In The
SUPREME COURT OF OHIO

Ohio Partners for Affordable Energy,	:	
	:	Case No. 06-1633
Appellants,	:	
	:	On appeal from the Public Utilities Commission of Ohio, Case No. 05-474-GA-ATA, *In the Matter of the Application of The East Ohio Gas Company dba Dominion East Ohio for the Approval of a Plan to Restructure its Commodity Service Function.*
v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE, PUBLIC UTILITIES COMMISSION OF OHIO

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SUPREME COURT OF OHIO

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PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION

The narrow question presented to the Commission addressed how a company procures natural gas to serve its customers. Historically gas companies made individual contracts to build up a supply portfolio of gas to serve their customers. The costs of this gas is reviewed after the fact by the Commission in an annual proceeding and, if reasonable, passed on to customers. As a result of the Commission's order, Dominion East Ohio (DEO or Dominion) will, on an experimental basis, put its entire requirement for gas out for bid with the bidding process overseen by the Commission. That is all this order does. Instead of buying its gas in increments over the course of a year through individual negotiations, the company will now buy it all at once through a public bidding process. Instead of a review of its gas costs under the gas cost recovery or GCR mechanism of R.C. 4905.302, Dominion has proposed that these costs will be set at market-based levels under a trial program filed under R.C. 4929.04. Customers will still receive gas from the utility at a rate whose reasonableness is assured by continuing Commission oversight.

While there are substantial reasons to think the public will benefit from the boost that Dominion's proposal brings to an already competitive market, it is only a pilot program. Time will tell if the approach is worth continuing. In large measure the consuming public will observe nothing as a result of this change. They will continue to buy reasonably-priced gas from Dominion as if nothing had happened. The bills will look the same and will still come from Dominion.

The law authorizes the Commission to consider innovative ways to move towards a competitive marketplace and that is what its order does. The order will promote greater competition and opportunities for marketplace participants and choices for customers. Customers benefit from more accurate market-pricing information and better informed decision-making in analyzing their natural gas needs. Appellant Ohio Partners for Affordable Energy (OPAE) seeks to derail this trial program primarily because it contains no new funding for weatherization and energy conservation programs that OPAE member agencies administer. As will be shown in this brief, the strings that OPAE seeks to attach to Dominion's pilot program are not mandated as part of a R.C. 4929.04 application.

The Commission's decision is authorized by law and its factual findings are supported by the record and grounded in good sense. The Commission's order should be affirmed.

STATEMENT OF THE FACTS AND CASE

On April 8, 2005, Dominion filed an application to restructure its commodity service obligation, to expand retail choice options for its customers and to maximize the pool of customers receiving commodity service from competitive retail natural gas suppliers. *In the Matter of the Application of The East Ohio Gas Company dba Dominion East Ohio for the Approval of a Plan to Restructure its Commodity Service Function*, Case No. 05-474-GA-ATA (hereinafter "*In re DEO*") (Opinion and Order at 2) (May 26, 2006), OPAE App. at 19.[1] Dominion proposed to eliminate its existing gas cost recovery pricing (GCR) mechanism, and replace it with a new market-based standard service offer rate through a two-phase process. This appeal involves only the Commission's approval of Phase 1 of Dominion's proposal on a "pilot" or trial basis through September 1, 2008, subject to ongoing Commission oversight. *Id.* at 27, OPAE App. at 44. Phase 2 will require a separate, future application and Commission approval and will be implemented only if Dominion justifies it to the Commission. *In re DEO* (Entry on Rehearing at 3) (September 7, 2005), OPAE App. at 59; *In re DEO* (Entry on Rehearing at 4) (July 12, 2006), OPAE App. at 12.

Phase 1 fundamentally changes the way DEO procures and prices its commodity sales service for retail customers. Dominion's Phase 1 proposal creates a standard service offer (SSO), priced in part upon auction results. *In re DEO* (Opinion and Order at

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1 References to appellant's appendix are denoted "OPAE App. at ___;" references to appellant's supplement are denoted "OPAE Supp. at ___;" references to appellee's appendix attached hereto are "App. ___;" references to appellee's second supplement are "Sec. Supp. at ___."

16) (May 26, 2006), OPAE App. at 33. Under Phase 1, DEO will continue to purchase wholesale supplies of natural gas for its remaining retail sales customers to provide this market-based SSO service. The auction bids, to be submitted by independent suppliers, will be specified as an adjustment to the New York Mercantile Exchange (NYMEX) monthly settlement price for natural gas futures. The overall SSO price is the sum of the NYMEX future price plus a retail price adjustment of $1.44/Mcf to cover related, non-commodity costs. The entire competitive process will be conducted by an independent auctioneer hired by the Commission. *Id.* at 21, OPAE App. at 38. DEO sales customers will continue to enjoy the freedom to choose between the company's SSO commodity sales service or taking service from a competitive supplier. DEO will remain the back-stop provider of last resort for customers throughout the Phase 1 period. *In re DEO* (Opinion and Order at 4) (May 26, 2006), OPAE App. at 21.

The Commission established a comment period and received both initial and reply comments from numerous parties representing supplier, competitive, and customer interests, including the Ohio Consumers' Counsel on behalf of residential customers. *Id.* at 2-3, OPAE App. at 19-20. The Commission made a threshold determination that Dominion's application was a request to exempt its natural gas commodity sale service from Chapter 4905 and, thus, should be evaluated under R.C. 4929.04. *In re DEO* (Entry) (August 3, 2005), OPAE App. at 50-56. That statute empowers the Commission to exempt commodity sales service from various chapters of Title 49 if enumerated statutory findings are made. Applications approved under the statute remain subject to the Commission's continuing jurisdiction under R.C. 4905.26 to entertain complaints.

Ohio Rev. Code Ann. § 4929.04(F) (Anderson 2006), App. at 8. R.C. 4929.04 contains built-in customer protections through several remedies that the Commission may order, including the right to order compliance, to modify an existing plan, or to abrogate an order approving a plan under R.C. 4929.04. *Id.*

Although several parties requested rehearing on the Court's procedural determination to evaluate Dominion's proposal under R.C. 4929.04, *OPAE did not*. The Commission denied all rehearing requests on this issue and the case proceeded to hearing as required under the statute. *In re DEO* (Entry on Rehearing) (September 7, 2005), OPAE App. at 57-60. The focus of the hearing and the required statutory inquiries were whether the application substantially complied with the policy objectives of R.C. 4929.02 and whether Dominion's retail commodity sales service is subject to effective competition.

Several days of hearings were held in December of 2005 during which time oral testimony and other evidence was elicited from a number of witnesses, as Dominion's Phase 1 plan was exhaustively analyzed by all parties. OPAE sponsored the testimony of Elizabeth Hernandez who principally advocated for an increase in funding for Dominion's existing weatherization and conservation programs for low-income customers. Test. of E. Hernandez, OPAE Supp. at 52-65. Presently, Dominion funds such programs at a level of $3.5 million per year[2] and it anticipates no reduction or termination of this funding level. Rebuttal Test. of J. Murphy at 12, OPAE Supp. at 143.

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2 A case broader in scope, such as a base rate application under R.C. 4909.18 where all utility revenues and expenses are examined, presents the best opportunity to evaluate OPAE's request for increased funding, since it could impact utility expenses and customer rates.

At the close of the hearing, on December 7, 2005, Dominion and other parties signed a Stipulation and Recommendation (Stipulation) that modified DEO's pilot proposal. *In re DEO* (Opinion and Order at 4) (May 26, 2006), OPAE App. at 21. One significant aspect of both Dominion's proposal and the Stipulation was the creation of a stakeholder process to provide ongoing opportunities for all interested parties to provide input regarding the implementation and operation of Phase 1, and ultimately, if necessary, the formulation of the Phase 2 application. *Id.* at 7, OPAE App. at 24.

A significant factor influencing the Commission's decision to approve the pilot commodity sales program is the minimal risk it poses to customers. Commission staff witness Steven E. Puican, who evaluated the merits of Dominion's "exit-the-merchant"[3] function proposal at length, pointed out that Phase 1 replaces current gas cost recovery pricing under R.C. 4905.302 on a trial basis. Dominion's proposal offers a market-based service offer that will provide customers with better pricing signals and enhanced ability to evaluate alternative supply offers. Test. of S. Puican at 10, Sec. Supp. at 11. He explained that elimination of the GCR will make market entry and participation more attractive for competitive suppliers and create greater flexibility in offers they can make. *Id.* at 10-11, Sec. Supp. at 11-12. In recommending Commission approval of the pilot phase, he explained that the risk to customers is very minimal since the Commission reserves the right to expand to Phase 2 only if Phase 1 is successful or, alternatively, to

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3 "Merchant function" refers to the natural gas company's obligation to purchase gas for resale to end-use customers at a regulated rate. Testimony of S. Puican at 3, Sec. Supp. at ___.

contract back to a gas cost recovery pricing methodology if the Phase 1 pilot experience dictates such a result. *Id.* at 11, Sec. Supp. at 12.

Based upon the record submitted, the Commission determined that Dominion's Phase 1 pilot, as subsequently amended by a Stipulation and Recommendation,[4] substantially complied with the policy requirements of R.C. 4929.02. The Commission further determined that it met the requirements of R.C. 4929.04(A), finding that DEO's commodity service was subject to effective competition and that its retail customers presently enjoy reasonable alternatives for that service. *In re DEO* (Opinion and Order at 27-28) (May 26, 2006), OPAE App. at 44-45. The Commission noted that DEO's pilot proposal constituted a measured progression in the Commission's regulatory oversight of retail sales of natural gas, that builds upon Dominion's existing and successful natural gas choice program that has been popular among customers for several years. *Id.* at 17, OPAE App. at 34. The Commission determined that Dominion's Phase 1 proposal, as modified, represented a reasonable structure to test the ability of the R.C. 4929.04 process to expand competition among suppliers and reduce long-term rates for commodity service to retail customers. *Id.* at 17, 27, OPAE App. at 34, 44. The Commission further found that DEO's remaining retail sales customers should benefit from a market-priced

4 The December 7, 2005 Stipulation modified the auction process and eliminated the previous charge to customers for choice-related customer education costs and replaced it with an identical charge, known as a Program Cost Fee, to be paid by *suppliers* (not by OPAE) to recover DEO's consumer education and program-implementation costs for DEO's pilot program. *In re DEO* (Opinion and Order at 6) (May 26, 2006), OPAE App. at 23. DEO committed to work with the stakeholder group to determine how to most effectively spend this money to educate customers about DEO's proposal. *Id.* at 7, OPAE App. at 24.

standard service offer, which will better reflect the market price of natural gas and thus promote more informed customer shopping, consumption, and conservation choices. *Id.* at 19, OPAE App. at 36. Finally, the Commission made it clear that its intention is to retain continuing oversight authority over DEO's proposal and the stakeholder process, including the right to terminate the Phase 1 pilot and return to a GCR pricing methodology if DEO fails to justify a move to Phase 2. *Id.* at 27, OPAE App. at 44. The Commission also reserved the right to order a special management performance audit at any time for any issue arising from DEO's implementation of its pilot program. Test. of S. Puican at 12, Sec. Supp. at 13; *In re DEO* (Opinion and Order at 8) (May 26, 2006), OPAE App. at 25. As approved, Dominion's Phase 1 program extends to September 1, 2008, and incorporates two winter heating seasons. *Id.*

Several parties, including OPAE, filed for rehearing of this decision, all of which were denied by the Commission. *In re DEO* (Entry on Rehearing) (July 12, 2006), OPAE App. at 9-15. Thereafter, on August 29, 2006, Dominion conducted an auction to establish pricing for its retail standard service offer during the Phase 1 period. Staff Post-Auction Report at 1, Sec. Supp. at 20. Auction participants bid a "retail price adjustment" in the form of an adder to the monthly NYMEX settlement price for natural gas futures. *Id.* This adjustment is a fixed dollar amount over the 23-month term of Dominion's Phase 1 pilot and reflects the bidders' estimates of their incremental cost to DOE. *Id.*

Under the watchful eye of independent auction manager Energy Gateway, 12 bidders participated in the auction held on August 29, 2006. *Id.* The Commission's Staff analyzed and compared the differential between Dominion's GCR rate and historical NYMEX rate information to develop a benchmark to assist the Commission in evaluating auction results. *Id.* at 1-4, Sec. Supp. at 20-23. The auction yielded a surprisingly low retail price adjustment of $1.44/Mcf, well below the $2.196-$2.504/Mcf above the NYMEX settlement price range that the Commission's Staff had concluded was reasonable. *Id* at 4-5, Sec. Supp. at 23-24.[5] The Commission found this result to be reasonable and determined that the auction was conducted in a fair and impartial manner. *Id.* It directed that Dominion's SSO price be determined as the sum of the NYMEX settlement price and the $1.44/Mcf retail price adjustment and it directed DOE to contract with winning bidders accordingly and to file final tariffs to implement this market-based standard service offer price during the Phase 1 term. *Id.* at 2-3, Sec. Supp. at 21-22.

Although parties representing a diversity of interests (including residential customers) participated in the case below, only OPAE has taken an appeal from this decision.

[5] In alleged error number five in its notice of appeal, OPAE asserts that the Commission approved an excessive price for Dominion's standard service offer. It is difficult to address OPAE's position since it filed no testimony on this point before the Commission, nor did it brief this alleged error to this Court. Having said that, the Commission fully explained its reasoning for selecting the already proven descending clock auction process. Likewise, the reasonableness of the $1.44 retail price adjustment derived from the auction process is amply established in the record and well below the range of benchmark prices calculated by the Commission's Staff. Post-Auction Report at 4-5, Sec. Supp. at 23-24.

ARGUMENT

Proposition of Law No. I:

The Commission lawfully analyzed Dominion's application under R.C. 4929.04 and made each required factual finding based upon evidence in the record.

R.C. 4929.02 evinces a legislative preference for competition and innovation in the natural gas industry. Consistent with the overarching goal of promoting adequate, reliable, and reasonably-priced supplies of natural gas for Ohioans, the statute encourages innovation, diversity of supplies and suppliers, better access for customers to market price information, and additional choices for residential customers. Ohio Rev. Code Ann. § 4929.02(1), (4), (8), (11) (Anderson 2006), App. at 5, 6. R.C. 4929.04 gives the Commission the tools to make this happen by allowing exemption from traditional regulatory restraints for new pricing and services. Dominion's pilot program facilitates each of these important goals. OPAE seeks instead to promote its own interests at the expense of these important policies through unlawful demands that could add additional costs for customers.

Appellant OPAE is not a natural gas company that provides commodity or ancillary service, nor does it compete with or directly provide retail natural gas service to customers. According to its motion to intervene, OPAE has a stated purpose of "advocating for affordable energy policies for low and moderate income Ohioans." Its members include organizations that provide bill assistance programs and weatherization and energy efficiency services. Although it ostensibly challenges the Commission's application of R.C. 4929.04 and the findings made by the Commission under the statute, OPAE's primary complaint is that Dominion's pilot plan does not come with enough strings attached. Specifically, OPAE claims Dominion's plan is unreasonable because it does not contain new and increased funding levels for the types of demand-side and conservation programs that OPAE and its members administer. Nowhere does Ohio law impose such a requirement, nor would a Commission fiat that requires Dominion to increase funding for these programs advance the stated policy objectives of R.C. 4929.02.

It appears that OPAE may be confused as to what the Commission actually did. For example, OPAE's brief notes that Dominion never requested an alternative regulation plan under R.C. 4929.05 and that the Commission "ignored R.C. 4929.05." OPAE Brief at 25. Dominion's pilot application was processed under R.C. 4929.04, not R.C. 4929.05, because substantively it requested an exemption from R.C. 4905.302 (the gas-cost-recovery or GCR statute) for Dominion's procurement and pricing of gas for its retail commodity sales service to customers. In other words, OPAE compares apples to oranges since the purposes and language of the statutes are different, and the Commission has adopted different rules for each.

Dominion sought a Title 49 exemption for its trial program. The Commission's decision to review Dominion's Phase 1 proposal under R.C. 4929.04 was both discretionary and lawful. The Commission enjoys broad authority in the conduct of its business. *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 734 N.E.2d 775 (2000) citing *Duff v. Pub. Util. Comm'n*, 56 Ohio St. 2d 367, 379, 384 N.E.2d 264, 273 (1978). Importantly, this Court has noted the Commission's discretion to decide how, in light of its internal organization and docket considerations, to best manage its docket to promote efficient and timely adjudication of cases before it. *Toledo Coalition for Safe Energy v. Pub. Util. Comm'n*, 69 Ohio St. 2d 559, 560, 433 N.E.2d 212, 214 (1982). Dominion's application affects acquisition, supply, and pricing of its retail commodity sales service to customers and thus it complies with the language of R.C. 4929.04(A). Moreover, OPAE enjoyed ample notice and procedural opportunities to challenge the proposal in comments, through witness testimony during the hearing and in briefs that it filed with the Commission. The Commission acted lawfully.

OPAE bears a heavy burden to prove its assertions, particularly where, as here, the Commission acts pursuant to express statutory authority. The Court has often afforded due deference to the Commission's expertise in interpretation and application of statutes that deal with utility rate matters. *Migden-Ostrander v. Pub. Util. Comm'n*, 102 Ohio St. 3d 451, 812 N.E.2d 955 (2004). Likewise, the Commission enjoys broad discretion in the manner and conduct of its business to promote thorough and efficient adjudication of matters before it. *Toledo Coalition, supra*. OPAE asks the Court to reweigh the evidence and second-guess the Commission's application of judgment to the facts. As to all factual determinations made by the Commission under R.C. 4929.04, OPAE must show that the Commission's decision is against the manifest weight of the evidence or clearly unsupported by the evidence. *Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 856 N.E.2d 213 (2006) citing *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 81, 85-86, 765 N.E.2d 862, 867 (2002). OPAE has not done so. Finally, this Court will not reverse a Commission order absent an affirmative showing by OPAE that it is harmed or prejudiced by the order. *Myers v. Pub. Util. Comm'n*, 64 Ohio St. 3d 299, 302, 595 N.E.2d 873, 876 (1992). As will be shown, the Commission's factual findings are supported by ample evidence, and OPAE has established no prejudice whatsoever from the Commission's order. The Commission's decision should be affirmed.

1. The Commission correctly reviewed Dominion's retail commodity service application under R.C. 4929.04.

The Commission's determination to analyze Dominion's pilot application under R.C. 4929.04 was correct as a matter of fact and law. The Commission did so because Dominion's proposal affects pricing and acquisition of natural gas supplies for its *retail commodity sales service,* a subject expressly contemplated under the statute:[6]

> (A) The public utilities commission, upon the application of a natural gas company . . . shall exempt, by order, *any commodity sales service* or ancillary service of the natural gas company from all provisions of Chapter 4905. . . .

Ohio Rev. Code Ann. § 4929.04(A) (Anderson 2006), App. at 6-7 (emphasis added). By approving Phase 1 of Dominion's application on a "pilot" basis, the Commission promoted market pricing (on a trial basis) for Dominion's commodity sales service in an environment already characterized by multiple suppliers and extensive customer shopping. The Commission will continue to review this trial program and can return Dominion commodity retail sales to former gas cost recovery pricing under R.C. 4905.302 if the results of Phase 1 are not favorable to customers.

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6 Although it did not sign the December 7, 2005 Stipulation, even residential customer representative, the Ohio Consumers' Counsel, agreed that the Commission's determination to consider Dominion's pilot under the R.C. 4929.04 was proper because that application sought exemption from the gas cost recovery requirements under R.C. 4905.302 for its commodity sales service. *In re DEO* (Entry on Rehearing at 2, ¶4) (September 7, 2005), OPAE App. at 58.

Importantly, OPAE *did not challenge* the Commission's threshold determination, despite ample opportunity to do so. *In re DEO* (Entry on Rehearing) (September 7, 2005), OPAE App. at 57-60. OPAE, like all other parties, was on notice that the substance of Dominion's April 5, 2005 application was intended to restructure its commodity sales service. It was not until nearly four months later, after comments and reply comments were submitted and two days of hearing held and evidence taken, that OPAE argued for the first time that this determination by the Commission was improper. Given the passage of time and expenditure of the parties' and Commission resources, OPAE's conscious decision to stand silently on the sidelines should not be rewarded, particularly since OPAE has not been prejudiced in any way. As already pointed out, OPAE was afforded all process under the statute and ample opportunity to challenge Dominion's proposal. The Court should affirm this threshold determination and find that it was properly within the Commission's discretion to make. *Toledo Coalition for Safe Energy v. Pub. Util. Comm'n*, 69 Ohio St. 2d 559, 560, 433 N.E.2d 212, 214 (1982).

2. OPAE received all process due under R.C. 4929.04.

In terms of procedural due process, R.C. 4929.04 requires:

a) Notice of the application;

b) A period for comments upon the application; and,

c) In the case of natural gas company (like Dominion) with 15,000 or more customers, a hearing on the application.

OPAE received notice of Dominion's application that was filed in April of 2005, and OPAE moved for intervention just a short time later. It was served with the Commission's August, 2005 entry that established a procedural schedule for analyzing Dominion's Phase 1 pilot program under R.C. 4929.04. Thus, OPAE was on notice and fully aware of the Commission's intended procedural course. The Commission granted a period for both initial and reply comments and OPAE submitted comments to Dominion's Phase 1 proposal. Evidence was taken during two days of hearings conducted in December, 2005. OPAE sponsored a witness and its counsel cross-examined other witnesses. All parties were provided the opportunity to fully brief the issues upon completion of the hearing. OPAE briefed the case to the Commission.

OPAE received all process required under R.C. 4929.04, and it *does not argue to the contrary*.

3. Dominion's Phase 1 application substantially complies with the policy provisions of R.C. 4929.02.

The Commission found, as a factual matter, that Dominion's pilot application, as modified by the Stipulation and Recommendation, substantially comports with the policy provisions of R.C. 4929.02. *In re DEO* (Opinion and Order at 29, ¶ 13) (May 26, 2006), OPAE at 46; *In re DEO* (Entry on Rehearing at 3) (July 12, 2006), OPAE App. at 11. This factual finding was made under R.C. 4929.04(A) and should be affirmed.

R.C. 4929.02 establishes a legislative preference to promote innovation and competition in the natural gas industry consistent with the continued availability of adequate, reliable, and reasonably-priced services and goods. More to the point, the Commission is charged with fostering an emerging competitive marketplace through flexible regulatory treatment. R.C. 4929.02(G). This is precisely what the Commission did, when it approved progressive movement toward market pricing to encourage development of new services, products, and pricing choices for customers. Customer decision-making is enhanced and comparison shopping made easier with more accurate market price information. This furthers, rather than frustrates, the overarching legislative goal to promote availability of adequate, reliable, and reasonably-priced natural gas supplies and choices for customers. Dominion's current market structure is consistent with the statutory policy directives and Phase 1 furthers each of these objectives by supporting even more vigorous competition. Rebuttal Test. of J. Murphy at 11-12, OPAE Supp. at 142-143.

Nonetheless, OPAE argues that the Commission failed to implement a single provision of the statute, namely R.C. 4929.02(A)(4), to *encourage* innovation and market access for cost-effective supply and demand-side natural gas services and goods. OPAE Brief at 34. It argues that Dominion's Phase 1 pilot proposal is unreasonable and unlawful essentially because it does not include increased funding for such programs.[7] OPAE's singular focus is nowhere more evident than in the testimony of its only witness, Elizabeth Hernandez. The self-avowed thrust of her testimony was "to establish the need for low-income customer assistance programs, both in the area of bill assistance and energy efficiency, weatherization and health and safety services." Test. of E. Hernandez

[7] OPAE's witness Hernandez noted that Dominion provides approximately $3.5 million annually for such programs. Test. of E. Hernandez at 6, OPAE Supp. at 59.

at 2, OPAE Supp. at 55. Ms. Hernandez recommended that funding for low-income assistance programs *be increased to $7.5 million annually* from the existing $3.5 million level. *Id.* at 6-7, OPAE Supp. at 59-60. The issue is not whether such funding and programs serve an important purpose – they do. The question is whether the law mandates them in this case. It does not.

The Commission found that neither R.C. 4929.02 nor R.C. 4905.70 (discussed later) mandated the increased demand-side or weatherization program funding sought by OPAE in this case or as a condition to approval of DEO's pilot application. *In re DEO* (Opinion and Order at 19, 25) (May 26, 2006), OPAE App. at 26, 42. While R.C. 4929.04(A)(4) states that the Commission should *encourage* innovation and market access for such programs, the statutory language does not require funding of this type as a prerequisite to approval of a R.C. 4929.04 application. Having said that, the Commission recognizes that such programs meet important needs. In fact, the Commission has recognized and encouraged conservation and energy efficiency programs in other cases under different statutory provisions as an important part of natural gas policy. *See, e.g. In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC (Opinion and Order at 13) (September 13, 2006), App. at 22. Unlike this case, the *Vectren* case involved a conservation program application filed as part of an *alternative regulation plan under R.C. 4929.05*, and not an exemption filing under R.C. 4929.04. *Id.* at 2, 10, 17 at ¶ 11, App. at 11, 19, 26.

In this case, OPAE attempts to convert a broad policy objective into a specific statutory mandate that does not conform to the words of the statute or the intent of the

General Assembly. The Commission noted that, from a practical perspective, a mechanism to move to purer market-pricing will provide customers with better comparative information and aid them in evaluating *their need* for such programs. *In re DEO* (Opinion and Order at 19, 25) (May 26, 2006), OPAE App. at 26, 42. Nor should it be overlooked that Dominion currently funds such programs at a level of $3.5 million per year, and the Company has not proposed any reduction to this ongoing, annual funding commitment. Rebuttal Test. of J. Murphy at 12, OPAE Supp. at 143.

Equally unpersuasive is OPAE's argument that the Commission violated R.C. 4905.70, a statute that generally promotes *electricity* conservation programs. Ohio enacted this statute to carry out mandates associated with the federal Public Utilities Regulatory Policies Act, or PURPA, a statute that addresses electricity, not natural gas, matters. *Greater Cleveland Welfare Rights Organization, Inc. v. Pub. Util. Comm'n*, 2 Ohio St. 3d 62, 442 N.E.2d 1288 (1982). The history of the bill which created R.C. 4905.70 is instructive in this regard. As originally written, the bill included a provision, section 12, that explained that the bill was intended to include natural gas companies in addition to electric companies. Subsequently, the addition of section 14 to the legislation *eliminated* any reference to natural gas companies in the statutory text. *See* discussion in *City of Columbus v. Pub. Util. Comm'n*, 58 Ohio St. 2d 427, 429, 390 N.E.2d 1201, 1202-1203 (1979) (emphasis added). By voiding the language of then H.B. No. 230 that previously referred to natural gas companies, the General Assembly showed that it meant R.C. 4905.70 to apply solely to electric light companies.

The very language of R.C. 4905.70 confirms this result. As already shown, the text of the statute reveals no reference to or mention of natural gas service or natural gas companies. The title refers to "methods of pricing *electricity*." The statute deals with electric rates and services not only in its caption but also through textual references to "electric light company," "kilowatt hours," and "kilowatt of billing demand," all of which pertain to the provision of electricity. Finally, the decisions of this Court that have examined R.C. 4905.70 have done so solely in an electricity context. R.C. 4905.70 does not authorize the Commission to foist upon Dominion new funded mandates for demand-side or conservation programs. Where the statutory language itself clearly expresses the legislative intent, courts need look no further. *Provident Bank v. Wood*, 36 Ohio St. 2d 101, 105, 304 N.E.2d 378 (1973) (citation omitted). R.C. 4905.70 is inapplicable to this case and OPAE's assertions should be rejected.

Finally, the Commission has previously dealt with and rejected similar attempts to misapply R.C. 4905.70 in cases before it. *See, e.g., In re Vectren Energy Delivery of Ohio Inc.,* Case Nos. 04-571-GA-AIR, *et al.* (Opinion and Order at 13) (April 13, 2005), App. at 22. In that case, the Commission labeled as "disingenuous" efforts by the Ohio Consumers' Counsel to apply the statute to attack a Stipulation and Recommendation in a *natural gas rate case*. The Commission there noted that R.C. 4905.70 applies to electricity matters and the Commission believes the same to be true here. No interpretation is needed. Assuming *arguendo* that the statute is not clear and requires interpretation, the Commission has interpreted R.C. 4905.70 and found that it does *not* pertain to natural gas companies. The Court has routinely recognized that due deference should be given to statutory interpretations by an administrative agency that has accumulated substantial expertise and to which the General Assembly has designated enforcement responsibility. *Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 384, 856 N.E.2d 213 (2006) citing *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 17-18, 734 N.E.2d 775 (2000).

In sum, R.C. 4929.02(A)(4) and 4905.70 encourage the types of demand-side management and conservation programs that OPAE touts. The Commission also recognizes the importance of these programs, but that is not the issue here. The issue before this Court is whether these statutes mandate newly-funded, demand-side management initiatives as a condition to the Commission approving Dominion's market-pricing plan filed under R.C. 4929.04. The plain words of the statute answer this question in the negative. DEO currently maintains and funds, at healthy levels, programs of this type and has committed to do so into the future. *See, e.g. In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC (Opinion and Order) (September 13, 2006), App. at 10-29. OPAE's demand for more weatherization and conservation funding enjoys no support in the language of either statute that it cites.

4. Dominion's retail commodity service is subject to effective competition and customers have reasonably available alternatives. Ohio Rev. Code Ann. § 4929.04(A)(1) and (2) (Anderson 2006), App. at 6-7.

Although the law requires that the Commission find only one or the other, under R.C. 4929.04(A), the Commission found that the record supported both findings. *In re DEO* (Opinion and Order at 25-27, 29, ¶ 13) (May 26, 2006), OPAE App. at 42-44, 46. There is substantial evidence of record to support these factual determinations:

- There is extensive competition in Dominion's Energy Choice market with 16 different marketers providing commodity service in that program (Test. of J. Murphy at 11, OPAE Supp. at 40);

- These suppliers serve 685,207 customers (including PIPP[8] customers) (*Id.* at 12, OPAE Supp. at 41);

- 53% of non-PIPP residential customers and 52% of non-residential customers participate in the Energy Choice program (*Id.*; Rebuttal Test. of J. Murphy at 11, OPAE Supp. at 142);

- In terms of gas volumes, GCR sales accounted for only 26% of DEO's total throughput in 2004 (Rebuttal Test. of J. Murphy at 11, OPAE Supp. at 142);

- Dominion's Energy Choice program has the highest participation rates and total number of customers of any choice program in the United States (*Id.*);

- Nearly 28% of Dominion's current retail customers have participated in the choice program with a competitive supplier at one time or another (*Id.* at 12, OPAE Supp. at 143);

- No single supplier has a dominant market share, indicating that customers are exercising varied supplier choices (*Id.* at 13, OPAE Supp. at 144); and

Scott White, who appeared on behalf of the Ohio Gas Marketers' Group, presented a competitor's perspective as to why Dominion's Phase 1 proposal enhances the level of competition in an already highly-competitive environment. He noted:

- The current Dominion market is probably the most competitive natural gas market in the United States (with the exception of Georgia markets) in terms of migration levels for residential, commercial, and industrial end-use customers (Test. of S. White at 9, Sec. Supp. at 49);

- Lack of barriers and ease of entry for competitive suppliers has led to a number of active marketers in Dominion's service area (*Id.* at 9-10, Sec. Supp. at 49-50);

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[8] This designation refers to low-income customers who qualify for the Percentage of Income Payment Program (*i.e.* PIPP).

- Use of a commodity price based upon a nationally-traded market price (New York Mercantile Exchange or NYMEX) will enhance customer understanding and decision-making in choosing their supplier and result in more choices (*Id.* at 6-8, Sec. Supp. at 46-48); and,

- Use of market pricing enhances the ability of marketers to develop new products and put offers into the market at all times during the year (*Id.* at 8-9, Sec. Supp. at 48-49).

This evidence is uncontroverted. It shows that Dominion's Choice program is one of the most established and competitive in Ohio, with numerous suppliers presently serving hundreds of thousands of customers as an alternative to Dominion's retail commodity sales service. It also suggests that, if successful, Dominion's trial proposal will benefit customers and allow effective competition in an already-competitive market area to grow and flourish. Nonetheless, OPAE argues that effective competition cannot be demonstrated absent a guarantee that market prices will translate into lower rates for customers or more suppliers entering the marketplace. OPAE Brief at 30. OPAE is unable to cite any legal support for this proposition because there is no such legal requirement. As the Commission noted in its order:

> Requirements that the company demonstrate with certainty that the cost of gas under this plan would be lower than GCR rates calls for a level of clairvoyance that extends both the letter and the spirit of Chapter 4929, Revised Code, and which would be, as a practical matter, impossible to satisfy.

In re DEO (Opinion and Order at 17) (May 26, 2006), OPAE App. at 34. The Commission approved Phase 1 as a measured progression toward market pricing for commodity service to test the ability of the new process to expand competition among suppliers and reduce rates in the long term. *Id.* Time will tell whether this trial effort will yield better prices for customers, but the Commission believes Dominion's pilot program holds worthwhile potential to effectively test the marketplace and unlock benefits for customers. If actual Phase 1 results fail to meet the collective stakeholder expectations of Dominion, customer representatives, and competitive interests, (and the Commission agrees), the Commission can terminate the pilot program and return to the gas cost recovery pricing methodology under R.C. 4905.302. The Commission's review will be ongoing and, under R.C. 4929.04, implementation of Dominion's proposal will be subject to the complaint provisions of RC. 4905.26 if disputes arise. Until then, OPAE's argument is simply speculative and should be rejected. *Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 856 N.E.2d 213 (2006). In the meantime, customers continue to enjoy numerous supply options under Dominion's existing Choice program and will continue to shop for the best quality and priced service available.

The facts are compelling and, as already noted, uncontroverted by OPAE. The level of customer participation in Dominion's existing customer choice program, the number and variety of alternative suppliers of natural gas commodity service, and the incentive for existing marketers to compete aggressively during Phase 1 all support the Commission's finding that Dominion's commodity sales service is *currently* subject to effective competition. The existing number of competitive suppliers in Dominion's service area is a testament to the robustness of the current marketplace and shows that there exist many reasonably-available supply alternatives to Dominion's retail sales service. OPAE has failed to show that the Commission's factual findings are either against the manifest weight of the evidence or clearly unsupported by the evidence as OPAE must to secure reversal. *Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 856 N.E.2d 213 (2006) (citation omitted). The Commission's factual determinations should be affirmed.

5. The Commission's finding that Dominion offers distribution services on a fully open, equal, unbundled basis to all its customers and that all its customers reasonably may acquire commodity sales services from other suppliers is reasonable and unchallenged by OPAE.

R.C. 4929.04(D) requires that Dominion offer distribution services on a fully open, equal, and unbundled basis to all customers. The Commission made this factual determination and OPAE does not challenge it in this appeal. *In re DEO* (Opinion and Order at 30, ¶ 14) (May 26, 2006), OPAE App. at 47. As already pointed out, nothing in Dominion's pilot program affects the current freedom of Dominion retail commodity customers to migrate to and from alternative suppliers as they do under Dominion's present Gas Choice program. Again, customers do so secure in the knowledge that Dominion remains as a backstop retail provider at a market-based rate if a supplier defaults or shopping customers return for any other reason. OPAE has not raised any arguments nor presented any evidence to the contrary. This criterion is met.

6. The Commission's approval of funding to educate customers regarding Dominion's pilot Phase 1 program was practical, lawful, and in no way prejudged the outcome of Phase 2.

As part of its decision approving Phase 1 of Dominion's plan, the Commission approved a budget of up to $14 million for customer education-related costs. As the Commission noted, this amount is based upon the amount previously expended by

Dominion to launch and implement its Gas Choice program. *Id.* at 22, OPAE App. at 39. These costs will largely be recovered through imposition of a "Program Cost Fee" paid by suppliers that participate in the Energy Choice program. Stipulation and Recommendation at 1-2, Sec. Supp. at 54-55. OPAE raises a narrow, speculative challenge. It does not challenge the concept, the need for such expenditures, or the proposed recovery mechanism. Instead, it argues that the Commission erred because its finding is outside of Phase 1, and because it alleges that approval of a customer-education budget presumes Commission approval of Phase 2. OPAE Brief at 31.

The Court should reject these arguments and apply the same practical reasoning employed by the Commission. The Commission noted that, even though the bulk of customer education expenses will likely be incurred in Phase 2, it made good sense to begin the planning/education process now given the short duration of the Phase 1 pilot. *In re DEO* (Entry at 3) (August 30, 2006), Sec. Supp. at 63. Since these costs will be paid by suppliers, not OPAE or any of its member agencies, the charge has no effect upon OPAE. During Phase 1, DEO will work closely with the stakeholder group, including the OCC, to develop an appropriate consumer education program. Rebuttal Test. of S. Beckett at 3-4, Sec. Supp. at 68-69. The vested interest that the collaborative stakeholders have in ensuring a positive Phase 1 experience will help ensure that customer-education expenditures are carefully targeted and effectively made.

Finally, the Commission flatly rejected OPAE's allegations that approval of the education plan fund constitutes Commission prejudgment of Phase 2. *In re DEO* (Entry on Rehearing at 4) (July 12, 2006), OPAE App. at 12. OPAE conveniently forgets that

Phase 2 will only move forward *if Dominion justifies it in the future* based upon Phase 1 results that are not now known or knowable. *In re DEO* (Entry on Rehearing at 4) (July 12, 2006), OPAE App. at 12. Indeed, the Commission made clear that it was not and, in fact, could not review and consider the merits of Phase 2, since much of the design and details of that phase are *yet to be developed* based upon the results of the pilot phase of DEO's proposal that is in progress. *In re DEO* (Entry on Rehearing at 3) (September 7, 2005), OPAE App. at 59. The Commission's approval of a customer-education budget was both practical and lawful.

Proposition of Law No. II:

The Court lacks jurisdiction to consider OPAE's assertion that the Commission did not strictly apply its rules regarding the filing of Dominion's application. OPAE failed to raise this issue in either its application for rehearing before the Commission or in its notice of appeal before this Court. *Communications Workers of America v. Pub. Util. Comm'n*, 57 Ohio St. 2d 76, 387 N.E.2d 230 (1979).

Neither OPAE's application for rehearing from the Commission's opinion and order, nor its notice of appeal before this Court contain any argument that the requirements of Ohio Administrative Code Chapter 4901:1-19 were not met. It is well-settled that the filing of an application for rehearing before the Commission is a prerequisite to invoking the Court's jurisdiction. Only matters set forth in the application are properly raised on appeal. *Communications Workers of America v. Pub. Util. Comm'n*, 57 Ohio St. 2d 76, 387 N.E.2d 230 (1979). Alleged errors must be in writing and pled with specificity. Ohio Rev. Code Ann. § 4903.10 (Anderson 2006), App. at 1-2. Strict compliance with this specificity requirement is required. *Consumers' Counsel v. Pub. Util. Comm'n*, 56 Ohio St. 2d 220, 383 N.E.2d 593 (1978). Indeed, this Court noted in a recent decision that the notice of appeal frames and limits the issues before it. The appellant's failure to raise an issue in its notice of appeal deprives the Court of jurisdiction. *Cincinnati Gas & Electric Co. v. Pub. Util. Comm'n*, 103 Ohio St. 3d 398, 402, 816 N.E.2d 238, 243 (2004). OPAE compounded its failure. Not only did OPAE not raise a "rules violation" in its application for rehearing, it then repeated this fatal jurisdictional error in its notice of appeal. A review of each of these pleadings bears this out. The first time OPAE alleged that the Commission failed to meet the requirements of Ohio Administrative Code Chapter 4901:1-19 was in *its merit brief* filed in this case. Thus, the Court lacks jurisdiction over these assertions.

Even assuming *arguendo* that OPAE had invoked the Court's jurisdiction on this matter, its argument should be rejected because it elevates form over substance. OPAE's arguments are not directed at the substance of Dominion's filing; rather, these arguments pertain to the form of the application. The Commission accepted Dominion's application and chose to review it under R.C. 4929.04. How the Commission processes cases to most efficiently manage its docket is and always has been a matter of discretion. *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 734 N.E.2d 775 (2000); *Toledo Coalition for Safe Energy v. Pub. Util. Comm'n*, 69 Ohio St. 2d 559, 560, 433 N.E.2d 212, 214 (1982). Moreover, Dominion's application complied with Commission rules regarding the substance of its application, at least in all material respects. The application described in great detail the objectives of the two-phase plan, rationale for the proposed changes, general framework, and timeframe, the stakeholder input process, auction process, and other matters fully in compliance with applicable Commission rules. Indeed, Dominion discussed the plan to exit the merchant function with a wide group of stakeholders for more than a year prior to the April 8, 2005 filing. Test. of J. Murphy at 13, OPAE Supp. at 42; DEO Application for Rehearing at 3, OPAE Supp. at 26. Dominion Application at 3-18, OPAE Supp. at 8-23. Additionally, Dominion filed its notice of intent to seek an exemption from Title 49 requirements as required under the rules. The substantive requirements of the Commission's rules for a R.C. 4929.04 application were met. Importantly, OPAE received all process provided under R.C. 4929.04, and OPAE does not contest this fact. It had notice of the application, it submitted comments, it sponsored a witness during the adjudicatory hearing, and it filed merit briefs with the Commission. In short, the full range of informational and procedural requirements under R.C. 4929.04 was met.

If some minor procedural rules were not strictly followed, the Commission can and did waive them by deciding to evaluate Dominion's proposal under R.C. 4929.04. In providing all process due under the statute, the Commission, even if not stating that it was doing so, effectively waived certain of the administrative code requirements. The Commission's rules provide for waiver. Ohio Admin. Code § 4901:1-19-03(A) (Anderson 2006), App. at 9. This Court has upheld the Commission's waiver of its rules in situations where the rules provided for waiver (*see, Maxwell v. Pub. Util. Comm'n*, 18 Ohio St. 3d 217, 480 N.E.2d 479 (1985)), and in cases where there was no waiver rule and no harm resulted from the waiver. *Bertolini v. Pub. Util. Comm'n*, 37 Ohio St. 2d 107, 307 N.E.2d 907 (1974); *Ohio Utilities Co. v. Pub. Util. Comm'n*, 58 Ohio St. 2d 153, 389 N.E.2d 483 (1979); *Columbus Motor Express v. Pub. Util. Comm'n*, 126 Ohio

St. 11, 183 N.E. 782 (1932). In this case, there is both a rule permitting waiver by action of the Commission and there is no harm to OPAE as a result of the order.

Again, since OPAE received all procedural protections afforded under R.C. 4929.04, including notice and ample opportunity to contest Dominion's application, it has not been harmed or prejudiced by any waiver. R.C. 4929.04 grants the Commission the authority to exempt gas utilities from R.C. 4905.302.[9] The Commission properly did so here by adopting as a pilot program Dominion's Phase 1 proposal that contains numerous customer safeguards. Test. of J. Murphy at 9-10, OPAE Supp. at 38-39. At worst, the Commission substantially complied with its rules and any omission constitutes harmless error that in no way affected the Commission's ability to thoroughly evaluate, nor OPAE's right to contest, the *substance* of Dominion's pilot proposal. When all is said and done, the burden remained upon Dominion to justify its filing, all due process under R.C. 4929.04 was afforded, and the Commission was still required to make all requisite statutory findings in accordance with the evidence of record. OPAE's alleged error is not properly before the Court, and is otherwise devoid of merit. It should be rejected.

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[9] It is noted here that R.C. 4905.302 does not mandate the application of the GCR process as it exists today in O.A.C. Chapter 4901:1-14. Instead, the legislature directed the Commission to promulgate a purchased gas adjustment rule consistent with R.C. 4905.302.

Proposition of Law No. III:

> **The Court will not reverse a Commission decision absent a showing of real and definite harm. *See, e.g. Myers v. Pub. Util. Comm'n*, 64 Ohio St. 3d 299, 302, 595 N.E.2d 873, 876 (1992). OPAE has not demonstrated any harmful or prejudicial impact from the Commission's order.**

OPAE has not established any injury to a substantial right or present pecuniary interest resulting from the Commission's order. Such a showing is required to warrant reversal. *Senior Citizens Coalition v. Pub. Util. Comm'n*, 40 Ohio St. 3d 329, 533 N.E.2d 353 (1988). The harm must be real and concomitant and not future or speculative in nature. *Cincinnati v. Pub. Util. Comm'n*, 63 Ohio St. 3d 366, 588 N.E.2d 1175 (1992). The Court has repeatedly declared that it will not reverse an order of the Commission unless the challenging party establishes actual prejudice. *Myers, supra*; *see also Holladay Corp. v. Pub. Util. Comm'n*, 61 Ohio St. 2d 335, 402 N.E.2d 1175 (Syllabus) (1980).

OPAE has not made this requisite showing. It asserts that it is unlawful to dismantle the GCR process without addressing the problems consumers may face under alternative regulation or an exemption. OPAE Brief at 39. Whatever this statement means, OPAE cites no statutory authority mandating the gas cost recovery mechanism under R.C. 4905.302 as the exclusive means for Dominion to recover its gas costs from retail customers. OPAE's statement speculates about unidentified "problems" that consumers *may* face. Such a hollow statement establishes no harm or prejudice. Harm must be real and present not future and speculative. *Cincinnati, supra*. Factually, the record reflects that there are a number of customer safeguards built into Dominion's Phase 1 proposal to protect customers during the trial program term, including:

- SSO suppliers are required to uphold the same reliability standards Dominion is held to as the GCR retail service provider;
- Changes to the existing Energy Choice pooling service terms and conditions increase the reliability of suppliers in that program;
- Dominion continues to act as the provider of last resort (POLR) for retail commodity service just as it does today in the event of a supplier's default;
- Pricing clarification for provider-of-last-resort, or POLR, service assures that customers receive commodity service at the supplier's price for the month of default, a feature not present in the current Energy Choice program;
- The Commission Staff and OCC review standard service offer, or SSO, auction results before Commission approval is requested;
- The Commission approves all bids to be rewarded;
- The Commission can reject the results of the bidding process if it concludes that there were market deficiencies in the process or that the market-clearing price is unacceptable; and
- A NYMEX-based mechanism sets the SSO price and assures that the rate is market responsive. Test. of J. Murphy at 9-10, OPAE Supp. at 38-39.

In addition to these safeguards, Dominion's pilot program performance will be subject to ongoing Commission scrutiny and the Commission may return to the gas cost recovery pricing methodology for Dominion retail commodity sales service if necessary. As Commission Staff witness Puican pointed out, there is significant potential upside for customers and correspondingly minimal risk since both the Commission and the collaborative stakeholders group will continue to carefully monitor and evaluate Phase 1 results. Test. of S. Puican at 11, Sec. Supp. 12. The Phase 1 trial will be a cooperative effort, that allows industry groups, regulators, customer groups (including the OCC), and market participants to establish the parameters and shape the program on a going-forward basis to ensure its success.

The Commission's approval of Dominion's pilot will test the potential of purer market pricing to increase competition, to create new supplier opportunities, and to lower natural gas prices to customers. These are benefits to customers. Dominion's standard service offer price better reflects a true market price since it is free of distortions associated with required adjustments to the GCR rate. This information better equips customers to evaluate the service offerings of different suppliers and the potential of demand- and supply-side programs to reduce their gas bills. Test. of S. Puican at 10-11, Sec. Supp. at 11-12. Customers remain free to select an alternative provider for commodity service, secure in the knowledge that Dominion stands ready as a POLR or backstop provider if they return for any reason. *Id.* In short, if it works as contemplated, Dominion's market price proposal will promote diversity of gas supplies and suppliers, effective competition, encourage efficient customer access to pertinent information, and facilitate additional choices for residential customers, all expressly-stated goals under the state policy statute, R.C. 4929.02. Again, OPAE has presented no evidence to rebut these positive customer attributes of Dominion's plan. To the extent OPAE has even discussed harm, it has done so only in a purely speculative way.

The Commission's decision to unlock the positive potential that Dominion's Phase 1 trial proposal holds for customers constitutes both a lawful and responsible exercise of its authority delegated under Chapter 4929. The Commission noted that Dominion's remaining retail customers will benefit from better market price information and more informed shopping, consumption, and conservation choices throughout Dominion's service area. *In re DEO* (Opinion and Order at 19) (May 26, 2006), OPAE App. at 36; *In re DEO* (Entry on Rehearing at 3) (July 12, 2006), OPAE App. at 11. The Commission further expressed its belief that neither demand-side nor weatherization programs represent the most effective tools to mitigate perceived risks to consumers associated with Dominion's proposal. *In re DEO* (Opinion and Order at 19) (May 26, 2006), OPAE App. at 36. OPAE's "interest" in this case, as explained by its witness Hernandez, is securing *new* funds for weatherization and conservation programs for low-income customers. It is a fact that Dominion presently provides $3.5 million annually for such programs. It is also a fact that Dominion has no plans to cut or discontinue this funding level. OPAE simply seeks more funding for its members to administer through demand-side management and conservation programs. Although such programs serve an important need, they are not mandated by law, and here would simply create more costs to be recovered from customers. The Court has repeatedly declared that it will not reverse an order of the Commission unless the challenging party establishes actual prejudice. *Myers, supra*; *see also Holladay Corp. v. Pub. Util. Comm'n*, 61 Ohio St. 2d 335, 402 N.E.2d 1175 (Syllabus) (1980). OPAE's "desire" for more funding to manage its programs is not an interest that has been harmed or prejudiced. The Commission's order should be affirmed.

CONCLUSION

Chapter 4929 was adopted to expand competition and promote market-based pricing of natural gas service for customers. The General Assembly delineated criteria that the Commission must consider and findings it must make in evaluating an application under R.C. 4929.04. The Commission made and the record supports its statutory findings, particularly that Dominion's pilot program will boost competition and enhance opportunities among marketplace participants. The availability of more accurate market pricing information will promote informed decision-making and choices by customers, and may ultimately lead to lower prices. Dominion's trial program will be closely monitored by the Commission and can be replaced with gas-cost-recovery pricing if necessary. The collaborative, stakeholder process directed by the Commission will provide ample opportunity for interested, affected parties to shape Dominion's program to ensure that it meets the needs and goals of the consuming public.

The Commission's order is well-reasoned, and its findings are supported by the record. That decision should be affirmed.

Respectfully submitted

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief** submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 22nd day of December, 2006.

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APPENDIX

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4903.10 Application for rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission.

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.

If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing.

No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

4905.26 Complaints as to service.

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. Such notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

Upon the filing of a complaint by one hundred subscribers or five per cent of the subscribers to any telephone exchange, whichever number be smaller, or by the legislative authority of any municipal corporation served by such telephone company that any regulation, measurement, standard of service, or practice affecting or relating to any service furnished by the telephone company, or in connection with such service is, or will be, in any respect unreasonable, unjust, discriminatory, or preferential, or that any service is, or will be, inadequate or cannot be obtained, the commission shall fix a time for the hearing of such complaint.

The hearing provided for in the next preceding paragraph shall be held in the county wherein resides the majority of the signers of such complaint, or wherein is located such municipal corporation. Notice of the date, time of day, and location of the hearing shall be served upon the telephone company complained of, upon each municipal corporation served by the telephone company in the county or counties affected, and shall be published for not less than two consecutive weeks in a newspaper of general circulation in the county or counties affected.

Such hearing shall be held not less than fifteen nor more than thirty days after the second publication of such notice.

4905.302 Purchased gas adjustment clause.

(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 liquified 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) Unless otherwise ordered by the commission for good cause shown:

(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.

(3) 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.

(4) In issuing an order under division (C)(2) or (3) 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)(2) or (3) 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) 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.

(E) 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.

(F) 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.

4905.70 Energy conservation programs.

The public utilities commission shall initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs. Notwithstanding sections 4905.31, 4905.33, 4905.35, and 4909.151 of the Revised Code, the commission shall examine and issue written findings on the declining block rate structure, lifeline rates, long-run incremental pricing, peak load and off-peak pricing, time of day and seasonal pricing, interruptible load pricing, and single rate pricing where rates do not vary because of classification of customers or amount of usage. The commission, by a rule adopted no later than October 1, 1977, and effective and applicable no later than November 1, 1977, shall require each electric light company to offer to such of their residential customers whose residences are primarily heated by electricity the option of their usage being metered by a demand or load meter. Under the rule, a customer who selects such option may be required by the company, where no such meter is already installed, to pay for such meter and its installation. The rule shall require each company to bill such of its customers who select such option for those kilowatt hours in excess of a prescribed number of kilowatt hours per kilowatt of billing demand, at a rate per kilowatt hour that reflects the lower cost of providing service during off-peak periods.

4929.02 Policy of state as to natural gas services and goods.

(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 non-exempt, 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.

(B) The public utilities commission shall follow the policy specified in this section in carrying out sections 4929.03 to 4929.30 of the Revised Code.

(C) Nothing in Chapter 4929. of the Revised Code shall be construed to alter the public utilities commission's construction or application of division (A)(6) of section 4905.03 of the Revised Code.

4929.04 Exempting commodity sales service or ancillary service of natural gas company from other rate provisions.

(A) The public utilities commission, upon the application of a natural gas company, after notice, after affording the public a period for comment, and in the case of a natural gas company with fifteen thousand or more customers after a hearing and in the case of a natural gas company with fewer than fifteen thousand customers after a hearing if the commission considers a hearing necessary, shall exempt, by order, any commodity sales service or ancillary service of the natural gas company from all provisions of Chapter 4905. with the exception of section 4905.10, Chapter 4909., and Chapter 4935. with the exception of sections 4935.01 and 4935.03 of the Revised Code, from sections 4933.08, 4933.09, 4933.11, 4933.123, 4933.17, 4933.28, and 4933.32 of the Revised Code, and from any rule or order issued under those Chapters or sections, including the obligation under section 4905.22 of the Revised Code to provide the commodity sales service or ancillary service, subject to divisions (D) and (E) of this section, and provided the commission finds that the natural gas company is in substantial compliance with the policy of this state specified in section 4929.02 of the Revised Code and that either of the following conditions exists:

(1) The natural gas company is subject to effective competition with respect to the commodity sales service or ancillary service;

(2) The customers of the commodity sales service or ancillary service have reasonably available alternatives.

(B) In determining whether the conditions in division (A)(1) or (2) of this section exist, factors the commission shall consider include, but are not limited to:

(1) The number and size of alternative providers of the commodity sales service or ancillary service;

(2) The extent to which the commodity sales service or ancillary service is available from alternative providers in the relevant market;

(3) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive prices, terms, and conditions;

(4) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of providers of services.

(C) The applicant shall have the burden of proof under this section.

(D) The commission shall not issue an order under division (A) of this section that exempts all of a natural gas company's commodity sales services from the chapters and sections specified in that division unless the commission finds that the company offers distribution services on a fully open, equal, and unbundled basis to all its customers and that all such customers reasonably may acquire commodity sales services from suppliers other than the natural gas company.

(E) An order exempting any or all of a natural gas company's commodity sales services or ancillary services under division (A) of this section shall prescribe both of the following:

(1) A separation plan that ensures, to the maximum extent practicable, that the operations, resources, and employees involved in the provision or marketing of exempt commodity sales services or ancillary services, and the books and records associated with those services, shall be separate from the operations, resources, and employees involved in the provision or marketing of nonexempt commodity sales services or ancillary services and the books and records associated with those services;

(2) A code of conduct that governs both the company's adherence to the state policy specified in section 4929.02 of the Revised Code and its sharing of information and resources between those employees involved in the provision or marketing of exempt commodity sales services or ancillary services and those employees involved in the provision or marketing of nonexempt commodity sales services or ancillary services.

The commission, however, shall not prescribe, as part of any such separation plan or code of conduct, any requirement that unreasonably limits or restricts a company's ability to compete with unregulated providers of commodity sales services or ancillary services.

(F) Notwithstanding division (A)(2) of section 4929.08 of the Revised Code or any exemption granted under division (A) of this section, the commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon the complaint or initiative of the commission, to determine whether a natural gas company has failed to comply with a separation plan or code of conduct prescribed under division (E) of this section. If, after notice and hearing as provided in section 4905.26 of the Revised Code, the commission is of the opinion that a natural gas company has failed to comply with such a plan or code, the commission may do any of the following:

(2) Modify the plan or code, if the commission finds that such a modification is reasonable and appropriate, and order the company to comply with the plan or code as modified;

(3) Abrogate the order granting the company's exemption under division (A) of this section, if the commission finds that the company has engaged in one or more material violations of the plan or code, that the violation or violations were intentional, and that the abrogation is in the public interest.

(G) An order issued under division (F) of this section is enforceable in the manner set forth in section 4905.60 of the Revised Code. Any violation of such an order shall be deemed a violation of a commission order for the purpose of section 4905.54 of the Revised Code.

4929.05 Requesting approval of alternative rate plan.

(A) As part of an application filed pursuant to section 4909.18 of the Revised Code, a natural gas company may request approval of an alternative rate plan. After notice, investigation, and hearing, and after determining just and reasonable rates and charges for the natural gas company pursuant to section 4909.15 of the Revised Code, the public utilities commission shall authorize the applicant to implement an alternative rate plan if the natural gas company has made a showing and the commission finds that both of the following conditions are met:

(1) The natural gas company is in compliance with section 4905.35 of the Revised Code and is in substantial compliance with the policy of this state specified in section 4929.02 of the Revised Code;

(2) The natural gas company is expected to continue to be in substantial compliance with the policy of this state specified in section 4929.02 of the Revised Code after implementation of the alternative rate plan.

(B) The applicant shall have the burden of proof under this section.

(C) No request may be made under this section prior to one hundred eighty days after the effective date of this section.

4901:1-19-03 Waivers.

(A) The commission may waive any provision in these rules upon a motion for good cause shown, or upon its own motion. In determining whether good cause has been shown, the following factors, among other things, may be taken into consideration.

(1) Whether other information, which the utility would provide if the waiver is granted, is sufficient for commission staff to effectively and efficiently review the application.

(2) Whether the information required to be filed by these rules, absent a waiver, is relevant to the commission's consideration of whether the application is reasonable and in the public interest.

(3) Whether the information, which is the subject of the waiver request, is reasonably available to the applicant from the information which it maintains or is reasonably obtainable by the applicant.

(4) The expense to the applicant in providing the information which is the subject of a waiver request.

(5) Whether granting of the waiver is in the public interest.

(B) Except for good cause shown, all waiver requests in an alternative rate plan case shall be filed thirty calendar days or more before the docketing of the application with the commission.

(C) All waiver requests in an exemption case shall be filed with the application and served upon all parties who are also being served a copy of the application under paragraph (B)(4) of rule 4901:1-19-04 of the Administrative Code. The applicant is encouraged to consult with the commission staff regarding its proposed waiver requests prior to the actual filing of these requests so as to avoid any undue delay in the processing of the application.

(D) Small natural gas companies should contact the staff of the commission of their intent to file an alternative rate plan or an exemption application to review individual company circumstances that support waivers and to investigate alternate filing requirements.

Case No. 96-700-GA-ORD

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Service and Related Matters.	)))))	Case No. 04-571-GA-AIR
In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Modify Current Accounting Procedures to Defer Expenditures Incurred Arising from Compliance with Federal Pipeline Safety Requirements.	))))))	Case No. 04-421-GA-AAM
In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Change Depreciation Accrual Rates for its Gas Facilities.	))))	Case No. 04-794-GA-AAM

OPINION AND ORDER

The Commission, considering the above-entitled applications, hereby issues its opinion and order in these matters.

APPEARANCES:

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo, Gretchen J. Hummel, and Daniel J. Neilsen, 21 East State Street, 17th Floor, Columbus, Ohio 43215-4228, and Robert Heidorn and Mary-James Young, Vectren Corporation, P.O. Box 209, Evansville, Indiana 47702-0209, on behalf of Vectren Energy Delivery of Ohio, Inc.

Jim Petro, Attorney General of the State of Ohio, by Duane W. Luckey, Senior Deputy Attorney General, by Steven T. Nourse and Stephen A. Reilly, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Vorys, Sater, Seymour and Pease, by M. Howard Petricoff, 52 East Gay Street, Columbus, Ohio 43215, on behalf of Honda of America Manufacturing, Inc.

Chester, Willcox & Saxbe, by Bobby Singh, and John Bentine, 65 East State Street, Suite 1000 and Vincent A. Parisi, 5020 Bradenton Avenue, Dublin, Ohio 43017, on behalf of Interstate Gas Supply, Inc. and Pinnacle Energy, LLC.

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Technician ____ Date Processed APR 13 2005

Vorys, Sater, Seymour and Pease, by W. Jonathan Airey and Gregory D. Russell, 52 E. Gay Street, P.O. Box 1008, Columbus, Ohio 43216-1008, on behalf of Industrial Energy Users-Ohio.

Bailey Cavalieri, LLC, by William Adams and Dane Stinson, 10 West Broad Street, Suite 2100, Columbus, Ohio 43215, on behalf of Shell Energy Services Co. LLC.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Ann Hotz and Joe Serio, Assistant Consumers' Counsel, Office of the Ohio Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215, on behalf of residential utility consumers of Vectren Energy Delivery of Ohio, Inc.

David Rinebolt, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839-1793 on behalf of Ohio Partners for Affordable Energy.

Ellis Jacobs, 333 West First Street, Suite 500, Dayton, Ohio 45402, on behalf of Community Action Partnership of the Greater Dayton Area.

John M. Dosker, 1077 Celestial Street, Suite 110, Cincinnati, Ohio 45202-1629, on behalf of Stand Energy Corporation.

Boehm, Durtz & Lowry, by Michael L. Kurtz, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202 on behalf of Alcoa, Inc.

HISTORY OF THE PROCEEDING:

The applicant, Vectren Energy Delivery of Ohio, Inc. (Vectren, applicant, or company), is natural gas company as defined by Section 4905.03(A)(6), Revised Code, and a public utility as defined by Section 4905.02, Revised Code. Vectren provides gas and transportation service to approximately 314,000 customers in Dayton and 87 other communities in 17 counties in west central Ohio (Staff Ex. 1, at 1). Vectren's current base rates were established by the Commission in Case No. 91-415-GA-AIR, Opinion and Order (February 20, 1992).

On April 16, 2004, Vectren filed in Case No. 04-571-GA-AIR (04-571) a notice of intent to file an application for an increase in rates to be charged for natural gas service in its entire service area subject to the jurisdiction of the Commission. In its notice of intent, Vectren requested that a test period be established beginning January 1, 2004, and ending December 31, 2004, and requested that a date certain of March 31, 2004 be established. In its notice of intent, Vectren also requested certain waivers of the Commission's standard filing requirements. By entry of May 12, 2004, the Commission approved the requested test year and date certain. The Commission also granted Vectren's request to waive the filing of Schedules B-7.2, B-9, C-8, C-9.1, C-11.1, C-11.2, C-12.1, C-12.2, C-12.3, C-12.4, D-5, and F-1, and granted a limited waiver of the requirement to file Schedule B-2.3. On

May 28, 2004, Vectren filed its application for authority to amend its filed tariffs to increase the rates and charges for gas service and related matters. By entry of July 7, 2004, Vectren's application in 04-571 was accepted for filing as of May 28, 2004.

In addition, Vectren filed an application for authority to modify current accounting procedures to defer expenditures incurred arising from compliance with federal pipeline safety requirements in Case No. 04-421-GA-AAM. Vectren also filed an application for authority to change depreciation accrual rates for its gas facilities in Case No. 04-794-GA-AAM. These matters were consolidated with 04-571 for hearing and determination.

The Commission granted intervention to Office of the Ohio Consumers' Counsel (OCC), Community Action Partnership (CAP), Ohio Partners for Affordable Energy (OPAE), Shell Energy Service Company (Shell), Interstate Gas Supply, Inc. (Interstate), Stand Energy Corporation (Stand), Alcoa, Inc. (Alcoa), Pinnacle Energy LLC (Pinnacle), Industrial Energy Users-Ohio (IEU), and Honda of America, Mfg., Inc. (Honda). The examiner also granted motions to admit John M. Dosker to practice *pro hac vice* on behalf of Stand, Timothy L. Stewart to practice *pro hac vice* on behalf of Alcoa, Mary-James Young and Robert E. Heidorn to practice *pro hac vice* on behalf of Vectren, and David C. Rinebolt to practice *pro hac vice* on behalf of OPAE.

Pursuant to Section 4909.19, Revised Code, Commission staff conducted an investigation of the matters set forth in Vectren's application. On November 24, 2004, staff filed its written report of investigation with the Commission. Objections to the staff report were filed by Vectren, OCC, IEU, Alcoa, Honda, Shell, CAP, OPAE, and Interstate. A prehearing conference was held on January 4, 2005. On January 7, 2005, the attorney examiner issued an entry that scheduled the evidentiary hearing to commence on February 1, 2005, and scheduled local public hearings on January 25, 2005, in Dayton, Ohio, and on January 27, 2005, in Sidney, Ohio, and ordered Vectren to publish notice of the local public hearings and the evidentiary hearing. The public hearings were held as scheduled. At the Dayton public hearing, 18 public witnesses gave sworn testimony. At the Sidney public hearing, five public witnesses gave sworn testimony.

On February 4, 2005, a stipulation was filed in these matters. Signatories to the stipulation include Vectren, staff, Honda, Interstate, Pinnacle, IEU, Alcoa, Stand and Shell. The February 1, 2005 evidentiary hearing was continued to and held on February 8 and 9, 2005. Initial briefs were filed by Vectren, staff, and OCC. Interstate, Honda, IEU and Shell filed statements in support of the stipulation. Reply briefs were filed by staff, Interstate, Vectren, OCC, CAP, OPAE.[1]

On three different occasions, OCC filed memoranda of *ex parte* communications with members of the Commission. On February 7, 2005, OCC filed a memorandum of *ex parte* communications between Janine Migden-Ostrander, Consumers' Counsel, and Alan

1 OPAE and CAP jointly filed a reply brief but subsequently jointly withdrew the reply brief.

Schriber, Chairman of the Commission. The subjects of their meeting were the importance of energy efficiency and a study entitled "Examining the Potential for Energy Efficiency to Help Address the Natural Gas Crisis in the Midwest" written by the American Council for an Energy Efficient Economy (ACEEE). There was also a discussion regarding the recovery mechanism for energy efficiency and the proposed treatment of demand side management (DSM) programs and the methodology for the recovery mechanism. On February 11, 2005, OCC filed a second memorandum of *ex parte* communication between Janine Migden-Ostrander and Donald Mason, Commissioner. On February 18, 2005, OCC filed a third memorandum of *ex parte* communication between Janine Migden-Ostrander and Bruce Weston, Deputy Consumers' Counsel of the OCC, and Alan Schriber, Chairman, and Paul Duffy, Legal Director, of the Commission. The subjects of the communications at the February 11 and 18, 2005 meetings were similar to the communications at the February 7, 2005 meeting.

COMMISSION REVIEW AND DISCUSSION:

SUMMARY OF STIPULATION

The stipulation provides that:

(1) The company's current rates are no longer sufficient to yield reasonable compensation for the services rendered and are therefore unreasonable.

(2) If all parties to these proceedings sign or do not oppose the stipulation, the company shall receive a revenue increase of $16,600,000, resulting in total annual revenues of $375,910,955, to be collected through the rates. If any party to these proceedings representing residential customers opposes the stipulation, the company shall receive a revenue increase of $15,700,000, resulting in total annual revenues of $375,010,955, to be collected through the rates.

(3) The value of all of Vectren's property used and useful for the rendition of service to its customers, determined in accordance with Sections 4909.05 and 4909.15, Revised Code, as of the approved date certain of March 31, 2004, is $246,069,230.

(4) The company is entitled to an overall rate of return of 8.94 percent, reflecting a cost of long-term debt of 7.40 percent and a return on equity of 10.6 percent.

(5) The depreciation accrual rates as proposed by staff for book depreciation purposes shall be adopted and utilized by Vectren.

(6) The tariff sheets provide Vectren with an opportunity to collect the total revenue specified herein, reasonably distribute revenue responsibility among and between the customer classes and rate schedules, and contain rates and terms and conditions that are reasonable and lawful and should be approved by the Commission effective for all service rendered on and after the date the final tariff is filed.

(7) The company is authorized to defer its expenses related to compliance with the Pipeline Safety Improvement Act of 2002 and the United States Department of Transportation Final Rule on Pipeline Integrity Management in High Consequence Areas incurred during the test year in the amount of $406,504, and to amortize the resulting regulatory asset over a period of five years.

(8) The company is authorized to defer its expenses related to the costs of these proceedings and to amortize its rate case expenses over a period of five years.

(9) The company is authorized to amortize the estimated March 31, 2005 (the date new rates are assumed implemented) deferred balance of $643,890 of choice program transportation costs, the deferral of which was previously authorized by the Commission, over a five-year period. Such annual amount is included in the revenue increase amount discussed above. If the actual balance at the date rates are implemented is different from the estimated balance contemplated in this case, the difference will be credited to all Choice eligible customers over the remainder of the original amortization period.

(10) The company's proposed Sheet No. 51 has been withdrawn and a replacement Sheet No. 51 has been inserted to consolidate current balancing-related provisions. Within 30 days of the effective date of the company's new rates, the company shall schedule a Transportation Working Group (TWG) meeting to review and discuss the issues raised by proposed Sheet No. 51. Notices of the meeting will be provided to stakeholders who request such notices. In the event that this process results in an agreement of the TWG, that agreement will be filed with the

Commission for approval. If no agreement is reached by the TWG, the company may initiate a proceeding with the Commission seeking revisions to Sheet No. 51. In the event the company initiates a proceeding seeking revisions to Sheet No. 51 which either reflect consensus revisions from the TWG or requesting revisions to Sheet No. 51 substantially similar to the revisions as the company proposed in this proceeding, no party to the stipulation shall contest or oppose such an application on the grounds that such revisions to Sheet No. 51 sought therein amount to a proposal to increase rates or charges under Section 4909.18, Revised Code. The company agrees that it will not oppose a hearing on any such application filed if a hearing is requested by a signatory party to this stipulation.

(11) The parties agree that Vectren shall implement a conservation program designed to cost-effectively reduce customer usage. The conservation program shall be funded pursuant to one of the following two options.

(12) Option A: If all parties to these proceedings sign or do not oppose this stipulation prior to February 8, 2005, the conservation program will include both a low-income conservation program, funded annually by Vectren through base rate recovery at $750,000, and a broader DSM program funded annually through base rate recovery at $1,250,000.

(13) For Option A, the DSM program funds shall be administered by a stakeholder working group, the membership of which is limited to Vectren, staff, and any parties representing residential customers who sign or decline to oppose the stipulation prior to February 8, 2005. Subject to further direction or order by the Commission, the Conservation Working Group (CWG) will make decisions with respect to DSM program initiative selection and funding levels (within the applicable funding parameters discussed below), and will be responsible for reviewing data and criteria related to DSM program initiative effectiveness. Decisions of the CWG shall be made by consensus. The CWG shall function to evaluate and report on DSM program initiatives and make recommendations for the implementation of and funding levels for DSM program initiatives in the future. The initial funding level and subsequent recommendations shall be applied to, among other things, permit Vectren to recover costs Vectren reasonably incurs as a result of its program implementation assistance and

program evaluation activities, costs associated with the use of any third-party administrator and such other costs as the CWG may specify.

(14) The level of funding specified for the DSM program initiatives in this stipulation shall remain in effect for a primary term of three years, continuing on a year-to-year basis after the primary term absent Commission action to the contrary. At the end of the primary term and annually thereafter, the CWG will make a report to the Commission on the cost effectiveness of the DSM program initiatives. This report shall include a report on the impact of the DSM program initiatives on usage, the purpose of which is to provide the Commission with sufficient information on which to base a decision to continue active DSM program initiatives or suspend those the report indicates are ineffective. If the Commission decreases the level of funding, the company agrees to implement a negative rider to reflect the reduced funding level. The CWG also reserves the right to request Commission approval for additional funding and a corresponding funding mechanism, including consideration of lost revenues, after the primary term but no sooner. The CWG shall work in good faith to provide the Commission with such other information as the Commission may reasonably request for purposes of evaluating the DSM program initiatives.

(15) Option B: If any party to these proceedings representing residential customers opposes the stipulation, the conservation program will be a low-income conservation program, funded annually by Vectren through base rate recovery at $1,100,000. This low-income conservation program will be modeled on the existing program funded by Vectren. Allocation of funds and program design will be jointly determined by Vectren, staff, and any parties to these proceedings representing residential customers who sign or decline to oppose this stipulation prior to February 8, 2005.

(16) For Option B, the level of funding shall remain at the $1,100,000 level until such time as Vectren files an application for approval of a change in its base rates.

(17) In no event shall Vectren have an obligation to continue funding the conservation programs without a contemporaneous, full and fair opportunity to recover the cost

of such funding through its base rates or other compensatory recovery mechanism.

(18) Vectren will adapt its bill format by November 2005, to reflect the total amounts actually due for customers on the one-third and one-sixth payment plans. Pending the reprogramming necessary to achieve this result, Vectren will inform one-third payment plan customers of the amount they owe each month by alternate written method. Vectren will work with staff to clarify the communications provided to customers relating to both payment plans.

(19) In the near term, Vectren will work with staff to develop a process to provide Staff with same day access to specified samples of customer calls made to Vectren's Customer Call Center for staff monitoring purposes.

(20) Vectren will make residential customer bills available upon request in large print format as soon as practicably possible.

(21) The company's proposed tariff, "Vectren Energy Delivery of Ohio, Inc., Tariff for Gas Service, PUCO No. 2", and all proposed tariff sheets included therein, should be approved.

(22) The company and other parties agree to withdraw their objections to the staff report.

(23) The company will notify all of its customers of the increase in rates by means of a bill insert.

REVIEW OF THE STIPULATION

Rule 4901-1-30, Ohio Administrative Code (O.A.C.), authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. See, *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, at 125, citing *Akron v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 155. This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Cincinnati Gas & Electric Company*, Case No. 91-410-EL-AIR (April 14, 1994); *Western Reserve Telephone Company*, Case No. 93-230-TP-ALT (March 30, 1004); *Ohio Edison Company*, Case No. 91-698-EL-FOR et al. (December 30, 1993); *Cleveland Electric Illuminating Company*, Case No.

88-170-EL-AIR (January 30, 1989); *Restatement of Accounts and Records* (Zimmer Plant), Case No. 84-1187-EL-UNC (November 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

(1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 547 (*citing Consumers' Counsel, supra*, at 126). The court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission (*Id.*).

OCC argued that the stipulation was not a product of bargaining among knowledgeable parties because none of the signatory parties represent the interest of residential customers, and no representatives of high or middle-income residential consumers either signed, or declined to oppose, the stipulation. Further, OCC claims that the low-income customers who are not opposing the stipulation are not directly representing the interest of residential customers or low-income customers, but the agencies that serve low-income customers. Vectren argues that there is no requirement that a representative of any specific customer class support or not oppose a stipulation in order for this standard to be met. In addition, Vectren claims that establishing such a requirement would empower any individual intervenor to a Commission proceeding that is the sole representative of a customer class to hold a reasonable stipulation hostage to its demands. Staff argued that the signatory parties represent a diverse group of interests and have been actively involved in regulatory matters before the Commission for many years. Staff also claims that the signatory parties are knowledgeable, as they have participated in extensive discovery in preparing for these cases. Based on our three-prong standard of review, we find that the first criterion, that the process involved serious bargaining by knowledgeable, capable parties is met. A review of the terms of the stipulation, and the schedules and tariffs attached thereto, show that all the parties engaged in comprehensive negotiations prior to signing the agreement. There is no requirement that any particular parties execute stipulations in order for the first prong of the test for stipulations to be met. Legal flaws and any lack of benefit conferred by a stipulation will be considered under the other two prongs of the test. In addition, the parties involved were knowledgeable as to the issues, having participated in numerous cases before the Commission in the past, including numerous prior cases involving rate issues. Further, we note that two groups not opposing the stipulation include OPAE and CAP, representatives of low-income residential groups directly affected by the stipulation. Accordingly, we find that the first criterion has been met.

With respect to the second criterion, OCC argues that the stipulation provides little benefit to residential ratepayers because the ratepayers' costs will increase for natural gas supplies. OCC also claims that the revenue distribution benefits transportation customers by allocating additional costs to residential customers, and away from transportation customers, without any support for this shift. OCC contends that residential customers receive no direct benefit from Option B of the stipulation because the program is very limited in magnitude. OCC also claims that there is no benefit to residential customers from the withdrawal of Vectren proposed sheet No. 51, which imposes tighter controls on transportation customers. Vectren argues that the stipulation provides an opportunity for the company to earn a reasonable return on its investment. Vectren also claims that the stipulation provides for greatly expanded funding for low-income conservation programs, makes large print bills available to sight-impaired customers and satisfactorily resolves all consumer service-related recommendations made in the staff report. Vectren also claims that the proposals contained in the withdrawn Tariff Sheet No. 51 would have no effect because they are withdrawn. Staff claims that the revenue assignment to the residential class does not make the stipulation unreasonable because the revenue assignment set forth in the stipulation is very similar to what staff recommended in the staff report. Staff also contends that another benefit to the stipulation is that it addresses multiple rate and tariff issues recommended by staff in the staff report, including a new process for staff to monitor customer calls to Vectren. Vectren also agreed to cooperatively address nomination and balancing issues in an upcoming process through the TWG. We find that the stipulation also meets the second criterion. As a package, it advances the public interest by resolving all issues raised in this proceeding without incurring the time and expense of extensive litigation. Although the stipulation includes a rate increase for all customers, the increase will allow the company the opportunity to recover expenses and maintain service quality. Further, as noted by Vectren and staff, the stipulation makes billing in a large print format available for Vectren customers, an issue raised at the public hearing, and provides a new process for staff to monitor customer calls made to Vectren. OCC had argued in its brief that the provision in the stipulation for large print billing formats is vague and should be based on established standards. We believe that the provision of the stipulation will be advantageous to numerous visually impaired customers. In addition, the stipulation provides for an expanded conservation program which will be funded annually by Vectren through base rate recovery and the allocation of funds and program design will be jointly determined by Vectren, staff, CAP, and OPAE.

OCC argues that the stipulation should not be approved or should be modified due to various inadequacies in the DSM program; in particular the funding level, the collaborative process managing the program, and the class of customers eligible for the program. OCC has submitted through testimony at the hearing, initial brief, reply brief and *ex parte* discussions with two Commissioners that this case should be utilized by the Commission to embrace a DSM program offered by OCC that would, in the opinion of OCC witness Gonzalez, be the only means to reduce customer bills now and in the foreseeable future (OCC Ex. 1 at 5-6). OCC claims that the program recommended by witness Gonzalez would reduce participating residential customer bills in the short-run and benefit all customers by lowering demand in the long-run (*Id.* at 7-9). OCC offered the report of The American Council for an Energy Efficient Economy (ACEEE) (*Id.* at Attachment 1) as a study that found the benefits of a gas DSM program that encompassed the midwest region included the reduction of wholesale gas costs and by this means could prevent the loss of industry and jobs from the midwest. Witness Gonzalez posited that, based on a 20-year average life of energy efficiency measures, residential customers will pay only a fraction of the investment, while enjoying improved comfort levels, increased health, enhanced safety, higher property values, and better control of gas costs. Witness Gonzalez further postulated that Vectren benefits by better system utilization, reduction of collection expenses, and postponed gas infrastructure investments. (*Id.* at 7). OCC recommended that the energy efficiency budget for residential customers be set for the next four years at $1.6, $3.4, $5.1 and $6.5 million, respectively, as an enhancement to any low-income weatherization program (*Id.* at 8). OCC also proposed a collaborative process, with a small group of major stakeholders, for analyzing, designing, and facilitating the implementation of the DSM programs. (*Id.* at 12-13).

OCC has also claimed that the stipulation violates important regulatory principles found in various sections of the Ohio Revised Code. OCC argues that the level of conservation funding is not just and reasonable as required under Sections 4909.18 and 4909.19, Revised Code; that it does not meet the efficiency, sufficiency, and adequacy of public utility facilities standard found in Section 4909.152, Revised Code; and that it contravenes the policy promoting conservation found in Sections 4905.70 and 4929.02(A)(4), Revised Code. OCC claims that the evidence shows that gas commodity rates are high, that customers are having difficulty paying their gas bills, that the level of funding in the stipulation for energy efficiency is inadequate, and that significant energy efficiency funding is mandated by those sections. OCC argues that the Commission must promote the proliferation of energy efficiency technologies and contractors through the funding of energy efficiency programs. Finally, OCC argues that the stipulation violates due process rights because it requires signatory parties to surrender their right to petition the Commission for additional funding during a three-year time period. OCC claims that this provision unreasonably limits signatory parties and the Commission from pursuing cost-effective additions to and complaints related to the level of energy efficiency programs in the future. OCC argues that, in the future, it may find it necessary to file a complaint as to service insisting that energy efficiency measures are necessary for the health and safety of residential customers and such a complaint would be foreclosed under the stipulation.

Vectren currently has a weatherization program funded at $175,000 per year (Staff Ex. 1 at 58). The company's application proposed to raise that level to $675,000 per year. The stipulation included an Option A that became effective only if all parties to the proceedings signed or did not oppose this stipulation; the conservation program would have included both a low-income conservation program, funded annually by Vectren through base rate recovery at $750,000, and a broader DSM program funded annually through base rate recovery at $1,250,000. The DSM program funds would be administered by a stakeholder working group consisting of Vectren, staff, and any parties representing residential customers who signed or declined to oppose the stipulation. Option B of the stipulation became operative when OCC, representing residential customers, opposed the stipulation. The Option B conservation program is a low income conservation program, funded annually by Vectren through base rate recovery at $1,100,000. This low-income conservation program is to be modeled on the existing program funded by Vectren; allocation of funds and program design will be jointly determined by Vectren, staff, and any parties to these proceedings representing residential customers who signed or declined to oppose this stipulation, in this case, CAP and OPAE. Option B keeps the level of funding at the $1,100,000 level until such time as Vectren files an application for approval of a change in its base rates.

Staff witness Puican testified that this level of conservation spending is comparable to that of the other large local distribution companies in Ohio (Staff Ex. 3 at 3). Staff further notes that the inclusion of $1.1 million in base rates is more than six times the current actual spending level and in traditional ratemaking terms, is considered an out-of-test-year adjustment. Staff witness Puican stated that this out-of-test-year adjustment requires a reasonable basis for establishing the amount customers would be charged for conservation expenditures (Staff Ex. 3 at 3). Staff argues that as an out-of-test-year adjustment, there should be heightened scrutiny of the spending levels. Staff maintains that since OCC witness Gonzalez admitted that he had not done a cost-benefit study as to particular conservation programs that could be implemented by Vectren (OCC Ex. 1 at 9, Tr. III at 36, 53, and 61), there is no basis to conclude that the spending levels should be mandated by the Commission at levels proposed by OCC.

Vectren submits that the OCC program should not be implemented without a thorough cost benefit study as the company has experienced a decline in average residential usage for many years while gas prices have been on the rise in both nominal and absolute terms. Vectren asserts that natural gas-supplied electric peaker units are a larger driver of demand than residential consumer usage and would continue to heavily influence national demand to a greater degree than any reduction in demand in the residential class of one company due to a DSM program. Vectren and the staff maintain that OCC has failed to demonstrate empirically that its proposal for a DSM program would result in cost savings for customers. Further, based on the standard of review of stipulations, OCC has not provided sufficient justification for the Commission to reject or modify the stipulation. Vectren and staff also contend that the stipulation does not violate any regulatory principle or practice embodied in the Revised Code.

We believe the stipulation meets the third criterion as it does not violate any important regulatory principle or practice. In fact, we find the OCC claims of violation of statutory policies and principles to be somewhat disingenuous. OCC has cited to a policy statement in the gas alternative regulation statute, Section 4929.02(A)(4), Revised Code, and a policy statement in an electric pricing statute, Section 4905.70, Revised Code, as a basis that the stipulation contravenes the policy of the state. Neither section is applicable to the determination of whether the stipulated DSM program is inconsistent with regulatory policy or principles. Similarly, neither the efficiency, sufficiency, and adequacy of public utility facilities requirements in Section 4909.152, Revised Code, nor the procedural requirements delineated in Sections 4909.18 and 4909.19, Revised Code, are relevant to the reasonableness of a DSM program. Under the stipulation, Vectren will specifically undertake a conservation program for which funding shall remain at the $1,100,000 level until such time as Vectren files an application for approval of a change in its base rates. According to the stipulation, the funds for the low-income conservation program will be jointly determined by the CWG, comprised of Vectren, staff, CAP and OPAE. The energy conservation efforts in the stipulation promote and encourage conservation of energy and a reduction in the growth rate of energy consumption and promote economic efficiencies. OCC's arguments are focused on the level of funding, claiming that it is insufficient. Such a claim does not make the energy conservation provisions in the stipulation violate any regulatory policies or principles. We also find no merit in OCC's claim that the stipulation violates the due process rights or interferes with OCC's and the Commission's ability to protect residential customers. We would encourage the CWG encourage the CWG to coordinate its efforts with local government to avoid duplication of project funding and to increase efficiency of the program.

OCC's efforts to develop DSM programs are laudable, but under close scrutiny OCC's proposal in this case does not warrant finding the stipulated program to be unreasonable. OCC witness Gonzalez acknowledged that there would be many customers that would not be able to participate in the programs (Tr. III at 59). Those nonparticipants would be paying higher rates to subsidize the program. In order to consider the adoption of the program, we would need to find net-economic benefits and, in this case, the lack of cost benefit analysis renders the issue moot. Further, OCC implies, through its reliance on the ACEEE report, that for the DSM program to substantially impact demand, similar DSM programs must be implemented throughout Ohio and the rest of the midwest. It would be unfair to impose the program on Vectren ratepayers where there is no credible basis that, in isolation, the DSM program would result in the economic benefits referenced by OCC. We believe that establishing a conservation program funding level of more than six times current actual level, and in excess of the average spending levels the other large gas utilities in Ohio, is more than reasonable.

OCC had argued that the Commission should modify its criteria used for approving partial stipulations and require additional tests to determine that the stipulation is fair and addresses the due process rights of opponents to settlements. We find no merit in OCC's argument that the Commission should at this time modify its established criteria on the approval of stipulations. As we have previously noted, the Ohio Supreme Court has endorsed the Commission's analysis of the reasonableness of stipulations using these three criteria to resolve issues in a manner economical to rate payers and public utilities. We believe that our three-pronged test continues to be a reasonable, fair, and balanced approach that provides all parties with an established standard that can be used to resolve issues in all proceedings before the Commission.

CUSTOMER CHARGE

Under the stipulation, the customer charge increases from $4.00 to $7.00. OCC argued that the increase in the customer charge, as part of the stipulation, creates rate shock and is against the principle of gradualism and past Commission practice. According to OCC, the customer charge should be maintained at its current rate or, in the alternative, should be limited to no more than $6.00. OCC claimed that it reviewed the customer charge requests of gas utilities and, in eight previous cases during the last 15 years, the increase in this case is almost three times greater than the next largest customer charge percentage recommended by staff. OCC claims than the Commission has adhered to principles of gradualism in setting rates and that the proposed rate would represent the highest customer charge for an LDC in Ohio. While recognizing that Vectren has not had an increase in its customer charge for the previous 12 years, OCC still views the stipulated increase as excessive. Vectren argues that the customer charge proposed in the stipulation reflects a compromise of positions taken with regard to the respective customer charge calculations as well as the terms of the settlement package. Vectren claims that the proposed customer charge is reasonable when viewed against the length of time since the charge was last modified, the adjustments being made to other areas of the company's rates, costs of service associated with serving customers, the degree of change that the customer charge will impose, and market factors. Vectren also argues that while the customer charge seeks to recover the customer costs, all fixed demand costs and a portion of the customer costs are still being recovered volumetrically and it is the volumetric recovery of fixed costs that creates customer bill and company earnings volatility. According to Vectren, at the $7.00 level, Vectren only recovers 32 percent of its fixed customer costs through the fixed customer charge. Vectren argues that the $7.00 customer charge partially addresses the deficiency in current rate design methodology. Vectren also argues that OCC's argument is wrong that it is difficult to justify a 75 percent increase to the customer charge in light of the fact that the company's expenses only increased one percent. Vectren argues that this is shortsighted as exercising expense control should not be a valid basis for refusing to move toward cost-based rates. In addition, Vectren argues that the record shows that its customer costs were 200 to 300 percent higher than the current residential customer charge. Vectren also claims that maintaining the customer charge at its current level violates the goals of fairness, conservation of resources, rate stability and gradualism. Vectren claims that if the customer charge did not exist, the fixed customer costs would have to be included in the volumetric distribution charges and customers with high monthly usage would subsidize customers with low monthly usage.

Vectren also claims that the concept of gradualism implies some movement toward costs; whereas maintaining the current customer charge implies no movement toward cost.

In its application, Vectren sought to increase the residential customer charge up to $8.00. In its analysis, staff determined that a customer charge of $6.50 was justified. Under the stipulation, the customer charge is increased to $7.00. We believe that an increase in the residential customer charge, as part of the stipulation, is reasonable. We note that OCC does not object to a customer charge, only the amount of the charge. We also note that it has been 12 years since Vectren's last rate case where the customer charge was set. The proposed customer charge recommended in the stipulation is $.50 greater than that recommended in the staff report. This customer charge is also within the range of other Ohio LDCs. Further, two groups representing Vectren's low income residential customers, on whom the customer charge would have a large impact, did not oppose the stipulation. Taken as part of a stipulation, we find that the increase in the customer charge is not unreasonable.

RATE CASE EXPENSE

OCC argued that the rate case expense amount of $800,000 in the stipulation is unjust and unreasonable. OCC claims that the expense is overstated and the Commission should reduce this expense so that it is more closely in line with previous Commission determinations on rate case expense for similar sized companies. OCC argues that the rate case expense level is also unreasonable when compared to other gas rate cases and it urges the Commission to apply the rate case expense standard of $335,000 from Case No. 91-410-EL-AIR, *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in Electric Rate in its Service Area*, Opinion and Order (May 12, 1992). Vectren claims that its estimated rate case expense was $1,080,000, amortized over a three-year period, that staff's recommendation was an expense of $800,000 amortized over a five-year period, and that, as of February 15, 2005, its actual rate case expense totaled $907,829. Vectren argues that the rate case expense identified in the stipulation is lower than its estimated and actual costs but, when taken in conjunction with the stipulation package, is reasonable and should be approved. Vectren further argues that OCC offered no evidence as to what level of expense should be used for test year purposes and that any comparison to the rate case expenses with other utilities fails to acknowledge the individual characteristics of the utilities, their respective rate case proceedings and the reasonableness of the expenses incurred. Upon review, we find that the rate case expense set forth in the stipulation is supported by the evidence of record.

Our review of the stipulation indicates that it is in the public interest and represents a reasonable disposition of this proceeding. We will, therefore, adopt the stipulation in its entirety.

RATE BASE AND RATE OF RETURN

As proposed under the stipulation, the value of Vectren's property used and useful in the rendition of gas service as of the date certain is $246,069,230. The Commission finds that the rate base stipulated by the parties to be reasonable and proper and adopts the valuation of $246,069,230 as the rate base for purposes of this proceeding. Under the stipulation, the parties also agreed that the adjusted test year operating income of Vectren was $12,262,807, and the required operating income is $21,998,589, resulting in an income deficiency of $9,735,782. Under the stipulation, the parties agreed that a revenue increase of $15,700,000 is required. The stipulation recommends that rates be approved that would enable Vectren to earn a rate of return of 8.94 percent. The Commission believes that 8.94 percent is fair and reasonable for the applicant. We will, therefore, authorize a rate of return of 8.94 percent for purposes of this case.

RATES AND TARIFFS

As part of its investigation in this matter, the staff reviewed the company's various rates and charges, and the provisions governing terms and conditions of service. By way of the stipulation, the parties have resolved all outstanding issues. As part of the stipulation, the company filed proposed tariffs that would produce revenues authorized by this opinion and order and which are in conformance with the changes agreed to by the parties. The staff has reviewed the proposed tariffs and has recommended that they be approved. The Commission finds the tariff sheets filed as part of the stipulation are reasonable and should be approved as part of the stipulation. Vectren shall file in final form four, complete printed copies of the replacement tariff with the Commission's docketing division.

CUSTOMER NOTICE AND EFFECTIVE DATE

As part of the stipulation, the parties agree that the company will notify all of its customers of the increase in rates by means of a bill insert. A copy of the customer notice was attached to the stipulation and the parties agree that such notice is reasonable and should be approved by the Commission. The parties agree that the rates will go into effect with services rendered after the filing of the final tariff rate pages.

The recommendations of the parties relative to the customer notice, bill format, and the effective date of the increase are reasonable and shall be approved. The company should be aware that, before the tariffs can become effective, four complete final copies of the approved tariffs must be filed. The new tariffs will become effective for all service rendered after the effective date of the tariffs.

FINDINGS OF FACT:

(1) On April 16, 2004, Vectren filed a notice of intent to file an application for an increase in rates. In that notice, the company requested a test year beginning January 1, 2004, and ending December 31, 2004, with a date certain of March 31, 2004.

(2) By Commission entry issued May 12, 2004, the test year and date certain were approved. Vectren's application was filed on May 28, 2004.

(3) Vectren also filed an application for authority to modify current accounting procedures to defer expenditures incurred arising from compliance with federal pipeline safety requirements in Case No. 04-421-GA-AAM.

(4) Vectren also filed an application for authority to change depreciation accrual rates for its gas facilities in Case No. 04-794-GA-AAM. These matters were consolidated with 04-571 for hearing and determination.

(5) The Commission granted intervention to OCC, CAP, OPAE, Shell, Interstate, Stand, Alcoa, Pinnacle, IEU, and Honda.

(6) The Commission granted motions to admit John M. Dosker to practice *pro hac vice* on behalf of Stand, Timothy L. Stewart to practice *pro hac vice* on behalf of Alcoa, and Mary-James Young and Robert E. Heidorn to practice *pro hac vice* on behalf of Vectren, and David C. Rinebolt to practice *pro hac vice* on behalf of OPAE.

(7) On November 24, 2004, staff filed its written report of investigation with the Commission.

(8) Objections to the staff report were filed by Vectren, OCC, IEU, Alcoa, Honda, Shell, CAP, OPAE, and Interstate.

(9) Local public hearings were held on January 25, 2005, in Dayton, Ohio, and on January 27, 2005, in Sidney, Ohio. At the Dayton public hearing, 18 public witnesses gave sworn testimony. At the Sidney public hearing, five public witnesses gave sworn testimony.

(10) Vectren published notice of the local public hearings and the evidentiary hearing.

(11) The February 1, 2005 evidentiary hearing was continued to and held on February 8 and 9, 2005.

(12) On February 4, 2005, a stipulation was filed in these matters. Signatories to the stipulation include Vectren, staff, Honda, Interstate, Pinnacle, IEU, Alcoa, Stand and Shell.

(13) On February 7, 11, and 18, 2005, OCC filed memoranda of *ex parte* communications with the Commission.

(14) Initial briefs were filed by Vectren, staff, and OCC. Interstate, Honda, IEU, and Shell, filed statements in support of the stipulation. Reply briefs were filed by staff, Interstate, Vectren, and OCC.

(15) The company filed proposed revised tariffs, a customer notice, a revised bill format, and proof of publication of the application and the hearings.

(16) The value of all of the company's property used and useful for the rendition of service to its customers affected by this application, determined in accordance with Section 4909.15, Revised Code, is not less than $246,069,230.

(17) The parties also agreed that the adjusted operating income of Vectren was $12,262,807, and the required operating income was $21,998,589, resulting in an income deficiency of $9,735,782. Under the stipulation, the parties agreed that a revenue increase of $15,700,000 was required.

(18) The applicant's proposed revised tariffs and notice to customers and revised bill format are consistent with the discussion and findings set forth in this opinion and order and shall be approved. The company's present tariffs governing service to its customers affected by this opinion and order should be withdrawn and canceled.

CONCLUSIONS OF LAW:

(1) The company's application was filed pursuant to, and this Commission has jurisdiction of the application under, the provisions of Sections 4909.17, 4909.18, and 4909.19, Revised Code; and the application complies with the requirements of these statutes.

(2) A staff investigation was conducted and a report duly filed and mailed, and public hearings held herein, the written notice of which complied with the requirements of Sections 4909.19 and 4903.083, Revised Code.

(3) The stipulation submitted by the parties is reasonable and, as indicated herein, shall be adopted in its entirety.

(4) The existing rates and charges for service are insufficient to provide the applicant with adequate net annual compensation and return on its property used and useful in the provision of service.

(5) A rate of return of 8.94 percent is fair and reasonable under the circumstances of this case and is sufficient to provide the applicant just compensation and return on its property used and useful in the provision of service to its customers.

(6) The company is authorized to withdraw its current tariffs and to file, in final form, revised tariffs which the Commission has approved herein.

ORDER:

It is, therefore,

ORDERED, That the joint stipulation filed on February 4, 2005, be approved in accordance with this opinion and order. It is, further,

ORDERED, That the application of Vectren Energy Delivery of Ohio, Inc. for authority to increase its rates and charges for service is granted to the extent provided in this opinion and order. It is, further, ORDERED, That the customer notice and revised bill format are approved and the company is authorized to file in final form four complete, printed copies of tariffs consistent with this opinion and order, and to cancel and withdraw its superseded tariffs. It is, further,

ORDERED, That the effective date of the new tariffs shall be a date not earlier than both the date of this opinion and order and the date upon which four complete, printed copies of final tariffs are filed with the Commission. The new tariffs shall be effective for service rendered on or after such effective date. It is, further,

ORDERED, That a copy of this opinion and order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

SDL/SEF:ct

Entered in the Journal

APR 13 2005

Reneé J. Jenkins
Secretary