

ORIGINAL

IN THE SUPREME COURT OF OHIO

OHIO PARTNERS FOR AFFORDABLE )  
ENERGY, )  
Appellant, )  
v. )  
THE PUBLIC UTILITIES )  
COMMISSION OF OHIO, et al., )  
Appellee. )

Case No. 2013 - 0433

Appeal from the Public Utilities  
Commission of Ohio

Public Utilities Commission of Ohio  
Case No. 12-1842-GA-EXM

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MERIT BRIEF OF INTERVENING APPELLEE  
THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

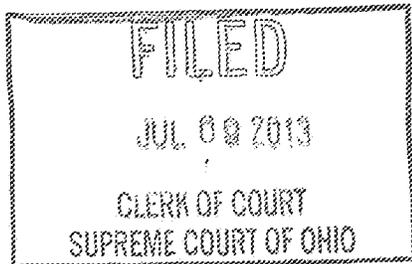
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## I. INTRODUCTION

In 2005, when The East Ohio Gas Company d/b/a Dominion East Ohio (“DEO”) first proposed using auctions to set the price of the natural gas consumed by its customers, DEO’s most vigorous opponent was the appellant in this case, the Ohio Partners for Affordable Energy (“OPAE”). OPAE appealed the decision approving those auctions, and it lost. *See Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 2007-Ohio-4790, 874 N.E.2d 764.

Seven years later, in the case below, DEO proposed another step towards a fully competitive market for the buying and selling of natural gas. This time, DEO and a group of natural gas marketers proposed—for non-residential customers only—removing the auction mechanism and moving to a *fully* competitive commodity market. While this is undoubtedly a significant step in the evolution of deregulation in Ohio, the entire point was to limit that step to a small group of customers (only 14,000 were directly affected) and analyze the results. As before, OPAE was the most vigorous opponent of the move.

OPAE was undoubtedly wrong the first time around. Not only did it lose its first appeal, but its current appeal is entirely premised on *preserving* the same auctions that it once opposed. This time around, as before, OPAE has presented a meritless appeal. OPAE identifies no error of law, no evidentiary holes, and no denial of fair process. At bottom, OPAE simply disagrees with the result, and the only thing its brief succeeds at is registering that disagreement. That is no basis for reversing the Order.

Whether the step taken below will have the same benefits as before, and whether OPAE will again be converted, remains to be seen. But what cannot be doubted is this. This step is being closely scrutinized by the Commission, and if OPAE is right and the removal of the

auction detrimentally affects competition and customers, the Commission has the power to take appropriate corrective action. The law specifically permits the Commission to reinstate the *status quo ante* if circumstances require it. While the Order is final, nothing has been determined with absolute finality. In essence, OP&E is asking the Court to prevent the Commission from taking even the most tentative step towards exploring a fully deregulated market.

The Court should disregard OP&E's meritless appeal, and allow the Commission to determine whether and to what extent a fully competitive commodity market will benefit Ohio's customers.

## **II. BACKGROUND AND PROCEEDINGS BELOW**

DEO is a natural gas company, and the business of natural gas companies is to deliver gas. They install and maintain pipelines, read meters, calculate and process bills, and perform myriad related activities. But they earn no profit on the natural-gas commodity *itself*. Nevertheless, in the past, natural gas companies were required to purchase the commodity on behalf of their customers, then passing through to them the cost. This buying-and-selling role is known as the utility's "merchant function."

To put a price on this bought-and-sold gas, however, was not so simple. Before 2006, it required a highly regulated, administratively burdensome process that resulted in the "gas cost recovery" rate (or GCR).

### **A. Phase 1 of DEO's Exit of the Merchant Function**

In 2005, based on its desire to focus on its fundamental role as a local distribution company, DEO began a multi-stage process to exit the merchant function. (DEO Ex. 1.0, Murphy Dir. at 3, OP&E Supp. 52.) That year, DEO sought Commission approval of Phase 1 of that plan, namely, to eliminate the GCR and replace it with something that would foster greater competition in the retail natural-gas supply markets.

Rather than have DEO purchase the gas and use the GCR to price it, the application proposed using an auction. In the auctions, suppliers would bid for the right to provide portions of DEO's load. These auctions established what was called the Standard Service Offer (or SSO) rate. Despite the opposition of several parties, including OPAE, the Commission approved Phase 1, *see* PUCO Case No. 05-474-GA-ATA, Opin. & Order (May 26, 2006), and its order was upheld on appeal, *see Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 2007-Ohio-4790, 874 N.E.2d 764.

Notwithstanding OPAE's challenge, it is uncontroversial to say that Phase 1 was a success. That success is illustrated well by OPAE's own change in positions. Before the auctions were approved, OPAE had predicted that customers would "see no reduction in price or enhancement of services." (*See* PUCO Case No. 05-474-GA-EXM, OPAE Pst-Hrg. Br. at 10 (Jan. 10, 2006).) But OPAE's position now is that auctions "provide customers with the lowest competitive market price." (OPAe Br. at 24.)

#### **B. Phase 2 of DEO's Exit of the Merchant Function**

In December 2007, about a year and a half after Phase 1 was approved, DEO filed an application for approval of Phase 2. *See* PUCO Case No. 07-1224-GA-EXM. Phase 2 continued to rely on an auction to price the gas, but it introduced a *direct* retail relationship between the supplier and the customer. (Under Phase 1, in contrast, suppliers simply served a specified portion of DEO's total customer load, without entering a relationship with any specific customer.) Service under Phase 2 was known as Standard Choice Offer (or "SCO") service.

The Commission approved Phase 2 on June 18, 2008. Its order in that case was the subject of the motion to modify below; DEO will refer to this order as "the 2008 Exemption Order." Critical to this case, the 2008 Exemption Order found "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.” (*See* 2008 Exemption Order at 20, OPAE Appx. 58.)

DEO expected that within approximately three years (that is, by March 31, 2011) “the final auction” would have been held and that eligible customers would have entered a direct retail relationship with the supplier of their choice. (*Id.* at 8–9, OPAE Appx. 46–47.)

Essentially, DEO expected that a complete exit of the merchant function would happen of its own accord. This did not occur, however. Some customers, whether by inaction or deliberate choice, were not shopping for service but were continuously relying on the auction-based pricing mechanism. By September 2012, over 80 percent of DEO’s non-residential customers (or approximately 64,000) had chosen a competitive retail natural gas (“CRNG”) supplier or to participate in an opt-out governmental aggregation program. (DEO Ex. 1.0, Murphy Dir. at 5, OPAE Supp. 54.) But the remaining 20 percent (approximately 14,000 customers) continued to rely on the auction-based pricing mechanism. (*Id.*) As DEO witness Jeffrey Murphy explained, “[a]fter steadily increasing from 2000 to 2008, non-residential enrollment in Energy Choice has held relatively steady at between approximately 46,000 and 49,000 from 2009 to 2012.” (*Id.* at 6, OPAE Supp. 55.) Thus, even though the auctions were expected to end in the spring of 2011, two more were held, with service under those auctions to continue until April 2013. (*See* PUCO Case No. 07-1224-GA-EXM, Order at 3 (Feb. 29, 2012).)

Based on the fact that non-residential market participation had “reached a plateau” (Tr. 68, OPAE Supp. 175), DEO and other stakeholders began to question whether Phase 2 was continuing to “further the potential benefits of market-based pricing,” as the 2008 Exemption Order had held. On the contrary, DEO believed that “the auctions [were] impeding the development of a fully competitive marketplace.” (Tr. 70, OPAE Supp. 177.)

**C. The Proceeding Below.**

This leads up to the present proceeding. Over the course of more than a year, DEO, a group of natural gas suppliers (the Ohio Gas Marketing Group, “OGMG”), and the Office of the Ohio Consumers’ Counsel (“OCC”) negotiated a stipulation, while inviting others to participate in the process as well. The stipulation was designed to explore whether and to what extent the removal of the default auction mechanism would spur further market development and benefit customers. The step was limited to non-residential customers only. Non-residential customers who did not select a supplier would be assigned to one and be served at that supplier’s publicly posted, monthly variable rate. This rate, known as the MVR, is subject to a pair of important conditions: (1) it must be the supplier’s *lowest* posted variable rate, and (2) customers must be free to leave that rate without any termination fee. (Tr. 158–59, OPAE Supp. 215–16.)

OPAЕ was not a signatory to the stipulation, but its representatives had been invited to participate in negotiations and had viewed drafts of the stipulation. (DEO Ex. 1.0, Murphy Dir. at 10, OPAЕ Supp. 59.)

On June 15, 2012, having completed negotiation of the stipulation, DEO and OGMG filed a joint motion to modify the 2008 Exemption Order, which proposed adoption of the stipulation. The motion was filed under the authority of R.C. 4929.08, which on certain conditions permits the Commission to modify prior exemption orders.

Several parties intervened in the case, including OPAЕ, which also filed a motion to dismiss. After a round of comments and responses, the case was heard on October 16 and 17 at the Commission. On January 9, 2013, the Commission granted the Joint Motion. This appeal ensued.

### III. ARGUMENT

In the case below, the Commission essentially approved a pilot program—a tentative step to explore whether and to what extent a fully deregulated commodity market would increase competition and provide customer benefits. This is a significant step in the evolution of Ohio deregulation. For that reason, by design, it was limited to a very small subset of DEO’s customer base. Only non-residential customers who are eligible to shop for supply are affected; only about 1.2 percent of DEO’s customers experienced a direct impact on service. And that impact is being closely examined: every month DEO and the suppliers send large quantities of data to allow the Commission to analyze pricing, customer participation, and numerous other indicators. If need be, what was done below may be undone.

OPAE clearly believes that the only possible outcome of removing auctions is unmitigated harm to customers. The evidence gives no reason to think that will be that case. But if that *is* what happens, DEO has little doubt that the pilot will not be expanded to the residential market and could swiftly be cancelled. But if OPAE is wrong, and increasing competition drives prices even lower, then perhaps OPAE will come to favor a fully deregulated market the way it has come to favor auctions.

But all that lies down the road. The question is whether OPAE has given this Court any reason to step in and prohibit the Commission from taking this tentative, exploratory step. OPAE has not done so. None of its propositions of law has merit; the Court should affirm.

**Prop. Of Law 1:     **The Requirements of R.C. 4929.08 Were Satisfied in this Case.****

**A.     **The Commission Reasonably Determined that R.C. 4929.08’s Requirements Were Satisfied.****

The Commission issued the Order below under the authority of R.C. 4929.08(A). That statute provides that the Commission “upon its own motion or upon the motion of any person

adversely affected by [an] exemption . . . may abrogate or modify any order granting such an exemption” if certain conditions are met. Only one of those conditions applied in this case, and it breaks down into two parts.<sup>1</sup> First, the Commission must determine “that the findings upon which the order was based are no longer valid.” R.C. 4929.08(A)(1). Second, it must determine “that the abrogation or modification is in the public interest.” *Id.* The Commission reasonably made both determinations in this case.

With respect to the first condition, the Commission found that DEO and OGMG had “demonstrated that the exemption order . . . contained findings that are no longer valid.” (Order at 7–8, OPAE Appx. 13–14.) Contrary to its earlier finding “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,” it found below that “phase two no longer provides any potential for further exploration of the benefits of market-based pricing for natural gas services” and was “hindering the development of a fully-competitive marketplace.” (*Id.* at 8, OPAE Appx. 14.)

The second condition, which the Commission also determined was satisfied, is that modification must be in the public interest. OPAE challenges this determination in its fourth proposition of law; DEO will discuss that finding in its response to that proposition. (*See infra* at 18.)

**B. OPAE has not shown that R.C. 4929.08 was violated.**

OPAЕ’s first proposition of law asserts that the Commission “disregard[ed] the statutory requirements” applicable to a modification of an exemption order. (OPAЕ Br. at 3.) Quite a few

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<sup>1</sup> No one disputes that the other condition has been met. The modification will not have been “made more than eight years after the effective date of the order,” which was June 18, 2008. R.C. 4929.08(A)(2).

different arguments, aimed at making quite a few different points, are presented under this heading. None of them succeed, however, and DEO will respond to them in turn.

**1. OPAE's lead argument is a mere quibble over a decision to use a synonym.**

It is hard to imagine an argument more trifling than OPAE's first. As noted, the Commission was required to determine "that the findings upon which the [2008 Exemption Order] was based are no longer valid." R.C. 4929.08(A)(1). According to OPAE, there were no invalid findings in the prior exemption order. Instead, it says, the Commission "unlawfully ignored," "deliberately mischaracterized" and "re-wrote the 2008 Exemption Order to justify the modification sought by [DEO] and the Marketers." (OPAE Br. at 4.)

When OPAE says the Commission ignored, mischaracterized, and re-wrote the prior order, it is referring to the fact that one sentence in the Order below characterized the 2008 Exemption Order using a synonym, instead of quoting it verbatim. The earlier Exemption Order stated this:

[P]hase 2 represents a reasonable structure through which to further the potential benefits of market-based pricing *of the commodity sales by the company*.

(Exemption Order at 20, OPAE Appx. 58 (emphasis added).) One sentence in the Order below did not quote this provision verbatim, but implicitly characterized it as follows:

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*.

(Order at 8, OPAE Appx. 14 (emphasis added).) The difference between the italicized words is the focus of OPAE's argument—in OPAE's words, it is "the crux of the issue on appeal to the Court." (*Id.* at 5, OPAE Appx. 11.)

DEO frankly struggles to understand OPAE's point. True, the Commission did not quote the earlier order verbatim—but what law requires the Commission to quote prior orders word-for-word? It is not as if the Commission mischaracterized the earlier order. In the context of this

case, there is *no difference whatsoever* between “commodity sales” and “natural gas services.” The only “natural gas service” at issue in this case *was* “commodity sales.” No other service was at issue. While it is certainly possible to imagine cases where the difference between the words “commodity sales” and “natural gas services” would actually make a difference, this is not one of them. Here, both phrases convey the same meaning. Certainly OPAE offers no cogent explanation of how the difference in words mattered.

This argument is a case of form over substance. Had the Commission quoted the earlier order verbatim, it would have made no difference in the outcome of the case. Either formulation makes clear the Commission’s belief that Phase 2 was no longer doing what it had been intended to do. And it seems safe to say that OPAE would not have dropped this appeal or its opposition had the Commission simply quoted the earlier order rather than paraphrased it.

**2. DEO did not unilaterally remove SCO service but sought and received Commission approval.**

OPAE then asserts that under the earlier Exemption Order, “[i]f Dominion want[ed] to eliminate SCO service, it must file a separate application.” (OPAE Br. at 6.) And it argues that the Commission “is unlawfully pretending that the 2008 Order was supposed to bring about Phase 3” (*id.* at 5) and that the Commission “re-wrote the 2008 Exemption Order as if the 2008 Exemption Order were to accomplish Phase 3” (*id.* at 8).

OPAE’s argument seems to presume that DEO did not file an application but acted unilaterally. Of course, the very existence of this appeal and the record below should make abundantly clear that DEO did not unilaterally do anything, but made a formal filing seeking Commission approval. No one took the position that the 2008 Exemption Order authorized DEO to simply exit the merchant function whenever it saw fit. That is why DEO asked the

Commission for approval. That filing resulted in a fully contested proceeding, involving notice, discovery, a hearing, and (now) an appeal.

**3. OPAE invents conditions that were never imposed by the earlier order.**

Perhaps recognizing the utter lack of merit of this argument, OPAE slips into its brief a pair of conditions that allegedly applied to any later application. But in doing so, it simply misrepresents the earlier order.

Here, from the 2008 Exemption Order, is the entirety of the provision requiring a later application:

DEO must seek, through a separate application in the future, Commission approval before moving from the SCO commodity service market to a market in which choice-eligible customers will be required to enter into a direct retail relationship with a supplier or governmental aggregator to receive commodity service, i.e., full-choice commodity service market.

(2008 Exemption Order at 15; OPAE Appx. 53.)

To argue that DEO did not comply with this provision, OPAE must invent a pair of conditions. First, it asserts that “the 2008 Exemption Order required” that any later application be filed “under Revised Code Section 4929.04.” (OPAe Br. at 7.) But the Exemption Order did not require an application under R.C. 4929.04. It simply requires “a separate application in the future” for “Commission approval.” (Exemption Order at 15; OPAE Appx. 53.)

Second, OPAE asserts that any application was required to be filed in 2011. (*See* OPAE Br. at 7 (“But in 2011, when the application should have been filed . . .”).) But once again, the 2008 Exemption Order does not say this. It says that an application must be filed “in the future,” not by the end of 2011.

Finally, although OPAE does not argue it, DEO would recognize that the request for approval below was entitled a “motion,” not an “application.” But that makes no difference. For all intents and purposes, a motion and an application are the same thing—a formal request for

relief from an authoritative body. Indeed, the first sense of the word “application” in Black’s Law Dictionary is “motion,” and “apply” means “make a formal request or motion.” *Id.* at 96 (1999 ed.); *see also* Webster’s Third New Intl. Dictionary 105 (2002 ed.) (defining “application” as “appeal, request, petition”).

The 2008 Exemption Order required a separate, formal request for Commission approval, and a separate, formal request was made in the case below. The conditions cited by OPAE are inventions with no basis in the earlier order.

**4. OPAE does not identify any procedural opportunity that it was denied in the case below.**

Finally, OPAE raises a process argument. It asserts that DEO’s “strategic decision was to avoid a full process under Revised Code Section 4929.04.” (OPAE Br. at 7.) According to OPAE, DEO “chose not to file the application, instead attempting an end run past the statute.” (*Id.* at 8.)

If DEO was “attempting an end run” around “process” requirements, then (to stay with the metaphor) it was tackled for a loss. How much more process could OPAE have received than it did in this case?

- DEO personally and repeatedly informed OPAE of the negotiations that led up to the formal filing (*see* DEO Ex. 1.0, Murphy Dir. at 10, OPAE Supp. 59);
- DEO publicly filed a formal request for approval (*see* 12-1842 Motion to Modify (June 15, 2012));
- DEO notified OPAE of the request (*see id.* (certificate of service));
- OPAE sought and was granted intervention (*see* Entry (July 27, 2012));
- OPAE presented written comments (*see* OPAE Comments (Aug. 30, 2012));
- OPAE filed a motion to dismiss the case (*see* OPAE Mot. to Dismiss (June 28, 2012));

- OP&A; filed a reply in support of its motion to dismiss (*see* OP&A; Reply (July 19, 2012));
- OP&A; opposed intervention by other parties (*see* OP&A; Memo. Contra Mots. to Intervene (Sept. 13, 2012));
- OP&A; took discovery (*see, e.g.*, Tr. 105 (admitting OCC Ex. 1.0, DEO responses to OP&A; interrogatories));
- notice of the proceeding and hearing was published in 15 regional newspapers (*see* Proof of Publ. (Oct. 8, 2012));
- the Commission held a public hearing (*see* Vol. I & II Tr. (Oct. 22, 2012));
- OP&A; presented its own witness (*see* OP&A; Ex. 1.0, Harper Dir. (Oct. 4, 2012));
- OP&A; cross-examined opposing witnesses (*see, e.g.*, Tr. 16–93 (OP&A; counsel cross-examination of DEO witness));
- OP&A; presented its views in post-hearing briefs (*see* OP&A; Init. Br. (Nov. 13, 2012); OP&A; Reply Br. (Nov. 21, 2012));
- OP&A; filed an application for rehearing (*see* OP&A; Rehg. Appl. (Jan. 25, 2013)); and
- OP&A; has now appealed.

In addition to the fact it availed itself of all these opportunities, OP&A; does not specify any procedural opportunity that it was denied. There was no shortage of process in this case, and this leads to the final point in response to OP&A;’s first proposition.

**5. OP&A; has shown no prejudice from the hearing of this case under R.C. 4929.08.**

OP&A; has not shown any error in the fact that this case proceeded under R.C. 4929.08 as opposed to any other vehicle. More than that, it has not specified a single procedural step *or* substantive showing that it believes should have been required but was not.

Thus, even if OP&A; had shown some error in the handling of this case under R.C. 4929.08 (and it has not), it has not demonstrated any prejudice from the alleged error. *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853,

¶ 12 (“this court will not reverse a commission order absent a showing by the appellant that it has been or will be harmed or prejudiced by the order”). That is an independent reason to reject its first proposition of law.

In sum, OPAE’s first proposition of law lacks any merit and should be rejected by the Court.

**Prop of Law 2:        The Order Was Both Reasonably Explained and Supported by the Record.**

OPAE’s second proposition of law again involves two different arguments under a single heading: it asserts (a) that the Commission did not explain the reasons for its decisions, as required under R.C. 4903.09, and (b) that the Order lacked record support. Yet as review of these propositions show, OPAE is simply rehashing its difference-in-wording argument from the first proposition.

**A.        With respect to R.C. 4903.09, OPAE never tells the Court what the Commission failed to explain.**

OPAE cites R.C. 4903.09, which requires the Commission to explain the reasons for its decisions. But OPAE never says what the Commission failed to explain.

The Court recently made clear that a party must “show at least three things to prevail under R.C. 4903.09: first, that the commission initially failed to explain a material matter; second, that [the party] brought that failure to the commission’s attention through an application for rehearing; and third, that the commission still failed to explain itself.” *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 71. The Commission obviously issued a written order in this case, so it falls to OPAE to make the demonstration required by the Court.

OPAE simply makes *no* showing under R.C. 4903.09. After citing the statute, it then attempts to show a lack of record support (*see* OPAE Br. at 9–11), and it asserts that the Order

“violates Ohio law” by not identifying an invalid finding in the 2008 Exemption Order (*id.* at 11–12). Those, however, are different issues than whether the Commission explained itself, but after discussing these unrelated issues, the second proposition comes to an end. So OPAE never explains how the Commission violated R.C. 4903.09.

The Court has made clear that unexplained, unsupported assertions do not cut it on appeal. *See, e.g., In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 57 (“Conclusory assertions that the commission cannot do something fall well short of demonstrating reversible error”); *Utility Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 53 (rejecting proposition when “[n]o argument is supplied regarding whether the relevant case law, applied to the facts of this case, justifies a decision in [appellant’s] favor”). As OPAE does not provide any support for its argument under R.C. 4903.09, it must be rejected.

**B. OPAE does not show a lack of record support.**

OPAЕ also argues that the Order lacked record support, but once again it does not present a coherent argument in support of its allegation.

OPAЕ’s record-support argument is actually a recapitulation of the argument in its first proposition of law. While OPAЕ does open with the discussion of the testimony of two witnesses, it then simply repeats its earlier arguments: that “the criteria for a modification of the 2008 Exemption Order pursuant to Revised Code Section 4929.08(A) have not been met” (OPAЕ Br. at 11), that the earlier order “did not find that there should be an exit” (*id.*), and that the Commission “was not free” to “mischaracterized and re-write the 2008 Exemption Order” (*id.* at 12). DEO has already explained why those arguments lack merit. And more to the point here, they all depend on what the earlier order said. And the meaning of the earlier order is a question of *law*, not a question of fact. These issues have nothing to do with the record.

OPAE's second proposition of law also lacks merit and should be rejected.

**Prop. of Law 3: Even If R.C. 4929.08(A) Imposed an Adverse Effect Requirement, It Was Shown in this Case.**

As noted, R.C. 4929.08(A) authorizes the Commission to modify an exemption order “upon its own motion or upon the motion of any person adversely affected by such exemption.” OPAE's third proposition of law asserts that neither DEO nor the marketers “showed . . . that it is adversely affected.” (OPAE Br. at 13.) There are a number of problems with this argument.

**A. OPAE misconstrues the pertinent provision of the statute.**

First, OPAE misconstrues this language of the statute. As a structural matter, the clause in question does not operate as a *limit* on the Commission. Rather, it is *authorizing* language, clarifying that the Commission's authority may be exercised on “its own” or in response to a motion by “any person adversely affected.” The phrase “any person” does not suggest narrowness, and, logically, any party asking the Commission to modify an order must find it “adverse” in some regard. Confirming the point, the statute *does* contain a section expressly characterizing the “conditions” that must be met, and an “adverse effect” finding is not one of them. *See* R.C. 4929.08(A)(1) & (2).

The fact that the General Assembly authorized the Commission to act on its own motion shows that this language could not have been intended as a check on the Commission's ability to act. The intent of the language is to authorize private parties to initiate an action, not to limit the Commission.

**B. Although it was not required, an adverse effect was shown.**

Even if an independent “adverse effect” showing were required, it has been shown. As discussed above, since its initial filing in 2005, DEO's plan has been to exit the merchant function, and it believed that the 2008 Exemption Order's indefinite continuance of the auctions

may have been hindering that process. (See Joint Mot. to Modify at 1, 4–5 (June 15, 2012), OPAE Supp. 4, 7–8.) And to the extent the SCO regime hinders competition in the market, that clearly harms at least some marketers. Even OPAE asserted below that modifying the 2008 Exemption Order would further “[t]he interest of marketers” to serve “more customers” than under the existing order. (See OPAE Memo. in Support of Mot. to Dismiss at 7–8 (June 28, 2012).) And it continues to assert on appeal that the Exemption Order had the effect of limiting the profitability of marketers operating in Ohio. (OPAE Br. at 16.)

OPAE itself acknowledges that a moving party was adversely affected by the 2008 Exemption Order. Even accepting OPAE’s misinterpretation of R.C. 4929.08(A), that was sufficient to allow the motion to proceed.

**C. OPAE’s oddly placed argument based on compliance with the Ohio Administrative Code is forfeited and also lacks merit.**

Several pages into its “adverse effect” argument, OPAE presents another misplaced argument, regarding alleged non-compliance with the Commission’s rules. (OPAE Br. at 17–18.) It asserts that the Commission’s rules were “simply ignored” and that “[t]his justifies the reversal of the PUCO’s decision.” (*Id.* at 18.) This argument has numerous problems.

**1. OPAE did not raise this argument in its notice of appeal.**

First, this theory of reversal was not raised in OPAE’s notice of appeal. OPAE’s notice made no mention of any failure to comply with the Commission’s rules. R.C. 4903.13 requires that notices of appeal “set[] forth the order appealed from and the errors complained of.” This Court has held that a party’s “notice of appeal and its complaints of alleged commission error delimit the issues for this court’s consideration.” *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238, ¶ 21. Indeed, in OPAE’s 2006 appeal, the Court reiterated just this rule. *Ohio Partners for Affordable Energy v. Pub. Util.*

*Comm.*, 115 Ohio St.3d 208, 2007-Ohio-4790, 874 N.E.2d 764, ¶ 16 (“The court lacks jurisdiction to consider arguments not included in a notice of appeal.”).

Under these authorities, OPAE has failed to preserve this issue. Any alleged failure to comply with the Ohio Administrative Code cannot serve as a basis for reversal by the Court.

**2. OPAE has not explained how it was harmed by the alleged non-compliance with the Commission’s rules.**

Even if the Court considers the issue, it need not reach the merits because OPAE has offered no explanation of how it has been harmed by any alleged non-compliance with the rules. *See Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 12 (“this court will not reverse a commission order absent a showing by the appellant that it has been or will be harmed or prejudiced by the order”).

OPAE has offered no explanation of how the alleged error harmed it. Indeed, the alleged “failings” that OPAE points out only highlight the lack of any harm. DEO concedes that the joint motion is not styled as a complaint or captioned with the CSS code. (*See* OPAE Br. at 18.) But how does that affect OPAE in any way? Likewise, the joint motion does not contain “detail . . . about the code of conduct, [and] about the corporate separation plan.” (*Id.*) What do DEO’s code of conduct and corporate separation plan have to do with this case? Certainly OPAE never explains what “detail” should have been provided but was not. This is yet another instance of OPAE splitting hairs over mere formalities but failing to identify any issue going to the fairness or substance of this case.

OPAE’s third proposition of law should be rejected.

**Prop. Of Law 4: The Approved Modification Was in the Public Interest.**

OPAE’s fourth proposition of law concerns whether the granting of the motion to modify was in the public interest. (OPAE Br. at 19.) To modify an order, one of the substantive

requirements that must be met is that “modification is in the public interest.” R.C. 4929.08(A)(1). OP&E alleges that modification was *not* in the public interest, and then it embarks on a lengthy description of its view of the evidence and how it believes that evidence should have been applied in this case.

Once again, OP&E has not demonstrated reversible error. First, OP&E’s argument demonstrates a misapprehension of the standard of review applicable to the challenged rulings. Second, the evidence affirmatively supports the Commission’s rulings. Finally, as DEO will show, OP&E’s characterization of the evidence is not accurate.

**A. The fact that some evidence supports OP&E’s policy views does not provide any basis to reverse the Commission.**

OP&E does not discuss what standard of review applies to its challenge of the Commission’s policy determination, but the applicable standards present *two* independent, difficult hurdles that OP&E must clear.

**1. The Commission’s determination of the public interest is entitled to deference by this Court.**

First, OP&E is challenging a policy determination that has been entrusted to the Commission. Thus, to prevail on appeal, OP&E must show an abuse of discretion.

The law allows the Commission to approve a modification if it “determines . . . that the . . . modification is in the public interest.” R.C. 4929.08(A)(1). Note that the statute does *not* spell out how this should be determined or what the Commission should consider. This “lack of statutory guidance” on how to determine what is in the public interest “should be read as a grant of discretion.” *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 68; *see also, e.g., In re Columbus S. Power Co.*, 129 Ohio St.3d 46, 2011-Ohio-2383, 950 N.E.2d 164, ¶ 27 (“The statute creates a goal . . . but does not tell the commission how to get there. This gives the commission discretion to find its way”) (citation omitted); *Payphone Assn.*

v. *Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, 849 N.E.2d 4, ¶ 25 (“When a statute does not prescribe a particular formula, the PUCO is vested with broad discretion”).

Because the law grants the Commission discretion, this Court should review its decision deferentially. “Discretionary decisions receive deferential review . . .” *In re Columbus S. Power*, 129 Ohio St.3d 568, 2011-Ohio-4129, 954 N.E.2d 1183, ¶ 11; *see also, e.g., In re Columbus S. Power Co.*, 129 Ohio St.3d 46, 2011-Ohio-2383, 950 N.E.2d 164, ¶ 27 (“IEU is attacking a discretionary decision, so our standard of review is deferential.”). And this is not the only way in which the standard of review works against OP&E’s challenge.

**2. The Commission’s determination need not be supported by all of the evidence.**

It is also clear that OP&E is challenging whether the Commission’s public-interest determination had record support. This is a difficult challenge to prevail upon.

An order will be reversed for lacking “sufficient probative evidence” only if its decision was “manifestly against the weight of the evidence” or “so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.” *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 13. When “[e]vidence before the commission point[s] both ways,” a record-support challenge will fail. *Util. Serv. Partners v. Pub. Util. Comm.*, 124 Ohio St. 3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 35. That is because such an appellant is essentially asking the Court “to reweigh the evidence,” which “is outside the scope of [its] function on appeal.” *Id.*

A pair of recent cases shows where the line falls. First, in the *In re Duke Energy Ohio* appeal, the Court rejected a record-support argument where the appellant failed to show that “the weight of the evidence unquestionably compelled a decision in its favor.” 131 Ohio St.3d 487, 2012-Ohio-1509, 967 N.E.2d 201, ¶ 32. The appellant “at best offer[ed] an alternative take on

the evidence,” and the Court reaffirmed that “reweighing the evidence is outside the scope of our function on appeal.” *Id.* In contrast, where “no evidence support[ed] the commission's characterization of [a certain] charge as based on cost,” the Court reversed the Commission’s ruling. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 29 (emphasis added).

**3. OPAE’s brief does not show what it must to prevail on appeal.**

In accordance with these authorities, OPAE must show that the Commission’s public-interest determination was both an abuse of discretion and clearly unsupported by record to prevail. It has not made either showing.

Indeed, OPAE’s long description of the evidence shows only that it misapprehends what the purpose of an appeal is. The Court’s role on appeal is to review the Commission’s decision for error, *see* R.C. 4903.13, not to review the evidence in the first instance nor to render the policy decisions entrusted to the Commission’s discretion. But all OPAE’s brief shows is that *some* evidence supported *its* views—which accomplishes *nothing* on appeal. It would be a highly unusual contested case in which there were no conflicting evidence, and of course conflicting evidence was presented below. But an order need not have unanimous record support to stand—that would be an impossible standard to satisfy in a contested case, and would essentially give veto power to an opposing party.

OPAЕ does not even *attempt* to show what is necessary for reversal. It never clearly identifies what finding it is challenging. And partly for that reason, it never demonstrates that the evidence unanimously and conclusively refutes the challenged finding. OPAЕ simply articulates the support for its view (*see* OPAЕ Br. at 19 (“[t]he record supports a finding that the public interest will be thwarted by the elimination of SCO service”), but it does not demonstrate a lack of support for the Order.

This is reason alone to reject its fourth proposition.

**B. The Commission’s public-interest findings were reasonable and supported by the evidence.**

Nevertheless, DEO will show that the record did support the Order. In concluding that modification was in the public interest, the Commission made several findings, all of which were supported by the evidence.

**1. The record supported the Commission’s finding that modification would promote the transition to direct retail relationships.**

First, the Commission found that approving the stipulation would be consistent with R.C. 4929.02(A)(7)’s goal of “provid[ing] 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.” (Order at 14, OP&E Appx. 20.) A great deal of evidence supported this finding.

DEO witness Jeffrey Murphy explained that “[s]everal years into Phases 1 and 2, it appears that as long as SCO service remains an option, some customers—for any number of reasons—will not exercise their ability to choose a CRNG supplier.” (DEO Ex. 1.0, Murphy Dir. at 7, OP&E Supp. 56.) Eliminating the auction will “encourage customers and suppliers to enter into direct retail relationships.” (*Id.*) That is because when SCO service is discontinued, “customers . . . will understand that they are subject to the process of being assigned to a supplier and that price will not be an auction price any longer.” (Tr. 73, OP&E Supp. 179.) This would provide customers incentive “to more carefully and thoroughly review the options available in the marketplace and come to their own determination of what type of bilateral agreement would suit them best.” (*Id.*) Even OP&E’s own witness conceded that a customer, now motivated to

seek the lowest price, could speak with a marketer directly and achieve a price lower than either the SCO or any price posted on the Commission's website. (Tr. 129–30.)

**2. The record supported the finding that modification would encourage innovation in the provision of service.**

The Commission also found that “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.” (Order at 15, OPAE Appx. 21.) The record also supported this finding.

DEO witness Mr. Murphy explained that “[d]iscontinuing SCO service will directly increase the entrance of customers into the commodity market, thus spurring market entry, additional competition, and the development of the natural gas supply market.” (DEO Ex. 1.0, Murphy Dir. at 6–7, OPAE Supp. 55–56.) He explained on cross-examination that the SCO has the potential to distort and preclude the full development of the marketplace. (Tr. 83, OPAE Supp. 189.) He also explained that “the structure of the marketplace” could “stop[] a marketer or supplier” from “providing innovative terms for a contract.” (Tr. 66, OPAE Supp. 173.) Likewise, OGMG witness Teresa Ringenbach pointed out that in fully competitive markets, suppliers “constantly . . . search[] for more efficient ways of supplying natural gas on a daily basis” and “there are more varied products available.” (OGMG/RESA Ex. 2.0 Ringenbach Dir. at 5, DEO Supp. 7.)

Even OPAE's witness Stacia Harper acknowledged that SCO service can create a disincentive for suppliers to offer lower prices. She explained that the effect of the required SCO offer was to *limit* lower-priced offers: “[t]he SCO auction price effectively acts as a price floor, the minimum price at which providers are willing to supply service,” which creates “little incentive for CRNGS providers to provide a price much lower than this . . . .” (OPAE Ex. 1.0,

Harper Dir. at 14, OPAE Supp. 107.) She confirmed on cross-examination that “just in terms of sheer economics, you have a published price, [and] you don’t have much reason to offer a price below that . . . .” (Tr. 144–45, OPAE Supp. 210–11.)

In sum, the record supported the Commission’s finding that the requested modification would tend to encourage market innovation.

**3. The record supported the Commission’s finding that customers would be protected by competition on DEO’s supply markets.**

The Commission “further believe[d] that customers will be protected by the market during this transition.” (Order at 15, OPAE Appx. 21.) It noted that “[o]nce a customer is switched to an MVR, that customer is immediately free to: switch to a different . . . provider, enter into a different rate plan with the same supplier, or participate in opt-out government aggregation, without any type of termination fee.” (*Id.*) The record also supported this finding; indeed, no one argues that DEO’s underlying market is not competitive.

Mr. Murphy explained that “[t]he number and size of suppliers in DEO’s service territory reveal a highly competitive market.” (DEO Ex. 1.0, Murphy Dir. at 7, OPAE Supp. 56.) At the time of his testimony, DEO had “50 suppliers offering commodity service to its traditional transportation market and 28 suppliers providing commodity service in the Energy Choice program” and “[t]he number of suppliers competing for market share ensures that offers must be made at competitive prices, terms, and conditions.” (*Id.*) Far from challenging Mr. Murphy’s testimony, OPAE acknowledges on appeal that DEO’s market “has achieved effective competition.” (OPAE Br. at 25.)

All facets of the Commission’s decision regarding the public interest were supported by the evidence.

**C. OPAE’s discussion of the evidence misstates several crucial points.**

The foregoing shows not only that OPAE failed to identify any unsupported conclusion of the Order but that the Order *is* supported by the evidence. That being the case, OPAE’s contrary discussion of the evidence need not even be considered. But to ensure that the Court has an accurate view of the record, DEO will respond to some of OPAE’s major points, namely, that the removal of SCO service will harm both competition and consumers.

**1. The evidence did not show that the elimination of SCO service will harm competition.**

First, OPAE argues that the evidence showed that the removal of SCO would harm competition. For example, OPAE repeatedly asserts that “[t]he promotion of competition requires an SCO option.” (OPAe Br. at 25; *see also, e.g., id.* at 23 (“Without the transparent SCO price set by an auction held by Dominion, there is a reduction in the efficiency of the competitive market”); *id.* at 27 (“eliminat[ing] the SCO service . . . limits competition”).)

This is not what the record showed—no witness demonstrated that the underlying competitiveness of DEO’s market would weaken without SCO service. In fact, the contrary appears true. The evidence showed that SCO service may have been *hindering* the further development and efficient operation of the competitive market. DEO witness Jeffrey Murphy explained that “anytime you have a product that is, in effect, forced into a market, be it a default product or something else, that market is not a fully competitive market.” (Tr. 64–65, OPAE Supp. 171–72.) “A fully competitive market is one in which there’s an absence of default services that may have a price that would be different than that that would result from the market forces created by the competing suppliers.” (*Id.* at 65, OPAE Supp. 172.) Thus, the effect of the modification was to remove the required offer that “potentially distorts the market by virtue of being a default pricing mechanism.” (*Id.* at 98, OPAE Supp. 201.)

In fact, when OPAE's own witness addressed the impact of SCO service on the competitive market, she actually testified that SCO service may be preventing further *decreases* in prices. (See OPAE Ex. 1.0 Harper Dir. at 14–15, OPAE Supp. 107–08.) As just noted, she explained that the effect of the required SCO offer was to *limit* lower-priced offers: “[t]he SCO auction price effectively acts as a price floor, the minimum price at which providers are willing to supply service,” which creates “little incentive for CRNGS providers to provide a price much lower than this . . . .” (*Id.* at 14, OPAE Supp. 107.)

The record gave the Commission no reason to think that removal of the SCO was expected to limit or harm the operation of competitive markets.

**2. No evidence shows that all or most SCO customers had affirmatively chosen to receive SCO service.**

Another point made by OPAE is that SCO service was the affirmative choice of all customers who received it. OPAE repeatedly implies that *all* customers who had received SCO service had affirmatively chosen that service. (See, e.g., OPAE Br. at 24 (asserting that removing SCO service will “result in roughly 20% of all non-residential customers”—that is, all SCO customers—“losing their current choice”); *id.* at 24 (asserting that “roughly 20% of Dominion non-residential customers”—that is, all SCO customers—“have chosen the SCO”).)

On the contrary, no evidence showed that *all* customers who were receiving SCO service had affirmatively chosen to receive it. SCO service was “the default service,” meaning that an SCO customer could have been one “by their own inaction rather than making a specific choice.” (Tr. 81, OPAE Supp. 187.) Thus, the bare fact of enrollment in SCO tells one nothing about what choice, if any, a customer made. OPAE witness Stacia Harper admitted that to the extent she testified that SCO customers had affirmatively chosen SCO service, this was simply “an assumption that [she] made.” (Tr. 141.)

To be fair, OPAE acknowledges more accurately elsewhere that “[s]ome customers who have not chosen a particular supplier do not want to choose a particular supplier.” (OPAE Br. at 36 (emphasis added).) That is probably true. But no evidence suggested that all, or even a majority, of SCO customers had made an affirmative choice for SCO service.

**3. No evidence shows that the elimination of SCO service will lead to higher prices.**

OPAE also repeatedly suggests that eliminating SCO service will result in “higher commodity prices.” (OPAE Br. at 23.) OPAE’s assertion rests on two comparisons: (a) between the SCO price and certain contract prices and (b) between the SCO price and certain monthly variable rates offered by competitive suppliers. Looking into the evidence behind these assertions shows that both comparisons are misleading.

**a. Comparing SCO service to a fixed-price contract is like comparing apples to oranges.**

First, OPAE asserts that bilateral-contract prices are generally higher than the SCO rate. “Bilateral contracts,” OPAE says, “simply cost more.” (*Id.*) The only evidence OPAE cites in support of this very broad assertion is Exhibit SH-4 to its witness’s testimony. And that exhibit compares *fixed-price* offers with the *variable* SCO rate and shows that the former are generally higher. (*See* OPAE Ex. 1.0, Harper Dir. SH-4, OPAE Supp. 117 (emphasis added).)

There is a good reason that a fixed-price offer would cost more than an offer to charge a price that rises and falls with the market. The whole point of a fixed-rate offer is to pay a *premium* to avoid the risk of natural-gas price increases. (*See* Tr. 61, OPAE Supp. 168.) The SCO rate is *not* a fixed-price offer. It provides no protection from increases in the price of natural gas. If the market price of natural gas doubled, the SCO rate would essentially double with it. A fixed rate would stay the same.

This explains the price difference highlighted by OP&A. It is only natural that a seller who bears the risk of rising prices would expect some premium to bear that risk. And that highlights another problem with OP&A's comparison. Its comparison between fixed-price offers and the SCO price covers *one* year. Such a small sample is hardly illuminating: it is not surprising that a fixed price might exceed a variable price over such a short run. Unless the price spiked within months of entering the contract, the fixed price would almost always be a bit higher than the market over the short run. But no matter what the market did, the customer would have the price certainty that he or she paid for.

**b. OP&A's comparison of SCO and MVR offers relies on an unexplained small sample of data.**

OP&A also relies on a comparison between SCO and monthly variable rate (or MVR) offers. This comparison is also incomplete and misleading, but before explaining why, DEO would briefly explain what the MVR is. The MVR is the rate at which a supplier serves a customer who has not otherwise selected a plan. Three important conditions attach to the MVR rate: it must be publicly posted; it may not be any higher than any other variable rate posted by that supplier; and no termination fees may be charged if a customer leaves the MVR. (Tr. 158–59, OP&A Supp. 215–16.)

OP&A asserts that MVR prices are “higher, often much higher, than the SCO price.” (OP&A Br. at 21.) Its sole support for this assertion is Exhibit SH-3 to its witness's testimony. (*See id.*) This exhibit once again shows only a single year of data. (*See* OP&A Ex. 1.0, Harper Dir. SH-3, OP&A Supp. 116.) Her analysis also excluded other posted variable prices. (*See* Tr. 134–35, OP&A Supp. 206–07.) What that data showed was that there were a variety of MVR offers, some at, some above, and some below the SCO rate. The shape of the pricing curves—

generally peaking in the middle—suggests that the data may have been selected to highlight a period of maximal difference between MVR and SCO.

The small, selective sample of data is not the only problem with OPAE’s comparison between MVR and SCO prices. As discussed above, the record showed that SCO service might be distorting the market and causing other structural problems, even acting as a price floor. (*See, e.g.*, Tr. 66–67, OPAE Supp. 173–74 (noting that SCO service may “inhibit . . . participation in the marketplace”); OPAE Ex. 1.0, Harper Dir. at 14–15, OPAE Supp. 107–08 (noting that SCO may act as a price floor).) So a simple comparison of contemporaneous SCO and MVR rates is not necessarily meaningful.

**c. OPAE’s pricing comparisons ignore the fact that it is competition, not auctions, that protect customers.**

In all these pricing comparisons, OPAE loses sight of a more fundamental point. As OGMG Teresa Ringenbach testified, “Auctions have not brought low prices; it has been the competitive suppliers who have participated in those auctions who have brought lower prices.” (OGMG/RESA Ex. 2.0, Ringenbach Dir. at 7, DEO Supp. 9.) Even OPAE recognizes that it is not auctions but “competition . . . harnessed through an auction” that provides lower prices. (OPAE Br. at 24.)

What this means is that if a given supplier posts a high MVR, that gives customers incentive to find a better rate. And not only customers, but marketers will also find incentive in the MVR. The MVR is a publicly posted rate. If a given MVR is high, other marketers will see it, seek out that company’s customers, and compete for their business.

To be sure, this protection is only as sure as the market is competitive. So the critical question comes back to whether effective competition exists on DEO’s market. But on that point, all parties agree. OPAE approvingly describes the evidence as showing that “[i]f DEO’s

natural gas market is not competitive, it is difficult to imagine one that is.” (OPAE Br. at 25 (internal quotations omitted).) And as OPAE put it below, there is “effective competition in [DEO’s] service area in compliance with the state’s energy policy.” (12-1842 OPAE Br. at 19 (Nov. 13, 2012).)

For the foregoing reasons, the Commission properly found that modification was in the public interest, and OPAE has not refuted that finding.

**Prop. of Law 5: OPAE Has Not Shown Any Error with the Approval of the Stipulation.**

OPAE’s fifth and final proposition concerns the stipulation approved by the Commission. Its lead argument is that the Commission erred by “treat[ing] a contested case as a settled case” because the “stipulation does not address the contested issues in the case.” (OPAE Br. at 28.) OPAE complains that the Commission found that the stipulation would further certain provisions of state policy even though “the stipulation itself does not even mention the state’s energy policy.” (*Id.* at 29.) OPAE further explains that one of the signatory parties to the stipulation, OCC, did not take an affirmative position on some of the legal issues in the case. (*Id.* at 30–31.) Based on all this, OPAE asserts that “[t]he stipulation is irrelevant to the contested issues in this case.” (*Id.* at 32.)

**A. OPAE cites no authority in support of its argument that stipulations must contain legal argumentation.**

OPAE’s argument—that the approved stipulation is irrelevant to this case—strikes DEO as bizarre. If the stipulation were “irrelevant” to this case, why is OPAE appealing? After all, what the Commission approved is what was contained in the stipulation.

OPAE’s complaint seems to be that the stipulation should have contained the legal arguments in support of itself. (*See, e.g.*, OPAE Br. at 29 (“the stipulation itself does not even mention the state’s energy policy”).) Not surprisingly, OPAE cites no authority that requires a

stipulation and recommendation to contain the legal arguments in support of itself. Such a requirement would be pointless, doing nothing but adding more sheets to the already burgeoning files in these cases.

The function of a stipulation and recommendation is for some or all parties to agree on what to ask the Commission to do. Its function is not to provide all the possible legal arguments in support of itself. That is what the briefs are for. The fact that the stipulation did not contain legal argument or discussions of state policy is no basis for reversing the Order.

**B. OPAE did not mention in its notice of appeal any argument regarding whether the stipulation was a product of serious bargaining.**

In the midst of its fifth proposition, OPAE states that the stipulation “is not the product of serious bargaining.” (*Id.* at 33.) It asserts that the Commission “cannot use the stipulation to claim that there is a settlement that meets the PUCO’s three-part test for the reasonableness of stipulations.” (*Id.*) OPAE failed to preserve this argument, and it also lacks merit.

**1. OPAE did not preserve this argument in its notice of appeal.**

First, OPAE’s notice of appeal did not mention any argument regarding whether the stipulation was supported by serious bargaining. As discussed above, the Court lacks jurisdiction to consider arguments not preserved in the notice of appeal. *See, e.g., Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 2007-Ohio-4790, 874 N.E.2d 764, ¶ 16 (“The court lacks jurisdiction to consider arguments not included in a notice of appeal.”). That holding applies here, and OPAE’s serious-bargaining argument should not be considered.

**2. The record shows that serious bargaining occurred with respect to the stipulation.**

Even if OPAE’s argument were considered, the record flatly contradicts its assertion that serious bargaining did not occur. In its entry on rehearing, the Commission rejected OPAE’s

allegation, stating that it did “not believe that the stipulating parties’ failure to obtain the signature of a non-residential customer group constitutes a reason to reject the Stipulation.” (Entry on Rehg. at 11, OPAE Appx. 36.) Moreover, the Commission noted that it had provided “due process and a hearing, and no such group came forward to oppose the Stipulation,” while “the Council of Smaller Enterprises filed correspondence in this docket indicating its support of the Stipulation.” (*Id.*)

OPAЕ presents no argument or evidence that rebuts the Commission’s decision rejecting OPAЕ’s argument. And the record supports the Commission’s rationale. DEO provided the notices required by the Commission. (*See* 12-1842 Proof of Publication (Oct. 8, 2012) (setting forth fact and date of publication of notices).) OPAЕ challenges neither the adequacy of the notices nor whether they were published. And in addition to these notices, the evidence showed that DEO specifically notified “other groups and representatives of other customer classes,” “including Staff, Ohio Partners for Affordable Energy (‘OPAЕ’), and Industrial Energy Users-Ohio,” and gave them “the opportunity to participate in settlement negotiations and to review drafts of the Stipulation.” (DEO Ex. 1.0, Murphy Dir. at 10, OPAЕ Supp. 59.) Specifically regarding OPAЕ, DEO “repeatedly invited OPAЕ to review drafts of the Stipulation and to participate in negotiations” and “personally contacted David Rinebolt, one of the counsel for OPAЕ, to follow-up on a draft Stipulation distributed on January 17, 2012, nearly five months before the final version was filed with the Commission.” (*Id.*) Finally, the Commission correctly noted that the Council of Smaller Enterprises, “a support organization for small businesses located in Northeast Ohio,” filed a letter in “support [of] the Joint Motion” on “behalf of its 14,000 members.” (*See* Letter in Support of the Joint Motion to Modify (Nov. 13, 2012).)

When OP&AE says the stipulation “is not the product of serious bargaining,” it means that OP&AE did not agree to the stipulation. But this Court has never held that a non-stipulating party has power to veto a stipulation.

**C. The AEP-Ohio case cited by OP&AE is irrelevant here.**

OP&AE concludes its argument by attempting to parallel this case with a stipulation that was adopted but later rejected in a case involving AEP. (*See* OP&AE Br. at 33–34.) Why OP&AE brings this case up is unclear. It does not present any legal argument that the AEP decision compelled any particular result in this case, either directly through *res judicata* or indirectly as an on-point precedent.

In any event, the case has no relevance here. In the AEP proceeding, the Commission rejected a stipulation after the approved rate increases proved “vastly” higher than predicted; on this basis, the Commission held that the stipulation did not benefit ratepayers and was not in the public interest. Notably, the Commission did *not* reject the stipulation for lack of serious bargaining, the proposition for which OP&AE cites it. *See* PUCO Case No. 11-346-EL-SSO, Entry on Rehearing at 10 (Feb. 23, 2012) (holding that the stipulation did not “benefit ratepayers and the public interest as required by the second prong of our three part test”).

OP&AE asserts that the parallel is that “small commercial customers . . . had no part in the stipulation” in either case. (OP&AE Br. at 34.) Whether that was true in the AEP case, it is not true here. The interests of non-residential customers were represented in this case. As noted, the Council for Smaller Enterprises affirmatively supported the outcome of this case. Other groups representing non-residential customers, such as Industrial Energy Users-Ohio, were given direct notice of these proceedings. (*See* DEO Ex. 1.0, Murphy Dir. at 10, OP&AE Supp. 59.) And OP&AE itself has represented the interests of non-residential customers in this case, actively litigated the case, and made its views known. Below, OP&AE acknowledged that this fact

distinguishes the two cases. (See 12-1842 OPAE Merit Br. at 40 (“The parallels between this case and the AEP case are clear, except that OPAE[] represent[ed] non-residential customers”))

The AEP Ohio case is simply irrelevant here, and the Commission should reject OPAE’s fifth proposition of law.

**Prop. of Law 6:      **If the Removal of SCO Service Is Detrimental to Customers or to the Competitive Market, the Commission May Reinstitute SCO Service.****

None of OPAE’s propositions of law has any merit. But DEO would conclude by noting that even if OPAE were ultimately correct as to its policy position—*i.e.*, that removal of SCO service is not the way forward—the law permits the Commission to reinstitute SCO service.

Under R.C. 4929.08(A), the Commission may “abrogate or modify any order granting . . . an exemption” and it may do so “upon its own motion.” If for whatever reason the removal of SCO services does not turn out well, the Commission is authorized, among other things, to take appropriate steps to remedy those problems, including reinstating SCO service. The Commission noted just this in its Opinion and Order, stating that “nothing precludes us from reestablishing the SCO or other pricing mechanism, if we determine that DEO’s exit is unjust or unreasonable for any customer class.” (Order at 16–17, OPAE Appx. 22–23 (citing R.C. 4929.08).)

DEO recognizes that OPAE is inflexibly opposed to any step that does not involve an auction as the default pricing mechanism. Of course, OPAE was also once inflexibly opposed to auctions. And that should be instructive. When DEO first proposed auctions, no one could have known precisely what impact that step would have, and OPAE did not want to find out. Obviously, OPAE’s position regarding auctions has now changed.

DEO is not attacking OPAE’s change in position—it had a right to argue against the auction process, and if anything it may be commended for changing its position in light of

experience. DEO's point is that no one knew how the auction process would turn out, but it was a measured risk, safely taken. That risk turned out exceedingly well, confirming that the competitive markets were ready to provide commodity for DEO's customers. And had it not turned out well, no one can doubt that the Commission would have responded appropriately.

The same holds true today. There is good reason, as there was in 2005, to believe that the market is ready to step up and perform, but whether and how it *will* can only be determined by giving it the chance. DEO and the stipulating parties have taken numerous steps to minimize risk, to provide transparency, and to allow full evaluation of the impacts of this exit. Even now, the Commission's Staff is receiving and analyzing large quantities of data to see whether and how pricing is being impacted by the removal of SCO service. (*See* Order at 17, OPAE Appx. 23 (stating Commission's belief "that a maximum amount of information should be provided regarding the impact of DEO's exit" and requiring stakeholders to establish a process for providing data regarding "effect on competition and customers").) Likewise, OCC is receiving files of information each month to enable its own analysis. (*See id.* at 10, OPAE Appx. 16 (describing provisions of stipulation requiring provision of information to "enable OCC to periodically analyze . . . the impact of an exit from the merchant function on nonresidential customers").) Indeed, far from cutting customers loose, the Commission is providing what (in DEO's experience) is an unprecedented level of analysis of the pricing of natural-gas service to customers.

In the end, some of OPAE's concerns are not unreasonable in themselves. But the proper response to its concerns is not to reject any further development of competitive markets or to ossify forever the current state of commodity regulation. The proper response is to identify a

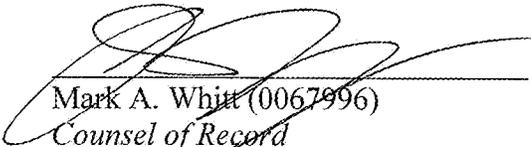
small step, take it carefully, and examine its impacts judiciously. And that is what happened in this case.

#### IV. CONCLUSION

For the foregoing reasons, DEO respectfully requests that the Court affirm the Order.

Dated: July 9, 2013

Respectfully submitted,



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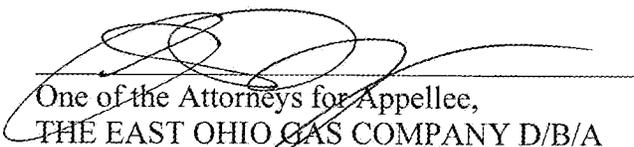
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief of Appellee, DEO, was served by U.S. mail this 9th day of July, 2013, upon the following:

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