover, the Commission believes that the Stipulation allowing DEO to exit the merchant function for nonresidential customers will encourage innovation, both in how services are provided and in the variety of available products. The Commission further believes that customers will be protected by the market during this transition. Once a customer is switched to an MVR, that customer is immediately free to: switch to a different CRNGS provider, enter into a different rate plan with the same supplier, or participate in opt-out government aggregation, without any type of termination fee. With respect to customer education, DEO has already accepted Staff's recommendations for a comprehensive customer education program, which will commence well in advance of the actual transition. The Commission believes that, with appropriate information and education, customers will be able to make informed decisions when SCO service is discontinued. Further, the Commission directs DEO to meet with Staff to assure coordination of customer education efforts. In addition to the requirements set forth in the Stipulation, the Commission finds that DEO must reach out to small businesses and entities representing small businesses in its service territory, in order to engage them in the stakeholder group and discussions regarding the educational obligations. Accordingly, with the above directives, the Commission finds that the Stipulation, as a package, benefit ratepayers and the public interest.

(Appx. at pp. 21-22, January 9, 2013 Opinion and Order at pp. 14-15.)

In reaching its conclusions, the Commission relied on witness testimony. For example, the Commission summarized Dominion witness Jeff Murphy's testimony that "discontinuing SCO service to nonresidential customers will directly increase the entrance of customers into the market, spurring market entry by CRNGS providers, the continued development of the competitive market, and will lead to an overall increase in competition." (Appx. at p. 18, January 9, 2013 Opinion and Order at p. 12 referencing DEO Ex. 1.0, pp. 6-7.) The Commission also highlighted OGMG/RESA witness Teresa Ringenbach's testimony that modifying the 2008 Exemption Order will advance the public interest because "in a fully-competitive marketplace, suppliers will constantly search for more efficient ways of supplying natural gas and will also

provide more varied products for consumers to choose from.” (Appx. at p. 18, January 9, 2013 Opinion and Order at p. 12 referencing OGMG/RESA Ex. 2, pp. 5-6.)

Ms. Ringenbach also testified that “with expansion of the competitive market, will come greater involvement in communities by CRNGS providers....suppliers will have offices in Ohio, creating jobs and tax revenue, and will also have people invested in local communities.” (OGMG/RESA Supp. Appx. at pp. 12-13, OGMG/RESA Ex. 2 at pp. 5-6; Appx. at 18, January 9, 2013 Opinion and Order at p. 12.) The Commission also noted Staff witness Boassart’s testimony regarding Staff’s desire for customer education on natural gas choice service and the natural gas commodity market, testimony that the Commission relied on when it directed Dominion to engage with Staff and nonresidential customers to assure coordination of customer education efforts. (Appx. at p. 21, January 9, 2013 Opinion and Order at p. 15.)

Given the record, the Commission’s determination that the public interest would be furthered by modifying the 2008 Exemption Order should be affirmed. Appellant wants to continue the standard choice offer for nonresidential customers, but as the record shows, the stipulation furthers state policy by increasing customers’ access to competitively provided products and services and by increasing the diversity of products available to customers. The Commission lawfully and reasonably used the evidence in the record before it to find that modifying the 2008 Exemption Order was in the public interest and advances the policies of the state as set forth in Section 4929.02 of the Revised Code. Appellant’s fourth proposition of law, which simply goes to the weight of the evidence, is without merit and should be rejected.

RESPONSE TO PROPOSITION OF LAW NO. 5

The record supports the Commission's adoption of the stipulation which provided the framework for modifying the 2008 Exemption Order.

In its fifth proposition of law, Appellant argues that the Commission improperly adopted the stipulation in Case No. 12-1842 because allegedly the stipulation did “not address the contested issues in the case.” (Appellant’s Merit Brief at p. 28.) Appellant claims that the Commission described “contested positions that the stipulation did not raise” and that the stipulation is not relevant to any “contested issue in this case.” (*Id.* at 29.) Appellant also claims that the stipulation was not the product of serious bargaining between capable, knowledgeable parties and that the Ohio Consumer’s Counsel’s participation and signature in the stipulation is irrelevant given its representation of residential customers. (*Id.* at 30-31.)

Appellant’s claims are without merit. First, the record does not support Appellant’s claim that the Commission described “contested positions that the stipulation did not raise.” Appellant cites to the Commission’s findings on whether the settlement, as a package, benefits ratepayers and the public interest, characterizing those findings as a description of “contested positions.” (Appellant’s Merit Brief at p. 29.) A review of the Commission’s January 9, 2013 Opinion and Order makes it clear that the Commission was not describing “contested positions,” but rather was making a determination as to whether the second criteria for a stipulation, whether the stipulation benefits ratepayers and the public interest, had been met. (Appx. at pp. 20-21, January 9, 2013 Opinion and Order at pp. 14-15.)

As stated by the Commission in its January 9, 2013 Opinion and Order:

In particular, the Commission finds that the Stipulation provides for an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods. Moreover, the Commission believes that the Stipulation allowing DEO to exit the merchant function for nonresidential customers will

encourage innovation, both in how services are provided and in the variety of available products. The Commission further believes that customers will be protected by the market during this transition.

(Appx. at pp. 20-21, January 9, 2013 Opinion and Order at pp. 14-15.) These statements by the Commission are not a description of contested issues as claimed by Appellant, but rather the appropriate findings on a stipulation.

Appellant's also claim that the "stipulation itself does not even mention the state's energy policy", and that the stipulation is "completely devoid of any provision regarding the public interest or the policy of the state of Ohio." (Appellant's Merit Brief at p. 29.) That argument is irrelevant, as there is no requirement that a stipulation contain provisions that address the state's energy policy. The Commission's practice with stipulations is to consider the reasonableness of a stipulation using the three criteria. *See Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 69 Ohio St. 3d 559 (1994). Appellant's claim is also not true, as the contents of the stipulation that addressed the modification of the 2008 Exemption Order certainly go toward furthering the energy policy of the state of Ohio.

Second and contrary to Appellant's claim, the stipulation was not intended to resolve every contested issue in the proceeding. The stipulation expressly notes that it was entered "into as an overall compromise and resolution of certain issues presented in this proceeding[.]" (OGMG/RESA Supp. Appx. at p. 37, Stipulation and Recommendation at p. 5.) Through the stipulation, the signatory parties presented to the Commission their agreement as to how the Commission should modify its 2008 Exemption Order. (OGMG/RESA Supp. Appx. at p. 34, Stipulation and Recommendation at p. 2.) The Commission made this very clear in its January 9, 2013 Opinion and Order, finding first that the joint motion to modify the 2008 Exemption Order should be granted, and then turning to consideration of the stipulation and how the 2008 Exemption Order should be modified. (Appx. at p. 22, January 9, 2013 Opinion and Order at p.

16.) The relevance of the stipulation was in how the 2008 Exemption Order should be modified. Appellant misses this point, instead claiming that the stipulation is irrelevant to this “contested proceeding.” (Appellant’s Merit Brief at p. 31.)

Lastly, Appellant argues that the stipulation was not the product of serious bargaining between capable and knowledgeable parties. Appellant claims that no customer group that would be affected by the joint motion to modify the 2008 Exemption Order signed the stipulation. (Appellant’s Merit Brief at 32.) The Commission correctly rejected this argument by Appellants, finding that the stipulating parties’ failure to obtain the signature of a non-residential customer group does not constitute a reason to reject the stipulation. (Appx. at p. 36, March 6, 2013 Entry on Rehearing at p. 11.) The Commission also noted that Appellant was able to oppose the stipulation and participate in the evidentiary hearing on the motion and stipulation. (*Id.*) The Commission also noted that the Council of Smaller Enterprises filed correspondence in the docket indicating its support for the stipulation. (*Id.*)

Indeed, the record supports the Commission’s conclusion that the stipulation was a product of serious bargaining among capable, knowledgeable parties. OGMG/RESA witness Ringenbach testified that the settlement was the product of several years of negotiations among the parties. (OGMG/RESA Supp. Appx. at p. 11, OGMG/RESA Ex. 2 at p. 3.) OCC witness Hayes testified that the settlement met all three criteria. (OGMG/RESA Supp. Appx. at pp. 15-17, OCC Ex. 2 at pp. 7-9.) As noted by the Commission, DEO witness Murphy testified that each of the signatory parties has a history of active participation in Commission proceedings and is represented by experienced and competent counsel. (Appx. at p. 18, January 9, 2013 Opinion and Order at p. 12; OGMG/RESA Supp. Appx. at pp. 5-6, DEO Ex. 1 at pp. 9-10.) Negotiations required numerous meetings and took place over several months, resulting in numerous

concessions, as evidenced by the Stipulation. (*Id.*) Mr. Murphy testified that the signatory parties represent the interest of a local distribution company, marketers and suppliers, and residential customers. (OGMG/RESA Supp. Appx. at pp. 5-6, DEO Exhibit 1.0, pp. 9-10.) The Commission's Staff and the Industrial Energy Users-Ohio (a group primarily representing manufacturers) each had the opportunity to participate in settlement negotiations and to review drafts of the Stipulation. (*Id.*)

Appellant also had an opportunity to participate in the negotiations. Mr. Murphy testified that he and DEO counsel contacted counsel for Appellant to review prior drafts of the Stipulation and to participate in the negotiations. (OGMG/RESA Supp. Appx. at p. 6, DEO Ex. 1 at p. 10; TR. 90-91.) Mr. Murphy testified that there was never any intent to exclude any party from participating in negotiations and that Appellant had ample opportunity to participate but chose not to. (*Id.*) Therefore, despite Appellant's argument that the first element for considering the reasonableness of a Stipulation is not met, the record firmly supports the Commission's finding that the stipulation was the product of serious bargaining between capable and knowledgeable parties.

Appellant may disagree with the framework of the stipulation adopted by the Commission, but that does not present a ground for reversal. The Commission exercised its discretion, based on testimony in the record, to adopt a stipulation that provided the framework for how the 2008 Exemption Order should be modified. The Commission's adoption of the stipulation was reasonable and lawful. Appellant's fifth proposition of law is without merit.

CONCLUSION

For the foregoing reasons, the Ohio Gas Marketers Group and the Retail Energy Supply Association respectfully request that this Court reject all propositions of law asserted by the Appellant, and affirm the Commission's January 13, 2013 Opinion and Order in Case No. 12-1842-GA-EXM.

Respectfully submitted on behalf of,

THE OHIO GAS MARKETERS GROUP AND
THE RETAIL ENERGY SUPPLY ASSOCIATION



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served on July 9, 2013 by U.S. Mail, postage prepaid, upon the following individuals:

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APPENDIX

**APPENDIX OF INTERVENING APPELLEES
THE OHIO GAS MARKETERS GROUP AND
THE RETAIL ENERGY SUPPLY ASSOCIATION**

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Ohio Revised Code § 4903.12.....	1
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*** Annotations current through April 22, 2013 ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 4903. PUBLIC UTILITIES COMMISSION -- HEARINGS

Go to the Ohio Code Archive Directory

ORC Ann. 4903.12 (2013)

§ 4903.12. Jurisdiction

No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the supreme court.

HISTORY:

GC § 549; 103 v 804, § 38; Bureau of Code Revision. Eff 10-1-53.

NOTES:

Related Statutes & Rules

Cross-References to Related Statutes

Power siting board to follow procedure of public utilities commission, *RC § 4906.12*.

Comparative Legislation



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TITLE 49. PUBLIC UTILITIES
CHAPTER 4905. PUBLIC UTILITIES COMMISSION -- GENERAL POWERS

Go to the Ohio Code Archive Directory

ORC Ann. 4905.302 (2013)

§ 4905.302. Purchased gas adjustment clause; rule

(A) (1) For the purpose of this section, the term "purchased gas adjustment clause" means:

(a) A provision in a schedule of a gas company or natural gas company that requires or allows the company to, without adherence to *section 4909.18 or 4909.19 of the Revised Code*, adjust the rates that it charges to its customers in accordance with any fluctuation in the cost to the company of obtaining the gas that it sells, that has occurred since the time any order has been issued by the public utilities commission establishing rates for the company pertaining to those customers;

(b) A provision in an ordinance adopted pursuant to *section 743.26 or 4909.34 of the Revised Code* or Section 4 of Article XVIII, Ohio Constitution, with respect to which a gas company or natural gas company is required or allowed to adjust the rates it charges under such an ordinance in accordance with any fluctuation in the cost to the company of obtaining the gas that it sells, that has occurred since the time of the adoption of the ordinance.

(2) For the purpose of this section, the term "special purchase" means any purchase of interstate natural gas, any purchase of liquefied natural gas, and any purchase of synthetic natural gas from any source developed after the effective date of this section, April 27, 1976, provided that this purchase be of less than one hundred twenty days duration and the price for this purchase is not regulated by the federal power commission. For the purpose of this division, the expansion or enlargement of a synthetic natural gas plant existing at such date shall be considered a source so developed.

(3) For the purpose of this section, the term "residential customer" means urban, suburban, and rural patrons of gas companies and natural gas companies insofar as their needs for gas are limited to their residence. Such term includes those patrons whose rates have been set under an ordinance adopted pursuant to *sections 743.26 and 4909.34 of the Revised Code* or Section 4 of Article XVIII, Ohio Constitution.

(B) A purchased gas adjustment clause may not allow, and no such clause may be interpreted to allow, a gas company or natural gas company that has obtained an order from the public utilities commission permitting the company to curtail the service of any customer or class of customers other than residential customers, such order being based on the company's inability to secure a sufficient quantity of natural gas, to distribute the cost of any special purchase made subsequent to the effective date of such order, to the extent that such purchase decreases the level of curtailment of any such customer or class of customers, to any class of customers of the company that was not curtailed, to any class of residential customers of the company, or to any class of customers of the company whose level of curtailment was not decreased and whose consumption increased as a result of, or in connection with, the special purchase.

(C) (1) The commission shall promulgate a purchased gas adjustment rule, consistent with this section, that establishes a uniform purchased gas adjustment clause to be included in the schedule of gas companies and natural gas companies subject to the jurisdiction of the public utilities commission and that establishes investigative procedures and proceedings including, but not limited to, periodic reports, audits, and hearings.

(2) The commission shall not require that a management or performance audit pertaining to the purchased gas adjustment clause of a gas or natural gas company, or a hearing related to such an audit, be conducted more frequently than once every three years. Any such management or performance audit and any such hearing shall be strictly limited to the gas or natural gas company's gas or natural gas production and purchasing policies. No such management or performance audit and no such hearing shall extend in scope beyond matters that are necessary to determine the following:

(a) That the gas or natural gas company's purchasing policies are designed to meet the company's service requirements;

(b) That the gas or natural gas company's procurement planning is sufficient to reasonably ensure reliable service at optimal prices and consistent with the company's long-term strategic supply plan;

(c) That the gas or natural gas company has reviewed existing and potential supply sources;

(3) Unless otherwise ordered by the commission for good cause shown and except as provided in division (D) of this section:

(a) The commission's staff shall conduct any audit or other investigation of a natural gas company having fifteen thousand or fewer customers in this state that may be required under the purchased gas adjustment rule.

(b) Except as provided in *section 4905.10 of the Revised Code*, the commission shall not impose upon such company any fee, expense, or cost of such audit or other investigation or any related hearing under this section.

(4) Unless otherwise ordered by the commission for good cause shown either by an interested party or by the commission on its own motion, no natural gas company having fifteen thousand or fewer customers in this state shall be subject under the purchased gas adjustment rule to any audit or other investigation or any related hearing, other than a financial audit or, as necessary, any hearing related to a financial audit.

(5) In issuing an order under division (C)(3) or (4) of this section, the commission shall file a written opinion setting forth the reasons showing good cause under such division and the specific matters to be audited, investigated, or subjected to hearing. Nothing in division (C)(3) or (4) of this section relieves such a natural gas company from the duty to file such information as the commission may require under the rule for the purpose of showing that a company has charged its customers accurately for the cost of gas obtained.

(D) A natural gas company that does not sell natural gas under a purchased gas adjustment clause shall not be subject to this section.

(E) Nothing in this section or any other provision of law shall be construed to mean that the commission, in the event of any cost distribution allowed under this section, may issue an order pursuant to which the prudent and reasonable cost of gas to a gas company or natural gas company of any special purchase may not be recovered by the company. For the purpose of this division, such cost of gas neither includes any applicable franchise taxes nor the ordinary losses of gas experienced by the company in the process of transmission and distribution.

(F) The commission shall not at any time prevent or restrain such costs as are distributable under this section from being so distributed, unless the commission has reason to believe that an arithmetic or accounting inaccuracy exists with respect to such a distribution or that the company has not accurately represented the amount of the cost of a special purchase, or has followed imprudent or unreasonable procurement policies and practices, has made errors in the estimation of cubic feet sold, or has employed such other practices, policies, or factors as the commission considers inappropriate.

(G) The cost of natural gas under this section shall not include any cost recovered by a natural gas company pursuant to *section 4929.25 of the Revised Code*.

HISTORY:

136 v H 1213 (Eff 4-27-76); 137 v H 1 (Eff 8-26-77); 146 v H 476 (Eff 9-17-96); 149 v H 9. Eff 6-26-2001; 2011 HB 95, § 1, eff. Sept. 9, 2011.

NOTES:

Section Notes

EFFECT OF AMENDMENTS

The 2011 amendment substituted "liquefied natural gas" for "liquified natural gas" in (A)(2); added (C)(2) and the introductory language of (C)(3) and redesignated the remaining subdivisions accordingly; added (D) and redesignated the remaining subsections accordingly; and made stylistic changes.

Related Statutes & Rules

Cross-References to Related Statutes

Adjusting rates after purchase of synthetic natural gas or fuels, *RC § 4905.303*.

Designation of supplies for exempt service, *RC § 4929.09*.

Ohio Constitution

Acquisition of public utility; contract for service; condemnation, Ohio Const, art XVIII, § 4.

OH Administrative Code