

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,	)	Case No. 08-1837
	)	
Appellant,	)	Appeal from the Public Utilities Commission of Ohio
	)	
v.	)	
	)	Public Utilities Commission of Ohio
The Public Utilities Commission of Ohio,	)	Case Nos. 07-589-GA-AIR, et al.
	)	07-590-GA-ALT, and
Appellee	)	07-591-GA-AAM

MERIT BRIEF OF APPELLANT,  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Janine L. Migden-Ostrander  
(Reg. No. 0002310)  
Consumers' Counsel

Nancy H. Rogers  
(Reg. No. 0002375)  
Attorney General of Ohio

Larry S. Sauer, Counsel of Record  
(Reg. No. 0039223)  
Joseph P. Serio  
(Reg. No. 0036959)  
Michael E. Idzkowski  
(Reg. No. 0062839)  
Assistant Consumers' Counsel

Duane Luckey, Counsel of Record  
(Reg. No. 0023557)  
Chief, Public Utilities Section  
William Wright  
(Reg. No. 0018010)  
Assistant Attorney General

10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-8574 - Telephone  
(614) 466-9475 - Facsimile  
[sauer@occ.state.oh.us](mailto:sauer@occ.state.oh.us)  
[serio@occ.state.oh.us](mailto:serio@occ.state.oh.us)  
[idzkowski@occ.state.oh.us](mailto:idzkowski@occ.state.oh.us)

Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, Ohio 43215-3793  
(614) 644-8698 - Telephone  
(614) 644-8764 - Facsimile  
[duane.luckey@puc.state.oh.us](mailto:duane.luckey@puc.state.oh.us)  
[william.wright@puc.state.oh.us](mailto:william.wright@puc.state.oh.us)

*Attorneys for Appellant,  
Office of the Ohio Consumers' Counsel*

*Attorneys for Appellee,  
Public Utilities Commission of Ohio*

FILED  
DEC 15 2008  
CLERK OF COURT  
SUPREME COURT OF OHIO

Colleen L. Mooney, Counsel of Record (Reg.  
No. 15668)  
David C. Rinebolt  
Ohio Partners for Affordable Energy  
1431 Mulford Road  
Columbus, Ohio 43212  
(614) 488-5739-Telephone  
(419) 425-8862-Facsimile  
[drinebolt@aol.com](mailto:drinebolt@aol.com)  
[cmoonev2@columbus.rr.com](mailto:cmoonev2@columbus.rr.com)

*Attorneys for Appellant,  
Ohio Partners for Affordable Energy*

Paul A. Colbert , Counsel of Record  
(Reg. No. 0058582)  
Associate General Counsel  
Rocco D'Ascenzo  
(Reg. No. 0077651)  
Amy Spiller  
(Reg. No. 47277)  
Elizabeth Watts  
(Reg. No. 31092)  
Counsel  
Duke Energy Ohio, Inc.  
155 East Broad Street, 2nd Floor  
Columbus, Ohio 43215  
(614) 221-7551-Telephone  
(614)221-7556-Facsimile  
[paul.colbert@duke-energy.com](mailto:paul.colbert@duke-energy.com)

*Counsel for Intervening Appellee,  
Duke Energy Ohio, Inc.*

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. STANDARD OF REVIEW .....	3
III. STATEMENT OF FACTS .....	4
A. Duke’s Application Did Not Request The SFV Rate Design.....	4
B. The Stipulation and Recommendation Excluded The Rate Design Issue Which Was Carved Out For Litigation.....	5
C. The PUCO’s Approval Of The SFV Rate Design Was Unreasonable.....	5
IV. ARGUMENT .....	6
Proposition of Law 1.....	6
A Rate Increase Authorized By The PUCO Is Unreasonable and Unlawful When The Notice Requirements Mandated By R.C. 4909.18, R.C. 4909.19 And R.C. 4909.43 Are Not Enforced.....	6
Proposition of Law 2.....	12
The PUCO Should Respect Its Own Precedents Unless The Need To Change Its Position Is Clear And It Is Shown That Its Prior Decisions Are In Error.....	12
A. The PUCO’s Order approving the SFV rate design violates thirty years of PUCO precedent.....	13
B. The PUCO’s approval of an Order implementing the SFV rate design is an unprecedented change in policy violating its principles of gradualism.....	19
Proposition of Law 3.....	22
The PUCO Violated R.C. 4929.02 and R.C. 4905.70 When It Approved The SFV Rate Design Which Fails to Promote Energy Efficiency and Discourages Conservation.....	22
A. The PUCO’s approval of the SFV rate design violates R.C. 4905.70 and R.C. 4929.02 because it because it fails to promote and encourage the conservation of energy.....	26

B.	The PUCO’s approval of the SFV rate design removes the customers’ incentive to invest in energy efficiency because the payback period for such investments made by consumers is extended. ....	28
C.	The PUCO’s approval of the SFV rate design was an unnecessary incentive to encourage Duke to promote conservation because Duke already had a demand-side management program in place. ....	29
D.	The PUCO disregarded an alternative rate design that would not have violated R.C. 4929.02 or R.C. 4905.70.....	31
	Proposition of Law 4.....	37
	A Finding Of The Public Utilities Commission Which Is Manifestly Against The Weight Of The Evidence Is Unreasonable And Unlawful.....	37
A.	The PUCO’s Implementation Of An SFV Rate Design Is Against The Manifest Weight Of The Evidence. ....	37
B.	The PUCO’s determination that the SFV rate design benefits low-income customers is against the manifest weight of the evidence. ....	46
V.	CONCLUSION.....	49

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Atchison v. Wichita Bd. of Trade</i> , 412 US 800, 806, 93 S.Ct. 2367 .....	12
<i>Bluefield Water Works &amp; Improvement Company v. Pub. Serv. Comm. of West Virginia</i> , (1923), 43S, Ct. 675, 692, 262 U.S. 679 .....	22, 32
<i>Williams Gas Processing v. FERC</i> , (D.C. Cir. 2006), 475 F.3d 319, 326 .....	12
<i>Canton Storage and Transfer Co. v. Public Util. Comm.</i> (1995), 72 Ohio St.3d 1, 647 N.E.2d 136 .....	4, 23
<i>City of Cleveland v. Pub. Util. Comm.</i> (1965), 3 Ohio St.2d 82, 209 N.E.2d 424 .....	37
<i>Cleveland Electric Illuminating Co. v. Pub. Util. Comm.</i> (1975), 42 Ohio St.2d. 431, 330 N.E.2d 1 .....	12
<i>Cleveland Electric Illuminating Co. v. Public Util. Comm.</i> (1996), 76 Ohio St.3d 521, 523, 668 N.E.2d 889.....	3
<i>Committee Against MRT, et. al. v. Public Util. Comm.</i> (1977), 52 Ohio St.2d 231, 231, 371 N.E.2d 547.....	9
<i>Elyria Foundry Company v. Pub. Util. Comm.</i> (2007), 114 Ohio St.3d 305, 317, 871 N.E.2d 1176	
<i>General Motors Corp. v. Pub. Util. Comm.</i> (1976), 47 Ohio St.2d 58, 351 N.E.2d 183.....	24
<i>Grafton v. Ohio Edison</i> (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241 .....	37, 43
<i>Industrial Energy Consumers of Ohio Power Co. v. Public Util. Comm.</i> (1994), 68 Ohio St.3d 559, 563; 629 N.E.2d 423, 427.....	3
<i>Office of Consumers' Counsel v. Pub. Util. Comm.</i> (1984), 10 Ohio St.3d 49, 50, 461 N.E.2d 303 .....	3
<i>Ohio Ass'n of Realtors v. Pub. Util. Comm.</i> (1979), 60 Ohio St.2d 172, 398 N.E.2d 784.....	12

**TABLE OF AUTHORITIES - cont.**

<b><u>Cases</u></b>	<b><u>Page</u></b>
<i>State, ex rel. Auto Machine Co. v. Brown</i> (1929), 121 Ohio St. 73, 166 N.E. 903 .....	12
<i>In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates</i> PUCO Case No. 07-589-GA-AIR, et al., Opinion and Order (May 28, 2008) .....	passim
<i>In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates</i> PUCO Case No. 07-589-GA-AIR, et al., Entry on Rehearing (July 23, 2008).....	1
<i>In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service,</i> PUCO Case No. 08-72-GA-AIR, et al., Opinion and Order (December 3, 2008) .....	42
<i>In the Matter of the Application of Eastern Natural Gas Company for Approval of an Alternative Rate Plan Proposing a Revenue Decoupling Mechanism</i> PUCO Case No. 08-940-GA-ALT, et al., Entry (November 5, 2008) .....	11
<i>In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service</i> PUCO Case No. 08-936-EL-SSO, Opinion and Order (November 25, 2008).....	25
<i>In the Matter of the Application for Recovery of Costs, Lost Margin and Performance Incentives Associated with Implementation of Natural Gas Demand-Side Management Programs by the Cincinnati Gas and Electric Company,</i> PUCO Case No. 06-91-EL-UNC, Finding & Order (July 11, 2007) .....	29

**TABLE OF AUTHORITIES - cont.**

<b><u>Cases</u></b>	<b><u>Page</u></b>
<i>In the Matter of the Commission's Investigation of the Customer Choice Program of Columbia Gas of Ohio, Inc., Case No. 98-593-GA-COI; In the Matter of the Commission's Investigation of the Energy Choice Program of the East Ohio Gas Company, PUCO Case No. 98-594-GA-COI; In the Matter of the Commission's Investigation of the Customer Choice Program of the Cincinnati Gas &amp; Electric Company, PUCO Case No. 98-595-GA-COI; In the Matter of the Application of Columbia Gas of Ohio, Inc., for Statewide Expansion of the Columbia Customer Choice Program, PUCO Case No. 98-549-GA-ATA; In the Matter of the Application of the East Ohio Gas Company for Authority to Implement Two New Transportation Services, for Approval of a New Pooling Agreement, and for Approval of a Revised Transportation Migration Rider, PUCO Case No. 96-1019-GA-ATA, Finding and Order (June 19, 1991) .....</i>	44, 45
<i>In the Matter of the Application of the Cincinnati Gas &amp; Electric Company for an Increase in Its Rates for Gas Service to All Jurisdictional Customers, PUCO Case No. 95-656-GA-AIR, Opinion and Order (December 12, 1996) .....</i>	16, 18
<i>In the Matter of the Applications of Columbia Gas of Ohio, Inc., to Establish a Uniform Rate for Natural Gas Service Within the Company's Lake Erie Region, Northwest Region, Central Region, Eastern Region, and Southeastern Region, PUCO Case No. 88-716-GA-AIR et. al, ("1988 Columbia Gas"), Opinion and Order (October 17, 1989).....</i>	15
<i>In the Matter of the Applications of Columbia Gas of Ohio, Inc., to Establish a Uniform Rate for Natural Gas Service Within the Company's Northwestern Region, Lake Erie Region, Central Region, Eastern Region, and Southeastern Region, PUCO Case No. 89-616-GA-AIR et. al., Opinion and Order (April 5, 1990) .....</i>	16
<i>In the Matter of the Application of Columbia Gas of Ohio, Inc., for an Increase in the Rates to be Charged and Collected for Gas Service in the Village of Mt. Sterling, Ohio, Case No. 77-1309-GA-AIR, In the Matter of the Application of Columbia Gas of Ohio, Inc., for an Increase in the Rates to be Charged and Collected for Gas Service in the City of Martins Ferry, Ohio, PUCO Case No. 77-1428-GA-AIR, Opinion and Order (May 24, 1979) .....</i>	21, 26
<b><u>Statutes</u></b>	
R.C. 4905.70 .....	passim

R.C. 4909.18 .....	6, 8, 9, 10, 11, 50
R.C. 4909.19 .....	6, 8, 10, 11, 50
R.C. 4909.43 .....	6, 8, 10, 11, 50
R.C. 4928.02 .....	24, 25
R.C. 4929.02 .....	passim

**APPENDIX**  
**TABLE OF CONTENTS**

*In the Matter of the Application of Duke Energy Ohio, Inc.*  
S. Ct. Case No. 08-1837  
Notice of Appeal (September 16, 2008) .....000001

*In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*  
PUCO Case No. 07-589-GA-AIR, et al.,  
Entry on Rehearing (July 23, 2008).....000007

*In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*  
PUCO Case No. 07-589-GA-AIR, et al.,  
Opinion and Order (May 28, 2008) .....000014

**Statutes**

R.C. 4905.70 .....000047

R.C. 4909.18 .....000048

R.C. 4909.19 .....000051

R.C. 4909.43 .....000053

R.C. 4928.02 .....000053A

R.C. 4929.02 .....000054

*In the Matter of the Application of Duke Energy Ohio, Inc. for an  
Increase in Rates* PUCO Case No. 07-589-GA-AIR, et al.  
Application for Rehearing (June 27, 2008).....000056

**SUPPLEMENT**  
**TABLE OF CONTENTS**

*In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*  
PUCO Case No. 07-589-GA-AIR, et al.,  
Stipulation and Recommendation (February 28, 2008).....000001

*In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*  
PUCO Case No. 07-589-GA-AIR, et al.,  
Tr. Vol. I, Pages 30, 38.48,50 58, 81-83, 147, 160, 188, 196, 204-209,221, 222, 240  
(March 5, 2008) .....000037

*In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*  
PUCO Case No. 07-589-GA-AIR, et al.,  
OCC Ex. No. 18 Rebuttal Testimony of Wilson Gonzalez (March 6, 2008) .....000060

*In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*  
PUCO Case No. 07-589-GA-AIR, et al.,  
OCC Ex. No. 5 Direct Testimony of Wilson Gonzalez (January 29, 2008).....000142

*In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*  
PUCO Case No. 07-589-GA-AIR, et al.,  
Staff Ex. No. Prefiled Testimony of Stephen E. Puican (February 28, 2008).....000177

*In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*  
PUCO Case No. 07-589-GA-AIR, et al.,  
OPAE Ex. No. 1 (March 5, 2008).....000183

*In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*  
PUCO Case No. 07-589-GA-AIR, et al.,  
Staff Report of Investigation (December 20, 2007).....000183A

*In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*  
PUCO Case No. 07-589-GA-AIR, et al.,  
Pre Filing Notice (June 18, 2007) .....000184

*In the Matter of the Application of Eastern Natural Gas Company for Approval of an  
Alternative Rate Plan Proposing a Revenue Decoupling Mechanism*  
PUCO Case No. 08-940-GA-ALT, et al.,  
Entry (November 5, 2008) .....000194

*In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend  
Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*  
PUCO Case No. 08-72-GA-AIR, et al.  
Opinion and Order (December 3, 2008) .....000198

<i>In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service</i> PUCO Case No. 08-936-EL-SSO, Opinion and Order (November 25, 2008).....	000226
<i>In the Matter of the Application for Recovery of Costs, Lost Margin and Performance Incentives Associated with Implementation of Natural Gas Demand-Side Management Programs by the Cincinnati Gas and Electric Company,</i> PUCO Case No. 06-91-EL-UNC, Finding & Order (July 11, 2007) .....	000260
<i>In the Matter of the Application for Recovery of Costs, Lost Margin and Performance Incentives Associated with Implementation of Natural Gas Demand-Side Management Programs by the Cincinnati Gas and Electric Company,</i> PUCO Case No. 06-91-EL-UNC, Amended Application (August 16, 2006).....	000267
<i>In the Matter of the Application of Ohio-American Water Company to Increase Its Rates For Water and Sewer Service Provided to Its Entire Service Area,</i> PUCO Case No. 07-1112-WS-AIR, Staff Report of Investigation (May 28, 2008).....	000269
<i>In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a Plan to Restructure its Commodity Service Function, Case No. 05-474-GA-ATA,</i> Opinion and Order (May 26, 2006) .....	000274
<i>In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a Plan to Restructure its Commodity Service Function,</i> PUCO Case No. 05-474-GA-ATA, Post-Auction Report of Dominion East Ohio Phase 1 Supply Auction, (August 29, 2006) .....	000280
<i>In the Matter of the Application of the Cincinnati Gas &amp; Electric Company for an Increase in its Gas Rates in its Service Territory,</i> PUCO Case No. 01-1228-GA-AIR, Pre-Filing Notice (June 28, 2001).....	000290
<i>In the Matter of the Commission's Investigation of the Customer Choice Program of Columbia Gas of Ohio, Inc., Case No. 98-593-GA-COI; In the Matter of the Commission's Investigation of the Energy Choice Program of the East Ohio Gas Company, PUCO Case No. 98-594-GA-COI; In the Matter of the Commission's Investigation of the Customer Choice Program of the Cincinnati Gas &amp; Electric</i>	

*Company, PUCO Case No. 98-595-GA-COI; In the Matter of the Application of Columbia Gas of Ohio, Inc., for Statewide Expansion of the Columbia Customer Choice Program, PUCO Case No. 98-549-GA-ATA; In the Matter of the Application of the East Ohio Gas Company for Authority to Implement Two New Transportation Services, for Approval of a New Pooling Agreement, and for Approval of a Revised Transportation Migration Rider, PUCO Case No. 96-1019-GA-ATA, Finding and Order (June 19, 1991).....000292*

*In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in Its Rates for Gas Service to All Jurisdictional Customers, PUCO Case No. 95-656-GA-AIR, Opinion and Order (December 12, 1996) .....000351*

*In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service, PUCO Case No. 07-829-GA-AIR, et al., Pre-Filing Notice (July 20, 2007) .....000354*

*In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service, PUCO Case No. 07-1080-GA-AIR, et al., Pre-Filing Notice (September 28, 2007) .....000355*

*In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service, PUCO Case No. 08-72-GA-AIR, et al., Pre-Filing Notice (February 1, 2008) .....000356*

*In the Matter of the Applications of Columbia Gas of Ohio, Inc., to Establish a Uniform Rate for Natural Gas Service Within the Company's Northwestern Region, Lake Erie Region, Central Region, Eastern Region, and Southeastern Region, PUCO Case No. 89-616-GA-AIR et. al. Opinion and Order (April 5, 1990) .....000357*

*In the Matter of the Applications of Columbia Gas of Ohio, Inc., to Establish a Uniform Rate for Natural Gas Service Within the Company's Lake Erie Region, Northwest Region, Central Region, Eastern Region, and Southeastern Region, PUCO Case No. 88-716-GA-AIR et. al. Opinion and Order (October 17, 1989) .....000365*

*In the Matter of the Application of Columbia Gas of Ohio, Inc., for an Increase in the Rates to be Charged and Collected for Gas Service in the Village of Mt. Sterling, Ohio, Case No. 77-1309-GA-AIR, In the Matter of the Application of Columbia Gas of Ohio, Inc., for an Increase in the Rates to be Charged and Collected for Gas Service in the City of Martins Ferry, Ohio, PUCO Case No. 77-1428-GA-AIR, Opinion and Order (May 24, 1979) .....000374*

## I. INTRODUCTION

In a recent eight-month period, the Public Utilities Commission of Ohio (“Commission” or “PUCO”) was faced with rate increase requests from all four of the major natural gas utilities in the state of Ohio.<sup>1</sup> The case below (“Duke Rate Case”) represented the first of the four cases that the PUCO decided. In the Duke Rate Case, and all three of the subsequent natural gas rate cases, the lone issue the parties litigated was the issue of rate design. The rate design issue involved the Commission’s objective, through the approved rate design, of ensuring that Duke has sufficient revenues to cover its fixed costs at a time when residential consumer usage is allegedly declining. While Ohio law provides utilities with the opportunity to file applications to increase rates to address declining revenues, the Commission identified two rate design alternatives that accomplish this objective: (1) a straight fixed variable (“SFV”) rate design; and (2) a decoupling mechanism.

An SFV rate design provides the utility with revenue stability by dramatically increasing the fixed monthly customer charge (and correspondingly reducing the volumetric charge). The utility collects its revenues without any reconciliation of any over-recovery or under-recovery from customers. On the other hand, a decoupling mechanism addresses revenue stability and declining customer usage in a way that is more gradual in its application and with protection for

---

<sup>1</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates*, Case No. 07-589-GA-AIR, et al., Pre-Filing Notice (June 18, 2007) (Supp. 000184); *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case No. 07-829-GA-AIR, et al., Pre-Filing Notice (July 20, 2007) (Supp. 000354); *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case No. 07-1080-GA-AIR, et al., Pre-Filing Notice (September 28, 2007) (Supp. 000355); and *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case No. 08-72-GA-AIR, et al., Pre-Filing Notice (February 1, 2008) (Supp. 000356).

customers of a reconciliation of any over-recovery or under-recovery. Decoupling continues the volumetric rate design so that those who use the most natural gas pay the most. Under decoupling, the company is essentially guaranteed the level of revenues approved by the Commission after certain appropriate adjustments. This occurs because at the end of the year, the Company's revenues received are compared with the revenues authorized resulting in a reconciliation adjustment that is either credited or debited to customers through a rider.

In this case, Duke proposed a decoupling mechanism and not SFV for collecting revenues from customers. It was the Commission who imposed the SFV rate design on customers. The Office of the Ohio Consumers' Counsel ("OCC") and other consumer groups<sup>2</sup> have consistently opposed the SFV rate design in all four natural gas rate cases. In the Duke Rate Case, the OCC opposed the Commission's action because the SFV rate design was approved despite the fact the Company failed to provide its customers with notice required by Ohio law. Furthermore, the PUCO's Order approved the SFV rate design which unreasonably violated prior Commission rate design precedent and the regulatory policy of gradualism, and the Commission's Order is against the manifest weight of the evidence.

The SFV rate design violates Ohio law pertaining to the promotion of energy efficiency and conservation because customers will pay the same amount for distribution service irrespective of their usage. The alternative rate design, decoupling, provides the appropriate price signals for customers who conserve since customers continue to be charged based upon the volume of natural gas consumed; and does not penalize consumers who have invested in energy efficiency with extended payback periods as does the SFV rate design. In fact, decoupling

---

<sup>2</sup> In this case, Ohio Partners for Affordable Energy ("OPAE") (a provider of weatherization and essential infrastructure services to the low income residential consumers within DE-Ohio's service territory) has also opposed the SFV rate design.

rewards conservation by providing customers with a needed tool - - especially in these hard economic times - - to reduce their consumption and hence their gas bills. SFV reduces those tools and renders conservation irrelevant for purposes of distribution service.

Decoupling encourages energy efficiency; SFV removes disincentives for the utility to promote conservation but discourages conservation by customers. Decoupling allows for gradual price increases; SFV results in large rate increases contrary to the concept of gradualism. Decoupling requires an annual true-up -- a little extra work for regulators and the OCC, but work that is merited and rightly expected by the public; SFV requires utility consumers to accept higher rates and expect little protection or concern from their government because there is no opportunity to refund to customers any overpayments. Decoupling sends the appropriate price signals: SFV disregards that concept. Decoupling allows low use customers to pay less; SFV socializes distribution costs so that low-use customers subsidize high-use customers.

This Court should reverse and remand the Commission's Order which failed to encourage conservation and protect vulnerable Ohioans by the implementation of the straight fixed variable rate design.

## **II. STANDARD OF REVIEW**

This Court uses a *de novo* standard of review to decide all matters of law such as those raised in this case.<sup>3</sup> The Court should reverse the PUCO's unreasonable and unlawful effort to impose a rate design that violates prior rate design precedent and the regulatory principle of gradualism, and is against the manifest weight of the evidence.

---

<sup>3</sup> *Grafton v. Ohio Edison* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Cleveland Electric Illuminating Co. v. Public Util. Comm.* (1996), 76 Ohio St.3d 521, 523, 668 N.E.2d 889; *Industrial Energy Consumers of Ohio Power Co. v. Public Util. Comm.* (1994), 68 Ohio St.3d 559, 563; 629 N.E.2d 423, 427.

The Court's review of this case is important because the Commission ignored provisions of R.C. Chapters 4909 and 4929. These chapters contain key rate-setting provisions for natural gas distribution service. This Court has repeatedly stated that the PUCO is a creature of statute, and as such does not have the authority to act beyond the authority provided under Ohio statutes.<sup>4</sup> The SFV rate design discourages Duke's customers' conservation efforts in violation of Ohio law.

### **III. STATEMENT OF FACTS**

#### **A. Duke's Application Did Not Request The SFV Rate Design.**

As required by statute, on June 18, 2007, Duke filed at the PUCO and served on mayors and legislative authorities of each municipality in Duke's service territory a Pre-Filing Notice ("PFN") of its intent to increase rates for the natural gas distribution service that is provided through its gas pipelines. On July 18, 2007, Duke Energy Ohio, Inc. ("Duke" or "Company") filed its application ("Application"), to increase the rates that customers pay. However, in its Pre-Filing Notice Duke stated,

it was proposing a new rate structure for delivery service that is not based upon the volume of gas delivered. Rather than allowing our annual delivery revenues to fluctuate with volumes flowed, we will compare our sales each year to a benchmark, which is the weather normalized level of sales approved by the Public Utilities Commission of Ohio in our most recent general gas rate case, adjusted for new customers added since that time. We will then compare our actual sales to this baseline, and provide customers a credit or charge to account for the difference. Pre-Filing Notice at 8-2 (Supp. 000188)

In the Pre-Filing Notice Duke described for customers in Duke's service territory a rate design that incorporated a decoupling mechanism--and not an SFV rate design. But the SFV is ultimately what the PUCO approved in its Order in this case.

---

<sup>4</sup> See, e.g., *Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St.3d 1, 5, 647 N.E.2d 136.

**B. The Stipulation and Recommendation Excluded The Rate Design Issue Which Was Carved Out For Litigation.**

On February 28, 2008, the parties to the cases entered into a Stipulation and Recommendation (“Stipulation”) Joint Ex. No. 1 (Supp. 000001) that settled all issues except for the rate design issue involving the fixed monthly customer charge. Under the Stipulation, OCC and Ohio Partners for Affordable Energy (“OPAE”) reserved their right to litigate the rate design issue, and on March 5-6, 2008, an evidentiary hearing on the rate design issue was held. The PUCO Staff and Duke (which had not proposed SFV during the initial six months its application was pending) proposed the SFV rate design. The SFV represents a radical departure from decades of PUCO regulation of natural gas Local Distribution Companies (“LDCs”) in Ohio and from the traditional rate design which the Commission historically has approved consisting of a low customer charge and a volumetric charge applicable to a customer’s usage.

**C. The PUCO’s Approval Of The SFV Rate Design Was Unreasonable.**

The Commission issued its Opinion and Order (“Order”) (Appx. 000014) on May 28, 2008, in which the Commission imposed on customers the modified SFV rate design. OCC filed an Application for Rehearing (Appx. 000056) advocating for the Commission to reconsider its decision to approve an SFV rate design and reject the unprecedented quadrupling of the monthly customer charge from \$6.00 to as much as \$25.33 and all but ended the long-standing practice of billing customers per cubic foot of the gas they use as the most significant part of the customer’s distribution cost determined in a base rate proceeding. OCC Application for Rehearing at 7 (Appx. 000067). On July 23, 2008, the PUCO issued its Entry on Rehearing (“Entry on Rehearing”) (Appx. 000007) and denied OCC’s Application for Rehearing. OCC’s Notice of Appeal was filed with this Court on September 16, 2008. (Appx. 000001).

#### IV. ARGUMENT

##### **Proposition of Law 1.**

##### **A Rate Increase Authorized By The PUCO Is Unreasonable and Unlawful When The Notice Requirements Mandated By R.C. 4909.18, R.C. 4909.19 And R.C. 4909.43 Are Not Enforced.**

Ohio Law requires that customers be provided actual notice of the utility's filing of a distribution rate increase. A decision whether or not to enforce the notice requirement is not within the Commission's discretion. In its Order, the PUCO unreasonably and unlawfully approved the SFV rate design despite the fact that sufficient notice of the impact on customers' bills resulting from such a rate design had not been provided to customers as required by Ohio law. The notice requirements for a public utility's application to begin a traditional rate case and for an alternative rate case are found under R.C. 4909.18 (Appx. 000048), 4909.19 (Appx. 000051) and 4909.43 (Appx. 000053). In this case, the Commission failed to enforce the notice requirements, thus denying consumers adequate notice with sufficient detail of the residential rate design ultimately approved by the Commission.

Duke's notice provided customers with information that the percentage increase for its customers would be a 5.8 percent increase from current rates for a total bill comprised of delivery charges and commodity charges. As demonstrated by the chart below, under the SFV rate design, the anticipated increase depends on a customer's usage and deviates significantly from the notice that Duke provided. In fact at the lower usage level (72 Mcf per year) the customer would see a 7.9 percent increase, whereas a higher usage customer (600 Mcf per year) would experience a 9.1 percent decrease. The comparison is even more dramatic when considering a bill comprised of the delivery charges only. In that comparison, the low use customer would experience a 24.7 percent increase over current delivery charges, and the higher use customer would experience a 42.3 percent decrease. Had Duke's notice provided its low-use

customers with accurate information and sufficient detail regarding the extent of the impact of the rate design that was ultimately approved, these customers may have responded differently to the rate increase to protect their interests.

Total Bill	72 Mcf Usage Annually)	240 Mcf Usage Annually)	600 Mcf Usage Annually)
At Current Annual Rates <sup>5</sup>	\$984.19	\$2,934.96	\$7,115.19
At Approved Annual Rates 2009 <sup>6</sup>	\$1,061.66	\$2,756.78	\$6,470.42
Increase/(Decrease) of Commission Approved June 2009 Rates over Current Rates Including Gas Costs	\$77.47	(\$178.18)	(\$644.77)
Percent Change	(7.9%_	(6.1%)	(9.1%)
Total Delivery Charges Only	72 Mcf Usage Annually)	240 Mcf Usage Annually)	600 Mcf Usage Annually)
At Current Rates <sup>7</sup>	\$313.34	\$698.79	\$1,524.76
At Approved Annual Rates 2009 <sup>8</sup>	<u>\$390.81</u>	<u>\$520.61</u>	<u>\$879.99</u>
Increase/(Decrease) of Commission Approved June 2009 Rates over Current Rates Excluding Gas Costs	(\$77.47)	(\$178.18)	(\$644.77)
Percent Change	24.7%	(25.5%)	(42.3%)

<sup>5</sup> Standard Filing Requirement Schedule. E-4.1. (Supp. 000193A) (Supporting calculations at Supp. 000193I).

<sup>6</sup> Commission Approved Duke Energy Ohio Tariff (Supp. 000193B-000193H.) (Supporting calculations at Supp. 000193I).

<sup>7</sup> Standard Filing Requirement Schedule. E-4.1. (Supp.000193A.) (Supporting calculations at Supp. 000193J).

<sup>8</sup> Commission Approved Duke Energy Ohio Tariff (Supp. 000193B-000193H.) (Supporting calculations at Supp. 000193J).

R.C. 4909.18 requires that, unless otherwise ordered by the Commission, the public utility must file, along with its application to the Commission, “[a] proposed notice for newspaper publication fully disclosing the substance of the application.” And, irrespective of whether the utility is required to file such notice with the Commission, R.C. 4909.19 provides that the utility must publish once a week for three consecutive weeks in newspapers of general circulation throughout the affected areas **the substance and prayer of its application**. Duke provided the following notice to the mayors and legislative authorities of each municipality pursuant to R.C. 4909.43:

Finally, DE-Ohio also proposes a new rate structure for delivery service that is not based upon the volume of gas delivered. Rather than allowing our annual delivery revenues to fluctuate with volumes flowed, we will compare our sales each year to a benchmark, which is the weather normalized level of sales approved by the Public Utilities Commission of Ohio in our most recent general gas rate case, adjusted for new customers added since that time. We will then compare our actual sales to this baseline, and provide customers a credit or charge to account for the difference. Pre-Filing Notice at 8-2 (Supp. 000188).

This notice describes a rate design that features a decoupling mechanism with annual true-ups. This rate design, which is substantially different than the SFV rate design that the Commission approved in its Order for Duke’s residential customers was not contained within the notice Duke provided its customers; therefore, the notice failed to provide sufficient detail as contemplated under R.C. 4909.43. Order at 25 (Appx. 000038).

Furthermore, the notice does not describe the impact that a change to the rate design would have on the customer charge. The Company’s proposal established the fixed customer increasing from its current \$6.00 to \$15.00 per month. Pre-Filing Notice Exhibit 3 at Sheet No. 30.14 and Sheet No.30.13 (Supp. 000185-000186). Moreover, the Commission approved a rate design that initially implements a \$15.00 fixed customer charge (through September 30, 2008)

Order at 20 (Appx. 000033), increases to \$20.25 per month (for the balance of the first year,) and then to \$25.33 per month thereafter. Order at 20 (Appx. 000033), citing Joint Ex. No. 1 (Stipulation) at Exhibit 2 (Supp. 0000027). These dramatic increases to the monthly fixed charge are not mentioned let alone explained to consumers anywhere in the notices the Company provided. Therefore, the substance of the notice did not sufficiently explain to consumers the rate design that Duke proposed and that the Commission approved, in violation of Ohio law.

This situation is analogous to the facts of *Committee Against MRT, et. al. v. Public Utilities Commission*, in which Cincinnati Bell Telephone through a rate proceeding under R.C. 4909.18 sought to change the existing rate design for its residential and business customers.<sup>9</sup> In an accompanying exhibit filed with the Commission, Cincinnati Bell described the nature and effect of this new method of charging customers, whereby rates would be based on a minimum fee plus a usage charge. *Id.*<sup>10</sup> However, except for a general reference to the exhibits which did contain information on the proposed new service, no mention of the service was made in the notices themselves.<sup>11</sup>

The Court stated:

From reading the notice published in their local newspapers, subscribers opposed to usage rates would not have known of the innovative plan being introduced by the utility, would not have had any reason to view the exhibits on file with the commission, nor would they have had any interest in participating in the hearings held before the commission. Thus, because of the insufficient notice, appellants were not only denied an opportunity to present evidence at the hearings before the commission opposing the

---

<sup>9</sup> *Committee Against MRT, et. al. v. Public Util. Comm.* (1977), 52 Ohio St.2d 231, 231, 371 N.E.2d 547.

<sup>10</sup> *Id.* at 231. (In the Duke Rate Case, Duke's residential rate design is changing from a low customer charge with high volumetric charge to a high customer charge with a low volumetric charge; whereas, in *Committee Against MRT*, Cincinnati Bell was changing its rate design from a higher flat fixed charge and no volumetric charge to a low fixed charge and a volumetric charge.)

<sup>11</sup> *Id.* at 231.

selection of the experimental area for measured rate service, but also were denied the opportunity to challenge the new rate service itself.

We therefore conclude that Cincinnati Bell, in order to insure an opportunity for its subscribers to be heard, was required under R.C. 4909.19 to specifically mention its proposed measured rate service in its published notice regarding rate increases.<sup>12</sup>

The Commission failed to find that Duke's notice in this case was likewise insufficient, despite evidence and OCC's arguments to the contrary.

The notice requirement is not an unreasonable one. It requires only that the notice state the reasonable substance of the proposal so that consumers can determine whether to inquire further as to the proposal or to voice their concerns in other ways such as through letters to the Commission or testimony in the local public hearings. The Court should hold that the legal notice required by R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43 was not given to customers, in as much as the rate design approved by the PUCO was significantly different from the rate design proposed by Duke in its Application and noticed to its customers. Therefore, the PUCO's Order is unreasonable and unlawful and should be reversed and remanded.<sup>13</sup>

The Commission's ruling in this case contradicts the Commission's more recent November 5, 2008 Finding and Order in a Pike Natural Gas Company/Eastern Natural Gas Company ("Pike/Eastern") case in which the Commission stated:

In particular, the Commission is concerned that the applicants are requesting waivers of its public notice requirements, **especially in light of the impact these applications would have on individual ratepayers.** Furthermore, we believe that it is essential that the applications contain sufficient information such that will [sic] be able to consider the merits of the request. **Without the necessary notice to customers and the requisite**

---

<sup>12</sup> Id. at 234.

<sup>13</sup> *Ohio Ass'n of Realtors v. Pub. Util. Comm.*, (1979), 60 Ohio St.2d 172, 176, 398 N.E.2d 784.

information, the Commission is unable to appropriately review these applications. (Emphasis added.)<sup>14</sup>

In the Pike/Eastern cases, the Commission rejected the waiver request because of the need for sufficient customer notice of the proposed rate changes and the impact that the proposed rate changes would have on individual customers. Yet in this case that was separated in time by only months from the Pike/Eastern decision, the Commission approved the change in rate design despite the fact that customers received notice of a **different rate design as proposed in Duke's Application**. In this case customers thus never received the necessary statutorily-required customer notice of the rate design the Commission ultimately approved.

The Commission was never confronted with a waiver request from Duke regarding the notice requirements in this case. The distinction between the PUCO's treatment of Duke and Pike/Eastern's customers appears to be that Duke never asked the Commission for authority to waive its notice requirements. The Commission instead chose to disregard the statutory requirements that pertain to Duke (and its customers) but not disregard those requirements as they pertain to Pike/Eastern. Regulation involving legal requirements, such as notice, cannot operate under the premise that it is better to ask forgiveness than permission. The legal requirements mandated by R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43 can neither be waived nor ignored by the Commission. The PUCO's failure to enforce the statutory notice requirements, regarding proposed changes to Duke's rate design, results in an unreasonable and unlawful Order that should be reversed and remanded by this Court.

---

<sup>14</sup> *In the Matter of the Application of Eastern Natural Gas Company for Approval of an Alternative Rate Plan Proposing a Revenue Decoupling Mechanism*, Case No. 08-940-GA-ALT, and *In the Matter of the Application of Pike Natural Gas Company for Approval of an Alternative Rate Plan Proposing a Revenue Decoupling Mechanism*, Case No. 08-941-GA-ALT, Finding and Order (November 5, 2008) at 3-4. (Supp. 000196-000197).

## Proposition of Law 2.

### **The PUCO Should Respect Its Own Precedents Unless The Need To Change Its Position Is Clear And It Is Shown That Its Prior Decisions Are In Error.**

The case law recognizes the PUCO's authority to change its position; however, it cannot be done without appropriate considerations. In *Office of Consumers' Counsel v. Public Utilities Commission*, the Court stated:

\* \* \* Although the Commission should be willing to change its position when the need therefore is clear **and** it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure predictability which is essential in all areas of the law, including administrative law. (Emphasis added.)<sup>15</sup>

The Commission neither demonstrated clear need to change its position in its Order or that its prior decisions were in error. By imposing the SFV rate design on Duke's residential customers, the Commission turned its back on thirty years of cases supporting a rate design comprised of a low customer charge with a volumetric charge associated with usage, and thirty years of adhering to the regulatory principle of gradualism. This Court should find that the PUCO's disregard for prior precedents resulted in rates that were unjust and unreasonable and the PUCO's Order should be reversed and remanded.

---

<sup>15</sup> *Office of Consumers' Counsel v. Pub. Util. Comm.*, (1984) 10 Ohio St.3d 49, 50, 461 N.E.2d 303, quoting *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, (1975) 42 Ohio St.2d. 431, 330 N.E.2d 1. See also *State, ex rel. Auto Machine Co. v. Brown* (1929), 121 Ohio St. 73, 166 N.E. 903. See also *Atchison v. Wichita Bd. of Trade*, 412 US 800, 806, 93 S.Ct. 2367 (In 1973 the U.S. Supreme Court set a limit on the power of federal agencies to change prior established policies stating that, while an agency may flatly repudiate its norms, "whatever the ground for the departure [whether it is completely disregarding a policy or simply narrowing its applicability] \*\*\* it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."); *Williams Gas Processing v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) (The Court further added that, although not bound by precedent, a demonstration of "reasoned decision-making necessarily requires consideration of relevant precedent.").

**A. The PUCO's Order approving the SFV rate design violates thirty years of PUCO precedent.**

The Commission's Order approved a rate design for Duke's residential customers that features a fixed monthly customer charge of \$15.00 through September 30, 2008 (approximately four-months), \$20.25 for the balance of year one (approximately eight-months) and \$25.33 in year two and beyond. Order at 20 (Appx. 000033), citing Joint Ex. No. 1 (Stipulation) at Exhibit 2 (Supp. 000027). Thus, after one year, customers will see their fixed customer charge more than quadruple.

Given that the current customer charge is \$6.00 per month, the approved increases in the PUCO's Order cannot be deemed gradual increases. Rather these increases to the fixed portion of the customer charge represent enormous and unprecedented increases in the customer charge that violate the principle of gradualism. Commissioner Centolella voiced his concern for the PUCO's pace to implement an SFV rate design by stating:

In my view, the pace of the transition in this case is more rapid than should be selected given the consumer expectations created by long-standing rate design practices \* \* \*. Order at Opinion of Commission Paul A. Centolella Concurring in Part and Dissenting in Part, page 2 of 4. (Appx. 000044).<sup>16</sup>

The Commission has consistently identified gradualism as one of the regulatory principles that it has incorporated as part of its decision-making process. Staff Report of Investigation at 23-24 (Supp. 000183B-000183C.). Yet in this case, the Commission ignored that very regulatory principle. The Commission's failure to be guided by its own regulatory principles absent a clear need or a showing that the prior decisions are in error is unreasonable

---

<sup>16</sup> Further Commissioner Centolella's stated position that: \* \* \* over the long-term, moving in the direction of a SFV rate design is preferable to keeping a modest customer charge and relying entirely on a decoupling adjustment. Order at Opinion of Commissioner Paul A. Centolella Concurring in Part and Dissenting in Part at 1 (Appx. 000043).

and this Court should reverse the Commission's Order and remand Duke's Rate Case back to the PUCO.

In the instant case, the PUCO identified the need for this drastic change to rate design to address an alleged decrease in the average annual use per customer. However, of the Company's \$34.1 million rate increase request, only \$6 million, or less than eighteen percent of the Company's requested increase was attributable to the alleged decrease in average use per customer. Order at 13 (Appx. 000026). Given the six-year period of time between Duke's natural gas rate cases<sup>17</sup> -- over which this revenue erosion allegedly occurred -- the small portion of the rate increase associated with the alleged decrease in average use per customer fails to represent clear need for the Commission's disregard for the regulatory principle of gradualism and thirty years of precedent. Moreover, less drastic approaches existed to address this alleged problem.

The PUCO has described the SFV as a levelized rate design. The PUCO found support for its Order approving such a rate design in the fact that virtually all the distribution costs are fixed, and the cost to serve a residential customer is largely the same, regardless of the specific customer's usage. Order at 14 (Appx. 000027). The traditional rate design, consisting of a low fixed monthly customer charge and a volumetric rate for a residential natural gas customer, has been in place for thirty years. Tr. Vol. I at 204 (Supp. 000051). The PUCO stated an artificially low customer charge minimally compensates the Company for its fixed costs of providing service. Order at 14 (Appx. 000027). Nonetheless, the low customer charge in conjunction with the volumetric charge was designed to fully compensate the Company for its costs of providing

---

<sup>17</sup> *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in its Gas Rates in its Service Territory*, Case No. 01-1228-GA-AIR, Pre-Filing Notice (June 28, 2001) (Supp. 000290) (Cincinnati Gas & Electric Company was the predecessor of Duke Energy Ohio, Inc. that filed the Application in this case on June 18, 2007) (Supp. 000184).

distribution service. The Court should reverse the PUCO's Order because the PUCO failed to find that the traditional rate design was in error, and therefore, should not have abandoned gradualism or the traditional rate design.

The Commission precedent in this area is long-standing and consistent in its adherence to the principle of gradualism. Unfortunately, in this case, the PUCO was all too willing to cast it aside as "one of many important regulatory principles" to be considered. Entry on Rehearing at 3 (Appx. 000009). By disregarding its prior precedent, the Commission approved a rate design that incorporated rates for the customer charge that quadrupled from the current customer charge and minimized the positive effect the volumetric charge traditionally has had on energy conservation efforts. This was an unjust and unreasonable result. Therefore, this Court should reverse and remand the PUCO's Order in this case.

The Commission's precedent regarding its adherence to the regulatory principle of gradualism is extensive. In *Columbia Gas*, Case No. 88-716-GA-AIR, the Commission noted that the Staff recommended a Customer Charge of \$6.00, which was lower than the calculated charge of \$7.79, based on principles of gradualism and stability.<sup>18</sup> As part of its decision, the Commission concluded:

**While it is true that the customer charge proposed by the staff might not recover all customer-related costs, it is important to note that costs, while very important, are not the only factor to consider in establishing the charge. The Commission must also consider the customers' expectations, acceptance, and understanding in setting rates and balance these factors accordingly with the determined costs.**<sup>19</sup>

---

<sup>18</sup> *In the Matter of the Applications of Columbia Gas of Ohio, Inc., to Establish a Uniform Rate for Natural Gas Service Within the Company's Lake Erie Region, Northwest Region, Central Region, Eastern Region, and Southeastern Region*, Case No. 88-716-GA-AIR et. al, ("1988 Columbia Gas"), Opinion and Order (October 17, 1989) at 87 (Supp. 000362).

<sup>19</sup> *Id.* at 89 (emphasis added). (Supp. 000364).

In accepting the PUCO Staff's position in the 1988 Columbia Gas case, the Commission noted that "[t]he Staff's application of the accepted ratemaking principles of gradualism and stability is reasonable."<sup>20</sup> Both the Staff Report and the Opinion and Order in another Columbia Gas, Case No. 89-616-GA-AIR,<sup>21</sup> echoed the same belief in and reliance on gradualism.

The Commission noted that:

Staff contends that its proposed customer charge of \$6.25 is reasonable, since the customer charge is meant to provide a utility only with a partial recovery of its fixed costs and since the charge it proposes is in keeping with the accepted ratemaking principles of gradualism and stability.<sup>22</sup>

The Commission further elaborated on these principles, when it ruled that:

We heard a great deal of testimony at the local hearings regarding the detrimental impact that an increase in the customer charge would have on low income customers (See, Cincinnati Tr. 29-30, 54, 61, 93). **We believe that it is appropriate in this case to keep the customer charge at its current level in order to minimize rate shock that would otherwise be experienced by residential customers.**<sup>23</sup>

The Staff's view of gradualism, as noted throughout the many Staff Reports, has been in the context of Company-proposed customer charge increases of only \$2.00 to \$4.00. OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at Exhibit WG-2 (Supp. 000080). In most cases, the Staff Report notes that in making its recommendation, the Staff recognized and prescribed to

---

<sup>20</sup> Id..

<sup>21</sup> *In the Matter of the Applications of Columbia Gas of Ohio, Inc., to Establish a Uniform Rate for Natural Gas Service Within the Company's Northwestern Region, Lake Erie Region, Central Region, Eastern Region, and Southeastern Region*, Case No. 89-616-GA-AIR et. al. ("1989 Columbia Gas"), Opinion and Order (April 5, 1990) at 80-82 (Supp. 000371-000373).

<sup>22</sup> *1989 Columbia Gas* at 80 (Supp. 000371).

<sup>23</sup> *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in Its Rates for Gas Service to All Jurisdictional Customers*, Case No. 95-656-GA-AIR, Opinion and Order (December 12, 1996) at 46 (Supp. 000353). (Emphasis added).

ratemaking principles of gradualism within the revenue distributions.<sup>24</sup> This same language also appeared in Northeast Ohio, Case No. 03-2170-GA-AIR where the Staff Report stated, “[i]n recommending customer charges, Staff recognizes and prescribes to the established ratemaking principle of gradualism within the revenue distribution.”<sup>25</sup>

Staff Witness Puican explained the Staff’s shift away from the prior application of gradualism by noting that “the concept of gradualism makes sense when prices are relatively stable. There was simply no compelling need to make large changes in it.” Tr. Vol. I at 205-206 (Supp. 000052-000053). Despite this justification, which had no foundation in any prior Opinion and Order where the Commission relied on gradualism, the Staff offered no evidence to support this claim. The PUCO Staff provided no support because its reasoning is flawed. Rather than needing gradualism when prices are relatively stable, gradualism is most needed and valued as a regulatory policy during a time of higher prices and greater price volatility. Gradualism in the

---

<sup>24</sup> *In the Matter of the Complaint and Appeal of Oxford Natural Gas Company from Ordinance No. 2896, Passed by the Council of the City of Oxford on February 7, 2006*, Case No. 06-350-GA-CMR, Staff Report (September 19, 2007) at 26 (Supp. 000090).

<sup>25</sup> *In the Matter of the Application of Northeast Ohio Natural Gas Corp. for an Increase in its Rates and Charges for Natural Gas Service*, Case No. 03-2170-GA-AIR, Staff Report (August 29, 2004) at 44 (Supp. 000097). See also *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in its Gas Rates in its Service Territory*, Case No. 01-1228-GA-AIR, Staff Report (January 1, 2002) at 57 (Supp. 000100.); *In the Matter of the Application of the Cincinnati Gas & Electric Company to File an Application for an Increase in Gas Rates in its Service Area*, Case No. 92-1463-GA-AIR, Staff Report (March 17, 1993) at 29 (Supp. 000118); *In the Matter of the Application of Columbia Gas of Ohio, Inc., to Increase Gas Sales and Certain Transportation Rates Within its Service Area*, Case No. 91-195-GA-AIR, Staff Report (August 25, 1991) at 58 (Supp. 121); *In the Matter of the Application of the Dayton Power and Light Company for Authority to Amend its Filed Tariffs to Increase the Rates and precedents Charges for Gas Service*, Case No. 91-415-GA-AIR, Staff Report, (November 13, 1991) at 45 (Supp. 000123); and *In the Matter of the River Gas Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Service*, Case No. 90-395-GA-AIR, Staff Report (October 29, 1990) at 31 (Supp. 000127).

form of mitigating a customer charge increase from \$6.77 to \$6.00<sup>26</sup> or from \$5.23 to \$5.00<sup>27</sup> or even keeping it at \$5.70<sup>28</sup> at a time when commodity prices are at a lower level is less important or necessary compared to when a \$6.00 customer charge may increase to \$15.00, \$20.25 or even \$25.33, and when the commodity prices are over \$8.00/Mcf. OPAE Ex. No. 1 (Natural Gas Graph) (Supp. 000183), Tr. Vol. I at 160 (Supp. 000047). The need for gradualism grows as consumers face greater costs; the need does not decline.

This Court should find that the PUCO's Order represents an abandonment of PUCO precedent pertaining to the regulatory principle of gradualism absent clear need or a showing that the prior precedent was in error. The fact that the proposed SFV rate design will be accomplished through three large incremental increases over a two year period rather than through many smaller incremental increases over a long-term period is not supported by this record. The SFV rate design has resulted in the implementation of rates that are unjust and unreasonable. Therefore, the Court should reverse and remand this case so that if the Commission is determined to implement an SFV rate design, it should be implemented in a more gradual manner with small incremental increases in the fixed customer charge over a longer-term period of time and with the opportunity to evaluate its impact on customer conservation and affordability during the transition.

---

<sup>26</sup> *In the Matter of the Application of the Cincinnati Gas & Electric Company to File an Application for an Increase in Gas Rates in its Service Area*, Case No. 92-1463-GA-AIR, Staff Report (March 17, 1993) at 29 (Supp. 000118).

<sup>27</sup> *In the Matter of the Application of the Dayton Power and Light Company for Authority to Amend its Filed Tariffs to Increase the Rates and precedents Charges for Gas Service*, Case No. 91-415-GA-AIR, Staff Report, (November 13, 1991) at 45 (Supp. 000123).

<sup>28</sup> *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in Its Rates for Gas Service to All Jurisdictional Customers*, Case No. 95-656-GA-AIR, Opinion and Order (December 12, 1996) at 45-46 (Supp.000352-000353).

**B. The PUCO's approval of an Order implementing the SFV rate design is an unprecedented change in policy violating its principles of gradualism.**

The Commission's Order neither explains its rationale for ignoring the principle of gradualism nor justifies disregarding thirty years of Commission rate design precedent. In his rebuttal testimony, OCC witness Gonzalez explained the regulatory principle of gradualism as being one in which a regulator attempts to **minimize** the impact of rate changes on the industry and customers. OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 14 (Supp. 000075). In this case, the principle of gradualism takes on an even more important role because of the radical nature of the change in price the Commission has unreasonably approved in its Order and also because of the unprecedented sheer magnitude of the fixed monthly residential customer charge increase. Both of these factors are exemplified by the fact that prior to the filing of this case, no Ohio LDC had ever requested a customer charge as large as the \$15.00 customer charge initially approved through September 30, 2008, Order at 20 (Appx.000033), let alone the \$20.25 or \$25.33 customer charges ultimately approved in this case based solely on the Staff's recommendation.

Not only did OCC witness Gonzalez testify to the concept of gradualism as being one in which a regulator attempts to **minimize** the impact of rate changes on customers, the PUCO Staff also identified gradualism as a rate design principle. OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 14 (Supp. 000075), See also, Staff Ex. No. 3 (Puican Direct Testimony) at 3-4 (Supp.000179-000180), and Tr. Vol. I at 205 (Supp. 000052). Although Staff witness Puican testified that Staff had followed the same rate design methodology to calculate the customer charge since 1978, Tr. Vol. I at 204 (Supp. 000051), and that Staff had previously put a "lot of emphasis on the concept of gradualism," Tr. Vol. I at 205 (Supp. 000052), the only application of the principle of gradualism in this case was that instead of a move to a complete SFV rate

design (e.g. \$30.00 per month), the move was to a modified form of SFV that was to be phased in over a two-year period. Tr. Vol. I at 209 (Supp.000056).

In practical terms this meant that instead of an increase from the current \$6.00 monthly customer charge<sup>29</sup> to a \$30 monthly customer charge, Tr. Vol. I at 147 (Supp. 000046) (400 percent increase), the increase would result in a customer charge of \$15.00 (a 150 percent increase) through September 30, 2008, a customer charge of \$20.25 (a 238 percent increase) for the balance of year one, and a customer charge of \$25.33 (a 322 percent increase) in year two. Thus, by the Commission's convoluted logic, it applied gradualism in its Order by "limit[ing]" the increase in the customer charge in this case to only \$9.00 or 150 percent through September 30, 2008, \$14.25 or 238 percent for the balance of year one, and \$19.33 or 322 percent in year two. Tr. Vol. I at 171 (Supp.000048).<sup>30</sup>

In previous rate cases, the largest difference between the current customer charge and the Staff recommended customer charge was \$4.34<sup>31</sup> The magnitudes of the difference between the current customer charge (\$6.00) and the Commission approved customer charges in this case (\$15.00, \$20.25 and \$25.33) are more than two times larger than the largest previous differential.<sup>32</sup>

---

<sup>29</sup> Although Duke Witness Smith attempted to characterize the current Accelerated Main Replacement Program ("AMRP") charge of \$5.77 as part of the customer charge, he ultimately acknowledged that the current customer charge does not include the AMRP charge and was only \$6.00. Tr. Vol. I at 171 (Supp. 000048).

<sup>30</sup> Any ensuing AMRP charge would be added to this customer charge for an even larger fixed charge.

<sup>31</sup> *In the Matter of the Application of Eastern Natural Gas Company to Increase Rates for Its Natural Gas Service Area and Related Matters*, Case No. 89-1714-GA-AIR, Staff Report, (June 14, 1990) at 22 (Supp. 000132).

<sup>32</sup> *Id.*

The residential rate design in this case constitutes a fundamental change from a position held for the previous 30 years, Tr. Vol. I at 204 (Supp. 000051), in which the Staff recommended a relatively small fixed charge and a larger variable charge to make up the total distribution charge to the customer.<sup>33</sup> The customer charge increases for Columbia Gas of Ohio, Inc. (“COH”) have totaled only \$2.95 over a 26-year period, for DEO have totaled only \$1.70 over the same 26-year period and for Vectren Energy Delivery of Ohio (“Vectren”), have totaled \$2.85 over a 25-year period.<sup>34</sup> The result is that the Commission’s Order approved a rate design for Duke that has more than doubled, tripled and even quadrupled what other Ohio gas utilities and their customers have experienced over the past twenty-five or so years. This Court should find the unprecedented increase to the customer charge in the SFV rate design to be an unjust and unreasonable result.

More importantly, prior customer charges recommended by the PUCO staff have consistently been within \$2.50 of the then-current customer charge, with only one instance -- Eastern Natural Gas, Case No. 89-1714-GA-AIR -- where it was greater. This illustrates the magnitude of the radical departure the Commission has taken in this case when compared to the

---

<sup>33</sup> Mr. Puican referenced a 1978 case. *In the Matter of the Application of Columbia Gas of Ohio, Inc., for an Increase in the Rates to be Charged and Collected for Gas Service in the Village of Mt. Sterling, Ohio*, Case No. 77-1309-GA-AIR, *In the Matter of the Application of Columbia Gas of Ohio, Inc., for an Increase in the Rates to be Charged and Collected for Gas Service in the City of Martins Ferry, Ohio*, Case No. 77-1428-GA-AIR, Opinion and Order (May 24, 1979) at 12-13 (Supp. 000375-000376). Where the Commission noted that “In these proceedings, applicant proposes to replace this rate with a rate structure incorporating a fixed monthly customer charge reflecting costs which do not vary with usage and a uniform rate per Mcf for gas consumed.” at 12. The Commission further concluded that, “**The Commission has approved this type of rate schedule in the belief that it is cost-justified and with the interests of conservation firmly in view**” (emphasis added) at 13. Thus the Commission recognized a customer charge comprised of a low customer charge and a volumetric rate better served conservation.

<sup>34</sup> OCC Ex. No. 5 (Gonzalez Direct Testimony) at 9-10, and Attachment WG-1 (Supp. 000168-000169).

past thirty years of rate design precedent. Moreover, given the volatility of natural gas prices and the fact that customers have had to absorb significant increases ranging from 200 to 300 percent, gradualism in distribution charges is a welcomed tool in the arsenal to keep gas service affordable for Duke residential customers.

The PUCO should respect its own precedent to assure predictability in the law. The PUCO's Order has abandoned thirty years of precedent without good cause. The Court should determine that by failing to adhere to its own precedent, without establishing clear need or that its prior precedent was in error, the PUCO's Order resulted in the Commission approving unjust and unreasonable rates. The Order should therefore be reversed and remanded with instructions that, if the Commission is determined to implement an SFV rate design, it should approve a more gradual move to an SFV rate design over a longer-term period of time or consider other less drastic rate designs that will serve its objectives of assuring that the Company has the opportunity to earn sufficient revenues.<sup>35</sup>

### **Proposition of Law 3.**

#### **The PUCO Violated R.C. 4929.02 and R.C. 4905.70 When It Approved The SFV Rate Design Which Fails to Promote Energy Efficiency and Discourages Conservation.**

The Commission contravened provisions of R.C. Chapters 4905 and 4929 in adopting the SFV rate design. These Code chapters contain key rate-setting provisions for natural gas distribution in terms of requirements that the Commission approve rates that promote energy efficiency and encourage conservation in accordance with Ohio law and policy. This Court has repeatedly stated that the PUCO is a creature of statute, and as such does not have the authority to

---

<sup>35</sup> *Bluefield Water Works & Improvement Company v. Pub. Serv. Comm. of West Virginia*, 43 S. Ct. 675, 692, 262 U.S. 679 (June 11, 1923) (“A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public \* \* \*; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.”).

act beyond the authority provided under Ohio statutes. See, e.g., *Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St.3d 1, 647 N.E.2d 136. This Court should find that the Commission has exceeded its authority in this case.

The Commission has a statutory duty to initiate programs that promote conservation.

R.C. 4905.70 (Appx. 000047) states:

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.

The SFV rate design serves the Company's limited cost recovery interests, but fails to promote conservation for the reasons discussed below. State law and policy direct the Commission to act such that the rate design influence has a positive effect on energy conservation.

The General Assembly recognized the importance that rate design plays in carrying out the energy conservation initiatives. R.C. 4905.70 further states:

\* \* \* 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.

Similar to a declining block rate structure, lifeline rates, etc., the SFV rate design has an impact on consumers' conservation efforts. However, the impact is undesirable, as noted below, because the SFV rate design sends consumers the wrong price signal and extends the payback period for those customers who invest in energy efficiency. Everywhere customers turn, they hear about the merits of conserving energy and resources. Yet instead of continuing a rate design that would reward customers for so doing, the Commission has chosen to implement a rate design that penalizes customers who conserve. They are penalized two ways. First the payback for any energy efficiency investments under SFV are extended and second the cost per

unit of consumption has increased, resulting in the efficient customer subsidizing the less efficient customer. Therefore, the SFV rate design does not encourage conservation and violates R.C. 4905.70.

The SFV rate design does not promote customer efforts to engage in conservation of natural gas, and instead would encourage increased usage of natural gas. Such a rate design is contrary to Ohio policy which states:

(A) It is the policy of this state to, throughout this state:

\* \* \*

(4) Encourage innovation and market access for cost-effective supply-and demand-side natural gas services and goods; R.C. 4929.02 (Appx. 000054).

This Court has found that violations of statutes containing state policy warrant a reversal of the Commission's Order and remand to remedy the statutory violation.<sup>36</sup> In this case, the SFV rate design fails to promote energy efficiency and encourage conservation which is contrary to state policy and is in violation of R.C. 4929.02(4). For example, the SFV rate design sends consumers the wrong price signal; will harm consumers who have invested in energy efficiency by extending the payback period; and will take away control that consumers have over their utility bills. The PUCO's implementation of the SFV rate design which violates R.C. 4929.02 and the mandated state policy to encourage conservation should result in this Court reversing and remanding this case to the Commission.

The Commission did uphold statutory requirements pertaining to energy efficiency policy mandates in a recent FirstEnergy case. The Commission stated:

---

<sup>36</sup> *Elyria Foundry Company v. Pub. Util. Comm.*, (2007) 114 Ohio St.3d 305, 317, 871 N.E.2d 1176. (In the Elyria Foundry Case, a violation of R.C. 4928.02 (G) a statute mandating state policy against anticompetitive subsidy relative to competitive retail electric service was found to have been violated).

Likewise, the Commission finds that FirstEnergy's application for an MRO cannot be approved in the absence of a proposal by the Companies for compliance with the energy efficiency and peak demand reduction requirements of Section 4928.66, Revised Code. The Commission further notes that SB 221 amended the policies of the state, codified in Section 4928.02, Revised Code, to specifically enumerate DSM, time differentiated pricing, and implementation of AMI as policies which should be promoted by the Commission. These provisions were all enacted as part of SB 221, and it is clear that the General Assembly intended for the Commission to consider an electric utility's plan for compliance with the energy efficiency and peak demand reduction requirements in conjunction with the consideration of its application for an MRO.<sup>37</sup>

Although the above case involves a Commission Order in an electric case, the intent of the legislation and policy mandates for energy efficiency and conservation promotion are similar.<sup>38</sup> The Commission rejected the FirstEnergy application because of the Company's failure, *inter alia*, to comply with energy efficiency statutory requirements. The Commission's Order in this case cannot be reconciled with the Commission's decision in the FirstEnergy Case, and should be reversed and remanded.

Moreover, under SB 221, a new provision was added in Section 4929.02 (Appx. 000054) of the Ohio Revised Code stating that it is the policy of this State to:

(12) Promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation. (Appx. 000055.).

Clearly, the adoption of SFV is in violation of this policy, since SFV does not promote such an alignment, but in fact inhibits such objectives. The Commission's Order should be reversed because it fails to comply with new law.

---

<sup>37</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service ("FirstEnergy Case")* Case No. 08-936-EL-SSO, Opinion and Order at 29 (November 25, 2008). (Supp. 000254).

<sup>38</sup> R.C. 4928.02 (Appx. 000053A).

- A. **The PUCO's approval of the SFV rate design violates R.C. 4905.70 and R.C. 4929.02 because it fails to promote and encourage the conservation of energy.**

The Commission's approval of the SFV rate design was unjust and unreasonable because it fails to promote and encourage the conservation of energy by sending the wrong price signal to consumers who should be receiving an incentive to conserve usage through the rates they pay. The Commission's Order improperly states that a "levelized rate design sends better price signals to customers." Order at 19 (Appx. 000032). It is widely accepted that high natural gas prices generally send a signal to consumers that encourages conservation. Tr. Vol. I. at 160 (Supp. 000047). The SFV rate design contradicts that basic message because it decreases the volumetric rate while significantly increasing the fixed portion. Commission Centolella echoed this consideration by stating:

Experience shows that there is a significant price response to increases in volumetric charges, as evidenced by the recent steep reductions in average per customer consumption as gas cost increased. Given that customer charges are paid to provide access to gas service, it is reasonable to expect comparatively less price response with respect to increases in the customer charge. Order at Opinion of Commission Paul A. Centolella Concurring in Part and Dissenting in Part page 2 of 4 (Appx. 000044).<sup>39</sup>

At a time when Duke's marginal costs for natural gas and energy prices generally are increasing, the SFV rate design sends the wrong price signal to customers, OCC Ex. No. 5

---

<sup>39</sup> See also *In the Matter of the Application of Columbia Gas of Ohio, Inc., for an Increase in the Rates to be Charged and Collected for Gas Service in the Village of Mt. Sterling, Ohio*, Case No. 77-1309-GA-AIR, *In the Matter of the Application of Columbia Gas of Ohio, Inc., for an Increase in the Rates to be Charged and Collected for Gas Service in the City of Martins Ferry, Ohio*, Case No. 77-1428-GA-AIR, Opinion and Order (May 24, 1979) at 12-13 (Supp. 000375-000376). Where the Commission noted that "In these proceedings, applicant proposes to replace this rate with a rate structure incorporating a fixed monthly customer charge reflecting costs which do not vary with usage and a uniform rate per Mcf for gas consumed." at 12. The Commission further concluded that, "**The Commission has approved this type of rate schedule in the belief that it is cost-justified and with the interests of conservation firmly in view**" (emphasis added) at 13. Thus the Commission recognized a customer charge comprised of a low customer charge and a volumetric rate better served conservation

(Gonzalez Direct Testimony) at 14 (Supp.000157), because as consumers use more natural gas the per unit price decreases under the SFV design. Tr. Vol. I at 50 (Supp. 000041); See also OCC Exhibit No. 5 (Gonzalez Direct Testimony) at 15 (Supp. 000158). In fact, the highest usage customers (the top 35 percent), OCC Ex. No. 5 (Gonzalez Direct Testimony) at WG-2 (Supp. 000170), will see a 6 percent to 21 percent decrease in their total bills from their current bills. OCC Ex. No. 5 (Gonzalez Direct Testimony) at 17 (Supp. 000160). This is absolutely the wrong price signal to send consumers making consumption decisions regarding a precious natural resource.

The residential rate design plays an important role in the promotion of the energy efficiency programs in Duke's service territory. On cross-examination, Duke Witness Storck agreed that a rate design with a lower fixed customer charge and a higher volumetric rate would be the optimum rate design for the customer to achieve savings from its energy efficiency investments.

- Q. The most optimum opportunity for consumers to realize true savings from their energy efficiency investments would be a rate design in which the customer charge is set as low as possible and the company recovers more base revenues through a volumetric rate?
- A. That would probably be most for the customer, would be most benefit for the customer but not for the company \* \* \*. Tr. Vol. I at 30 (Supp. 000038).

As Duke admitted, the customer who would reap more savings from an investment in a high efficiency furnace would be the customer under the rate design that was structured with a lower fixed customer charge, such as \$6.00, and a higher volumetric charge as compared to the rate design with a higher fixed customer charge, such as \$15.00, \$20.25, or \$25.33 and a lower volumetric rate. Tr. Vol. I at 48 (Supp. 000040). The Commission unreasonably ignored this evidence when approving the rate design in this case.

The SFV rate design fails to send the proper price signal to encourage conservation. The only conclusion that the Commission should have reached from the weight of the evidence presented in this case is that since the per-unit price decreases as consumption increases the price signal from the SFV rate design is improper. Therefore, the Court should reverse the PUCO's Order approving the SFV rate design because the resulting rates contravene the law.

**B. The PUCO's approval of the SFV rate design removes the customers' incentive to invest in energy efficiency because the payback period for such investments made by consumers is extended.**

The Commission's approval of the SFV rate design was unjust and unreasonable because the SFV rate design fails to provide consumers the incentive to invest in energy efficiency or conserve usage. The Commission in its approval of the residential rate design puts undue emphasis on the conservation issue solely from the Company's perspective by stating, "that a rate design that prevents a company from embracing energy conservation efforts is not in the public interest." Order at 18 (Appx. 000031). The PUCO failed to acknowledge that in order for demand-side management programs to work, consumers must participate. That necessitates that customers be provided incentives too. However, the PUCO has taken a giant step backwards by admitting, in its Order, that the SFV rate design "will modest[ly] increase the payback period for customer-initiated energy conservation measures." Order at 19 (Appx.000032).

The Commission's decision to approve an SFV rate design is internally inconsistent with the following statement:

What we are attempting to do today is to provide appropriate incentives, through a rational pricing scheme, to encourage a reduction in the consumption of natural gas. By 'rational,' I mean a balanced approach that penalizes neither those whom have already squeezed the last cubic foot of natural gas from their budget, nor those whom might be inclined to 'over-conserve'. Order at Concurring Opinion of Chairman Alan R. Schriber page 1 of 3 (Appx.000040).

It is uncontroverted in the record that those customers who have invested in additional home insulation and purchased more efficient furnaces and water heaters as a rational response to increasing gas costs (and in response to Ohio policy) will see their investment returns diminished and payback periods lengthened as a result of the SFV rate design. OCC Ex. No. 5 (Gonzalez Direct Testimony) at 18 (Supp. 000161). The SFV rate design discourages customer conservation. This Court should find that the SFV rate design approved by the Commission will materially alter customer economies when contemplating an energy efficiency investment. *Id.* at Exhibit WG-3 (Supp. 000172-000174).

Therefore, the residential rate design as approved by the Commission, in this case, is unjust and unreasonable because it is harmful to consumers and violates state law and should, therefore, be reversed by this Court.

**C. The PUCO's approval of the SFV rate design was an unnecessary incentive to encourage Duke to promote conservation because Duke already had a demand-side management program in place.**

The Commission's Order approving the SFV rate design relies on a disingenuous argument that the SFV rate design encourages Duke's participation in energy conservation efforts. In a prior proceeding, the Commission approved a sizeable amount of energy efficiency programs for Duke which are currently in place.<sup>40</sup> In this case, the Commission relied on an argument that lacks merit as a means to support its decision to move to an SFV rate design. The Commission stated:

---

<sup>40</sup> *In the Matter of the Application for Recovery of Costs, Lost Margin and Performance Incentives Associated with Implementation of Natural Gas Demand-Side Management Programs by the Cincinnati Gas and Electric Company*, Case No. 06-93-GA-UNC, Amended Application, (August 16, 2006). See also OCC Ex. No. 5 (Gonzalez Direct Testimony) at 12-13. (Duke's DSM Program is designed to reduce the level of usage by, at a minimum, .75 percent to two percent of verified annual energy reductions as a result of implementing the Company's comprehensive energy efficiency programs) (Supp. 000155-000156).

In contrast, under the current pricing scheme, the gas company has no incentive to encourage conservation because those same usage sensitive rates might flow through to fixed costs as consumption grows, much to the utility's advantage. Under the SFV, the fixed costs are covered and the company makes no money on the gas commodity. Therefore, the company might actually promote conservation more aggressively. Order at Concurring Opinion of Chairman Alan R. Schriber page 2 of 3 (Appx. 000041).

Therefore, the Commission's argument that the SFV rate design reduces the Company's disincentive to promote energy conservation is also without merit in this case because Duke already has a three-year demand-side management pilot program in place. Further, the decoupling mechanism as originally proposed by Duke in its Application would have accomplished the same objective. SFV is the invention of the Commission, not the utilities.

The demand-side management pilot program was approved by the Commission prior to Duke's filing its Application in this case, and thus was done prior to and without the necessity of an SFV rate design. In addition, Duke has been spending \$2 million annually on low-income weatherization, and through this case has agreed to spend another \$1 million. Joint Ex. No. 1 (Stipulation) at 12, ¶12 (Supp. 000012). With the cost recovery opportunities Duke has from the demand-side management programs, the Company's incentive to promote energy efficiency was already in place.<sup>41</sup> In fact, the Commission should not have implemented a rate design with an "energy efficiency incentive" that exceeded the incentive the Company itself proposed in its Application. There was absolutely no need for the Commission to increase the fixed customer charge by an additional 68.9 percent.<sup>42</sup>

It was duplicative to approve a rate design that removed the Company's disincentive to encourage conservation when that disincentive had been previously addressed. It is important

---

<sup>41</sup> Id. Order at 3 (July 11, 2007) (Supp. 000262). (Duke has authority to recover program costs, lost margins, and shared savings associated with the implementation of a set of DSM programs for residential small/medium size business consumers.).

<sup>42</sup>  $\$25.33 - \$15.00 = \$10.33$ ,  $\$10.33 / \$15.00 \times 100 = 68.9$  percent.

that as part of the compact to make energy efficiency a success, the Commission consider not only company incentives and revenues but also customer incentives to participate in programs. If the price signal encourages consumption or if customers invest in energy efficiency only to see their payback periods extended, this can have a chilling effect on continued investments in energy efficiency. Such an outcome is anathema to the intent of the law. Therefore, the residential rate design as approved by the Commission was unlawful and in violation of Ohio policy due to its failure to promote energy efficiency and encourage conservation and should, therefore, be reversed and remanded by this Court.

**D. The PUCO disregarded an alternative rate design that would not have violated R.C. 4929.02 or R.C. 4905.70.**

The Commission was faced with a decision between two alternative rate design methods: 1) an SFV rate design which is a levelized rate design, which recovers most fixed costs up front in a flat monthly fee, or 2) a decoupling rider, which maintains a lower customer charge and allows the company to offset lower sales through an adjustable rider. The Company and Commission's Staff supported the SFV approach. The Appellants advocated for the adjustable rider approach that incorporated a decoupling mechanism. The Commission offered the following unreasonable explanation for its preference for the levelized method:

On balance, the Commission finds the levelized rate design advocated by Duke and Staff to be preferable to a decoupling rider. Both methods would address revenue and earnings stability issues in that the fixed costs of delivering gas to the home will be recovered regardless of consumption. Each would also remove any disincentive by the company to promote conservation and energy efficiency. The levelized rate design, however, has the added benefit of producing more stable customer bills throughout all seasons because fixed costs will be recovered evenly throughout the year. In contrast, with a decoupling rider, as favored by OCC, customers would still pay a higher portion of their fixed costs during the heating season when their bills are already the highest, and the rates would be less predictable since they could be adjusted each year to make up for lower-than-expected sales.

A levelized rate design also has the advantage of being easier for customers to understand. Customers will transparently see most of the costs that do not vary with usage recovered through a flat monthly fee. Customers are accustomed to fixed monthly bills for numerous other services, such as telephone, water, trash, internet, and cable services. A decoupling rider, on the other hand, is much more complicated and harder to explain to customers. It is difficult for customers to understand why they have to pay more through a decoupling rider if they worked hard to reduce their usage; the appearance is that the company is penalizing them for their conservation efforts. Order at 18-19 (Appx. 000031-000032).

The Commission readily admits that both alternative rate design methods address the revenue and earnings stability issue and remove the disincentive for the utility to engage in energy efficiency and conservation. However, the reasons for the Company's acceptance of the SFV rate design was its singular focus on revenue stability. Duke's concern with the present rate design (consisting of a lower customer charge and a higher volumetric rate) had more to do with its ability to collect a fixed amount of revenue, regardless of consumers' usage level, and less to do with the desire for customers to conserve. It must be noted that rates are set by the Commission in order to permit the Company an "opportunity" to collect a fair rate of return -- rates are not designed to "guarantee" the utility anything.<sup>43</sup> The Commission had the opportunity to balance Duke's revenue stability concerns with consumer energy conservation interests by the implementation of an alternative rate design which incorporates a decoupling mechanism with appropriate consumer safeguards instead of the SFV rate design.

In sharp contrast to these problems encountered with an SFV rate design is a decoupling mechanism which is accountable, transparent and fair. The utility collects its Commission-authorized revenues, but unlike the SFV rate design, customers have a mechanism that ensures

---

<sup>43</sup> *Bluefield Water Works & Improvement Company v. Pub. Serv. Comm. of West Virginia*, 43S, Ct. 675, 692, 262 U.S. 679 (June 11, 1923) ("A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public \* \* \*; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.").

fairness by providing a credit if the utility over-collects from them. Furthermore, a decoupling mechanism sends more accurate and appropriate price signals to customers encouraging less use and more conservation. Decoupling provides customers the tools to lower their consumption. Decoupling also benefits society by motivating individual customers to engage in energy efficiency. According to a study by the American Council for an Energy-Efficient Economy (“ACEEE”), if consumption can be reduced by 1 percent per year every year for five years, then the price of natural gas can be reduced by 13 percent due to reduced demand.<sup>44</sup>

The Commission also admits that the both methods remove any disincentive for the Company to promote energy efficiency and conservation. As argued by OCC, “[t]he SFV rate design does not maintain the customer incentive to conserve and further mutes the price signal to the customer.” OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 2 (Supp.000063). Therefore, a decoupling mechanism provides more of a “proper balance” between the Company and the consumer, rather than an SFV rate design which only addresses the Company’s need for revenue stabilization.

The Commission found more favorably for the SFV rate design because of its levelizing effect on customer billings. Order at 18 (Appx. 000031). However, the record does not support the assumption that customers are interested in the levelizing effect that the SFV rate design offers them. In fact, the argument that a larger fixed charge will levelize customer bills is irrelevant and without merit. Neither the Company nor the Staff, Tr. Vol. I. at 240 (Supp. 000059) offered any valid studies to support the belief that consumers are interested in a forced

---

<sup>44</sup> American Council for an Energy-Efficient Economy, Report No. U051, *Examining the Potential for Energy Efficiency To Help Address the Natural Gas Crisis in the Midwest*, (January 2005) at 5.

levelized fixed charge. On cross-examination Duke witness Smith offered what was apparently the only study that was performed:

- Q. My question is, Mr. Smith, did you look at any studies, opinion studies, where customers evidence a preference for fixed prices, yes or no?
- A. Yes.
- Q. Okay. And what was that study?
- A. My own personal family use. I prefer cell phones with fixed minutes, fixed charge, fixed internet service.
- Q. And you are, of course, representative of all residential customers?
- A. I am certainly a residential customer, yes. Tr. Vol. I at 188 and 196 (Supp. 000049 and 000050).

A “study” with **one** data point, regarding a service where usage has no seasonality, is not a statistically significant study. This is a preference expressed by one individual, not a study and Duke failed to maintain its burden of proof.

Unfortunately, the Commission was all too willing to accept the Company’s argument in support of its position. The Commission stated: “Customers are accustomed to fixed monthly bills for numerous other services, such as telephone, water, trash, internet and cable.” Order at 18 (Appx. 000031). These services that the Commission relies upon for fixed charge billing examples do not involve the consumption of a precious natural resource with the exception of water, and Ohio water utilities still rely upon a rate design that incorporates a large volumetric based charge. In the recent Ohio American Water case, the PUCO Staff refused to support the increase to the customer charge requested by the Company.<sup>45</sup> In fact, instead of an increase, the PUCO Staff proposed the current customer charge be decreased by 23.4 percent.<sup>46</sup>

---

<sup>45</sup> *In the Matter of the Application of Ohio-American Water Company to Increase Its Rates For Water and Sewer Service Provided to Its Entire Service Area*, Case No. 07-1112-WS-AIR, Staff Report at 32 (May 28, 2008). (The Company’s current customer charge was \$9.41 and the Company proposed \$10.59) (Supp. 000269-000273).

<sup>46</sup> *Id.* at 35. The PUCO Staff proposed a \$7.21 customer charge, or a 23.4 percent reduction (\$9.41 - \$7.21/\$9.41) (Supp. 000273).

In essence, the Commission, recognizing that both rate designs provide revenue stability for the utility and removed disincentives to engage in energy efficiency, placed a premium on rate stability over energy efficiency. While there are statutes that require the Commission to consider energy efficiency, the Commission cited no statutes that support rate stability as a policy.

The Commission Order further misses the mark regarding budget billing. Chairman Schriber stated

Finally, those who argue that inadequate price signals are the biggest issue need only look at the impact of budget billing. What signal is being sent when the bill each month is the same regardless of consumption? Yet, is anyone recommending the elimination of budget billing? Order at Concurring Opinion of Chairman Alan R. Schriber page 2 of 3 (Appx. 000041).

What is missing in this analysis is that in the budget billing scenario, unfettered consumption will be remedied through the true-up mechanism. The SFV rate design does not include a true-up mechanism. Therefore, the concern that a customer is getting the wrong price signal when being sent the same bill each month, regardless of consumption, is legitimate for the SFV rate design.

It should further be pointed out that currently only approximately 20 percent of Duke's natural gas residential customers have chosen to participate in Duke's budget billing program. Tr. Vol. I at 38 (Supp.000039). The evidence was uncontroverted and suggests that Duke's customers do not initiate budget billing because the natural leveling effect of their total energy bills, the gas and electric, form sort of a natural budget billing plan in itself. Tr. Vol. I at 38 (Supp. 000039) The fact that the vast majority (80 percent) of Duke's natural gas customers have not chosen the budget billing option is a revealed preference and, should be significant evidence to support the fact that they are not particularly interested in a levelized bill. Moreover, budget billing is an option that customers can choose. SFV as approved by the Commission, is

not. The Commission should not force customers who have rejected budget billing to accept it in the form of a SFV rate design and then be told that this form of a levelized billing is a benefit, contrary to their own preferences.

It is unreasonable for the PUCO to rely on the mere stabilizing effect that the SFV rate design offers to Duke's customers in an effort to support its implementation of the levelized rate design. Absent any independent studies to demonstrate consumer preference, the PUCO has merely speculated as to what it is that consumers want. The manifest weight of the evidence supports the fact that Duke's residential customers have not voluntarily participated in budget billing an alternative means for consumers to levelize their natural gas bills.

Finally, the Commission found in favor of the SFV rate design because it would allegedly be easier for customers to understand. Order at 19 (Appx. 000032). However, as has been seen so often throughout the Order in this case, the Commission's statement is made without a scintilla of record evidence in support.<sup>47</sup> There were no studies conducted or consumer surveys taken to establish such a fact. It is just stated as if it must be so.

The Commission was faced with a decision to either implement a rate design that has a negative impact on a customer's energy conservation efforts, or a rate design that positively impacts on those efforts. The Commission approved the former. The Commission's Order does not adhere to the state policy in R.C. 4929.02 and R.C. 4905.70, because it failed to approve the rate design that included a smaller customer charge (\$6.00), a higher volumetric rate, and a decoupling mechanism with appropriate consumer safeguards that would have positively impacted consumers' energy conservation efforts. Therefore, the Commission's Order should be reversed and remanded.

---

<sup>47</sup> Tr. Vol. I at 196 (Supp. 000050); See also Tr. Vol. I. at 240 (Supp. 000059).

#### **Proposition of Law 4.**

#### **A Finding Of The Public Utilities Commission Which Is Manifestly Against The Weight Of The Evidence Is Unreasonable And Unlawful.<sup>48</sup>**

The PUCO has implemented the SFV rate design against the manifest weight of the evidence. The Commission's rush to implement the SFV rate design without taking the necessary time to study its impacts on Duke's residential customers supports the argument that the Commission should not have implemented the SFV. The Commission also relied on arguments that low-income customers benefited by the rate design supported by the PUCO's Order. The PUCO's Order is manifestly against the weight of the evidence and is unreasonable and unlawful. This Court should reverse and remand the PUCO's Order with instructions to perform the independent study necessary to allow the Commission to thoroughly evaluate the SFV rate design's impacts before approving a more permanent implementation of this radically different rate design.

#### **A. The PUCO's Implementation Of An SFV Rate Design Is Against The Manifest Weight Of The Evidence.**

Decisions such as *General Motors v. Pub. Util. Comm.*, (1976) 47 Ohio St.2d 58 articulate the standard an appellant faces with regard to challenging a PUCO Order on the evidence:

It is well understood that the Supreme Court will not substitute its judgment for that of the Public Utilities Commission on questions of fact unless it appears from the record that the evidence and order are manifestly against the weight of the evidence, or are so clearly unsupported by it as to show misapprehension, mistake or willful disregard of duty.

As will be explained in detail below, the Commission's approval of the SFV rate design was done with a blatant disregard for the fact that critical and fundamental information (e.g. the SFV

---

<sup>48</sup> *City of Cleveland v. Pub. Util. Comm.* (1965), 3 Ohio St.2d 82, 209 N.E.2d 424.

rate design impact on low-income customers and impact on customers' conservation efforts) was not available from the record evidence in this case. Therefore, the Order should be found to be manifestly against the weight of the evidence.

Prior to rendering its Order in this case, the PUCO Commissioners, in an April 23, 2008 open session, discussed the rate design issue in rather great detail. There were repeated references by the Commissioners to a lack of record necessary to answer their questions predominantly surrounding the impact of the SFV rate design on Duke's residential customers. There are two important points to be made from the Commissioners' discussion. First, the record could not have been supplemented between the April 23, 2008 (the date of the Commission meeting) and its Order rendered on May 28, 2008; therefore it must be presumed that these questions remain unanswered today. Second, the Commissioners questions addressed such fundamental issues regarding the implementation of the SFV rate design that absent such information, it was unjust and unreasonable for the PUCO to have approved the implementation of the SFV rate design without first ordering an impact study to ascertain the affect the SFV rate design would have on Duke's residential consumers.

In its Application for Rehearing, OCC inserted numerous quotes from the April 23, 2008 Commission meeting, and cited to an electronic file of the meeting. OCC Application for Rehearing at 28-33 (Appx. 000088-000093). The Commission in its Entry On Rehearing struck from the record the electronic webcast file, but did not strike or contend that OCC's quotes were inaccurate or misleading. The Commission stated:

Finally, the Commission observes that, in addition to electronically filing its application for rehearing, OCC also uploaded an electronic video file of the webcast of the April 23, 2008, Commission meeting, where these matters were discussed at length by the Commissioners. While Commission webcasts may be instructional on the views of the individual members, it is well settled that the Commission speaks through its

published opinions and orders, as provided by Section 4903.09, Revised Code. *Murray v. Ohio Bell Tel Co.*, 54 Ohio Op. 82, 117 N.E.2d 495 (1954). \* \* \* Moreover, the minutes of the Commission meetings are not considered to be a part of the record in the cases discussed. Accordingly, the Commission will, on its own motion, strike this file from the record in these proceedings. Entry on Rehearing at 6-7 (Appx. 000012-000013).

While OCC does not disagree with the Commission's premise that it speaks through its Orders, given the extent of the Commission's public meeting discussion about the lack of record, it is OCC's contention that the Commission's Order must be against the manifest weight of the evidence and thus considered to be unjust and unreasonable.

Directly from its Order, the Commission has admitted that the impacts of the dramatic change in residential rate design on conservation and low-income consumers were unknown.

Chairman Schriber stated:

All told it is important that we arrive at a decision as expeditiously as possible. I believe that over the years the lesson to be learned is that we can never know with absolute certainty all of the facts and all of the possible outcomes. Order at Concurring Opinion of Chairman Alan R. Schriber page 3 of 3 (Appx. 000042).

Commission Schriber's statement offers some insight into the willingness of the Commission to render decisions without having before it "all of the facts and all the possible outcomes."

However, in this case, the facts and possible outcomes that are missing are so fundamental such that rendering an opinion without sufficient record evidence must be found to be against the manifest weight of the evidence.

At the April 23, 2008 PUCO meeting, several Commissioners expressed concern about the lack of evidence in the record regarding the effects of an SFV rate design on low-income users and conservation. Worried about "some customers who will inevitably be impacted quite negatively and potentially see substantial, double digit rate increases[,]" Commissioner

Centolella stated:

**I think it would be certainly helpful to the Commission for the Company to file in this case data showing for different deciles \* \* \* what the sales figures actually are for residential customers, so that we can take a look at what those bill impacts are going to be, both for residential customers as a whole and also for some breakdown of low income customers, either by PIPP or HEAP or some combination thereof, depending on what the Company has the data for, so that we can actually see what those impacts are and can look at what alternatives -- what alternative approaches might have in terms of those impacts, because there's certainly going to be some customers who may be on fixed incomes for whom that impact could be substantial. Application for Rehearing at 29 (Appx. 000089).**

Echoing Commissioner Centolella's concern over a lack of evidence in the record regarding the effects of SFV, Commissioner Roberto stated:

**I do not disagree with Commissioner Centolella in the least, that externalities are incredibly important. We do not have good evidence in this record, and I would urge in future cases that we should have some degree of information in front of us so that we can try to account for those externalities. Those externalities, I am honestly not sure that we get a better result by going to decoupling or straight fixed variable, but in this case, I don't have the information in front of me to make a judgment on that. Id. (Appx. 000089).**

\* \* \*

**A downside of straight fixed variable is certainly rate shock, and I am concerned with that. And I would concur with Commissioner Centolella that we do not have in our record information that would allow me to assess the impacts of the required rate distribution - - redistribution on that volume of those low volume users in the lowest percentile of usage. And I would really like to have that kind of information in front of us as we weigh this. Id. (Appx. 000089).**

\* \* \*

**While philosophically, the straight fixed variable is appropriate, from my perspective, that is with the caution that we need to be sensitive to the rate impact and the rate shock. And we do not have in front of us adequate information to make that judgment right now. And I do urge that we need to be able to understand, on the record, with the record before us, the actual impacts for high end users and low end users \* \* \*. Id. at 29-30 (Appx. 000089-000090).**

\* \* \*

Specifically regarding the lack of evidence in the record about the effects of SFV on conservation, Commissioner Roberto stated:

\* \* \* As a policy matter, I would stand strongly behind a conservation program -- any way that we can structure rates to lead to conservation and efficient use of energy. Some might suggest that having the high volume users subsidize low volume users would lead to that. I would disagree, because **the information that we have in front of us does not link high volume usage to inefficient usage. We simply don't know.** When we look at our PIPP users, for instance, we see overall increased usage. That does not suggest to me that our PIPP customers are making poor choices. It suggests possibly to me that our housing stock for our PIPP customers is not affording them the ability to make energy conservation choices.

**Now, I don't have evidence in front of me that would support either of those conclusions,** that our PIPP customers make bad choices or that they have poor housing stock. **That is not in the record. I can't make that judgment.** With that in front of me, I'm going to try to find a system that has the closest allocation of costs as best we have them in front of us. Id. at 30 (Appx. 000090) (emphasis added).

Commission Chairman Alan Schriber also admitted that the Commission was uncertain of the impacts of SFV, stating:

If you want to start making a list of externalities, you will never get to the end, okay? And **we don't even know,** we can't even imagine, **the externalities that are going to occur.** And when it comes to internalizing the externalities, we can't even imagine who is going to be internalizing them or how. I mean, that's up for grabs and its down the road and it will never -- that's a process that's never going to end as you can imagine. Externalities will always be there -- you improve one -- [and] pick up one somewhere else, that's just the nature of general equilibrium; it keeps going on and on and on. So, externalities -- it's a problem, but you know, we have to begin somewhere, and I think straight fixed variable is a rational place to begin.

However, we have to think of the income effects, **and we've all agreed, we are not quite sure of the income impacts of straight fixed variable.** Id. at 30-31 (Appx. 000090-000091).

The reality of this is that the record in this case with regard to the impact the SFV rate design will have on Duke's residential customers is not clear. With so many fundamental questions surrounding customer impacts resulting from implementation of the SFV rate design and such a dearth of information on the record, it was against the manifest weight of the evidence for the Commission to approve the implementation of the SFV rate design. and this Court should

reverse and remand this case for the Commission to place specific reporting requirements placed upon Duke to assure all Commission inquiries and customer impacts are adequately evaluated including due process protections that provide an opportunity for interested parties to present evidence at hearing to challenge the proposed rate design before implementation of the SFV rate design is approved.

In Columbia Gas Of Ohio, Inc's most recent rate case, the Commission approved an independent study of the impacts of the SFV rate design on Columbia's residential customers. The Commission's Order stated,

As part of the stipulation, Columbia will fund and manage a comprehensive DSM/Conservation Program Evaluation Study. The scope of study will be cooperatively developed by Columbia, staff, OCC, OP&E, and other interested parties and will include, but not be limited to, the effects of a levelized rate design on: consumption decisions, conservation efforts, and uncollectible account balances at all levels of income and usage levels; low-use/low-income customers consumption patterns; PIPP enrollments and arrearages; and consumers' energy efficiency investment decisions. \* \* \* All of the Parties agree that this Joint Stipulation and Recommendation would not preclude the filing of an action or complaint based on the DSM/Conservation Program Evaluation study \* \* \*.<sup>49</sup>

The manifest weight of the evidence does not support the PUCO's approval of the implementation of the SFV rate design in this case. Therefore, this Court should reverse and remand this case to the Commission for further deliberation consistent with the evidence presented and the policies of the state of Ohio.

The Commission did approve a low-income program as a **pilot** in an attempt to mitigate the harm the SFV rate design would cause Duke's non-Percentage of Income Payment Plan low-income customers. The Order stated, "This new program will provide a four-dollar, monthly discount to

---

<sup>49</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case No. 08-72-GA-AIR, et al., Opinion and Order at 21 (December 3, 2008). (Supp. 000218).

cushion much of the impact on qualifying customers. To ensure that this discount is available to as many customers as possible, we direct that Duke expand this pilot program to include up to 10,000 customers, instead of the 5,000 customers specified in the Stipulation. \* \* \* Following the end of the pilot program, the Commission will evaluate the program for its effectiveness in addressing our concerns relative to the impact on low-use, low-income customers.” Order at 19-20 (Appx. 000032-000033).

While a study is important, the Commission implemented the pilot in a manner that only addresses one of many concerns that have been raised against the SFV rate design, its impact as to low-income customers. However, the approved pilot program was done with no evaluation on the extent of the low-income customers’ need (e.g. whether allowing 10,000 customers to participate is sufficient, or whether the \$4.00 per month credit was adequate). A more expansive study of all impacts to residential customers should have been considered through a more exhaustive study of the overall impacts resulting from the implementation of the SFV rate design. It should be noted that no such program exists where rates have traditionally been based on the volume of natural gas consumption. If the Commission had been so sure that its favored rate design would do no harm, this pilot would have been unnecessary in the first place.

Although the PUCO is given significant discretion in the determination of rate structures, the PUCO in this case abused that discretion by failing to implement the SFV rate design without requiring sufficient evaluation of customer impacts from the approved rate design.<sup>50</sup> There are examples of more deliberate and more openly debated policy changes that the Commission has undertaken but as pilot programs. One example is the manner in which residential customers have been afforded the opportunity to switch to a competitive retail natural gas service provider under

---

<sup>50</sup> *General Motors Corp. v. Pub. Util. Comm.*, (1976) 47 Ohio St.2d 58, 65, 351 N.E.2d 183.

R.C. Chapter 4929 (“Choice Programs”) which were first implemented as pilot programs. Even now, over 10 years after the first programs were put in place,<sup>51</sup> the Choice Programs are still governed with the understanding that the Commission can make any changes or modifications as needed.<sup>52</sup> The Choice Programs were developed over a period of years with all Stakeholders being able to participate in an open process. Moreover, each LDC individually addressed Customer Choice, and any one company plan was not forced on all others. The Staff and the Commission recognized the magnitude of the changes being proposed in the Choice Programs and dealt with the issue accordingly.

Another example is the implementation of a Wholesale Auction. Despite the fact that virtually all stakeholders have declared the wholesale auction for Dominion East Ohio (“DEO”) to be a success, the Staff has been hesitant to impose a similar wholesale auction on other large Ohio LDCs.<sup>53</sup> The Wholesale Auction process for DEO was considered a significant policy change in

---

<sup>51</sup> *In the Matter of the Commission’s Investigation of the Customer Choice Program of Columbia Gas of Ohio, Inc.*, Case No. 98-593-GA-COI; *In the Matter of the Commission’s Investigation of the Energy Choice Program of the East Ohio Gas Company*, Case No. 98-594-GA-COI (Supp. 000292); *In the Matter of the Commission’s Investigation of the Customer Choice Program of the Cincinnati Gas & Electric Company*, Case No. 98-595-GA-COI (Supp. 000292); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Statewide Expansion of the Columbia Customer Choice Program*, Case No. 98-549-GA-ATA (Supp. 000292); *In the Matter of the Application of the East Ohio Gas Company for Authority to Implement Two New Transportation Services, for Approval of a New Pooling Agreement, and for Approval of a Revised Transportation Migration Rider*, Case No. 96-1019-GA-ATA, Finding and Order (June 19, 1991) (Supp. 000292).

<sup>52</sup> Order at Concurring Opinion of Chairman Alan R. Schriber at 3 (“All told, it is important that we arrive at a decision as expeditiously as possible. I believe that over the years the lesson to be learned is that we can never know with one hundred percent certainty all of the facts and all of the possible outcomes. This is precisely why the law has provided this Commission with the ability to react to adverse outcomes should they arise. This is the ultimate consumer protection.”).

<sup>53</sup> *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a Plan to Restructure its Commodity Service Function*, Case No. 05-474-GA-ATA, Post-Auction Report of Dominion East Ohio Phase 1 Supply Auction, (August 29, 2006) at 4-5 (Supp. 000284-000285).

how LDCs purchase gas for sales customers. The DEO Wholesale Auction process took well over 13 months and was open to all Stakeholders.<sup>54</sup>

In sharp contrast with the current proceeding, the Choice Program and Wholesale Auction were both the product of long deliberate processes that included participation by all Stakeholders **before** any decision was made. The deliberate nature of this review and implementation are magnified in this case as the PUCO did not merely impose the Customer Choice Program or the Wholesale Auction on Duke. Instead, in this case, the Commission agreed to merely establish a process to discuss the Wholesale Auction issue. Order at 11. (Appx. 000024.). This begs the question of why the PUCO would be so deliberate with the Choice Program and Wholesale Auction -- programs that have resulted in quantifiable benefits for consumers -- and yet is so fast to act on the SFV rate design -- a change that produces quantifiable benefits only for the Company and high-use residential customers but results in detriments for low-use low income customers. Note also that in the examples cited; it was done with full participation of the parties, culminating in a consensus.<sup>55</sup> There is no such consensus here. In fact, the only support for the Commission's position can be found with the utilities. No consumer representative supports the Commission on the SFV.

---

<sup>54</sup> Id. Opinion and Order (May 26, 2006) (Supp. 000280).

<sup>55</sup> Id. at 000285; See also *In the Matter of the Commission's Investigation of the Customer Choice Program of Columbia Gas of Ohio, Inc.*, Case No. 98-593-GA-COI; *In the Matter of the Commission's Investigation of the Energy Choice Program of the East Ohio Gas Company*, Case No. 98-594-GA-COI (Supp. 000292); *In the Matter of the Commission's Investigation of the Customer Choice Program of the Cincinnati Gas & Electric Company*, Case No. 98-595-GA-COI (Supp. 000292); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Statewide Expansion of the Columbia Customer Choice Program*, Case No. 98-549-GA-ATA (Supp. 000292); *In the Matter of the Application of the East Ohio Gas Company for Authority to Implement Two New Transportation Services, for Approval of a New Pooling Agreement, and for Approval of a Revised Transportation Migration Rider*, Case No. 96-1019-GA-ATA, Finding and Order (June 19, 1991) (Supp. 000295) (All interested parties were allowed to participate in a collaborative setting.).

The PUCO's deliberation leading up to its Order which included discussions regarding critical and fundamental record evidence that was not available, as well as the Order itself demonstrate that the Order is manifestly against the weight of the evidence. The record was incomplete and did not support the action taken by the PUCO. Therefore, this Court should reverse and remand this case to the Commission with instructions to requiring the Duke to conduct an independent study that will provide the Commission with data necessary to assess the impact that the SFV rate design has on Duke's residential customers who are being charged for natural gas delivery service under this rate design.

**B. The PUCO's determination that the SFV rate design benefits low-income customers is against the manifest weight of the evidence.**

The fact that there is an adverse affect on low-use customers as a result of implementation of the SFV rate design in this case is without question. While the record is clear as to the impact that the SFV rate design has on low-use customers, the actual impact that an SFV rate design will have upon Duke's low-income customers is unknown and debatable. The Commission acknowledged that:

with this change in rate design, as with any change, there will be some customers who will be better off and some customers who will be worse off, as compared with the existing rate design. Order at 19 (Appx. 000032).

The record in this case does not answer the question of how the SFV rate design impacts the low-income low-usage customer. It would seem axiomatic that such a fundamental question would need to be fully explored and analyzed prior to approving such a dramatic change in policy. The SFV rate design approved by the Commission is bad news for a majority of Duke's low-use customers, some of whom are low-income customers, who will now be forced to subsidize Duke's larger-use customers. The SFV rate design has the effect of making "the distribution cost per Ccf that a customer faces \* \* \* higher at lower consumption levels than at higher

consumption levels.” OCC Ex. No. 5 (Gonzalez Direct Testimony) at 14 (Supp. 000157), See also Staff Ex. No. 3 (Puican Direct Testimony) at 5 (Supp. 000181). Such a rate design is inherently unfair to low-usage, low-income customers, who because of their limited means, likely live in smaller dwellings, such as apartments, and use less natural gas than wealthy homeowners with large homes. The SFV rate design is not only unfair to these customers with small incomes, it is extremely insensitive in its timing; coming on the heels of several years of belt-tightening by America’s working poor, amidst a nationwide mortgage foreclosure crisis and with the country in a recession.

Rather than recognizing SFV as injurious to Duke’s low-income customers, Duke and the Staff witness assert that an SFV rate design is beneficial. Staff Ex. No. 3 (Puican Direct Testimony) at 5-6 (Supp. 000181-000182).<sup>56</sup> The Commission accepts in its Order Duke and the Staff’s argument based upon the erroneous assumption that Duke’s Percentage of Income Payment Plan customers, many of whom are high energy users, are representative of all of Duke’s low-income customers. Order at 15 (Appx.000028). However, the record reflects that Percentage of Income Payment Plan customers constitute only 23 percent of the low-income households in Hamilton County, Duke’s largest county served, and only about 10 percent of the total low-income customers purchasing gas from Duke. OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 4-6 (Supp. 000065-000067) Tr. Vol. I at 221-222 (Supp. 000057-000058).<sup>57</sup> The parties agree that Percentage of Income Payment Plan customers have demonstrated higher use of energy than non-Percentage of Income Payment Plan customers, and also that low-income

---

<sup>56</sup> Staff witness Puican stated, “Because high-usage customers will benefit from the SFV rate design, and low-income customers are more likely to be high usage customers, it is reasonable to conclude that low-income customers are more likely to actually benefit from SFV.”

<sup>57</sup> There are 66,000 low-income Duke customers in Hamilton County and over 100,000 low-income customers in Duke’s service territory.

customers are more likely to rent than own their homes, but the consensus ends there. OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 5-7 (Supp. 000066-000068.); Staff Ex. No. 3 (Puican Direct Testimony) at 5 (Supp. 000181).

The Commission erroneously stated that: "OCC and OPAE insist that the levelized rates will harm low-income customers and that the Percentage of Income Payment Plan customer data is not indicative of other Duke low-income customers, but offered no data to support this contention (OCC Br. at 46-53; OPAE Br. at 4,8)." Order at 15 (Appx. 000028). In actuality, OCC offered into evidence the latest Impact Evaluation by the Ohio Department of Development's Home Weatherization Assistance Program ("HWAP"), which found that PIPP weatherization participants "used 20 percent more energy than non PIPP [low- income] participants." OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 6 (Supp. 000067). In fact, it was the Company and Staff who offered no evidence to support their assertion that Percentage of Income Payment Plan customers were an appropriate proxy for low-income customers.

Duke chose Percentage of Income Payment Plan customers as a proxy for low-income customers with little regard for the accuracy of such a choice. Duke examined only ten houses, via the Hamilton County Auditor's website, as the basis for the Company's assertions regarding the characteristics of Percentage of Income Payment Plan customer housing. Tr. Vol. I at 82-83 (Supp. 000044-000045). With ten thousand households participating in Percentage of Income Payment Plan in Duke service territory, the Company offers no explanation regarding how it can reasonably hold out the "top ten" Percentage of Income Payment Plan customers' homes as being a fair representation of the thousands of Percentage of Income Payment Plan customers' housing stock. The Company's witness acknowledged that there was no characteristic analysis performed on the housing stock of the larger, low-income population. Tr. Vol. I at 83 (Supp. 000045).

Therefore, it is unknown to the Company whether or not the inadequate sample used to evaluate Percentage of Income Payment Plan participant housing is at all indicative or similar to the housing characteristics of the low-income population in general.

In addition, Duke witness Smith stated that he has no idea what percentage of the total low-income customer base is represented by Percentage of Income Payment Plan customers. Tr. Vol. I at 81 (Supp. 000043). Without knowing the percentage of total low-income customer base represented by Percentage of Income Payment Plan participants, the Commission cannot reasonably proffer this group of customers as being representative of a customer group of unknown size. Further, it is highly likely that those who are low-income/low energy users may be eligible for one or more assistance programs, including Percentage of Income Payment Plan, but choose not to participate in them due to the fact that their usage is low enough to be affordable under the former rate design. This reveals yet another new issue or problem – given this new rate design, will there be an increase in the Percentage of Income Payment Plan enrollments which are subsidized by all other customers. This is yet another impact that the Commission did not consider and on which there is little, if any, record.

The manifest weight of the evidence demonstrates that low-income customers, who are not on the Percentage of Income Payment Plan program, are harmed from the SFV rate design. Because the Commission's Order relies upon the opposite and unreasonable conclusion to support its Order adopting the SFV rate design, the Order is against the manifest weight of the evidence and thereby unreasonable and unlawful. Therefore, this Court should reverse and remand this case to the Commission.

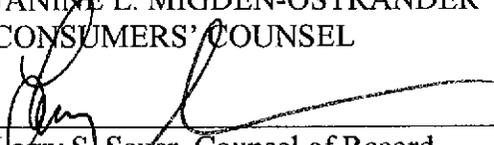
## **V. CONCLUSION**

As demonstrated above, the Commission erred by approving a Straight Fixed Variable rate design for several reasons. First, the PUCO's Order is unlawful because the residential SFV rate

design was approved without the Commission requiring Duke to comply with the notice requirements pursuant to R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43. Second, it was unreasonable for the Commission to approve the extraordinarily large increase in the monthly customer charge produced by the SFV rate design, in violation of the Commission's prior rate design precedent and regulatory policy of gradualism. Third, the Commission's Order is unlawful because approving the SFV rate design discourages conservation in violation of R.C. 4929.02 and R.C. 4905.70. The SFV rate design sends the wrong price signals to Duke's consumers, extends the pay back period of consumer investments in energy efficiency, and thereby, does not remove customer disincentives to invest in energy efficiency. In addition, because Duke has an existing Demand-Side Management program, SFV provides no additional incentive to Duke to participate in energy conservation programs. Fourth, the PUCO's Order is against the manifest weight of the evidence and is therefore unreasonable and unlawful. The record does not support the Commission's conclusions that low-income customers benefit from an SFV rate design, that budget billing supports an SFV rate design, or that SFV should be implemented. This Court should therefore reverse and remand the PUCO's Order.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL



---

Larry S. Sauer, Counsel of Record  
Joseph P. Serio  
Michael E. Idzkowski  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
614-466-8574 (Telephone)  
614-466-9475 (Facsimile)  
[sauer@occ.state.oh.us](mailto:sauer@occ.state.oh.us)  
[serio@occ.state.oh.us](mailto:serio@occ.state.oh.us)  
[idzkowski@occ.state.oh.us](mailto:idzkowski@occ.state.oh.us)

**IN THE SUPREME COURT OF OHIO**

The Office of the Ohio Consumers' Counsel,	)	
	)	Case No. 08-1837
	)	
Appellant,	)	Appeal from the Public Utilities Commission
	)	of Ohio
	)	
v.	)	
	)	Public Utilities Commission of Ohio
The Public Utilities Commission of Ohio,	)	Case Nos. 07-589-GA-AIR, et al.
	)	07-590-GA-ALT, and
Appellee	)	07-591-GA-AAM

---

**APPENDIX OF APPELLANT,  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

**APPENDIX**  
**TABLE OF CONTENTS**

*In the Matter of the Application of Duke Energy Ohio, Inc.*  
S. Ct. Case No. 08-1837  
Notice of Appeal (September 16, 2008) .....000001

*In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*  
PUCO Case No. 07-589-GA-AIR, et al.,  
Entry on Rehearing (July 23, 2008).....000007

*In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*  
PUCO Case No. 07-589-GA-AIR, et al.,  
Opinion and Order (May 28, 2008) .....000014

**Statutes**

R.C. 4905.70 .....000047  
R.C. 4909.18 .....000048  
R.C. 4909.19 .....000051  
R.C. 4909.43 .....000053  
R.C. 4928.02 .....000053A  
R.C. 4929.02 .....000054

*In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*  
PUCO Case No. 07-589-GA-AIR, et al.  
Application for Rehearing (June 27, 2008).....000056

**FILE**

**IN THE SUPREME COURT OF OHIO**

RECEIVED-DOCKETING DIV  
2008 SEP 16 PM 3:03

The Office of the Ohio Consumers' Counsel, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 The Public Utilities Commission )  
 of Ohio, )  
 )  
 Appellee. )

Case No. \_\_\_\_\_  
**08-1837**  
 Appeal from the Public  
 Utilities Commission of Ohio  
 Case Nos. 07-589-GA-AIR,  
 07-590-GA-ALT, and  
 07-591-GA-AAM

**PUCO**

**NOTICE OF APPEAL  
 OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Janine L. Migden-Ostrander  
 (Reg. No. 0002310)  
 Consumers' Counsel

Larry S. Sauer, Counsel of Record  
 (Reg. No. 0039223)  
 Joseph P. Serio  
 (Reg. No. 0036959)  
 Michael E. Idzkowski  
 (Reg. No. 0062839)  
 Assistant Consumers' Counsel

10 West Broad Street, Suite 1800  
 Columbus, Ohio 43215-3485  
 (614) 466-8574 - Telephone  
 (614) 466-9475 - Facsimile  
[sauer@occ.state.oh.us](mailto:sauer@occ.state.oh.us)  
[serio@occ.state.oh.us](mailto:serio@occ.state.oh.us)  
[idzkowski@occ.state.oh.us](mailto:idzkowski@occ.state.oh.us)

Nancy H. Rogers  
 (Reg. No. 0002375)  
 Attorney General of Ohio

Duane W. Luckey  
 (Reg. No. 0023557)  
 Chief, Public Utilities Section  
 William Wright  
 (Reg. No. 0018010)  
 Public Utilities Commission of Ohio

180 East Broad Street  
 Columbus, Ohio 43215-3793  
 (614) 644-8698 - Telephone  
 (614) 644-8764 - Facsimile  
[duane.luckey@puc.state.oh.us](mailto:duane.luckey@puc.state.oh.us)  
[william.wright@puc.state.oh.us](mailto:william.wright@puc.state.oh.us)

**PUCO**

RECEIVED-DOCKETING DIV  
2008 SEP 16 PM 4:10

*Attorneys for Appellant  
 Office of the Ohio Consumers' Counsel*

*Attorneys for Appellee  
 Public Utilities Commission of Ohio*

**FILED**  
 SEP 16 2008  
 CLERK OF COURT  
 SUPREME COURT OF OHIO  
**000001**

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.  
 Technician Amc Date Processed 9/16/08

**NOTICE OF APPEAL**

Appellant, the Office of the Ohio Consumers' Counsel, pursuant to R.C. 4903.11 and 4903.13, and S. Ct. Prac. R. II (3)(B), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal to the Supreme Court of Ohio from Appellee's Opinion and Order entered in its Journal on May 28, 2008; and its Entry on Rehearing entered in its Journal on July 23, 2008 in the above-captioned cases.

Pursuant to R.C. Chapter 4911, Appellant is the statutory representative of the residential customers of Duke Energy Ohio, Inc. ("Duke Energy" or "Company"). Appellant was a party of record in the above-captioned PUCO cases.

On June 27, 2008, Appellant timely filed an Application for Rehearing from the May 28, 2008 Opinion and Order pursuant to R.C. 4903.10. Appellant's Application for Rehearing was denied with respect to the issues raised in this appeal by an Entry on Rehearing entered in Appellee's Journal on July 23, 2008.

Appellant files this Notice of Appeal complaining and alleging that Appellee's May 28, 2008 Opinion and Order, and the July 23, 2008 Entry on Rehearing are unlawful and unreasonable, and the Appellee erred as a matter of law, in the following respects that were raised in Appellant's Application for Rehearing:

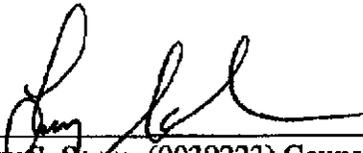
- A. The Commission erred by approving a rate design that is unreasonable and violates prior Commission precedent and policy and is against the manifest weight of the evidence.
- B. The Commission erred by approving a rate design that includes an increase to the monthly residential customer charge without providing consumers adequate notice of the Straight Fixed Variable rate design pursuant to R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43.
- C. The Commission erred by approving a Straight Fixed Variable rate design that discourages customer conservation efforts in violation of R.C. 4929.05 and R.C. 4905.70.

- D. The Commission erred when it failed to comply with the requirements of R.C. 4903.09, and provide specific findings of fact and written opinions that were supported by record evidence.

WHEREFORE, Appellant respectfully submits that the Appellee's May 28, 2008 Opinion and Order and July 23, 2008 Entry on Rehearing are unreasonable and unlawful, and should be reversed, vacated, or modified. These cases should be remanded to Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
(0002310)  
OHIO CONSUMERS' COUNSEL

By:   
Larry S. Sauer, (0039223) Counsel of Record  
Joseph P. Serio (0036959)  
Michael E. Idzkowski (0062839)  
Assistant Consumers' Counsel

**The Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-8574 (telephone)  
(614) 466-9475 (facsimile)  
[sauer@occ.state.oh.us](mailto:sauer@occ.state.oh.us)  
[serio@occ.state.oh.us](mailto:serio@occ.state.oh.us)  
[idzkowski@occ.state.oh.us](mailto:idzkowski@occ.state.oh.us)

*Attorneys for Appellant*  
*Office of the Ohio Consumers' Counsel*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Appeal of the Office of the Ohio Consumers' Counsel was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus and upon all parties of record by hand-delivery or regular U.S. Mail this 16th day of September 2008.

  
\_\_\_\_\_  
Larry Sauer  
Attorney for Appellant  
Office of the Ohio Consumers' Counsel

**COMMISSION REPRESENTATIVES  
AND PARTIES OF RECORD**

**Alan R. Schriber, Chairman**  
Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, OH 43215-3793

**Duane W. Luckey, Section Chief,**  
**William Wright, Asst. Attorney General**  
Public Utilities Commission of Ohio  
180 East Broad Street  
Columbus, OH 43215-3793

**Paul A. Colbert**  
Associate General Counsel  
Duke Energy Ohio  
139 Fourth Street, Room 25 ATII  
Cincinnati, Ohio 45201

**Thomas Lindgren**  
**William Wright**  
**Sarah Parrot**  
Attorney General's Office  
Public Utilities Section  
180 East Broad Street, 9<sup>th</sup> Floor  
Columbus, Ohio 43215

**David F. Boehm**  
**Michael L. Kurtz**  
**Kurt J. Boehm**  
Boehm, Kutz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202-4454

**David Rinebolt**  
Ohio Partners for Affordable Energy  
231 West Lime Street  
P.O. Box 1793  
Findlay, Ohio 45839-1793

**John M. Dosker**  
General Counsel  
Stand Energy Corporation  
1077 Celestial Street, Suite 110  
Cincinnati, Ohio 45202-1629

**Sally W. Bloomfield**  
**Thomas J. O'Brien**  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215-4219

**John W. Bentine**  
**Mark S. Yurick**  
Chester, Willcox & Saxbe LLP  
65 East State Street, Suite 1000  
Columbus, Ohio 43215-4213

**Mary W. Christensen**  
Christensen Christensen Donchatz Kettlewell &  
Owens, LLC  
100 East Campus View Blvd. Suite 360  
Columbus Ohio 43235

**Howard Petricoff**  
Vorys, Sater, Seymour and Pease LLP  
52 E. Gay Street  
Columbus Ohio 43215

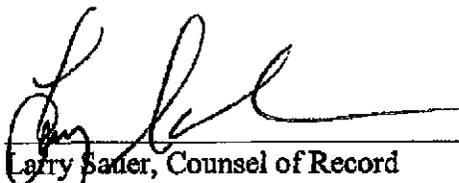
**W. Jonathan Airey**  
Gregory D. Russell  
Vorys Sater Seymour and Pease LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008

**John M. Dosker**  
Stand Energy Corporation  
1077 Celestial Street Suite 110  
Cincinnati Ohio 45202-1629

**Todd M. Smith**  
Schwarzwald & McNair LLP  
616 Penton Media Building  
1300 East Ninth Street  
Cleveland, Ohio 44114

**CERTIFICATE OF FILING**

I certify that this Notice of Appeal has been filed with the docketing division of the Public Utilities Commission of Ohio in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.

  
\_\_\_\_\_  
Larry Sauer, Counsel of Record  
Counsel for Appellant  
The Office of the Ohio Consumers' Counsel

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

- In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates. ) Case No. 07-589-GA-AIR
- In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for Gas Distribution Service. ) Case No. 07-590-GA-ALT
- In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods. ) Case No. 07-591-GA-AAM

ENTRY ON REHEARING

The Commission finds:

- (1) On July 18, 2007, Duke Energy of Ohio, Inc. (Duke) filed applications to increase its gas distribution rates, for authority to implement an alternative rate plan for its gas distribution services, and for approval to change accounting methods. On February 28, 2008, the parties filed a Joint Stipulation and Recommendation (Stipulation) resolving all the issues raised in the application except the issue of residential rate design. By Opinion and Order issued May 28, 2008, the Commission approved the Stipulation and, based on the record presented, adopted a "levelized" residential rate design to decouple Duke's revenue recovery from the amount of gas actually consumed.
- (2) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.
- (3) On June 27, 2008, the Office of the Ohio Consumers' Counsel (OCC) and Ohio Partners for Affordable Energy (OPAE) filed applications for rehearing. Both applications assert that the May 28, 2008 Order is unreasonable, unlawful and/or an abuse of the Commission's discretion on the following grounds:

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.  
 Technician TA Date Processed 7/23/2008

000007

- (a) The Commission erred by approving a rate design that unreasonably violates prior Commission precedent and policy, and does not produce just and reasonable rates in violation of Sections 4905.22 and 4909.18, Revised Code.
- (b) The Commission erred by approving a rate design that discourages customer conservation efforts in violation of Sections 4929.05 and 4905.70, Revised Code.
- (c) The Commission erred when it failed to comply with the requirements of Section 4903.09, Revised Code, and provide specific findings of fact and written opinions that were supported by record evidence.

In addition to the foregoing common three arguments, OCC adds a fourth ground for rehearing: that the Commission erred by approving a rate design which increases the monthly residential customer charge without providing consumers adequate notice of the new rate design pursuant to Sections 4909.18, 4909.19 and 4909.43, Revised Code.

- (4) On July 7, 2008, Duke filed a memorandum in opposition to the applications for rehearing.
- (5) Before addressing these arguments, we would note that the opinion contains a clerical error which we now correct, *nunc pro tunc*. In the summary of the stipulation on page 6, the Opinion incorrectly states that Duke's revenue increase of \$18,217,566 is based on an 8.15 percent rate of return. The stipulated revenue increase was based upon a rate of return of 8.45 percent.
- (6) With respect to the applications for rehearing, we first observe that neither OCC nor OP&E raises any issues which were not fully considered and rejected in the Opinion at pages 12-15 and 17-20. As noted therein, the only unstipulated issue left to the Commission in this proceeding is the adoption of a new residential gas distribution rate design which would reduce or eliminate the link between natural gas sales volumes and the utility's revenue requirement in order to more closely match costs and revenues such that customers pay their fair share of distribution costs, to reduce or eliminate any disincentive for

the utility to promote conservation programs, and to afford the utility a reasonable opportunity to recover fixed costs. Our choice was between the two approaches deemed most appropriate to accomplish this decoupling: (1) a modified "straight fixed-variable (SFV)" or "levelized" rate design, which recovers most fixed costs in a flat monthly fee; or (2) a decoupling rider, which maintains a lower customer charge and allows the company to offset lower sales through an annually adjusted rider. For the reasons set forth in the record and our Opinion, we believe the levelized rate design best balances the interests of customers and the utility.

- (7) The first ground for rehearing listed by both OCC and OP&E is that our adoption of a levelized rate design violates prior Commission precedent, as well as the regulatory principles of gradualism and rate continuity, thereby producing unjust and unreasonable rates in violation of Sections 4905.22 and 4909.18, Revised Code. In examining these claims, we first observe that this Commission is not bound by any statutory requirement relating to the regulatory principle of gradualism, which is only one of many important regulatory principles. However, consistent with the principle of gradualism, the Commission noted at page 19 of our Opinion that the new levelized rate design best corrects the traditional rate design inequities while mitigating the impact of the new rates on residential customers by maintaining a volumetric component to the rates, by phasing in the increase over a two-year period, and by not reflecting the full extent of Duke's fixed costs in the proposed fixed charge. We also noted that the Pilot Low Income Program, aimed at helping low-income, low-use customers pay their bills, was crucial to our decision. Furthermore, OCC and OP&E continue to compare the new flat monthly fee with the customer charge under the previous distribution rate structure. Such comparisons are misleading and distort the impact on customers, since any analysis of the impact of the new levelized rate structure should consider the total customer distribution charges, including the current Rider AMRP and the volumetric charge. We note that, in association with the adoption of the levelized rate design, the volumetric charge reflected on the bills of residential customers will be reduced as the customer charge is phased-in to reflect the elimination of the majority of the company's fixed costs from the volumetric charge. Moreover, as noted in our Opinion, at page 18, the new rate

design also achieves the important regulatory principle of matching costs and revenues to ensure that customers pay their fair share of distribution costs. Accordingly, the Commission finds that OCC's and OP&E's requests for rehearing on such basis should be denied.

- (8) With respect to the second common ground for rehearing, both OCC and OP&E assert that the Commission erred by approving a rate design that discourages customer conservation efforts in violation of Sections 4929.05 and 4905.70, Revised Code. This argument was fully considered and rejected in the Opinion at pages 14-15 and 18-19. There is no dispute that both the modified straight fixed-variable rate design and the decoupling rider reduce or eliminate any disincentive for utility sponsored or promoted conservation programs. There is also no dispute that, under both of the rate designs, a customer who makes conservation efforts to reduce gas consumption will equally enjoy the full benefit of those efforts for the commodity portion of their gas bill which typically represents 75 to 80 percent of their total gas bill. While under the levelized rate design, a lower-use customer who conserves may not reduce his distribution charges as much as such charges would otherwise be reduced under the decoupling rider method, it is also true that all potential customer savings are not guaranteed under the decoupling rider method due to the attendant uncertainty caused by periodic reviews and adjustments necessary with the decoupling rider. Moreover, any greater reduction in distribution charges achieved through a decoupling rider would have the effect of preserving the inequities within the existing rate design that have caused higher use customers to subsidize the fixed costs of lower use customers. As discussed in the Commission's opinion at page 19, the Commission opted to more closely match costs and revenues such that customers pay their fair share of distribution costs. Finally, this argument for rehearing disregards the fact that a fundamental reason for our adoption of the new rate design is to foster conservation efforts in accordance with Sections 4929.02 and 4905.70, Revised Code. The only question at issue in these proceedings is whether a levelized rate design or a decoupling rider better achieves all competing public policy goals. As discussed at length in our opinion, we believe the levelized rate design is the better choice. This ground for rehearing is denied.

- (9) The third common assignment of error is that the Commission erred when it failed to comply with the requirements of Section 4903.09, Revised Code, by failing to provide specific findings of fact and written opinions that were supported by record evidence. We find this assertion to be without merit. The evidence of record and arguments of the parties were fully considered as reflected in the Opinion at pages 12-15 and 17-20, in accordance with Section 4903.09, Revised Code. The undisputed evidence of record is that the new levelized rates will more closely match fixed costs with fixed revenues, thereby ensuring that residential distribution customers pay their fair share of the costs incurred to serve them. Our adoption of this new rate design was conditioned upon this consideration and upon other important factors, including the gradual phase-in of these new rates and the company's new low-income assistance plan.
- (10) OCC also identifies a fourth basis for rehearing in arguing that our approval of the new levelized rate design violates Sections 4909.18, 4909.19 and 4909.43, Revised Code, by increasing the monthly residential customer charge without providing consumers adequate notice.

We find this argument to be without merit. Sections 4909.18, 4909.19, and 4909.43, Revised Code, direct the utility to notify customers, mayors and legislative authorities in the company's service area of the application and the rates proposed therein. Duke served upon mayors and legislative authorities and published in newspapers throughout its affected service area notices that met the requirements of Section 4909.18, 4909.19, and 4909.43, Revised Code, as approved by the Commission. The notice specifically set forth the rates and percentage increase, by rate schedule, proposed by Duke in the application, including a reference to and explanation of the proposed sales decoupling rider.

OCC relies on *Committee Against MRT v. Pub. Util. Comm.* (1977), 52 Ohio St.2d 231, to argue that the notice failed to inform customers of the levelized rate design adopted by the Commission. In the *Committee Against MRT* case, Cincinnati Bell Telephone Company (CBT) filed an application with the Commission requesting approval to introduce a new rate plan for basic local exchange service throughout its service area.

The notice submitted by CBT did not include a description of measured rate service but did include a general reference to the exhibits filed in the case. The exhibits filed in the case and referenced in the notice included an explanation of the proposed measured rate service. In *Committee Against MRT*, the Commission approved and CBT issued the proposed notice. Subsequently, the Commission approved a stipulation filed by the parties to the case, recommending that the Commission authorize CBT to provide non-optional measured rate service on an experimental basis in one exchange. The court held that the notice issued by CBT failed to sufficiently describe the company's proposal to implement measured rate service. The court reasoned that the notice failed to disclose the essential nature or quality of the proposal; that is, to implement usage-based rates. The Commission finds this case to be distinguishable from *Committee Against MRT*. In *Committee Against MRT*, the court found that the notice failed to disclose the essential nature of the rates proposed by CBT. The notice in this case clearly disclosed the nature of the rates, including the implementation of a decoupling mechanism, as such was proposed by Duke. Although the Commission did not adopt the decoupling mechanism proposed by Duke, the notice was sufficient to inform customers of such proposal and to allow customers to register an objection to a decoupling mechanism and the increase in rates. In addition, the notice stated that "[r]ecommendations which differ from the filed application ... may be adopted by the Commission." Accordingly, OCC's request for rehearing on this basis is denied.

- (11) Finally, the Commission observes that, in addition to electronically filing its application for rehearing, OCC also uploaded an electronic video file of the webcast of the April 23, 2008, Commission meeting, where these matters were discussed at length by the Commissioners. While Commission webcasts may be instructional on the views of the individual members, it is well settled that the Commission speaks through its published opinions and orders, as provided by Section 4903.09, Revised Code. *Murray v. Ohio Bell Tel. Co.*, 54 Ohio Op. 82, 117 N.E.2d 495 (1954). We note that OCC has argued exactly this point in a prior Commission proceeding. In *Cincinnati Bell Telephone Company*, Case No. 04-720-TP-ALT, et al., OCC cited Supreme Court of Ohio decisions for the proposition that commissions, such as this one, only speak

through their published orders (See, OCC's August 9, 2004, reply memorandum at 3, in Case No. 04-720-TP-ALT, et al.). Moreover, the minutes of the Commission meetings are not considered to be a part of the record in the cases discussed. Accordingly, the Commission will, on its own motion, strike this file from the record in these proceedings.

It is, therefore,

ORDERED, That the applications for rehearing filed by OCC and OP&E on June 27, 2008, are denied. It is, further,

ORDERED, That the video file of the April 23, 2008, Commission webcast, which was electronically filed by OCC with its application for rehearing, is hereby stricken from the record in these proceedings. It is, further,

ORDERED, That a copy of this order be served upon all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

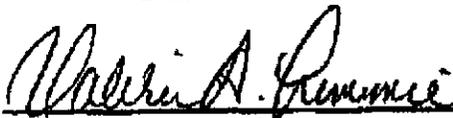


Alan R. Schriber, Chairman

Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie

Cheryl L. Roberto

RMB/GNS/vrm  
Entered in the Journal  
JUL 23 2008



Renee J. Jenkins  
Secretary

000013



Vorys, Sater, Seymour and Pease LLP, by M. Howard Petricoff and Stephen M. Howard, 52 Gay State Street, P.O. Box 1008, Columbus, Ohio 43215, on behalf of Direct Energy Services, LLC and Integrys Energy Services, Inc.

Christensen, Christensen, Donchatz, Kettlewell & Owens, LLC, by Mary W. Christensen and Jason Wells, 100 East Campus View Blvd., Suite 360, Columbus, Ohio 43235, on behalf of People Working Cooperatively, Inc.

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

Thomas R. Winters, First Assistant Attorney General, by Duane W. Luckey, Section Chief, and William L. Wright and Thomas Lindgren, Assistant Attorneys General, Public Utilities Section, 180 East Broad Street, 9<sup>th</sup> Floor, Columbus, Ohio 43215, on behalf of the Staff of the Public Utilities Commission of Ohio.

#### OPINION:

#### I. PROCEDURAL BACKGROUND

Duke Energy Ohio, Inc. (Duke, company) is a public utility, engaged in the distribution and sale of natural gas to approximately 424,000 customers in Adams, Brown, Butler, Clermont, Clinton, Hamilton, Highland, Montgomery, and Warren counties, Ohio. As a public utility and a natural gas company within the definition of Sections 4905.02 and 4905.03(A)(6), Revised Code, Duke is subject to the jurisdiction of this Commission in accordance with Sections 4905.04, 4905.05 and 4905.06, Revised Code.

On June 18, 2007, Duke filed notice of its intent to file an application to increase its rates. The Commission issued an entry on July 11, 2007, establishing a test period of January 1, 2007 through December 31, 2007 for the proposed rate increase and a date certain of March 31, 2007, as well as granting certain waivers requested by Duke.

Duke filed the application in Case No. 07-589-GA-AIR, seeking to increase its gas rates on July 18, 2007. Duke also filed separate applications for approval of an alternative rate plan (Case No. 07-590-GA-ALT) and for approval to change accounting methods (Case No. 07-591-GA-AAM). As originally filed, Duke's rate increase application sought approval for a 5.71 percent annual rate increase, an additional \$34 million, over current total adjusted operating revenues. As part of the alternative rate plan application, Duke proposes to: (a) extend the term of the Accelerated Main Replacement Program (AMRP) and the associated rider (Rider AMRP) through the year 2019, (b) establish a process to recover its future investment in Duke's Utility of the Future initiative through a new rider

(Rider AU), and (c) create a new sales decoupling rider (Rider SD) to remove any disincentive for energy conservation initiatives. In the accounting application, Duke seeks approval to defer certain costs to be recovered later as a part of the AMRP expenditures and to capitalize the cost incurred for certain property relocations and replacements.

By entry issued September 5, 2007, the Commission found that Duke's application in Case No. 07-589-GA-AIR complied with the requirements of Section 4909.18, Revised Code, and Rule 4901:1-19-05, Ohio Administrative Code (O.A.C.) and accepted the application for filing as of July 18, 2007. The entry also granted Duke's waiver requests as to certain standard filing requirements and directed Duke to publish notice of the application in newspapers of general circulation in the company's service territory. Duke filed proof of such publication on February 25, 2007. To provide interested parties with an opportunity to make inquiries about the Duke applications, a technical conference was hosted by the Commission's staff on August 20, 2007.

Motions to intervene in these cases were granted to the Ohio Energy Group (OEG), the Kroger Company (Kroger), Interstate Gas Supply, Inc. (Interstate), the city of Cincinnati, the office of the Ohio Consumers' Counsel (OCC), People Working Cooperatively, Inc. (PWC), Integrys Energy Services, Inc. (Integrys), Direct Energy Services, LLC (Direct), Stand Energy Corporation (Stand), and the Ohio Partners for Affordable Energy (OPAE).

Investigations of Duke's applications were conducted and reports filed by the Commission staff and Blue Ridge Consulting Services, Inc. (Blue Ridge), an independent auditing firm. Both the report filed by staff (Staff Report, Staff Ex. 1) and financial audit report filed by Blue Ridge (financial audit report, Staff Ex. 4) were filed on December 20, 2007. Objections to the Staff Report and/or financial audit report were filed by PWC, OEG, Duke, OPAE, OCC, and, jointly, by Integrys and Direct. Motions to strike certain objections were filed by Duke and OCC. Memoranda contra the motions to strike objections were filed by Duke, Interstate, OPAE, and, jointly, by Integrys and Direct.

On January 25, 2008, a prehearing conference was held, as required by Section 4909.19, Revised Code. In accordance with Section 4903.083, Revised Code, local public hearings were held on February 25, 2008, in Cincinnati, Ohio, and on March 11, 2008, in Mason, Ohio.

A total of 27 witnesses testified at the two local hearings in Cincinnati, while four people took the stand at the Mason hearing. Two witnesses testified in favor of the rate increase, particularly as to the accelerated main replacement (AMRP) and riser replacement programs. Another witness testified that, although he was not opposed to the rate increase if Duke required additional money to maintain the gas lines, he was opposed to the extent that the increase is incorporated into the monthly customer charge as

opposed to the volumetric charge. The witness claimed that applying the increase in such a manner discourages energy efficiency and adversely affects residential customers with small homes (Cincinnati Public Hearing I, p. 20-21). The remaining witnesses at the local public hearings were opposed to the increase, asserting that their utility bills are already expensive, particularly for individuals on fixed incomes and for low income individuals and families; while others argued that increasing the customer charge, as proposed, would discourage conservation.

The evidentiary hearing was called on February 26, 2008, and continued, to allow the parties additional time to negotiate a settlement of the issues in these proceedings. On February 28, 2008, the parties filed a Joint Stipulation and Recommendation (Stipulation, Joint Ex. 1) resolving all the issues except the adoption of a new residential rate design. The evidentiary hearing was reconvened on March 5 and March 6, 2008. Duke and staff filed the testimony of Paul G. Smith (Duke Ex. 29) and of J. Edward Hess (Staff Ex. 2), in support of the Stipulation. With respect to the unresolved issue of residential rate design, Duke presented witnesses James A. Riddle (Duke Exs. 10 and 25), Paul G. Smith (Duke Exs. 11 and 19), Donald L. Stork (Duke Exs. 13, 20, and 22), and James E. Ziokowski (Duke Ex. 16); OCC called Wilson Gonzalez (OCC Exs. 5 and 18) and Anthony J. Yankel (OCC Ex. 6 and 17); and Staff presented the testimony of Stephen E. Puican (Staff Ex. 3).

Initial briefs, in support of their respective positions, were filed by Duke, OP&E, OCC, and staff on March 17, 2008. Reply briefs were filed on March 24, 2008.

A. Duke's Motion for Protective Order

On February 21, 2008, Duke filed a motion for protective order for information attached to the direct testimony of Matthew G. Smith (Duke Ex. 27) and marked as Attachment MGS-1. Duke contends that Attachment MGS-1 contains proprietary pricing information from vendors for equipment necessary for Duke's Utility of the Future program. The company states that the information for which Duke seeks confidential treatment is not known outside of Duke and its vendors. Furthermore, Duke states that, within the company, such information is only disseminated to employees who have a legitimate business need to know and act upon such information. Accordingly, Duke considers the information to be proprietary, confidential, and trade secret, as defined in Section 1333.61, Revised Code, and requests that the information be treated as confidential in accordance with the provisions of Sections 1333.61 and 4901.16, Revised Code. No party opposed Duke's request for protective treatment of Attachment MGS-1.

The Commission recognizes that Ohio's public records law is intended to be liberally construed to ensure that governmental records are open and made available to the public, subject to only a few very limited and narrow exceptions. *State ex rel. Williams*

*v. Cleveland* (1992), 64 Ohio St.3d 544, 549. However, one of the exceptions is for trade secrets. Section 1333.61(D), Revised Code, defines trade secret as:

[I]nformation, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The Commission finds that Attachment MGS-1 is financial information that derives independent economic value from not being generally known to or readily ascertainable by proper means by others who can obtain economic value from its use and that it is subject to reasonable efforts to maintain its secrecy. Therefore, we find that it contains trade secret information, as defined under Section 1333.61(D), Revised Code, and, therefore, that it should be granted protective treatment. In accordance with Rule 4901-1-24, O.A.C., Duke's request for a protective order is granted and the information filed under seal, as Attachment MGS-1, shall be afforded protective treatment for 18 months from the date this order is issued. Any request to extend protective treatment shall be made in accordance with Rule 4901-1-24(F), O.A.C.

**B. Duke's Motion for Waiver and Leave to File Depositions**

On February 25, 2008, Duke filed a motion for waiver of a Commission filing requirement and leave to file depositions *instanter*. Duke states that depositions were conducted on February 21, 2008. On Friday, February 22, 2008, Duke filed notice that it would be filing the deposition transcripts of five witnesses and commenced electronic transmission of the depositions. However, Duke states that it subsequently learned that only one of the five depositions was received by the Commission's Docketing Division before the end of the business day on February 22, 2008. Accordingly, the remaining four depositions were electronically transmitted on Monday, February 25, 2008. Duke requests that the Commission waive the requirement of Rule 4901-1-21(N), O.A.C., that depositions be filed with the Commission at least three days prior to the commencement of the

000018

hearing. In this instance, the Commission finds Duke's request to waive the requirement that deposition transcripts be filed at least three days prior to the commencement of the hearing to be reasonable. Accordingly, the request for waiver should be granted.

## II. SUMMARY OF THE EVIDENCE

### A. Summary of the Proposed Stipulation

The only issue not resolved by the Stipulation is the proposed residential rate design which was litigated and is expressly reserved for our determination. A new design is recommended by the Commission's staff and Duke, but opposed by OCC and OP&E. The city of Cincinnati, PWC, and the commercial and industrial intervenors take no position with respect to this issue (Jt. Ex. 1 at 5). Pursuant to the Stipulation, the parties agree, among other things, that:

- (1) Duke will receive a revenue increase of \$18,217,566, which represents a percentage increase of 3.05 percent and is based on a 8.15 percent rate of return. Duke will not be required to file the 60-day update filing of actual financial data for the test year (Jt. Ex. 1, at 5 and Stipulation Ex. 1).
- (2) Duke's revenue distribution, billing determinants, and rates to be adopted are shown on Exhibit 2 of the Stipulation, and assume the adoption of the new residential rate design. The rates also reflect the shift of \$6,000,000 to the residential class, phased-in over two years, based upon the agreed revenue requirement and Duke's updated cost of service study (*Id.* at 5; Stipulation Ex. 2).<sup>1</sup>
- (3) Duke will amortize deferred rate case expenses requested for recovery in its filing in these cases as recommended in the Staff Report (*Id.* at 6).
- (4) Duke will implement new depreciation rates that reflect the mid-point between Duke's proposed depreciation rates and the rates proposed in the Staff Report, as shown on Stipulation Exhibit 5 (*Id.*).
- (5) The allocation of common plant related to the provision of gas distribution service will be based on an updated allocation.

---

<sup>1</sup> OCC and OP&E object to the characterization of this cost reallocation as a "subsidy/excess" used in the Stipulation (*Id.* at 5, footnote 6).

factor of 18.29 percent that excludes the generation plant assets contributed to Duke by Duke Energy North America, LLC (*Id.*).

- (6) Duke will file actual data to support a Rider AMRP adjustment for the last nine months of 2007. The Rider AMRP revenue requirement will be modified to include deferred curb-to-meter expense and riser expense, net of maintenance savings, for calendar year 2007. Such net deferred expense shall be capitalized with carrying charges at an annual rate of 5.87 percent, representing the company's long-term debt rate, and recovered through Rider AMRP, beginning in this filing. Duke may elect to recover this expense in any annual Rider AMRP filings, provided that the recovery does not exceed the Rider AMRP cumulative residential rate caps. If this deferred expense causes Duke to exceed the Rider AMRP cumulative rate cap in any year, Duke may recover that portion of the deferred expense that exceeds the rate cap in a subsequent year as long as the recovery does not exceed the cumulative rate cap. The new Rider AMRP residential rates are limited on a cumulative basis as shown on Stipulation Exhibit 4, at 3, and recoverable pursuant to the Rider AMRP revenue allocation described in paragraph 9 of the Stipulation. Duke may implement these rates, effective with the beginning of the first billing cycle following issuance of the Commission's order, adjusted as necessary to permit the company full recovery of the revenue increase through May 1, 2009, subject to refund, upon Commission approval (*Id.* at 6-7).
- (7) Following the implementation of new Rider AMRP rates, Duke will file a pre-filing notice and application annually to implement subsequent adjustments to Rider AMRP, beginning in November 2008.<sup>2</sup> The annual filing will support the adjustment to Duke's revenue requirement for any increase to Rider AMRP. Duke shall continue to make its Rider AMRP annual filing until the effective date of the Commission's order in Duke's next base rate case (*Id.* at 8-9).

---

<sup>2</sup> Although the Stipulation directs Duke to make its annual filings in Case No. 07-589-GA-AIR, each annual review should be filed in a new case to accommodate the operational efficiencies of the Commission's Docketing Information System. These annual review cases will be linked to the instant proceedings, and Duke should serve all parties to these proceedings with each pre-filing notice and annual AMRP application.

- (8) Duke's revenue requirement calculation and Rider AMRP application filed with the Commission shall include the post-March 31, 2007 (date certain) original cost and accumulated reserve for depreciation of property associated with the AMRP program that is used and useful on December 31 of the prior year in the rendition of service as such property is associated with the AMRP and riser replacement programs, including capital expenditures for new plant (including but not limited to new mains, services and risers), adjustments for the retirement of existing assets, calculated Post-In-Service Carrying Charges ("PISCC") on net plant additions and related deferred taxes until included in rates for collection in Rider AMRP, a proper annual depreciation expense, and any sums of money or property that Duke may receive to defray the cost of property associated with the AMRP capital expenditures. The return assigned to the recovery of all such net capital expenditures shall be at a pre-tax weighted average cost of capital of 11.7 percent (*Id.* at 9-11).<sup>3</sup>
- (9) Duke will substantially complete the AMRP by the end of 2019 and will complete the riser replacement program by the end of 2012. Duke will file an application with the Commission for approval to extend the AMRP program if not substantially completed by the end of 2019 (*Id.* at 12).
- (10) Duke shall maintain its alternative regulation commitments until the effective date of the Commission's order in the company's next base rate case, except that the incremental \$1,000,000 in funding for weatherization shall be funded through base rates.<sup>4</sup> If, for any reason, Duke does not expend the \$3,000,000 gas weatherization funding amount in any year, the amount not expended will be carried over to the following year and added to the annual \$3,000,000 funding to be available for distribution to weatherization projects during that year. If a weatherization service provider does not meet its contract requirements, including its failure to meet deadlines, following consultation with the Duke Energy Community Partnership (Collaborative), Duke will reprogram the remaining funding to

<sup>3</sup> This rate of return is based on a 10.4 percent return on equity.

<sup>4</sup> OCC agrees with Duke's incremental \$1 million weatherization funding; however, OCC does not agree that this out-of-test period expenditure should be collected through base rates, and asserts that this amount should instead be collected through a rider.

a different project and/or assign it to another weatherization service provider so that the funding dollars can be spent expeditiously and productively (*Id.* at 12-14).<sup>5</sup>

- (11) The residential rate caps on Stipulation Exhibit 4 apply to Rider AMRP. Duke may establish deferrals for the expenses of the riser replacement program if these expenses cause Duke to exceed the cumulative rate cap, including a carrying cost of 5.87 percent. The rate caps shall be cumulative rather than annual caps such that if the rate increase is below the annual cap in a given year, the unused portion of the cap may be carried forward to future years but can never exceed the cumulative cap. If the deferred curb-to-meter expense or the deferred riser replacement program expense causes Duke to exceed the cumulative rate cap in any year, then Duke may recover that portion of the deferred expense that exceeds the cumulative rate cap in a subsequent year as long as the recovery does not exceed the cumulative rate cap (*Id.* at 17).
- (12) The parties agree that Duke shall take over ownership of the curb-to-meter service, including the riser, whenever a new service line or riser is installed or whenever an existing curb-to-meter service or riser is replaced. Duke shall file its tariffs in these cases such that Duke will be responsible for the cost of initial installation, repair, replacement and maintenance of all curb-to-meter services, including risers, except that consumers shall pay the initial installation costs related to the portion of service lines in excess of 250 feet. In 2008, Duke will begin capitalizing rather than expensing the costs currently described as "Customer Owned Service Line Expense." For this purpose, Duke will submit proposed tariff changes to Staff for review and approval, with a copy to parties, prior to filing the revised sheets with the Commission. Such capitalized costs shall be recoverable through Rider AMRP (*Id.* at 12-14).<sup>6</sup>
- (13) Duke will file, within 60 days of the Commission's final order in this proceeding, a deployment plan for the company's Utility of the Future Program for 2008-2009 (*Id.* at 15-16).

---

5 The members of the Collaborative include Duke personnel and representatives of the OCC, Staff, the Hamilton County Cincinnati Community Action Agency, City of Cincinnati, and PWC.

6 Neither Direct, Interstate, nor Integrys endorse this provision of the stipulation.

- (14) Duke's base rates do not include any amount for gas storage carrying costs. On a going forward basis, Duke will recover its actual gas storage carrying costs through its gas cost recovery rider (Rider GCR), without reduction to rate base, as shown on Stipulation Exhibit 1. Carrying charges associated with the actual monthly balances of Current Gas in Storage shall be accrued at a 10 percent annual rate as shown on Stipulation Exhibit 3. Further, the parties agree that the Commission should: (a) approve the methodology for the calculation of the storage carrying costs for inclusion in the GCR rate, as demonstrated in Stipulation Exhibit 3; (b) find that such an adjustment to Duke's rates is not an increase in base rates; and (c) approve recovery of such costs in Duke's next GCR filing following the Commission's order in this proceeding (*Id.* at 16-17).
- (15) Duke shall conduct an internal audit of its method and process for allocating service company charges to Duke by no later than 2009, and shall provide the audit report to Staff and the OCC (*Id.* at 18).
- (16) Duke shall continue to use the "Participants Test" as one of the methods for evaluating its Demand Side Management/Energy Efficiency programs as appropriate; however, Duke shall continue to use other cost/benefit tests as the Collaborative deems appropriate (*Id.* at 19).
- (17) Duke will implement a pilot program available to the first 5,000 eligible customers. The intent of the pilot program will be to provide incentives for low-income customers to conserve and to avoid penalizing low-income customers who wish to stay off of programs such as the Percentage of Income Payment Plan (PIPP). Eligible customers shall be non-PIPP low usage customers verified at or below 175 percent of the poverty level. Duke will design a tariff that adjusts the fixed monthly charge for eligible customers as shown on Stipulation Exhibit 2. These rates may be adjusted if the Commission does not approve the fixed customer charge as shown in Stipulation Exhibit 2. Duke will develop the details for this program in consultation with Staff and the parties. Duke shall evaluate the program after the first winter heating season to determine, following consultation with staff and the parties, whether the program should be

000023

continued to all eligible low-income customers, including considerations of program demand and cost (*Id.* at 20).

- (18) Duke will convene a working group or collaborative process, open to interested stakeholders, within 60 days after approval of the Stipulation, to explore implementing an auction to supply the standard service offer. Duke will report to the Commission within one year after approval of this Stipulation, the findings of the working group or collaborative including the facts and arguments which support and or oppose implementation of an auction process. The working group or collaborative process shall also review whether the present allocation of 80 percent of the net revenues from Duke's asset management agreement should continue to flow to GCR customers only, or should be changed to flow to GCR customers and choice customers (*Id.* at 21-22).
- (19) Duke shall revise its GCR tariff to implement a sharing mechanism for sharing of net revenues from off-system transactions.<sup>7</sup> Such sharing mechanism shall be effective if Duke does not have an asset management agreement transferring management responsibility for its gas commodity, storage and transportation contracts to a third party, and shall provide for sharing of the net revenues from off-system transactions to be allocated 80 percent to GCR and choice customers and 20 percent to Duke shareholders. The revenue sharing percentage proposed by implementation of the sharing mechanism in this Stipulation is expressly limited to gas-related sales transactions, and shall not have precedential value in establishing the sharing percentages for similar electric sales transactions by Duke. This sharing mechanism, but not the 80 percent/20 percent revenue allocation, shall be subject to review in future GCR cases (*Id.* at 21-22).<sup>8</sup>
- (20) Duke shall meet with Staff and other interested parties to discuss eliminating customer deposits for PIPP customers and shall eliminate such deposits if Staff agrees (*Id.* at 18).

---

7 Off-system transactions are defined to include but are not limited to Off-System Sales Transactions, Capacity Release Transactions, Park Transactions, Loan Transactions, Exchange Transactions, and any other similar, but yet unnamed transactions.

8 This paragraph does not change the allocation contained in the current sharing mechanism for revenues received under Duke's asset management agreement.

- (21) Duke shall review and fully consider the merits of adopting any new payment plans submitted by any party and, if Duke elects not to implement such new payment plan, Duke shall respond to the stakeholder in writing to state the reason for its decision (*Id.* at 18).
- (22) Duke shall review its use of payday lenders as authorized payment stations and will use its best efforts to eliminate the use of payday lenders as authorized payment stations if other suitable locations for the payment stations are available in the same geographic area. Duke shall provide a list of all payday lenders utilized as authorized payment stations to Staff and other interested parties annually. The annual payday lenders list is to be provided initially on May 1, 2008, and on May 1, each year thereafter (*Id.* at 18-19).
- (23) Duke shall communicate with its customers to educate them about the difference between authorized and non-authorized payment stations. Duke shall work with members of the Collaborative to develop the educational materials and communication strategy (*Id.* at 19).

B. Summary of the Residential Rate Design Issue

This case marks a sea change in the recommendation of the Commission's Staff with respect to the method of determining a gas utility's residential distribution rate design. Traditionally, natural gas distribution rates in Ohio have been set by allocating a relatively small proportion of the fixed costs to the "customer" charge, with the remaining fixed costs recovered through a volumetric component. However, volatile and sustained increases in the price of natural gas, along with heightened interest in energy conservation, have called into question long-held ratemaking practices for gas companies. In this proceeding, Staff and Duke advocate the adoption of a modified Straight Fixed Variable (SFV) residential rate design that allocates most fixed costs of delivering gas to a monthly flat fee with the remaining fixed costs recovered through a variable or volumetric component. Under this proposed new "levelized" rate design, Duke's current \$6.00 residential customer charge would be eliminated. Instead, residential customers would pay a flat monthly fee of around \$20 to \$25, but with a corresponding lower usage component to recover the remaining fixed distribution costs (Staff Ex. 1, at 30-33, 46-48; Stipulation Ex. 2; Duke Ex. 29 at 6; Tr. I at 87-88, 147-148, 159).

In its initial filings, Duke's proposed residential rate design included a \$15.00 customer charge with a sales decoupling rider to address an alleged revenue erosion problem caused by declining average use per customer. The Staff Report noted this

historical trend, but rejected a sales decoupling rider mechanism in favor of a phased-in SFV rate design. Staff's position was subsequently joined by Duke and the new design was used for calculations in the Stipulation exhibits, but adoption of the proposed rate design was expressly reserved for consideration by the Commission (Staff Ex. 1, at 30-33, 46-49; Jt. Ex. 1, at 1, 5, 19-20).

The levelized rate design is opposed by OCC and OPAE, both of whom advocate keeping the current low residential customer charge and high volumetric rates. In the alternative, they argue that, if a decoupling mechanism is to be adopted, the appropriate design is a decoupling rider rather than the flat rates recommended by Duke and Staff. The other parties to these proceedings either have no interest in residential rate design or chose not to take a position on this issue.

OCC and OPAE first cite the projected overall growth in Duke's residential gas revenues for 2008-2012 in contending that Duke has no revenue erosion problem because any revenue loss from declining sales on a per-customer basis will be more than offset by future increases in Duke's residential customer base (OCC Br. at 53; OCC Ex. 6, at 5-6; OCC Ex. 12). OCC and OPAE then argue that, in the event the Commission determines there is a revenue erosion problem, the Commission should adopt a sales decoupling rider to unlink revenue recovery from sales, similar to that stipulated to by Vectren Energy Delivery of Ohio ("Vectren"). *See, In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval, Pursuant to Section 4929.11, Revised Code, of a Tariff to Recover Conservation Expenses and Decoupling Revenues Pursuant to Automatic Adjustment Mechanisms and for Such Accounting Authority as May be Required to Defer Such Expenses and Revenues for Future Recovery through Such Adjustment Mechanisms, Case No. 05-1444-GA-UNC, Supplemental Opinion and Order (June 27, 2007).*

Staff maintains that the evidence of record clearly indicates that Duke's revenue erosion problem is real and that the levelized rate design is the better way to balance the utility's desire for recovery of its authorized return with promotion of energy efficiency as a customer and societal benefit through control of energy bills. Staff notes that nearly six million dollars of the total \$34.1 million revenue deficiency identified by Duke in this case is attributable to declining customer usage and cites the decline in per-customer, residential natural gas consumption, which has been accelerating since the marked price increases in the winter of 2000/2001. Staff asserts that, as long as the bulk of a utility's distribution costs are recovered through the volumetric component of base rates, this decline in per-customer usage threatens the utility's recovery of its fixed costs of providing service. Staff contends that the levelized rate design best addresses this issue while simultaneously removing the disincentives to utility-sponsored energy efficiency programs that exist with the traditional rate design (Duke Ex. 11, at 3-6, 11; Staff Ex. 3, at 3-5; Tr. I at 214-216; Staff Br. at 6-7).

Staff points out that the proposed new levelized rate design is a form of decoupling that breaks strict linkage between utility earnings and customer consumption by recognizing that virtually all the costs of gas distribution service are fixed, and the cost to serve a residential customer is largely the same, regardless of the specific customer's usage. Duke and Staff contend that it is neither fair nor accurate to characterize this fixed component as a customer charge because, under Duke's current rate design, the customer charge is set at an artificially low level that only minimally compensates the company for its fixed costs of providing gas service (Duke Ex. 29, at 6; Tr. I at 159; Staff Br. at 6-8; ).

Staff and Duke argue that, since the costs of providing gas distribution service are almost exclusively fixed, the proposed rate design will more closely match costs and revenues, thereby giving customers more accurate and timely pricing signals. They also contend that spreading the recovery of fixed costs more evenly over the entire year will help to reduce winter heating bills. Staff and Duke allege that customer incentives to conserve energy will remain strong because 75 to 80 percent of each customer's total bill is the cost of the gas itself (Staff Ex. 3, at 3-5; Tr. I at 159, 214-216; Tr. II at 91-93).

Finally, Staff and Duke suggest that a strict matching of fixed rates with fixed costs would result in a \$30.00 fixed residential distribution charge. However, because the proposed rate design is a significant departure from current rates, the Stipulation proposes to phase-in the new design over two years, using a lower fixed charge of \$20.25 in year one, and \$25.33 in year two. In addition, the remaining variable base rate component contains two usage tiers in an effort to minimize impacts on low-use residential customers, since average and larger usage residential customers will either benefit or be unaffected by the levelized rate design proposal (Jt. Ex. 1, at Ex. 2; Tr. I at 55, 87-88, 147-148).

OCC and OPAE counter that the stipulated rate design proposal amounts to a huge jump in the fixed monthly customer charge and violates a 30-year rate-making principle of gradualism. Moreover, they allege, it would violate the state policy to promote energy efficiency under Section 4929.02, Revised Code, because the proposed rate design sends an anti-conservation price signal to consumers, penalizes customers who have invested in energy efficiency by extending the payback period, and takes away the consumers' ability to control their energy bills. In addition, they assert that the levelized rate design is regressive towards low-use customers, and transfers wealth from low-income customers to high-use customers who are predominantly high-income customers (OCC Br. at 17-35, 46-55, 75-76).

Staff and Duke contend that under the proposed new rate design, high-use customers will benefit relative to low-use customers, and cite an analysis of PIPP customers to support the proposition that most low-income customers will actually benefit from this change. According to Duke witness Paul G. Smith, the PIPP customer data indicated that the average PIPP customer consumes approximately 1,000 ccf per year, or

approximately 25 percent more than the average non-PIPP customer and, therefore, levelized rates will actually reduce the annual cost for the average PIPP customer, and the cost of the PIPP program (Duke Ex. 29, at 11-12). Duke and Staff argue that if PIPP customer usage is representative of all of Duke's low-income customers, then most of Duke's low-income ratepayers will actually benefit from this policy change. In addition, they note any adverse impact of the levelized rate design will be mitigated by the new low-income/low-use pilot program included in the Stipulation. This program provides a credit to offset the higher fixed monthly charge for the first 5,000 non-PIPP, low-use customers verified at or below 175 percent of the federal poverty level. (Duke Br. at 17-35, 46-55, 75-76).

OCC and OPAE insist that the levelized rates will harm low-income customers and that the PIPP customer data is not indicative of other Duke low-income customers, but offered no data to support this contention (OCC Br. at 46-53; OPAE Br. at 4, 8).

### III. DISCUSSION AND CONCLUSION

#### A. Consideration of the Stipulation

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

In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (a) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (b) Does the settlement, as a package, benefit ratepayers and the public interest?
- (c) 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.*, 68 Ohio St.3d 559 (1994) (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.*).

The Commission finds that the Stipulation filed in these cases appears to be the product of serious bargaining among capable, knowledgeable parties. The signatory parties represent a wide diversity of interests including the utility, residential consumers, low-income residential consumers, commercial and industrial consumers, and Staff. Further, we note that the signatory parties routinely participate in complex Commission proceedings and that counsel for the signatory parties have extensive experience practicing before the Commission in utility matters.

The Stipulation also meets the second criterion. As a package, the Stipulation advances the public interest by resolving all issues raised, except as to residential revenue design, thereby avoiding extensive litigation. While the Stipulation includes a general rate increase of approximately three percent across all customer classes, that increase will allow the company an opportunity to recover its expenses. As for the new AMRP, which now includes riser replacement and company ownership of certain customer service lines, the Stipulation continues the mechanism established for the parties and the Commission to evaluate the reasonableness of the expenses incurred on a consistent, regular basis during the program until another base rate application is filed by Duke. We conclude that the continuance of the main replacement program, the initiation of the riser replacement program and Duke's ownership of customer service lines advances the public interest and safety. As with the previous program, the new AMRP and riser replacement program does not sanction cost recovery of any or all yet-to-be-incurred costs and does institute caps on future recovery. The Stipulation also continues the process under which each year's AMRP and riser replacement expenses can be evaluated for the next AMRP rider, while also addressing questions related to over-recovery and treatment of cost savings. We note that the accounting provisions adopted to facilitate the new AMRP program and the riser replacement program cease at the completion of each program. The Commission further notes that the Stipulation provides for the continuation of the weatherization program and a pilot program for low income customers.

Regarding company ownership of certain customer service lines, Duke should, upon the request of the customer, work with the customer as to location, relocation, and manner of installation of the service line, to the extent feasible under the gas pipeline safety regulations, Duke's tariff, and Duke's procedures.

Finally, the Stipulation meets the third criterion because it does not violate any important regulatory principle or practice. Indeed, the Stipulation provides a resolution for Duke to economically continue the AMRP and to initiate the riser replacement program facilitating gas system safety and reliability improvements.

On March 14, 2008, Duke moved for waiver of the requirement to file an update of the partially forecasted income statement and any variances for the test year, pursuant to Rule 4901-7-01, Appendix A, Chapter II(A)(5)(d), O.A.C. Duke notes that, as part of the Stipulation, the parties negotiated a revenue increase and further agreed to recommend that Duke be allowed to forgo the requirement of filing actual financial data for the test year (Jt. Ex. 1, at 5, footnote 5).

The Commission finds that the Stipulation filed in these matters is in the public interest and represents a reasonable disposition of all but one of the issues raised in these proceedings. We will, therefore, adopt the Stipulation in its entirety and grant Duke's motion for a waiver of the requirement to file an updated income statement in accordance with Rule 4901-7-01, Appendix A, Chapter II(A)(5)(d), O.A.C.

**B. Consideration of the Residential Rate Design**

The Commission first notes that there is no disagreement in this case that Duke's residential rates need to go up in order to cover Duke's prudently incurred costs to provide service. There is also no dispute in this case as to the amount of the increase in revenues needed to allow Duke to earn a fair rate of return on its investment. In addition to an overall increase in revenue of 3.1 percent, the settlement before us provides for the assignment of \$6 million in costs from commercial and industrial customers to the residential class. This reallocation reduces a pre-existing subsidy of residential customers by commercial and industrial customers. Thus, the parties have already agreed that residential customers, as a class, will pay an increase of 11.9 percent during the first year and 14.1 percent in the second year for the distribution portion of each residential customer's bill.

The only issue left to the Commission is the design of the rates Duke should bill residential customers to collect the revenues agreed to in the settlement. We agree with Staff that the time has come to re-think traditional natural gas rate design. Conditions in the natural gas industry have changed markedly in the past several years. The natural gas market is now characterized by volatile and sustained price increases, causing customers to increase their efforts to conserve gas. The evidence of record clearly documents the declining sales-per-customer trend over the decades. In fact, more than 15 percent of Duke's revenue deficiency in this rate case is attributable to declining customer usage, a trend which is not just continuing, but is also accelerating (Duke Ex. 11, at 3-6, 11; Staff Ex. 3, at 3-5; Tr. I at 214-216; Staff Br. at 7). Under traditional rate design, the ability of a company to recover its fixed costs of providing service hinges in large part on its actual sales, even though the company's costs remain fairly constant regardless of how much gas is sold. Thus, a negative trend in sales has a corresponding negative effect on the utility's ongoing financial stability, its ability to attract new capital to invest in its network, and its incentive to encourage energy efficiency and conservation.

The Commission, therefore, concludes that a rate design which separates or "decouples" a gas company's recovery of its cost of delivering the gas from the amount of gas customers actually consume is necessary to align the new market realities with important regulatory objectives. We believe it is in the interest of all customers that Duke has adequate and stable revenues to pay for the costs of its operations and capital and to ensure the continued provision of safe and reliable service. We further believe that there is a societal benefit to removing from rate design the current built-in incentive to increase gas sales. A rate design that prevents a company from embracing energy conservation efforts is not in the public interest. Duke's commitment to provide \$3 million for weatherization projects under the Stipulation is critical to our decision in this case (Jt. Ex. 1, at 12-14). Indeed, the Commission notes that a commitment to conservation initiatives will be an important factor in any future decision to adopt a decoupling mechanism. The Commission encourages Duke to review and further enhance its weatherization and conservation program offerings. As one part of this review, Duke should adopt the objective to make cost-effective weatherization and conservation programs available to all *low-income consumers* and to ramp up such programs as rapidly as reasonably practicable.

Having determined that a new decoupling rate design is appropriate, we must decide the better choice of two methods: a levelized rate design, which recovers most fixed costs up front in a flat monthly fee, or a decoupling rider, which maintains a lower customer charge and allows the company to offset lower sales through an adjustable rider.

On balance, the Commission finds the levelized rate design advocated by Duke and Staff to be preferable to a decoupling rider. Both methods would address revenue and earnings stability issues in that the fixed costs of delivering gas to the home will be recovered regardless of consumption. Each would also remove any disincentive by the company to promote conservation and energy efficiency. The levelized rate design, however, has the added benefit of producing more stable customer bills throughout all seasons because fixed costs will be recovered evenly throughout the year. In contrast, with a decoupling rider, as favored by OCC, customers would still pay a higher portion of their fixed costs during the heating season when their bills are already the highest, and the rates would be less predictable since they could be adjusted each year to make up for lower-than-expected sales.

A levelized rate design also has the advantage of being easier for customers to understand. Customers will transparently see most of the costs that do not vary with usage recovered through a flat monthly fee. Customers are accustomed to fixed monthly bills for numerous other services, such as telephone, water, trash, internet, and cable services. A decoupling rider, on the other hand, is much more complicated and harder to explain to customers. It is difficult for customers to understand why they have to pay

more through a decoupling rider if they worked hard to reduce their usage; the appearance is that the company is penalizing them for their conservation efforts.

The Commission also believes that a levelized rate design sends better price signals to consumers. The rate for delivering the gas to the home is only about 20 to 25 percent of the total bill. The largest portion of the bill, the other 75 to 80 percent, is for the gas that the customer uses. This commodity portion, the cost of the actual gas used, is the biggest driver of the amount of a customer's bill. Therefore, gas usage will still have the biggest influence on the price signals received by the customer when making gas consumption decisions, and customers will still receive the benefits of any conservation efforts in which they engage. While we acknowledge that there will be a modest increase in the payback period for customer-initiated energy conservation measures with a levelized rate design, this result is counterbalanced by the fact that the difference in the payback period is a direct result of inequities within the existing rate design that cause higher use customers to pay more of their fair share of the fixed costs than low-use customers.

The levelized rate design also promotes the regulatory objective of providing a more equitable cost allocation among customers regardless of usage. It fairly apportions the fixed costs of service, which do not change with usage, among all customers, so that everyone pays his or her fair share. Customers who use more energy for reasons beyond their control, such as abnormal weather, large number of persons sharing a household, or older housing stock, will no longer have to pay their own fair share plus someone else's fair share of the costs.

We recognize that, with this change to rate design, as with any change, there will be some customers who will be better off and some customers who will be worse off, as compared with the existing rate design. The levelized rate design will impact low usage customers more, since they have not been paying the entirety of their fixed costs under the existing rate design. Higher use customers who have been overpaying their fixed costs will actually experience a rate reduction. Average users will see only the impact of the increase agreed to by the parties; they will see no additional impact as a result of the Commission choosing the levelized rate design.

The Commission is sensitive to the impact of any rate increase on customers, especially during these tough economic times. We believe that the new levelized rate design best corrects the traditional design inequities while mitigating the impact of the new rates on residential customers by maintaining a volumetric component to the rates, by phasing in the increase over a two-year period, and by not reflecting the full extent of Duke's fixed costs in the proposed fixed charge. Still, we are concerned with the impact on low-income, low-use customers. Thus, crucial to our decision to adopt Duke and Staff's proposed rate design is the Pilot Low Income Program aimed at helping low-income, low-use customers pay their bills. This new program will provide a four-dollar, monthly

discount to cushion much of the impact on qualifying customers. To ensure that this discount is available to as many customers as possible, we direct that Duke expand this pilot program to include up to 10,000 customers, instead of the 5,000 customers specified in the Stipulation. Pursuant to the terms of the stipulation, Duke, in consultation with staff and the parties, shall establish eligibility qualifications for this program by first determining and setting the maximum low usage volume projected to result in the inclusion of 10,000 low-income customers who have previously been defined by the stipulation to be those at or below 175 percent of the poverty level. The Commission expects that Duke will promote this program such that to the fullest extent practicable the program is fully enrolled with 10,000 customers. Following the end of the pilot program, the Commission will evaluate the program for its effectiveness in addressing our concerns relative to the impact on low-use, low-income customers.

We are also concerned about the immediate impact of implementing the levelized rate design during the summer months when overall consumption is lowest. For the average customer, the new rate design will result in lower bills in the winter, but higher bills in the summer. Our concern is that the fixed charge increase may not be anticipated by customers who have budgeted for the traditional lower fixed charge during the low usage summer months. To mitigate this impact, we are directing that, from the initial bills resulting from this order through bills covering the period ending September 30, 2008, the fixed charge be set at \$15.00, consistent with Duke's original proposal. The corresponding volumetric rate for those months should also be adjusted to compensate for any revenue shortfall that this adjustment in the fixed charge will cause. Thereafter, rates will be as proposed in the Stipulation. We believe this additional phase-in of the new residential rate structure will give customers a further opportunity to adapt to this change, including the benefits of the budget billing option.

C. Rate Determinants:

1. Rate Base

The value of Duke's property used and useful in the rendition of natural gas services as of the December 31, 2007, is not less than \$649,964,874, as stipulated by the parties (Jt. Ex. 1, at Schedule A-1).

The Commission finds the rate base of \$649,964,874, as provided in the Stipulation, to be reasonable and proper based on the evidence presented in these matters. Accordingly, the Commission adopts the valuation of \$649,964,874 as the rate base for purposes of this proceeding.

2. Operating Income:

In accordance with the proposed Stipulation, the parties agree that Duke's operating revenue is \$597,573,805 and that the net operating income is \$43,274,872 for the 12 months ended December 31, 2007 (Jt. Ex. 1, at Schedule A-1). The Commission finds the operating revenue and net operating income, as provided in the Stipulation, to be reasonable and proper based on the evidence presented in these matters. The Commission will, therefore, adopt these figures for purposes of these proceedings.

3. Rate of Return and Authorized Increase:

As stipulated by the signatory parties, under its present rates, Duke's net operating income is \$43,274,872. Applying this amount to the rate base of \$649,964,874 results in a rate of return of 6.66 percent. Such a rate of return is insufficient to provide Duke with reasonable compensation for the gas service it renders to customers. Accordingly, the signatory parties have agreed that Duke should be authorized to increase its revenues by \$18,217,566, an increase of approximately 3.05 percent above current annual revenues. This would result in an overall rate of return of 8.45 percent, which the Commission finds to be reasonable.

4. Rates and Tariffs:

Duke is directed to file a proposed customer notice. Duke is further authorized to cancel and withdraw its present tariffs governing service to customers affected by these applications and to file tariffs consistent in all respects with the discussion and findings set forth herein for the Commission's consideration. The approved tariffs will be effective for all services rendered after the effective date of the tariffs.

FINDINGS OF FACT:

- (1) On June 18, 2007, Duke filed notice of its intent to file an application to increase its rates. In that notice, the company also requested a test year beginning January 1, 2007, and ending December 31, 2007, with a date certain of March 31, 2007.
- (2) By entry issued July 11, 2007, the Commission approved Duke's request to establish the test period of January 1, 2007, through December 31, 2007, for the rate increase proposal and a date certain of March 31, 2007.
- (3) Duke filed its rate increase application on July 18, 2007. On July 18, 2007, Duke also separately filed requests for approval

of an alternative rate plan, docketed at Case No. 07-590-GA-ALT, and for approval of changes in accounting methods, docketed at Case No. 07-591-GA-AAM.

- (4) By entry dated September 5, 2007, the Commission found that Duke's rate increase and alternative rate plan applications complied with the requirements of Section 4909.18, Revised Code, and Rule 4901:1-19-05, O.A.C.
- (5) The Commission accepted Duke's rate increase application for filing as of July 18, 2007.
- (6) OEG, Kroger, Interstate, the city of Cincinnati, OCC, PWC, Integrys, Direct, Stand and OP&E each requested, and was granted, intervention in these proceedings.
- (7) Objections to the staff report were filed by Duke, PWC, OEG, OP&E, OCC, and, jointly, by Integrys and Direct.
- (8) Duke published notice of its applications and the hearings and filed the required proofs of publication on February 11, February 25, and March 12, 2008.
- (9) The staff of the Commission and the financial auditor filed their respective reports of investigation on December 20, 2007.
- (10) On January 25, 2008 a prehearing conference was held, as required by Section 4909.19, Revised Code.
- (11) Two local public hearings were held in Cincinnati, Ohio, on February 25, 2008, and another local public hearing was held in Mason, Ohio, on March 11, 2008, in accordance with Section 4903.083, Revised Code. At the Cincinnati hearings a total of 27 witnesses gave testimony and four witnesses gave testimony at the Mason hearing.
- (12) On February 28, 2008, a Stipulation was filed by all the parties to this proceeding resolving all the issues presented in these matters, except rate design.
- (13) The evidentiary hearing commenced as scheduled on February 26, 2008, was continued until February 28, 2008, and reconvened on March 5, 2008. At the evidentiary hearing, Duke and staff each presented one witness in support of the

Stipulation. In regard to the one litigated issue, rate design, Duke presented four witnesses, OCC presented two witnesses and staff presented one witness.

- (14) The Stipulation is the product of serious bargaining between knowledgeable parties, benefits ratepayers, advances the public interest, and does not violate any important regulatory principles or practices.
- (15) The value of all of the company's jurisdictional property used and useful for the rendition of natural gas service to customers affected by this application, determined in accordance with Section 4909.15, Revised Code, is not less than \$649,964,874.
- (16) Under its existing rates, Duke's net operating revenue is \$43,274,872, under its existing rates. This net annual revenue of \$43,274,872, when applied to a rate base of \$649,964,874, results in a rate of return of 6.66 percent.
- (17) A rate of return of 6.66 percent is insufficient to provide Duke reasonable compensation for the service it provides.
- (18) A rate of return of 8.45 percent is fair and reasonable, under the circumstances presented in these cases, and is sufficient to provide the company just compensation and return on the value of its property used and useful in furnishing natural gas service to its customers.
- (19) A rate of return of 8.45 percent applied to the rate base of \$649,964,874 will result in allowable net operating income of \$54,922,032.
- (20) The allowable gross annual revenue to which the company is entitled for purposes of this proceeding is \$615,791,371.

CONCLUSIONS OF LAW:

- (1) Duke's application for a rate increase was filed pursuant to, and this Commission has jurisdiction of the application pursuant to, the provisions of Sections 4909.17, 4909.18, and 4909.19, Revised Code. The application complies with the requirements of these statutes.

- (2) Staff and Blue Ridge conducted investigations of the application, filed their respective reports, and served copies of the Staff Report on interested persons in accordance with the requirements of Section 4909.19, Revised Code.
- (3) The hearings, and notice thereof, complied with the requirements of Sections 4909.19 and 4903.083, Revised Code.
- (4) The Stipulation is the product of serious bargaining between knowledgeable parties, benefits ratepayers, advances the public interest, and does not violate any important regulatory principles or practices. The Stipulation submitted by the parties is reasonable and shall be adopted in its entirety.
- (5) Duke's existing rates and charges for gas service are insufficient to provide Duke with adequate net annual compensation and return on its property used and useful in the provision of natural gas service.
- (6) A rate of return of 8.45 percent is fair and reasonable under the circumstances of this case and is sufficient to provide Duke just compensation and return on its property used and useful in the provision of gas service to its customers.
- (7) Duke should be authorized to cancel and withdraw its present tariffs governing service to customers affected by these applications and to file tariffs consistent in all respects with the discussion and findings set forth herein.
- (8) The levelized rate design, as modified herein, is a reasonable resolution to address Duke's declining sales volumes per customer, allow Duke the opportunity to collect the revenue requirement established in this rate case proceeding and encourage Duke's participation in customer energy conservation programs.

ORDER:

It is, therefore,

ORDERED, That Duke's request for a protective order in regards to Attachment MGS-1 is granted for 18 months from the date this order is issued. It is, further,

000037

ORDERED, That Duke's request for leave to file depositions less than three days prior to the commencement of the evidentiary hearing is granted. It is, further,

ORDERED, That the Stipulation filed on February 28, 2008 is approved in its entirety. It is, further,

ORDERED, That Duke's request for a waiver of the requirement to file an updated income statement, pursuant to Rule 4901-7-01, Appendix A, Chapter II(A)(5)(d), O.A.C., is granted. It is, further,

ORDERED, That Duke implement the levelized rate design for its residential customers as discussed in this order. It is, further,

ORDERED, That Duke's applications to increase its rates and charges for gas service, to implement an alternative rate plan and to modify accounting methods are granted to the extent provided in this opinion and order. It is, further,

ORDERED, That Duke is authorized to cancel and withdraw its present tariffs governing gas service to customers affected by these applications and to file new tariffs consistent with the discussion and findings as set forth in this order. Upon receipt of four complete copies of tariffs conforming to this opinion and order, the Commission will review and consider approval of the proposed tariffs by entry. It is, further,

ORDERED, That a copy of this order be served upon all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber - concurring opinion  
Alan R. Schriber, Chairman

Paul A. Centolella - concurring opinion  
Paul A. Centolella

Ronda Hartman Riegus  
Ronda Hartman Riegus

Valerie A. Lemmie  
Valerie A. Lemmie

Cheryl L. Roberto  
Cheryl L. Roberto

RMB/GNS/vrm

Entered in the Journal  
MAY 28 2008

Renee J. Jenkins

Renee J. Jenkins  
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates. ) Case No. 07-589-GA-AIR  
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for Gas Distribution Service. ) Case No. 07-590-GA-ALT  
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods. ) Case No. 07-591-GA-AAM

CONCURRING OPINION OF  
CHAIRMAN ALAN R. SCHRIEBER

The straight fixed variable (SFV) option proposed by the PUCO Staff and adopted here today appropriately speaks to two significant issues. One is the potential impact on low income customers and the other is the desired effect that the Order shall have upon conservation.

The latter consideration is paramount. As we acknowledge that there are serious energy issues, we strive to promote and adopt advanced and renewable energy sources. While these are necessary and important pursuits, I believe that conservation is the most important measure of all. Nothing is less costly or more effective than simply reducing consumption. As time goes by, I trust that we will expend many resources adopting conservation measures on "both sides of the meter".

What we are attempting to do today is to provide appropriate incentives, through a rational pricing scheme, to encourage a reduction in the consumption of natural gas. By "rational", I mean a balanced approach that penalizes neither those whom have already squeezed the last cubic foot of natural gas from their budget, nor those whom might be inclined to "over-conserve".

The proposed SFV option achieves the optimum balance because it segregates fixed costs from those costs that are within the control of the consumer. In contrast, the current pricing scheme assigns all costs- fixed and variable - to the level of usage. The inherent danger with the current system is that consumers might be led to believe that the more they cut back, the more they save. This is true to a point. The point happens to be that of diminishing returns; over conservation takes place when the fixed costs of providing the

service are no longer covered with revenue. This inevitably leads to a rate case and higher rates. In other words, if usage-sensitive rates are assigned to fixed costs, and if usage falls below a certain point, then fixed costs do not get covered. It is then time for a rate case: what has the consumer saved?

If the solution is appropriate price signals, then prices must be associated with the volume of gas alone. In contrast, under the current pricing scheme, the gas company has no incentive to encourage conservation because those same usage sensitive rates might flow through to fixed costs as consumption grows, much to the utility's advantage. Under the SFV, the fixed costs are covered and the company makes no money on the gas commodity. Therefore, the company might actually promote conservation more aggressively.

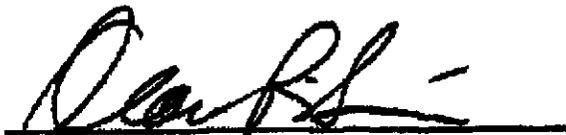
One alternative to the old conventional method is a decoupling rider mechanism. In this case, Homeowner A who has already squeezed the last cubic foot of un-needed gas from his home via conservation oriented expenditures is discriminated against. This results from the make-whole provision that accrues to the utility when Homeowner B begins to pare down consumption. In other words, as B's meter begins to spin slower, so too do the company's revenues. Homeowner A will be compelled to make up some share of the shortfall, notwithstanding the fact that Homeowner A can cut back consumption no further.

Finally, those who argue that inadequate price signals are the biggest issue need only look at the impact of budget billing. What signal is being sent when the bill each month is the same regardless of consumption? Yet, is anyone recommending the elimination of budget billing?

The other issue in play is that of the income effect of the SFV methodology. One can conclude that consumers of greater amounts of gas will see their bills fall while those at the low end will see theirs rise. This does not mean that the burden will fall disproportionately on low-income consumers. There is record testimony that suggests that low-income consumers, i.e., PIPP customers consume more on average per year than others. Clearly, PIPP customers are protected. Furthermore, while one can play freely with percentages, the nominal dollar increases due to the rate restructuring is quite small. As a precaution, however, the Commission is modifying the stipulation to provide a four dollar credit to ten thousand non-PIPP customers as opposed to five thousand provided for in the stipulation.

Concurring Opinion of Chairman Alan R. Schriber  
Case No. 07-589-GA-AIR et al.  
Page -3-

All told, it is important that we arrive at a decision as expeditiously as possible. I believe that over the years the lesson to be learned is that we can never know with one hundred percent certainty all of the facts and all of the possible outcomes. This is precisely why the law has provided this Commission with the ability to react to adverse outcomes should they arise. This is the ultimate consumer protection.



Alan R. Schriber, Chairman

000042

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke )  
Energy Ohio, Inc. for an Increase in Rates. ) Case No. 07-589-GA-AIR

In the Matter of the Application of Duke )  
Energy Ohio, Inc. for Approval of an ) Case No. 07-590-GA-ALT  
Alternative Rate Plan for Gas Distribution )  
Service. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc. for Approval to Change ) Case No. 07-591-GA-AAM  
Accounting Methods. )

OPINION OF COMMISSIONER PAUL A. CENTOLELLA  
CONCURRING IN PART AND DISSENTING IN PART

The majority concludes that the current residential rate design has a negative impact on the ability of Duke Energy Ohio (hereafter "Duke", "the Company", or "the utility") to maintain financial stability, attract new capital, and on its incentive to encourage energy efficiency and conservation. And, the majority determines that it is necessary to decouple the utility's recovery of fixed costs from its volumetric sales. I concur with the majority in these conclusions and on issues other than residential rate design. I dissent from the majority regarding how to transition toward a residential rate design which decouples the recovery of fixed costs from volumetric rates.

Having determined that a new decoupling rate design is appropriate, the Commission must decide two questions. First, we must decide the better choice between two decoupling methods: a straight fixed variable (SFV) rate design, which recovers fixed costs in a flat monthly customer charge, or a decoupling adjustment, which allows the company to recover the same fixed cost revenue requirement with a lower customer charge by adjusting subsequent year rates to true up revenues received from volumetric charges. Second, in the event the Commission finds the SFV rate design preferable, the Commission should consider how to transition to a rate design which is significantly different from the rate structures that have formed the basis of consumer expectations.

Over the long-term, moving in the direction of a SFV rate design is preferable to keeping a modest customer charge and relying entirely on a decoupling adjustment. Both methods will address revenue and earnings stability issues in that the fixed costs of delivering gas to the home will be recovered irrespective of consumption. When fully implemented, each will remove any disincentive by the Company to promote conservation

and energy efficiency. And, both methods can be implemented in a straight forward manner and, if appropriately designed, easily explained to consumers as a deliberate or more gradual transition toward recovering fixed costs through a customer charge. However, as the ultimate objective, significant movement toward a fixed variable rate design is consistent with developing a more efficient rate structure. Efficient rate design seeks to align price elastic rate elements more closely to marginal costs, while recovering a larger portion of any residual revenue requirements through comparatively price inelastic charges. Experience shows that there is a significant price response to increases in volumetric charges, as evidenced by the recent steep reductions in average per customer consumption as gas costs increased. Given that customer charges are paid to provide access to gas service, it is reasonable to expect comparatively less price response with respect to increases in the customer charge. Over the long-term, this supports significant movement toward a SFV rate design in which a larger portion of the company's fixed cost revenue requirements is recovered through the customer charge.

Additionally, the SFV rate design will reduce the month-to-month variation in customer bills as fixed costs will be recovered evenly throughout the year, making it easier for customers to deal with high winter heating bills. While decoupling adjustments are not difficult to implement, a SFV rate design, when fully implemented, will remove the need for any additional administrative proceedings to review decoupling adjustments.

Consumers have made investment decisions based on expectations regarding natural gas pricing and fairness compels us to move at a measured pace when making fundamental changes in rate design. For this reason, the Commission should carefully consider the appropriate transition path.

On the question of how to transition to a fixed charge rate design, Duke and the Staff have proposed a modified SFV rate design in which the customer charge would be set at \$20.25 per bill in year one and \$25.33 per bill in year two. Fully implementing a SFV rate design would require a customer charge in excess of \$30 per residential consumer bill. Duke and the Staff also proposed and the Commission has expanded a "Pilot Low Income Program" that would provide some low income consumers a discount to cushion the impact of the change in rate design.

In my view, the pace of the transition in this case is more rapid than should be selected given the consumer expectations created by long-standing rate design practices and the recovery of fixed costs should be fully decoupled from sales volumes during the transition.

The pace of the transition proposed in the stipulation could send the wrong message to consumers with respect to energy conservation. Consumers who have made efficiency investments and reduced their consumption could see a significant increase in

the regulated portion of their bills, while their neighbors who have implemented no energy efficiency measures and are high use customers will see the regulated portion of their gas bills decline by similar amounts. Given rising gas commodity costs, increasing dependence on foreign sources of gas supply, and the likely adoption of limits on greenhouse gas emissions from the burning of fossil fuels, encouraging the adoption of cost effective energy efficiency measures should be among our highest priorities. A more gradual transition to a SFV rate design would minimize near term bill increases for low use consumers recognizing the investments that many of these consumers have made to reduce their gas usage, allow consumers to capture a greater portion of the expected benefits of such investments, and avoid the appearance that the Commission is rewarding high use by lowering the gas bills of high use customers.

Second, during the period covered by this Order, the modified SFV approach will not fully decouple recovery of the Company's fixed costs from sales volumes. A modest three percent reduction in sales during the first year would represent a loss to Duke of the opportunity to recover more than a million dollars of its fixed costs.

To address these concerns, I would reach the following result.

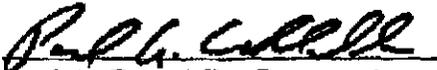
First, the recommendation of the Staff and Company should be modified to reduce the year one customer charge for all residential consumers to \$16.25 per residential bill and establish the base level of the year two customer charge for all residential consumers at \$21.33.

Second, consistent with the majority opinion, the Company should review and further enhance its weatherization and conservation program offerings. As one part of this review, Duke should adopt the objective of making cost-effective weatherization and conservation programs available to all low income consumers and to ramp up programs to facilitate implementation of all such measures as rapidly as reasonably practicable. Low income consumers often face difficult choices between paying their energy bills and meeting other essential needs, yet may be among the last to be able to take advantage of cost-effective energy efficiency investments. Consumers who struggle to make ends meet often find it difficult to pay for the initial cost of efficiency measures. And, many low income consumers live in rental housing with landlords who have little incentive to install efficiency measures that would reduce their tenants' utility bills.

Third, in conjunction with filing a proposal for approval of significantly expanded energy efficiency programs and recovery of the costs of such programs, I would invite the Company to propose an interim decoupling adjustment. This adjustment should be structured to adjust the second and subsequent year base customer charge of \$21.33 for the difference, on a per customer bill basis, between the portion of the Company's fixed cost

residential revenue requirement that is allocated to volumetric rates and the revenues recovered for such fixed costs through volumetric rates at weather normalized sales levels.

To meet the energy challenges of the 21<sup>st</sup> Century, Ohio will need to greatly improve the efficiency with which we use all forms of energy including natural gas. Efficient price signals will be an important, but not sufficient, element in this transformation. Our increasing knowledge of behavioral economics and experience with utility energy efficiency programs has shown that utility efficiency programs can produce significant net economic benefits. The Commission needs to encourage the cost-effective expansion of such programs. And, we should not wait through the completion of a multi-year transition to a SFV rate design before doing so in full measure.

  
Paul A. Centolella, Commissioner

000046

## **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.

Effective Date: 01-01-2001

**000047**

## **4909.18 Application to establish or change rate.**

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending

**000048**

written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A report of its property used and useful in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed;

(D) A statement of financial condition summarizing assets, liabilities, and net worth;

(E) A proposed notice for newspaper publication fully disclosing the substance of the application. The notice shall prominently state that any person, firm, corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The notice shall further include the average percentage increase in rate that a representative industrial, commercial, and residential customer will bear should the increase be granted in full;

(F) Such other information as the commission may require in its discretion.

**000049**

Effective Date: 01-11-1983

**000050**

## **4909.19 Publication - investigation.**

Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall forthwith publish the substance and prayer of such application, in a form approved by the public utilities commission, once a week for three consecutive weeks in a newspaper published and in general circulation throughout the territory in which such public utility operates and affected by the matters referred to in said application, and the commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within a reasonable time as determined by the commission after the filing of such application, a written report shall be made and filed with the commission, a copy of which shall be sent by certified mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the commission deems interested. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable.

If objections are filed with the commission, the commission shall cause a pre-hearing conference to be held between all parties, intervenors, and the commission staff in all cases involving more than one hundred thousand customers.

If objections are filed with the commission within thirty days after the filing of such report, the application shall be promptly set down for hearing of testimony before the commission or be forthwith referred to an attorney examiner designated by the commission to take all the testimony with respect to the application and objections which may be offered by any interested party. The commission shall also fix the time and place to take testimony giving ten days' written notice of such time and place to all parties. The taking of testimony shall commence on the date fixed in said

**000051**

notice and shall continue from day to day until completed. The attorney examiner may, upon good cause shown, grant continuances for not more than three days, excluding Saturdays, Sundays, and holidays. The commission may grant continuances for a longer period than three days upon its order for good cause shown. At any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.

When the taking of testimony is completed, a full and complete record of such testimony noting all objections made and exceptions taken by any party or counsel, shall be made, signed by the attorney examiner, and filed with the commission. Prior to the formal consideration of the application by the commission and the rendition of any order respecting the prayer of the application, a quorum of the commission shall consider the recommended opinion and order of the attorney examiner, in an open, formal, public proceeding in which an overview and explanation is presented orally. Thereafter, the commission shall make such order respecting the prayer of such application as seems just and reasonable to it.

In all proceedings before the commission in which the taking of testimony is required, except when heard by the commission, attorney examiners shall be assigned by the commission to take such testimony and fix the time and place therefor, and such testimony shall be taken in the manner prescribed in this section. All testimony shall be under oath or affirmation and taken down and transcribed by a reporter and made a part of the record in the case. The commission may hear the testimony or any part thereof in any case without having the same referred to an attorney examiner and may take additional testimony. Testimony shall be taken and a record made in accordance with such general rules as the commission prescribes and subject to such special instructions in any proceedings as it, by order, directs.

Effective Date: 01-11-1983

**000052**

## **4909.43 Filing rate increase application.**

(A) No public utility shall file a rate increase application covering a municipal corporation pursuant to section 4909.18 or 4909.35 of the Revised Code at any time prior to six months before the expiration of an ordinance of that municipal corporation enacted for the purpose of establishing the rates of that public utility.

(B) Not later than thirty days prior to the filing of an application pursuant to section 4909.18 or 4909.35 of the Revised Code, a public utility shall notify, in writing, the mayor and legislative authority of each municipality included in such application of the intent of the public utility to file an application, and of the proposed rates to be contained therein.

Effective Date: 01-11-1983

**000053**

## **4928.02 State policy.**

It is the policy of this state to do the following throughout this state :

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;

(D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure;

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;

(F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;

(G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

**000053A**

(H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;

(I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy.

In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

**0000538**

## **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;

**000054**

(9) Ensure that the risks and rewards of a natural gas company's offering of nonjurisdictional and exempt services and goods do not affect the rates, prices, terms, or conditions of nonexempt, regulated services and goods of a natural gas company and do not affect the financial capability of a natural gas company to comply with the policy of this state specified in this section;

(10) Facilitate the state's competitiveness in the global economy;

(11) Facilitate additional choices for the supply of natural gas for residential consumers, including aggregation;

(12) Promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation.

(B) The public utilities commission and the office of the consumers' counsel shall follow the policy specified in this section in exercising their respective authorities relative to 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.

Effective Date: 06-26-2001; 2008 SB221 07-31-2008

000055

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates.	)	Case No. 07-589-GA-AIR
	)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for its Gas Distribution Service.	)	Case No. 07-590-GA-ALT
	)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.	)	Case No. 07-591-GA-AAM
	)	

---

**APPLICATION FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL

Larry S. Sauer, Counsel of Record  
Joseph P. Serio  
Michael E. Idzkowski

Assistant Consumers' Counsel  
**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
614-466-8574 (Telephone)  
614-466-9475 (Facsimile)  
sauer@occ.state.oh.us  
serio@occ.state.oh.us  
idzkowski@occ.state.oh.us

June 27, 2008

000056

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates.	)	Case No. 07-589-GA-AIR
	)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for its Gas Distribution Service.	)	Case No. 07-590-GA-ALT
	)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.	)	Case No. 07-591-GA-AAM
	)	

---

**APPLICATION FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

The Office of the Ohio Consumers' Counsel ("OCC") applies for rehearing of the May 28, 2008 Opinion and Order ("Order") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). Through this Application for Rehearing, OCC seeks to protect approximately 380,000 residential utility customers of Duke Energy Ohio, Inc. ("Duke" or "Company") from the consequences of the straight fixed variable ("SFV") rate design ordered by the Commission.

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Order was unjust, unreasonable and unlawful and the Commission abused its discretion because:

- A. The Commission erred by approving a rate design that unreasonably violates prior Commission precedent and policy.
- B. The Commission erred by approving a rate design that includes an increase to the monthly residential customer charge without providing consumers adequate notice of the SFV rate design pursuant to R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43.

**000057**

- C. The Commission erred by approving an SFV rate design that discourages customer conservation efforts in violation of R.C. 4929.05 and R.C. 4905.70.
- D. The Commission erred when it failed to comply with the requirements of R.C. 4903.09, and provide specific findings of fact and written opinions that were supported by record evidence.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claims of errors, the PUCO should reverse its Order.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL

/s/ Larry S. Sauer

Larry S. Sauer, Counsel of Record

Joseph P. Serio

Michael E. Idzkowski

Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

614-466-8574 (Telephone)

614-466-9475 (Facsimile)

sauer@occ.state.oh.us

serio@occ.state.oh.us

idzkowski@occ.state.oh.us

000058

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. PROCEDURAL HISTORY.....	4
III. STANDARD OF REVIEW .....	7
IV. ARGUMENT.....	8
A. The Commission Erred By Approving A Rate Design That Unreasonably Violates Prior Commission Precedent And Policy.....	8
1. The Commission’s Order violates PUCO precedent. ....	8
2. The Commission’s Order unreasonably approved an SFV rate design that is an unprecedented change in policy and magnitude. ....	14
B. The Commission Erred By Approving A Rate Design That Includes An Increase To The Monthly Residential Customer Charge Without Providing Consumers Adequate Notice Of The SFV Rate Design Pursuant To R.C. 4909.18, R.C. 4909.19 And R.C. 4909.43. ....	17
C. The Commission Erred By Approving An SFV Rate Design That Discourages Customer Conservation Efforts In Violation Of R.C. 4929.05 And R.C. 4905.70. ....	20
1. The SFV rate design sends the wrong price signal to consumers. ....	22
2. SFV rate design does not remove the customers’ disincentive to invest in energy efficiency because the SFV rate design extends the pay back period for energy efficiency investments made by consumers.....	24
3. The Commission’s contention that the SFV rate design encourages Company participation in energy conservation efforts disregarded the fact that Duke has an existing DSM program.....	26
D. The Commission Erred When It Failed To Comply With The Requirements Of R.C. 4903.09, And Provide Specific Findings Of Fact And Written Opinions That Were Supported By Record Evidence.....	28

1.	The record supports implementation of an SFV rate design as a pilot. ....	28
2.	The record fails to support the Order that low-income customers benefit from an SFV rate design.....	33
3.	The record does not support reliance on budget billing to support adopting an SFV rate design. ....	37
V.	CONCLUSION.....	39

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke )  
Energy Ohio, Inc. for an Increase in Gas ) Case No. 07-589-GA-AIR  
Rates. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc. for Approval of an ) Case No. 07-590-GA-ALT  
Alternative Rate Plan for its Gas )  
Distribution Service. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc. for Approval to Change ) Case No. 07-591-GA-AAM  
Accounting Methods. )

---

**MEMORANDUM IN SUPPORT**

---

**I. INTRODUCTION**

At a time when the public rightly demands increased transparency and accountability in government, its regulation of utilities, and the process of setting energy prices, the PU CO has turned its back on transparency and accountability in favor of black box regulation that is wholly unaccountable. This is not good policy in the best of times, and it most certainly is not good policy in times like these when every dollar counts – when utility customers testify in public hearings, as they did in this case, about hard choices between food or heat during a long, cold winter.

In this case, the Commission is seeking to ensure that Duke has sufficient revenues to cover its fixed costs in a time when residential consumer usage is declining. The Commission has identified two ways that accomplish this objective: (1) a straight fixed variable rate design; and (2) a decoupling mechanism. A straight fixed variable rate design provides the utility with revenues by dramatically increasing the fixed

monthly customer charge. The utility collects its revenues and there is no accounting for any over-recovery. Customers can anticipate hearing from the utility at such time in the future when those revenues are no longer sufficient, but not before. On the other hand, a decoupling mechanism provides a solution that is more gradual in its application and that is trued-up on an annual basis to more fairly address the problem of lost revenues attributable to declining customer usage.

The one claimed benefit of the SFV rate design is that it gives the utility its revenue in an easy to administer fashion, however it also comes with a cost in that it discourages customers from making rational energy efficiency investments by increasing the pay back period. Such anti-conservational impacts must not be ignored. Another benefit of decoupling over the SFV rate design is that decoupling does not force small users - - especially low and moderate income consumers with small homes - - to subsidize larger and perhaps less efficient users by being charged the same amount regardless of consumption. And while the Commission relied on evidence in the record of a subset of low-income customers - - Percentage of Income Payment Plan (“PIPP”) customers, use more gas than the average consumers and thus benefit from the SFV rate design - - the Commission ignored the fact that not all low-income customers are PIPP customers, and evidence indicating that other low-income customers use less than the average customers and are in fact harmed by the SFV rate design. Furthermore, payments made by PIPP customers are not usage based but income based, so any change in rate for PIPP customers will not affect a PIPP customer’s consumption decisions while on PIPP.

OCC is particularly concerned about the effects of the SFV rate design on Ohio's working poor. From a social justice standpoint, a public policy that forces a struggling family living just above the poverty line in a small apartment with the thermostat turned low to pay as much as the wealthy homeowners with large homes is unconscionable. The Company and the Commission Staff have failed to demonstrate that such subsidies are not occurring. They have failed to provide evidence to demonstrate that all, or even a majority of low-income customers are using more natural gas than large customers, and they have failed to establish a public policy rationale to charging low users the same amount as large users.

In sharp contrast to these problems encountered with an SFV rate design is a decoupling mechanism which is accountable, transparent and fair. The utility gets its Commission-authorized revenues, but unlike the SFV rate design, customers have a mechanism that ensures fairness by providing a credit if the utility over-collects. Furthermore, a decoupling mechanism sends more accurate and appropriate price signals to customers encouraging less use and conservation. Decoupling provides customers the tools to lower their consumption. Decoupling also benefits society by motivating individual customers to engage in energy efficiency. According to a study by the American Council for an Energy-Efficient Economy ("ACEEE"), if consumption can be reduced by 1 percent per year every year for five years, then the price of natural gas can be reduced by 13% due to reduced demand.<sup>1</sup>

OCC does not dispute that a utility is entitled to a reasonable opportunity to recover its authorized costs and revenues for serving customers. However, OCC disputes

---

<sup>1</sup> American Council for an Energy-Efficient Economy, Report No. U051, *Examining the Potential for Energy Efficiency To Help Address the Natural Gas Crisis in the Midwest*, (January 2005) at 5.

the rate design the Commission has chosen to achieve that goal. Decoupling is a transparent and accountable rate design; SFV is a black box, providing no transparency or accountability. Decoupling protects customers from over-compensating the utility; SFV simply guarantees utility cost recovery and revenue which may exceed the utility's revenue requirements. Decoupling provides the appropriate price signals for customers who conserve; while SFV sends contrary signals. Decoupling provides customers with more tools to control their usage; SFV reduces those tools. Decoupling encourages energy efficiency; SFV removes disincentives for the utility to promote conservation but discourages conservation by certain customers. Decoupling allows for gradual price increases; SFV results in large rate increases contrary to the concept of gradualism. Decoupling does not create social justice concerns of small users subsidizing large users; SFV ignores those social justice concerns. Decoupling requires an annual true-up -- a little extra work, but work that is merited and rightly expected by the public; SFV requires utility consumers to accept higher rates and expect little protection or concern from their government.

The Commission is strongly and respectfully urged to encourage conservation and protect vulnerable Ohioans by rejecting the straight fixed variable rate design and returning to the current rate design or adopting a decoupling mechanism with appropriate consumer safeguards.

## II. PROCEDURAL HISTORY

On June 18, 2008, Duke filed a Pre-Filing Notice of its intent to increase rates for the natural gas distribution service that is provided through its gas pipelines. Duke also requested the continuation of its accelerated main replacement program ("AMRP") for

charging customers for the replacement of the pipelines in its service area. On July 18, 2007, Duke filed its application (“Application”) in these cases (“Rate Case”), to increase the rates that customers pay.

Motions to Intervene were filed by the Office of the OCC,<sup>2</sup> Stand Energy Corporation (“Stand”),<sup>3</sup> Ohio Partners for Affordable Energy (“OPAE”),<sup>4</sup> Ohio Energy Group (“OEG”),<sup>5</sup> Kroger Co. (“Kroger”),<sup>6</sup> Interstate Gas Supply, Inc. (“IGS”),<sup>7</sup> City of Cincinnati (“City”),<sup>8</sup> People Working Cooperatively (“PWC”),<sup>9</sup> Integrys Energy Services, Inc. (“Integrys”),<sup>10</sup> and Direct Energy Services, LLC. (“Direct”).<sup>11</sup>

On August 1, 2007, the Company filed the direct testimony of sixteen Company witnesses and outside experts. On December 20, 2007, the PUCO Staff filed its Staff Report of Investigation (“Staff Report”) and the Report of Conclusions and Recommendations on the Financial Audit by Blue Ridge Consulting Services, Inc. (“Blue Ridge Report”).

Between January 18, 2008 and January 22, 2008, OCC, Duke, OPAE, OEG, IGS, Direct, Integrys and PWC filed objections to the Staff Report, and Summaries of Major

---

<sup>2</sup> OCC Motion to Intervene (July 12, 2007).

<sup>3</sup> Stand Motion to Intervene (July 18, 2007).

<sup>4</sup> OPAE Motion to Intervene (July 26, 2007).

<sup>5</sup> OEG Motion to Intervene (August 1, 2007).

<sup>6</sup> Kroger Motion to Intervene August 14, 2007).

<sup>7</sup> IGS Motion to Intervene August 17, 2007).

<sup>8</sup> City Motion to Intervene (August 24, 2007).

<sup>9</sup> PWC Motion to Intervene January 16, 2008).

<sup>10</sup> Integrys Motion to Intervene (January 18, 2008).

<sup>11</sup> Direct Motion to Intervene (January 18, 2008).

Issues.<sup>12</sup> On January 29, 2008, pursuant to a PUCO Entry,<sup>13</sup> OCC filed testimony of six witnesses,<sup>14</sup> and Duke filed the Supplemental Testimony of five witnesses.<sup>15</sup> On February 22, 2008, Duke filed Second Supplemental Testimony for seven witnesses.<sup>16</sup>

On February 28, 2008, the parties to the cases entered into a Stipulation and Recommendation (“Stipulation”) that settled all issues except for the rate design issue involving the fixed monthly customer charge. The major issues that OCC and the other parties settled include *inter alia* a fair and reasonable revenue requirement, a fair compromise to the tariff subsidy issue, a continuation of the AMRP with reasonable price caps, and establishment of a program to address the safety concerns and replacement of risers in a reasonable time period.<sup>17</sup> Under the Stipulation, OCC and OPAE reserved their right to litigate the rate design issue, and the City did not take a position on this issue. The PUCO Staff and Duke proposals for rate design represent a radical departure from decades of PUCO regulation of natural gas Local Distribution Companies (“LDCs”) in Ohio.

---

<sup>12</sup> OCC, Duke, and OPAE were the only parties who filed objections that specifically addressed the rate design issue that was the subject of litigation in the evidentiary hearing.

<sup>13</sup> Duke Rate Case, Entry (January 7, 2008) Granting OCC’s Motion for Extension to file testimony.

<sup>14</sup> OCC Ex. No. 1 (Adams Direct Testimony), OCC Ex. No. 2 (Hagans Direct Testimony), OCC Ex. No. 3 (Hayes Direct Testimony), OCC Ex. No. 4 (Hines Direct Testimony), OCC Ex. No. 5 (Gonzalez Direct Testimony), and OCC Ex. No. 6 (Yankel Direct Testimony).

<sup>15</sup> Duke Ex. No. 17; (Hebbeler Supplemental Testimony); Duke Ex. No. 18 (Morin Supplemental Testimony); Duke Ex. No. 19 (P. Smith Supplemental Testimony); Duke Ex. No. 20 (Stork Supplemental Testimony); Duke Ex. No. 21 (Wathen Supplemental Testimony).

<sup>16</sup> Duke Ex. No. 22 (Storck Second Supplemental Testimony); Ex. No. 23 (Morin Second Supplemental Testimony); Ex. No. 24 (Hebbeler Second Supplemental Testimony); Ex. No. 25 (Riddle Second Supplemental Testimony); Ex. No. 26 (Wathen Second Supplemental Testimony); Duke Ex. No. 27 (M. Smith Direct Testimony); Duke Ex. No. 28 (O’Connor Direct Testimony).

<sup>17</sup> Staff Ex. No. 2 (Hess Direct Testimony) at 4-5.

The Commission held local public hearings in Cincinnati on February 25, 2008 and in Mason on March 11, 2008, and the evidentiary hearings were conducted on March, 5-6, 2008. On March 6, 2008, the OCC filed rebuttal testimony.<sup>18</sup> The Attorney Examiners established a briefing schedule with initial briefs due on March 17, 2008, and reply briefs due on March 24, 2008.

The Commission issued its Opinion and Order (“Order”) on May 28, 2008, in which the Commission approved the modified SFV rate design. On June 3, 2008, OP&E filed a Motion to Stay Implementation of the May 28, 2008 Opinion and Order and Issuance of the Entry Approving the Tariffs (“Motion to Stay”). On June 4, 2008, OCC filed a letter in support of OP&E’s Motion to Stay. Later that same day, the PUCO issued an Entry denying OP&E’s Motion to Stay and approving Duke’s tariffs. OCC advocates for the Commission to reconsider its decision to approve a modified SFV rate design and reject the unprecedented quadrupling of the monthly customer charge from \$6.00 to as much as \$25.33 and all but end the time-honored practice of billing customers per cubic foot of the gas they use as the most significant part of the customer distribution cost determined in a base rate proceeding.

### **III. STANDARD OF REVIEW**

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty (30) days after issuance of an order from the Commission, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the

---

<sup>18</sup> OCC Ex. No. 17 (Yankel Rebuttal Testimony); and OCC Ex. No. 18 (Gonzalez Rebuttal Testimony).

proceeding.” Furthermore, the application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”<sup>19</sup>

In considering an application for rehearing, Ohio law provides that the Commission “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.”<sup>20</sup> Furthermore, if the Commission grants a rehearing and determines 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 \* \* \*.”<sup>21</sup>

OCC meets the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10. Accordingly, OCC respectfully requests that the Commission grant rehearing on the matters specified below.

#### IV. ARGUMENT

The Commission’s Entry was unjust, unreasonable and unlawful in the following particulars:

**A. The Commission Erred By Approving A Rate Design That Unreasonably Violates Prior Commission Precedent And Policy.**

**1. The Commission’s Order violates PUCO precedent.**

The Commission’s Order approved a rate, for Duke’s residential customers, design that features a fixed monthly customer charge of \$15.00 through September 30,

---

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

000068

2008 (approximately four-months),<sup>22</sup> \$20.25 for the balance of year one (approximately eight-months) and \$25.33 in year two and beyond.<sup>23</sup> Thus, after one-year, customers will see their customer charge more than quadruple. Given that the current customer charge is \$6.00 per month, these increases are not gradual increases. Rather these increases to the fixed portion of the customer charge represent enormous and unprecedented increases in the customer charge and they violate the principle of gradualism. Commissioner Centolella voiced his concern for the PUCO's pace to implement an SFV rate design by stating:

In my view, the pace of the transition in this case is more rapid than should be selected given the consumer expectations created by long-standing rate design practices \* \* \*.<sup>24</sup>

The Commission has consistently identified gradualism as one of the regulatory principles that it has incorporated as part of its decision-making process. Yet in these cases, the Commission ignored over thirty-years of precedent regarding the application of gradualism to the customer charge. The Commission's failure to be guided by its own regulatory principles in these cases is a reasonable basis for granting rehearing.

In a Columbia Gas, Case No. 88-716-GA-AIR, the Commission noted that the Staff recommended a Customer Charge of \$6.00, which was lower than the calculated charge of \$7.79, based on principles of gradualism and stability.<sup>25</sup> As part of its decision, the Commission concluded:

---

<sup>22</sup> Order at 20.

<sup>23</sup> Order at 20, citing Joint Ex. No. 1 (Stipulation) at Exhibit 2.

<sup>24</sup> Order at Opinion of Commission Paul A. Centolella Concurring in Part and Dissenting in Part page 2 of 4.

<sup>25</sup> *In the Matter of the Applications of Columbia Gas of Ohio, Inc., to Establish a Uniform Rate for Natural Gas Service Within the Company's Lake Erie Region, Northwest Region, Central Region, Eastern Region, and Southeastern Region*, Case No. 88-716-GA-AIR et. al, ("1988 Columbia Gas"), Opinion and Order (October 17, 1989) at 87.

While it is true that the customer charge proposed by the staff might not recover all customer-related costs, *it is important to note that costs, while very important, are not the only factor to consider in establishing the charge. The Commission must also consider the customers' expectations, acceptance, and understanding in setting rates and balance these factors accordingly with the determined costs.*<sup>26</sup>

In accepting the Staff position in the Columbia Gas case, the Commission noted that “[t]he Staff’s application of the accepted ratemaking principles of gradualism and stability is reasonable.”<sup>27</sup> Both the Staff Report and the Opinion and Order in another Columbia Gas, Case No. 89-616-GA-AIR<sup>28</sup> echoed the same belief in and reliance on gradualism.

The Commission noted that:

Staff contends that its proposed customer charge of \$6.25 is reasonable, since the customer charge is meant to provide a utility only with a partial recovery of its fixed costs and since the charge it proposes is in keeping with the accepted ratemaking principles of gradualism and stability.<sup>29</sup>

The Commission further elaborated on these principles, when it ruled that:

We heard a great deal of testimony at the local hearings regarding the detrimental impact that an increase in the customer charge would have on low income customers (See, Cincinnati Tr. 29-30, 54, 61, 93). *We believe that it is appropriate in this case to keep the customer charge at its current level in order to minimize rate shock that would otherwise be experienced by residential customers.*<sup>30</sup>

---

<sup>26</sup> Id. at 89. Emphasis added.

<sup>27</sup> Id.

<sup>28</sup> *In the Matter of the Applications of Columbia Gas of Ohio, Inc., to Establish a Uniform Rate for Natural Gas Service Within the Company’s Northwestern Region, Lake Erie Region, Central Region, Eastern Region, and Southeastern Region*, Case No. 89-616-GA-AIR et. al. (“1989 Columbia Gas”), Opinion and Order (April 5, 1990) at 80-82.

<sup>29</sup> *1989 Columbia Gas* at 80.

<sup>30</sup> **Emphasis added.** *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in Its Rates for Gas Service to All Jurisdictional Customers*, Case No. 95-656-GA-AIR, Opinion and Order (December 12, 1996) at 46.

The Staff view of gradualism, as noted throughout the many Staff Reports has been in the context of Company-proposed customer charge increases of only \$2.00 to \$4.00.<sup>31</sup> In most cases, the Staff Report notes that in making its recommendation, the Staff recognized and prescribed to ratemaking principles of gradualism within the revenue distributions.<sup>32</sup> This same language also appeared in Northeast Ohio, Case No. 03-2170-GA-AIR where the Staff Report stated, “[i]n recommending customer charges, Staff recognizes and prescribes to the established ratemaking principle of gradualism within the revenue distribution.”<sup>33</sup>

The same or similar statement appears in the Cincinnati Gas & Electric, Case No. 01-1228-GA-AIR, Staff Report,<sup>34</sup> in the Cincinnati Gas & Electric, Case No. 92-1463-GA-AIR Staff Report,<sup>35</sup> Columbia Gas of Ohio, Case No. 91-195-GA-AIR Staff Report,<sup>36</sup> Dayton Power & Light Company, Case No. 91-415-GA-AIR Staff Report,<sup>37</sup> and the River Gas Company, Case No. 90-395-GA-AIR Staff Report.<sup>38</sup>

---

<sup>31</sup> OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at Exhibit WG-2.

<sup>32</sup> *In the Matter of the Complaint and Appeal of Oxford Natural Gas Company from Ordinance No. 2896, Passed by the Council of the City of Oxford on February 7, 2006, Case No. 06-350-GA-CMR, Staff Report (September 19, 2007) at 26.*

<sup>33</sup> *In the Matter of the Application of Northeast Ohio Natural Gas Corp. for an Increase in its Rates and Charges for Natural Gas Service, Case No. 03-2170-GA-AIR, Staff Report (August 29, 2004) at 44.*

<sup>34</sup> *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in its Gas Rates in its Service Territory, Case No. 01-1228-GA-AIR, Staff Report (January 1, 2002) at 57.*

<sup>35</sup> *In the Matter of the Application of the Cincinnati Gas & Electric Company to File an Application for an Increase in Gas Rates in its Service Area, Case No. 92-1463-GA-AIR, Staff Report (March 17, 1993) at 29.*

<sup>36</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc., to Increase Gas Sales and Certain Transportation Rates Within its Service Area, Case No. 91-195-GA-AIR, Staff Report (August 25, 1991) at 58.*

<sup>37</sup> *In the Matter of the Application of the Dayton Power and Light Company for Authority to Amend its Filed Tariffs to Increase the Rates and precedents Charges for Gas Service, Case No. 91-415-GA-AIR, Staff Report, (November 13, 1991) at 45.*

<sup>38</sup> *In the Matter of the River Gas Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Service, Case No. 90-395-GA-AIR, Staff Report (October 29, 1990) at 31.*

Staff Witness Puican explained the Staff's shift away from the prior application of gradualism by noting that "the concept of gradualism makes sense when prices are relatively stable. There was simply no compelling need to make large changes in it."<sup>39</sup> Despite this justification, Staff offered no evidence to support this claim. Staff provided no support because this reasoning is flawed. Rather than needing gradualism when prices are relatively stable, gradualism is most needed and valued as a regulatory policy during a time of higher prices and greater price volatility. Gradualism in the form of mitigating a customer charge increase from \$6.77 to \$6.00<sup>40</sup> or from \$5.23 to \$5.00<sup>41</sup> or even keeping it at \$5.70<sup>42</sup> at a time when commodity prices are at a lower level is less important or necessary compared to when a \$6.00 customer charge may increase to \$15.00, \$20.25 or even \$25.33, and when the commodity prices are over \$8.00/Mcf.<sup>43</sup> The need for gradualism grows as consumers face greater costs; the need does not decline.

The Commission stated in its Opinion and Order that Staff held, "the evidence of record clearly indicates that Duke's revenue erosion problem is real and that the levelized rate design is the better way to balance the utility's desire for recovery of its authorized return with promotion of energy efficiency as a customer and societal benefit through

---

<sup>39</sup> Tr. Vol I at 205-206.

<sup>40</sup> *In the Matter of the Application of the Cincinnati Gas & Electric Company to File an Application for an Increase in Gas Rates in its Service Area*, Case No. 92-1463-GA-AIR, Staff Report (March 17, 1993) at 29.

<sup>41</sup> *In the Matter of the Application of the Dayton Power and Light Company for Authority to Amend its Filed Tariffs to Increase the Rates and precedents Charges for Gas Service*, Case No. 91-415-GA-AIR, Staff Report, (November 13, 1991) at 45.

<sup>42</sup> *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in its Rates for Gas Service to All Jurisdictional Customers*, Case No. 95-656-GA-AIR, Opinion and Order (December 12, 1996) at 45-46.

<sup>43</sup> OPAE Ex. No. 1 (Natural Gas Graph), Tr. Vol. I at 160.

control of energy bills.”<sup>44</sup> The Commission’s reasoning ignored the fact that, if there was a revenue erosion problem with Duke (which OCC and OP&E contended that there is not), the Company still has the option of filing an Application To Increase Rates On An Emergency Temporary Basis (AEM) which is defined on the Commission website as an application by a public utility to temporarily alter its rate structure to prevent injury to the business or public. (R.C. 4909.16). With this in mind, the alternative decoupling mechanism proposed by OCC could be adopted and Duke would still have a rate making option to fall back on, other than a full-blown rate case, if revenue erosion were to become too severe.

However, if the Commission is determined to move towards a SFV rate design, (which OCC argues it should not), the minimum the PUCO should consider on rehearing a more gradual approach to the ultimate goal of an SFV rate design. This would be consistent with Commissioner Centolella’s stated position that:

over the long-term, moving in the direction of a SFV rate design is preferable to keeping a modest customer charge and relying entirely on a decoupling adjustment.”<sup>45</sup>

The problem with the Commission’s Order is that it is not a long-term move to the SFV rate design. Should such a shift occur, it should be gradual with small incremental increases in the fixed customer charge and with the opportunity to evaluate its impact on customer conservation and affordability.

---

<sup>44</sup> Order at 13.

<sup>45</sup> Order at Opinion of Commissioner Paul A. Centolella Concurring in Part and Dissenting in Part at 1.

**2. The Commission's Order unreasonably approved an SFV rate design that is an unprecedented change in policy and magnitude.**

The Commission's Order neither explains its rationale for ignoring the principle of gradualism nor justifies disregarding thirty-years of Commission rate design precedent. In his rebuttal testimony OCC witness Gonzalez explained the regulatory principle of gradualism as being one in which a regulator attempts to *minimize* the impact of rate changes on the industry and customers.<sup>46</sup> In this case, the principle of gradualism takes on an important role because of the radical nature of the change in price the Commission has unreasonably approved and also because of the unprecedented sheer magnitude of the fixed monthly residential customer charge increase. Both of these factors are exemplified by the fact that prior to the filing of this case, no Ohio LDC had ever requested a customer charge as large as the \$15.00 customer charge initially approved through September 30, 2008,<sup>47</sup> let alone the \$20.25 or \$25.33 customer charges ultimately approved in these cases based solely on the Staff's recommendation.

Not only did OCC witness Gonzalez testify to the concept of gradualism as being one in which a regulator attempts to *minimize* the impact of rate changes on customers, the PUCO Staff also identified gradualism as a rate design principle.<sup>48</sup> Although Staff witness Puican testified that Staff had followed the same rate design methodology to calculate the customer charge since 1978,<sup>49</sup> and that Staff had previously put a "lot of

---

<sup>46</sup> OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 14.

<sup>47</sup> Order at 20.

<sup>48</sup> OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 14, See also, Staff Ex. No. 3 (Puican Direct Testimony) at 3-4, and Tr. Vol. I at 205.

<sup>49</sup> Tr. Vol. I at 204.

emphasis on the concept of gradualism,<sup>50</sup> the only gradualism applied in this case was that instead of a move to a complete SFV rate design, the move was to a modified form of SFV that was to be phased in over a two-year period.<sup>51</sup>

In practical terms this meant that instead of an increase from the current \$6.00 monthly customer charge<sup>52</sup> to a \$30 monthly customer charge<sup>53</sup> (400 percent increase), the increase would be limited to an increase of \$9.00 (150 percent increase) through September 30, 2008, and \$14.25 to a total customer charge of \$20.25 for the balance of year one (238 percent increase), and an increase of \$19.33 to a total customer charge of \$25.33 in year two (322 percent increase). Thus, the Commission applied gradualism in order to “limit” the increase in the customer charge in this case to only \$9.00 or 150 percent through September 30, 2008 and \$14.25, or 238 percent for the balance of year one, and \$19.33 or 322 percent in year two.<sup>54</sup>

In previous cases, the largest difference between the current customer charge and the Staff recommended customer charge was \$4.34<sup>55</sup>. The magnitude of the difference between the current customer charge (\$6.00) and the Commission approved customer charges in this case (\$9.00, \$20.25 and \$25.33) are more than two times larger than the largest previous differential.<sup>56</sup>

---

<sup>50</sup> Tr. Vol. I at 205.

<sup>51</sup> Tr. Vol. I at 209.

<sup>52</sup> Although Duke Witness Smith attempted to characterize the current AMRP charge of \$5.77 as part of the customer charge, he ultimately acknowledged that the current customer charge does not include the AMRP charge and was only \$6.00. Tr. Vol. I at 171.

<sup>53</sup> Tr. Vol. I at 147.

<sup>54</sup> Tr. Vol. I at 171 (Any ensuing AMRP charge would be added to this customer charge for an even larger fixed charge).

<sup>55</sup> *In the Matter of the Application of Eastern Natural Gas Company to Increase Rates for its Natural Gas Service Area and Related Matters*, Case No. 89-1714-GA-AIR, Staff Report, (June 14, 1990) at 22.

<sup>56</sup> *Id.*

The Commission's approved residential rate design in these cases constitutes a fundamental change from a position held for the previous 30 years<sup>57</sup> in which the Staff recommended a relatively small fixed charge and a larger variable charge to make up the total customer charge. The customer charge increases for Columbia Gas of Ohio, Inc. ("COH") have totaled only \$2.95 over a 26-year period, for DEO have been only \$1.70 over the same 26-year period and for Vectren Energy Delivery of Ohio ("Vectren"), they have totaled \$2.85 over a 25-year period.<sup>58</sup> The result is that the Commission's approved rate design in these cases has more than double, triple or even quadruple what other Ohio gas utilities and their customers have experienced over the past quarter century.

More importantly, the PUCO Staff Recommended Customer Charge has consistently been within \$2.50 of the then-current customer charge, with only one instance -- Eastern Natural Gas, Case No. 89-1714-GA-AIR -- where it was greater. This illustrates the radical departure the Commission has taken in these cases when compared to the past thirty years of rate design precedents. Moreover, given the volatility of natural gas prices and the fact that customers have had to absorb significant increases ranging from 200 to 300 percent, gradualism in distribution charges is a welcomed tool in the arsenal to keep gas service affordable for Duke residential customers.

---

<sup>57</sup> See Tr. Vol. I at 204, where Mr. Puican referenced a 1978 case. *In the Matter of the Application of Columbia Gas of Ohio, Inc., for an Increase in the Rates to be Charged and Collected for Gas Service in the Village of Mt. Sterling, Ohio, Case No. 77-1309-GA-AIR, In the Matter of the Application of Columbia Gas of Ohio, Inc., for an Increase in the Rates to be Charged and Collected for Gas Service in the City of Martins Ferry, Ohio, Case No. 77-1428-GA-AIR, Opinion and Order (May 24, 1979) at 12-13.* Where the Commission noted that "In these proceedings, applicant proposes to replace this rate with a rate structure incorporating a fixed monthly customer charge reflecting costs which do not vary with usage and a uniform rate per Mcf for gas consumed." at 12. The Commission further concluded that, "*The Commission has approved this type of rate schedule in the belief that it is cost-justified and with the interests of conservation firmly in view*" (emphasis added) at 13. Thus the Commission recognized a customer charge comprised of a low customer charge and a volumetric rate better served conservation.

<sup>58</sup> OCC Ex. No. 5 (Gonzalez Direct Testimony) at 9-10, and Attachment WG-1.

The Commission should adhere to its own precedent and reverse its Order on rehearing and approve a more gradual move to an SFV rate design over a longer-term period of time.

**B. The Commission Erred By Approving A Rate Design That Includes An Increase To The Monthly Residential Customer Charge Without Providing Consumers Adequate Notice Of The SFV Rate Design Pursuant To R.C. 4909.18, R.C. 4909.19 And R.C. 4909.43.**

The Commission's Order unreasonably and unlawfully approved the SFV rate design despite the fact that the impact on customers' bills resulting from such rate design had not been sufficiently noticed pursuant to Ohio law. The notice requirements for an application for a traditional rate case and for an alternative rate case can be found under R.C. 4909.18, 4909.19 and 4909.43. In this case, the Company failed to provide consumers notice with sufficient detail of the residential rate design as approved by the Commission.

R.C. 4909.18 provides that, unless otherwise ordered by the commission, the public utility must file, along with its application to the commission, "[a] proposed notice for newspaper publication fully disclosing the substance of the application." And, irrespective of whether the utility is required to file such notice with the commission, R.C. 4909.19 provides that the utility must publish once a week for three consecutive weeks in newspapers of general circulation throughout the affected areas *the substance and prayer of its application*.<sup>59</sup> Duke provided the following notice to the mayors and legislative authorities of each municipality pursuant to R.C. 4909.43:

---

<sup>59</sup> R.C. 4909.19 (emphasis added).

Finally, DE-Ohio also proposes a new rate structure for delivery service that is not based upon the volume of gas delivered. Rather than allowing our annual delivery revenues to fluctuate with volumes flowed, we will compare our sales each year to a benchmark, which is the weather normalized level of sales approved by the Public Utilities Commission of Ohio in our most recent general gas rate case, adjusted for new customers added since that time. We will then compare our actual sales to this baseline, and provide customers a credit or charge to account for the difference.<sup>60</sup>

This notice describes a rate design that features a decoupling mechanism with annual true-ups which is substantially different than the residential SFV rate design that the Commission approved in its Order.<sup>61</sup>

Furthermore, the notice does not describe the impact that a change to the rate design would have on the customer charge. Under the Company's proposal the fixed customer charge was proposed to increase to \$15.00<sup>62</sup> from its current \$6.00<sup>63</sup> per month. The Commission approved a rate design that initially implements a \$15.00 fixed customer charge (through September 30, 2008),<sup>64</sup> increases it to \$20.25 per month (for the balance of the first year, and then increases the customer charge to \$25.33 per month thereafter.<sup>65</sup> These dramatic increases to the monthly fixed charge are not explained to consumers anywhere in the notices the Company provided. Therefore, the substance of the notice did not sufficiently explain to consumers Duke's rate design that the Commission approved.

---

<sup>60</sup> PFN (June 18, 2007) at 8-2.

<sup>61</sup> Order at 25.

<sup>62</sup> PFN Exhibit 3 (June 18, 2007) at Sheet No. 30.14.

<sup>63</sup> PFN Exhibit 3 (June 18, 2007) at Sheet No. 30.13.

<sup>64</sup> Order at 20.

<sup>65</sup> Order at 20 citing Joint Ex. No. 1 (Stipulation) at Exhibit 2.

This is analogous to the *Committee Against MRT, et.al. v. Public Util. Comm.* Case in which Cincinnati Bell Telephone through an R.C. 4909.18 rate proceeding sought to change the existing rate design for its residential and business customers. In an accompanying exhibit filed with the Commission, Cincinnati Bell described the nature and effect of this new method of charging customers, whereby rates would be based on a minimum fee plus a usage charge.<sup>66</sup> However, except for a general reference to the exhibits which did contain information on the proposed new service, no mention of the service was made in the notices themselves.<sup>67</sup> The Court stated:

From reading the notice published in their local newspapers, subscribers opposed to usage rates would not have known of the innovative plan being introduced by the utility, would not have had any reason to view the exhibits on file with the commission, nor would they have had any interest in participating in the hearings held before the commission. Thus, because of the insufficient notice, appellants were not only denied an opportunity to present evidence at the hearings before the commission opposing the selection of the experimental area for measured rate service, but also were denied the opportunity to challenge the new rate service itself.

We therefore conclude that Cincinnati Bell, in order to insure an opportunity for its subscribers to be heard, was required under R.C. 4909.19 to specifically mention its proposed measured rate service in its published notice regarding rate increases.

Duke's notice in this case was likewise insufficient, and the Commission should reverse its Order.

---

<sup>66</sup> *Committee Against MRT, et. al. v. Public Util. Comm.* (1977), 52 Ohio St. 2d 231. (In this Case, Duke's residential rate design is changing from a low customer charge with high volumetric charge to a high customer charge with a low volumetric charge; whereas, in *Committee Against MRT*, Cincinnati Bell was changing its rate design from a high or flat fixed charge and no volumetric charge to a low fixed charge and a volumetric charge.

<sup>67</sup> *Id.*

The Commission stated in its Order that, “27 witnesses testified at two local hearings in Cincinnati while four people took the stand at the Mason hearing.”<sup>68</sup> It must be noted that even all of this opposition and outcry was based on the original Company proposed customer charge increase from \$6.00 to \$15.00.<sup>69</sup> The Commission did not provide the public, as required under R.C. 4903.083, with public notice regarding the fact that the Commission might approve future customer charges of \$20.25 and \$25.33.<sup>70</sup>

The Ohio Supreme Court has stated that the purpose of R.C. 4909.18(E) is “to provide *any person*, firm, corporation, or association, *an opportunity to file an objection to the increase under R.C. 4909.19.*”<sup>71</sup> Without notice of the specific nature and dramatic increases to the customer charge incorporated in Duke’s residential rate design, the public does not have the statutory opportunity to participate in the proceedings.

**C. The Commission Erred By Approving An SFV Rate Design That Discourages Customer Conservation Efforts In Violation Of R.C. 4929.05 And R.C. 4905.70.**

The Commission’s approval of an SFV rate design is contrary to Ohio policy. The SFV rate design does not promote customer efforts to engage in conservation of natural gas, and instead would encourage increased usage of natural gas. Such a rate design is contrary to the State policy which states:

(A) It is the policy of this state to, throughout this state:

\* \* \*

---

<sup>68</sup> Order at 3.

<sup>69</sup> Duke Prefiling Notice at Current Tariff Sheet No. 30.13 (Customer Charge per month - \$6.00), and Duke Prefiling Notice at Proposed Tariff Sheet No. 30.14 (Customer Charge per month - \$15.00).

<sup>70</sup> Joint Ex. No. 1 (Stipulation) at Exhibit 2.

<sup>71</sup> *Committee Against MRT, et.al. v. Public Util. Comm.* (1977), 52 Ohio St. 2d 231, 234. (Emphasis added.)

- (4) Encourage innovation and market access for cost-effective supply-and demand-side natural gas services and goods;<sup>72</sup>

For a number of reasons, approval of an SFV rate design by the Commission impedes the development of DSM innovation in Ohio. For example, the SFV rate design: sends consumers the wrong price signal; will harm consumers who have invested in energy efficiency by extending the payback period; and will take away control that consumers have over their utility bills.

The Commission has a statutory duty to initiate programs that promote conservation. R.C. 4905.70 states:

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.

The SFV rate design serves the Company's limited cost recovery interests, but fails to promote conservation for the reasons discussed below. State Policy and statutory mandates direct the Commission to act such that the rate design influence has a positive effect on energy conservation.

The Commission has the responsibility to approve rates that are just and reasonable.<sup>73</sup> An SFV rate design does not meet the State policy of promoting energy efficiency<sup>74</sup> and violates the legislative mandate to the Commission to initiate programs to promote and encourage conservation.<sup>75</sup> In fact, the Commission has approved a sizeable amount of energy efficiency programs for Duke which are currently in place. It is

---

<sup>72</sup> R.C. 4929.02.

<sup>73</sup> R.C. 4909.18 and R.C. 4909.19.

<sup>74</sup> R.C. 4929.02(A)(4).

<sup>75</sup> R.C. 4905.70.

important that as part of the compact to make energy efficiency a success, that the Commission consider not only company incentives and revenues but also customer incentives to participate in programs. If customers invest in energy efficiency only to see their payback periods extended, this may have a chilling effect on continued investments in energy efficiency. Such an outcome is anathema to the intent of the law. Therefore, the SFV rate design results in the implementation of rates that are unjust and unreasonable, and the Commission should reverse its Order on rehearing.

**1. The SFV rate design sends the wrong price signal to consumers.**

The Commission's Order improperly states that a "levelized rate design sends better price signals to customers."<sup>76</sup> It is widely accepted that high natural gas prices generally send a signal to consumers that encourages conservation.<sup>77</sup> The SFV rate design contradicts that basic message because it decreases the volumetric rate while significantly increasing the fixed portion. Commission Centolella echoed this consideration by stating:

Experience shows that there is a significant price response to increases in volumetric charges, as evidenced by the recent steep reductions in average per customer consumption as gas cost increased. Given that customer charges are paid to provide access to gas service, it is reasonable to expect comparatively less price response with respect to increases in the customer charge.<sup>78</sup>

---

<sup>76</sup> Order at 19.

<sup>77</sup> Tr. Vol. I. at 160.

<sup>78</sup> Order at Opinion of Commission Paul A. Centolella Concurring in Part and Dissenting in Part page 2 of 4.

At a time when Duke's marginal costs for natural gas and energy prices generally are increasing, the SFV rate design sends the wrong price signal to customers,<sup>79</sup> because as consumers use more natural gas the per unit price decreases under the SFV design.<sup>80</sup> In fact, the highest usage customers (the top 35 percent),<sup>81</sup> will see a 6 percent to 21 percent decrease in their total bills from their current bills.<sup>82</sup> This is absolutely the wrong price signal to send consumers making decisions on the consumption of a precious natural resource.

The residential rate design plays an important role in the promotion of the energy efficiency programs in Duke's service territory. On cross-examination, Duke Witness Storck agreed that a rate design with a lower fixed customer charge and a higher volumetric rate would be the optimum rate design for the customer to achieve savings from its energy efficiency investments.

- Q. The most optimum opportunity for consumers to realize true savings from their energy efficiency investments would be a rate design in which the customer charge is set as low as possible and the company recovers more base revenues through a volumetric rate?
- A. That would probably be most for the customer, would be most benefit for the customer but not for the company \* \*
- \*<sup>83</sup>

As Duke admitted, the customer who would reap more savings from an investment in a high efficiency furnace would be the customer under the rate design that was structured with a lower fixed customer charge, such as \$6.00, and a higher volumetric charge as

---

<sup>79</sup> OCC Ex. No. 5 (Gonzalez Direct Testimony) at 14.

<sup>80</sup> Tr. Vol. I at 50; See also OCC Exhibit No. 5 (Gonzalez Direct Testimony) at 15.

<sup>81</sup> OCC Ex. No. 5 (Gonzalez Direct Testimony) at WG-2.

<sup>82</sup> OCC Ex. No. 5 (Gonzalez Direct Testimony) at 17.

<sup>83</sup> Tr. Vol. I at 30.

compared to the rate design with a higher fixed customer charge, such as \$15.00, \$20.25, or \$25.33 and a lower volumetric rate.<sup>84</sup> The Commission unreasonably ignored this analysis when approving the rate design in this case.

The SFV rate design fails to send the proper price signal to encourage conservation. The reasons for the Company's concern with the present rate design (consisting of a lower customer charge and a higher volumetric rate) has to do with collecting a fixed amount of revenue, no matter what the weather conditions and not the desire for the customers to conserve. It must be noted that rates are set by the Commission in order to permit the Company an "opportunity" to collect a fair rate of return -- rates are not designed to "guarantee" the utility anything.<sup>85</sup> However, the opportunity to develop a more stable revenue stream can be addressed by the implementation of decoupling mechanism with appropriate safeguards.

The only conclusion that the Commission should have reached in these cases is that the price signal from the SFV rate design is improper. Therefore, the Commission should reverse its Order approving the SFV rate design on rehearing because the resulting rates are unjust and unreasonable.

2. **SFV rate design does not remove the customers' disincentive to invest in energy efficiency because the SFV rate design extends the pay back period for energy efficiency investments made by consumers.**

The Commission in its approval of the residential rate design improperly looked at the conservation issue solely from the Company's perspective by stating, "that a rate

---

<sup>84</sup> Tr. Vol. I at 48.

<sup>85</sup> *Bluefield Water Works & Improvement Company v. Pub. Serv. Comm. of West Virginia*, 43S, Ct. 675, 692 (June 11, 1923) ("A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public \* \* \*; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.").

design that prevents a company from embracing energy conservation efforts is not in the public interest.”<sup>86</sup> The PUCO failed to acknowledge that in order for DSM programs to work, the Company needs the consumers to participate. That means that customers need incentives too. However, the PUCO has taken a giant step backwards by admitting, in its Order, that the SFV rate design “will modest[ly] increase the payback period for customer-initiated energy conservation measures.”<sup>87</sup>

The Commission’s decision to approve an SFV rate design is internally inconsistent with the following statement:

What we are attempting to do today is to provide appropriate incentives, through a rational pricing scheme, to encourage a reduction in the consumption of natural gas. By "rational", I mean a balanced approach that penalizes neither those whom have already squeezed the last cubic foot of natural gas from their budget, nor those whom might be inclined to "over-conserve".<sup>88</sup>

It is uncontroverted in the record, that those customers who have invested in additional home insulation and purchased more efficient furnaces and water heaters as a rational response to increasing gas costs (and in response to Ohio State policy) will see their investment returns diminished and payback periods lengthened as a result of an SFV rate design.<sup>89</sup> The SFV rate design discourages customer conservation. OCC argued that the SFV rate design approved by the Commission is sufficiently different to materially alter customer economies when contemplating an energy efficiency investment.<sup>90</sup>

---

<sup>86</sup> Order at 18.

<sup>87</sup> Order at 19.

<sup>88</sup> Order at Concurring Opinion of Chairman Alan R. Schriber page 1 of 3.

<sup>89</sup> OCC Ex. No. 5 (Gonzalez Direct Testimony) at 18.

<sup>90</sup> at Exhibit WG-3.

As argued by OCC, “[t]he SFV rate design does not maintain the customer incentive to conserve and further mutes the price signal to the customer.”<sup>91</sup> Therefore, a decoupling mechanism provides more of a “proper balance” between the Company and the consumer, rather than an SFV rate design which only addresses the Company’s need for revenue stabilization. The decoupling mechanism addresses the Company’s need for revenue stabilization and also rewards consumers who invest in energy efficiency. If the Commission believes that Duke is under-earning and has a disincentive to promote energy efficiency, then the PUCO should approve a rate design which incorporates an appropriate decoupling mechanism. That approach would benefit both customers and the Company. Therefore, it was unreasonable for the PUCO to adopt the more extreme SFV rate design, which only benefits the Company.

**3. The Commission’s contention that the SFV rate design encourages Company participation in energy conservation efforts disregarded the fact that Duke has an existing DSM program.**

In these cases, the Commission relies on an argument that lacks merit as a means to support its decision to move to an SFV rate design. The Commission stated:

In contrast, under the current pricing scheme, the gas company has no incentive to encourage conservation because those same usage sensitive rates might flow through to fixed costs as consumption grows, much to the utility’s advantage. Under the SFV, the fixed costs are covered and the company makes no money on the gas commodity. Therefore, the company might actually promote conservation more aggressively.<sup>92</sup>

The Commission’s argument that the SFV rate design reduces the Company’s disincentive to promote energy conservation is also without merit in these cases because

---

<sup>91</sup> OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 2.

<sup>92</sup> Order at Concurring Opinion of Chairman Alan R. Schriber page 2 of 3.

Duke already has a three-year DSM pilot program in place.<sup>93</sup> The DSM pilot program was approved by the Commission prior to Duke's filing its Application in this case, and thus was done prior to and without the necessity of an SFV rate design. In addition, Duke has been spending \$2 million annually on low-income weatherization, and through these cases has agreed to spend another \$1 million.<sup>94</sup> Therefore, the Company has no disincentive to promote energy efficiency that needs to be reduced. In fact, if the Company deemed that it needed an "energy efficiency incentive" through an SFV rate design that incentive was set by the Company itself with its proposed \$15 fixed customer charge in its Application. There was absolutely no need for the Commission to increase the fixed customer charge by an additional 66.6%.

Unfortunately, the SFV rate design approved by the Commission fails to offer customers the necessary incentives to invest in energy efficiency and in fact constitutes a disincentive. The cost per unit under the SFV rate design declines as consumption grows which sends the wrong price signal, and the customers who invest in energy efficiency investments face longer payback periods.<sup>95</sup> The Commission was faced with a decision to implement a rate design that has a negative impact on a customer's payback analysis, or a rate design that positively impacts the payback analysis. The Commission's Order does not adhere to the state policy in R.C. 4929.02 and R.C. 4905.70, because it failed to approve the rate design that included a smaller customer charge (\$6.00), a higher

---

<sup>93</sup> *In the Matter of the Application for Recovery of Costs, Lost Margin and Performance Incentives Associated with Implementation of Natural Gas Demand-Side Management Programs by the Cincinnati Gas and Electric Company*, Case No. 06-93-GA-UNC, Amended Application, (August 16, 2006), See also OCC Ex. No. 5 (Gonzalez Direct Testimony) at 12-13. (Duke's DSM Program is designed to reduce the level of usage by, at a minimum, .75 percent to two percent of verified annual energy reductions as a result of implementing the Company's comprehensive energy efficiency programs.).

<sup>94</sup> Joint Ex. No. 1 (Stipulation) at 12, ¶12.

<sup>95</sup> Tr. Vol. I at 50, 58.

000037

volumetric rate, and a decoupling mechanism with appropriate safeguards. Therefore, the residential rate design as approved by the Commission, in these cases, is unjust and unreasonable because it is harmful to consumers and violates state law and should; therefore, be reversed by the Commission on rehearing.

**D. The Commission Erred When It Failed To Comply With The Requirements Of R.C. 4903.09, And Provide Specific Findings Of Fact And Written Opinions That Were Supported By Record Evidence.<sup>96</sup>**

**1. The record supports implementation of an SFV rate design as a pilot.**

The Commission has admitted that the impacts of the dramatic change in residential rate design on conservation and low income consumers were unknown.

Chairman Schriber stated:

All told it is important that we arrive at a decision as expeditiously as possible. I believe that over the years the lesson to be learned is that we can never know with absolute certainty all of the facts and all of the possible outcomes.<sup>97</sup>

It is unclear with such an admission by the Chairman, why the Commission did not first implement a pilot program before undertaking such a drastic policy change..

At the April 23, 2008 PUCO meeting, several Commissioners expressed concern about the lack of evidence in the record regarding the effects of an SFV rate design on low income users and conservation. Worried about “some customers who will inevitably be impacted quite negatively and potentially see substantial, double digit rate increases[,]” Commissioner Centolella stated:

---

<sup>96</sup> *Tongren v. Pub. Util. Comm.*, (1999) 85 Ohio St. 3d 87.

<sup>97</sup> Order at Concurring Opinion of Chairman Alan R. Schriber page 3 of 3.

I think it would be certainly helpful to the Commission for the Company to file in this case data showing for different deciles \*  
\*\* what the sales figures actually are for residential customers, so that we can take a look at what those bill impacts are going to be, both for residential customers as a whole and also for some breakdown of low income customers, either by PIPP or HEAP or some combination thereof, depending on what the Company has the data for, so that we can actually see what those impacts are and can look at what alternatives -- what alternative approaches might have in terms of those impacts, because there's certainly going to be some customers who may be on fixed incomes for whom that impact could be substantial.<sup>98</sup>

Echoing Commissioner Centolella's concern over a lack of evidence in the record regarding the effects of SFV, Commissioner Roberto stated:

I do not disagree with Commissioner Centolella in the least, that externalities are incredibly important. **We do not have good evidence in this record**, and I would urge in future cases that we should have some degree of information in front of us so that we can try to account for those externalities. Those externalities, I am honestly not sure that we get a better result by going to decoupling or straight fixed variable, but in this case, I don't have the information in front of me to make a judgment on that." <sup>99</sup> \* \* \*

A downside of straight fixed variable is certainly rate shock, and I am concerned with that. And I would concur with Commissioner Centolella that we do not have in our record information that would allow me to assess the impacts of the required rate distribution- - redistribution on that volume of those low volume users in the lowest percentile of usage. And I would really like to have that kind of information in front of us as we weigh this.<sup>100</sup>

\* \* \*

While philosophically, the straight fixed variable is appropriate, from my perspective, that is with the caution that we need to be sensitive to the rate impact and the rate shock. **And we do not have in front of us adequate information to make that judgment right now.** And I do urge that we need to be able to

---

<sup>98</sup> Attachment, Real Player Video of April 23, 2008 PUCO Meeting at 11 minutes 20 seconds. (Emphasis added).

<sup>99</sup> Id. at 29 minutes 25 seconds. (Emphasis added).

<sup>100</sup> Id. at 32 minutes 15 seconds. (Emphasis added).

**understand, on the record, with the record before us, the actual impacts for high end users and low end users \* \* \* .<sup>101</sup>**

\* \* \*

Specifically regarding the lack of evidence in the record about the effects of SFV on conservation, Commissioner Roberto stated:

\* \* \* As a policy matter, I would stand strongly behind a conservation program -- any way that we can structure rates to lead to conservation and efficient use of energy. Some might suggest that having the high volume users subsidize low volume users would lead to that. I would disagree, because **the information that we have in front of us does not link high volume usage to inefficient usage. We simply don't know.** When we look at our PIPP users, for instance, we see overall increased usage. That does not suggest to me that our PIPP customers are making poor choices. It suggests possibly to me that our housing stock for our PIPP customers is not affording them the ability to make energy conservation choices.

**Now, I don't have evidence in front of me that would support either of those conclusions, that our PIPP customers make bad choices or that they have poor housing stock. That is not in the record. I can't make that judgment.** With that in front of me, I'm going to try to find a system that has the closest allocation of costs as best we have them in front of us."<sup>102</sup>

\* \* \*

Commission Chairman Alan Schriber also admitted that the Commission was uncertain of the impacts of SFV, stating:

If you want to start making a list of externalities, you will never get to the end, okay? **And we don't even know, we can't even imagine, the externalities that are going to occur.** And when it comes to internalizing the externalities, we can't even imagine who is going to be internalizing them or how. I mean, that's up for grabs and its down the road and it will never -- that's a process that's never going to end as you can imagine. Externalities will always be there -- you improve one -- [and] pick up one somewhere else, that's just the nature of general equilibrium; it keeps going on and on and on. So, externalities -- it's a problem, but you know,

---

<sup>101</sup> Id. at 58 minutes 18 seconds. (Emphasis added).

<sup>102</sup> Id at 30 minutes 21 seconds. (Emphasis added).

we have to begin somewhere, and I think straight fixed variable is a rational place to begin.

However, we have to think of the income effects, and we've all agreed, we are not quite sure of the income impacts of straight fixed variable.<sup>103</sup>

There are examples of a more deliberate and more openly debated policy changes that the Commission undertook as pilot. One example is the manner in which residential Choice Programs have been implemented. Even now, over 10 years after the first programs were put in place as pilots,<sup>104</sup> the Choice Programs are still governed by the ultimate consumer protection, that the Commission could make any changes or modifications as needed.<sup>105</sup> The Choice Programs were developed over a period of years with all Stakeholders being able to participate in an open process. Moreover, each LDC individually addressed Customer Choice, and any one company plan was not forced on all others. The Staff and the Commission recognized the magnitude of the changes being proposed in the Choice Programs and dealt with the issue accordingly.

Another example is the implementation of a Wholesale Auction. Despite the fact that virtually all stakeholders have declared the wholesale auction for Dominion East Ohio ("DEO") to be a success, the Staff has been hesitant to impose a similar wholesale

---

<sup>103</sup> Id. at 47 minutes 11 seconds. (Emphasis added.).

<sup>104</sup> *In the Matter of the Commission's Investigation of the Customer Choice Program of Columbia Gas of Ohio, Inc.*, Case No. 98-593-GA-COI; *In the Matter of the Commission's Investigation of the Energy Choice Program of the East Ohio Gas Company*, Case No. 98-594-GA-COI; *In the Matter of the Commission's Investigation of the Customer Choice Program of the Cincinnati Gas & Electric Company*, Case No. 98-595-GA-COI; *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Statewide Expansion of the Columbia Customer Choice Program*, Case No. 98-549-GA-ATA; *In the Matter of the Application of the East Ohio Gas Company for Authority to Implement Two New Transportation Services, for Approval of a New Pooling Agreement, and for Approval of a Revised Transportation Migration Rider*, Case No. 96-1019-GA-ATA, Finding and Order (June 19, 1991).

<sup>105</sup> Id. See also Order at Concurring Opinion of Chairman Alan R. Schriber at 3 ("All told, it is important that we arrive at a decision as expeditiously as possible. I believe that over the years the lesson to be learned is that we can never know with one hundred percent certainty all of the facts and all of the possible outcomes. This is precisely why the law has provided this Commission with the ability to react to adverse outcomes should they arise. This is the ultimate consumer protection.").

auction on other large Ohio LDCs.<sup>106</sup> The Wholesale Auction process for DEO was considered a significant policy change in how LDCs purchase gas for sales customers. The DEO Wholesale Auction process took well over 13 months and was open to all Stakeholders.<sup>107</sup>

In sharp contrast with the current proceeding, the Choice Program and Wholesale Auction were both the product of long deliberate processes that included participation by all Stakeholders **before** any decision was made. The deliberate nature of this review and implementation is magnified in this case as the PUCO did not merely impose the Customer Choice Program or the Wholesale Auction on Duke. Instead, in this case, Commission agreed to merely establish a process to discuss the Wholesale Auction issue. This begs the question of why the PUCO would be so deliberate with the Choice Program and Wholesale Auction -- programs that have resulted in quantifiable benefits for consumers -- and yet is so fast to act on the SFV rate design -- a change that produces no quantifiable benefits only for the Company and results in detriments for low-use low income customers.

Without an adequate record in this case, the Company could not and did not meet its statutory burden of proof and therefore, the SFV rate design should not have been approved. The more reasonable and prudent course of action for the Commission - - if it is insistent on adopting the SFV rate design - - would be to implement the SFV rate design as a pilot program with specific reporting requirement placed upon Duke to assure

---

<sup>106</sup> *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a Plan to Restructure its Commodity Service Function*, Case No. 05-474-GA-ATA, Post-Auction Report of Dominion East Ohio Phase 1 Supply Auction, (August 29, 2006) at 4-5.

<sup>107</sup> *Id.* Opinion and Order (May 26, 2006).

all Commission inquiries and customer impacts are adequately evaluated before fully accepting the SFV rate design.

**2. The record fails to support the Order that low-income customers benefit from an SFV rate design**

The fact that there is an adverse affect on low-use customers as a result of implementation of the SFV rate design in these cases is without question. The Commission in its Order stated:

We recognize that, with this change to rate design, as with any change, there will be some customers who will be better off and some customers who will be worse off, as compared with the existing rate design. The levelized rate design will impact low usage customers more, since they have not been paying the entirety of their fixed costs under the existing rate design. Higher use customers who have been overpaying their fixed costs will actually experience a rate reduction.<sup>108</sup>

What is troublesome is that that the Commission in spite of the recognition of this adverse impact on low-use customers, has failed to explain why as a policy matter it is just and reasonable to have low volume users subsidize high volume users. The goal of rate design should be to eliminate inter-class subsidies to the maximum extent possible not create them, but if a subsidy is unavoidable, as a policy matter the rate design should be structured such that the high users be asked to subsidize low users.

While the record is clear as to the impact that the SFV rate design has on low-use customers; however, the actual impact that an SFV rate design will have upon Duke's low-income customers is unknown and debatable. The Commission acknowledged that:

---

<sup>108</sup> Order at 19.

000093

with this change in rate design, as with any change, there will be some customers who will be better off and some customers who will be worse off, as compared with the existing rate design.<sup>109</sup>

The record in this case, does not answer the question of how the SFV rate design impacts the low-income customer. It would seem axiomatic that such a fundamental question would be fully explored and analyzed prior to approving such a dramatic change in policy. The SFV rate design approved by the Commission is bad news for Duke's low-use low-income customers who will now be forced to subsidize Duke's larger use customers. The SFV rate design has the effect of making "the distribution cost per Ccf that a customer faces \* \* \* higher at lower consumption levels than at higher consumption levels."<sup>110</sup> Such a rate design is inherently unfair to low-usage low-income customers, who because of their limited means, likely live in smaller dwellings, such as apartments, and use less natural gas than wealthy homeowners with large homes. The SFV rate design is not only unfair to these customers with small incomes, it is extremely insensitive in its timing; coming on the heels of several years of belt-tightening by America's working poor, amidst a nationwide mortgage foreclosure crisis and with the country facing a looming recession.

Rather than recognizing SFV as injurious to Duke's low-income customers, Duke and the Staff witness assert that an SFV rate design is beneficial.<sup>111</sup> The Commission accepts in its Order Duke and the Staff's argument based upon the erroneous assumption

---

<sup>109</sup> Order at 19.

<sup>110</sup> OCC Ex. No. 5 (Gonzalez Direct Testimony) at 14, See also Staff Ex. No. 3 (Puican Direct Testimony) at 5.

<sup>111</sup> Staff Ex. No. 3 (Puican Direct Testimony) at 5-6. (Staff witness Puican stated, "Because high-usage customers will benefit from the SFV rate design, and low-income customers are more likely to be high usage customers, it is reasonable to conclude that low-income customers are more likely to actually benefit from SFV.")

that Duke's PIPP customers, many of whom are high energy users, are representative of all of Duke's low-income customers.<sup>112</sup> However, the record reflects that PIPP customers constitute only 23 percent of the low-income households in Hamilton County, Duke's largest county served, and only about 10 percent of the total low income customers purchasing gas from Duke.<sup>113</sup> The parties agree that PIPP customers have demonstrated higher use of energy than non-PIPP customers, and also that low-income customers are more likely to rent than own their homes, but the consensus ends there.<sup>114</sup>

The Commission erroneously stated that: "OCC and OPAE insist that the levelized rates will harm low-income customers and that the PIPP customer data is not indicative of other Duke low-income customers, but offered no data to support this contention (OCC Br. at 46-53; OPAE Br. at 4,8)."<sup>115</sup> In actuality, OCC offered into evidence the latest Impact Evaluation by the Ohio Department of Development's Home Weatherization Assistance Program ("HWAP"), which found that PIPP weatherization participants "used 20 percent more energy than non PIPP [low- income] participants."<sup>116</sup> In fact, it was the Company and Staff who offered no evidence to support their assertion that PIPP customers were an appropriate proxy for low-income usage.

Duke chose PIPP customers as a proxy for low income customers with little regard for the accuracy of such a choice. Duke examined only ten houses, via the Hamilton County Auditor's website, as the basis for the Company's assertions regarding

---

<sup>112</sup> Order at 15.

<sup>113</sup> OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 4-6. There are 66,000 low income Duke customers in Hamilton County and over 100,000 low income customers in Duke's service territory. Tr. Vol. I at 221-222.

<sup>114</sup> OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 5-7; Staff Ex. No. 3 (Puican Direct Testimony) at 5.

<sup>115</sup> Order at 15.

<sup>116</sup> OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 6.

the characteristics of PIPP customer housing.<sup>117</sup> With ten thousand households participating in PIPP in Duke service territory, the Company offers no explanation regarding how it can reasonably hold out the “top ten” PIPP customers’ homes as being a fair representation of the thousands of PIPP customers’ housing stock. The Company witness acknowledged that there was no characteristic analysis performed on the housing stock of the larger, low-income population.<sup>118</sup> Therefore, it is unknown to the Company whether or not the inadequate sample used to evaluate PIPP participant housing is at all indicative or similar to the housing characteristics of the low-income population in general.

In addition, Duke witness Smith stated that he has no idea what percentage of the total low-income customer base is represented by PIPP customers.<sup>119</sup> Without knowing the percentage of total low-income customer base represented by PIPP participants, the Commission cannot reasonably proffer this group of customers as being representative of a customer group of unknown size. Further, it is highly likely that those who are low income/low energy users may be eligible for one or more assistance programs, including PIPP, but choose not to participate in them due to the fact that their usage is low enough to be affordable under the former rate design.

The facts in evidence show that PIPP customers’ usage is not a good proxy for low-income customers’ usage; therefore, an SFV rate design is harmful to low-use and low-income customers who in actuality will subsidize Duke’s larger use customers. Therefore, the Commission should reverse its Order on rehearing.

---

<sup>117</sup> Tr. Vol. I at 82-83.

<sup>118</sup> Tr. Vol. I at 83.

<sup>119</sup> Tr. Vol. I at 81.

**3. The record does not support reliance on budget billing to support adopting an SFV rate design.**

The Commission unreasonably approved the SFV rate design because of its stabilizing effect on customer billings. The Commission stated:

The levelized rate design however, has the added benefit of producing more stable customer bills throughout all seasons because fixed costs will be recovered evenly throughout the year.

However, the record does not support the assumption that customers are interested in the stabilizing effect that the SFV rate design offers them. In fact, the argument that a larger fixed charge will levelize customer bills is irrelevant and without merit. Neither the Company nor the Staff<sup>120</sup> offered any valid studies to support the belief that consumers are interested in a forced levelized fixed charge. On cross-examination Duke witness Smith offered what was apparently the only study that was performed:

Q. My question is, Mr. Smith, did you look at any studies, opinion studies, where customers evidence a preference for fixed prices, yes or no?

A. Yes.

Q. Okay. And what was that study?

A. My own personal family use. I prefer cell phones with fixed minutes, fixed charge, fixed internet service.

Q. And you are, of course, representative of all residential customers?

A. I am certainly a residential customer, yes.<sup>121</sup>

---

<sup>120</sup> Tr. Vol. I. at 240.

<sup>121</sup> Tr. Vol. I at 188, and 196.

A “study” with one data point, regarding a service where usage has no seasonality, is not a statistically significant study. This is a preference, not a study and Duke failed to maintain its burden of proof.

Unfortunately, the Commission was all too willing to accept the Company’s argument in support of its position. The Commission stated: “Customers are accustomed to fixed monthly bills for numerous other services, such as telephone, water, trash, internet and cable.”<sup>122</sup> These services that the Commission relies upon for fixed charge billing examples do not involve the consumption of a precious natural resource except water, and Ohio water utilities still rely upon a rate design that incorporates a large volumetric based charge. In the recent Ohio American Water case, the PUCO Staff refused to support the increase to the customer charge requested by the Company.<sup>123</sup> In fact, instead of an increase, the PUCO Staff has proposed the current customer charge be decreased by 23.4 percent.<sup>124</sup>

The Commission Order further misses the mark regarding budget billing.

Chairman Schriber stated:

Finally, those who argue that inadequate price signals are the biggest issue need only look at the impact of budget billing. What signal is being sent when the bill each month is the same regardless of consumption? Yet, is anyone recommending the elimination of budget billing?<sup>125</sup>

---

<sup>122</sup> Order at 18.

<sup>123</sup> *In the Matter of the Application of Ohio-American Water Company to Increase Its Rates For Water and Sewer Service Provided to Its Entire Service Area*, Case No. 07-1112-WS-AIR, Staff Report at 32 (May 28, 2008). (The Company’s current customer charge was \$9.41 and the Company proposed \$10.59).

<sup>124</sup> *Id.* at 35. The PUCO Staff has proposed a \$7.21 customer charge, or a 23.4 percent reduction (\$9.41 - \$7.21/\$9.41).

<sup>125</sup> Order at Concurring Opinion of Chairman Alan R. Schriber page 2 of 3.

What is missing in the Chairman's analysis is that in the budget billing scenario, unfettered consumption will be remedied through the true-up mechanism. The SFV rate design does not include a true-up mechanism. Therefore, the concern that a customer is getting the wrong price signal when being sent the same bill each month, regardless of consumption, is legitimate for the SFV rate design.

It should further be pointed out that currently only approximately 20 percent of Duke's natural gas residential customers have chosen to participate in Duke's budget billing program.<sup>126</sup> The evidence was uncontroverted and suggests that Duke's customers do not initiate budget billing because the natural leveling effect of their total energy bills, the gas and electric, form sort of a natural budget billing plan in itself.<sup>127</sup> The fact that the vast majority (80 percent) of Duke's natural gas customers have not chosen the budget billing option is a revealed preference and, should be significant evidence to support the fact that they are not particularly interested in a levelized bill. The Commission should not force customers who have rejected budget billing to be forced to accept it in the form of a SFV rate design and then be told that this form of a levelized billing is a benefit, contrary to their own preferences.

## V. CONCLUSION

As demonstrated above, the Commission erred by approving a Straight Fixed Variable rate design for several reasons. First, the extraordinarily large increase in the customer monthly charge produced by the SFV rate design unreasonably violates the Commission's prior precedent and policy of gradualism. Second, the Commission's

---

<sup>126</sup> Tr. Vol. I at 38.

<sup>127</sup> Tr. Vol. I at 38.

Order erred by unreasonably and unlawfully authorizing a residential rate design with customer charge increases that exceed the notice provided consumers pursuant to R.C. 4903.083, R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43. Third, the Commission erred by approving an SFV rate design that discourages conservation in violation of R.C. 4929.02 and R.C. 4905.70. SFV sends the wrong price signals to Duke's consumers, extends the pay back period of consumer investments in energy efficiency, and thereby, does not remove customer disincentives to invest in energy efficiency. In addition, because Duke has an existing Demand Side Management program, SFV provides no additional incentive to Duke to participate in energy conservation programs. Fourth, the Commission erred when, in violation of R.C. 4903.09, it failed to provide findings of fact and written opinions supported by the evidence in the record. The record does not support the Commission's conclusions that low-income customers benefit from an SFV rate design, that budget billing supports an SFV rate design, or that SFV should be implemented, if at all, in any way other than a pilot program. For these reasons, the Commission should grant OCC's Application for Rehearing.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL

/s/ Larry S. Sauer

Larry S. Sauer, Counsel of Record

Joseph P. Serio

Michael E. Idzkowski

Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

614-466-8574 (Telephone)

614-466-9475 (Facsimile)

[sauer@occ.state.oh.us](mailto:sauer@occ.state.oh.us)

[serio@occ.state.oh.us](mailto:serio@occ.state.oh.us)

[idzkowski@occ.state.oh.us](mailto:idzkowski@occ.state.oh.us)

**000101**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing *Application for Rehearing by the Office of the Ohio Consumers' Counsel* has been served upon the below-named counsel via Electronic Mail this 27 day of June 2008.

/s/ Larry S. Sauer  
Larry S. Sauer  
Assistant Consumers' Counsel

**Paul A. Colbert**  
Associate General Counsel  
Duke Energy Ohio  
139 Fourth Street, Room 25 ATII  
Cincinnati, Ohio 45201

**Thomas Lindgren**  
**William Wright**  
**Sarah Parrot**  
Attorney General's Office  
Public Utilities Section  
180 East Broad Street, 9<sup>th</sup> Floor  
Columbus, Ohio 43215

**David F. Boehm**  
**Michael L. Kurtz**  
**Kurt J. Boehm**  
Boehm, Kutz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202-4454

**David Rinebolt**  
Ohio Partners for Affordable Energy  
231 West Lime Street  
P.O. Box 1793  
Findlay, Ohio 45839-1793

**John M. Dosker**  
General Counsel  
Stand Energy Corporation  
1077 Celestial Street, Suite 110  
Cincinnati, Ohio 45202-1629

**Sally W. Bloomfield**  
**Thomas J. O'Brien**  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215-4219

**John W. Bentine**  
**Mark S. Yurick**  
Chester, Willcox & Saxbe LLP  
65 East State Street, Suite 1000  
Columbus, Ohio 43215-4213

**Mary W. Christensen**  
Christensen Christensen Donchatz Kettlewell &  
Owens, LLC  
100 East Campus View Blvd. Suite 360  
Columbus Ohio 43235

**Howard Petricoff**  
Vorys, Sater, Seymour and Pease LLP  
52 E. Gay Street  
Columbus Ohio 43215

**Stephen M. Howard**  
Vorys Sater Seymour and Pease LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008

**W. Jonathan Airey**  
Gregory D. Russell  
Vorys Sater Seymour and Pease LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008

**Todd M. Smith**  
Schwarzwald & McNair LLP  
616 Penton Media Building  
1300 East Ninth Street  
Cleveland, Ohio 44114

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**6/27/2008 3:50:22 PM**

**in**

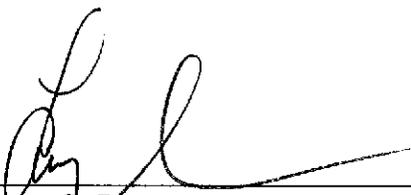
**Case No(s). 07-0589-GA-AIR, 07-0590-GA-ALT, 07-0591-GA-AAM**

**Summary: Application Application for Rehearing and Attachment by the Office of the Ohio Consumers' Counsel electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.**

**000104**

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Merit Brief on behalf of the Office of the Ohio Consumers' Counsel was served by regular U.S. mail, postage prepaid upon the counsel listed below this 15th day of December, 2008.

  
\_\_\_\_\_  
Larry S. Sauer  
Assistant Consumers' Counsel

**SERVICE NOTICE**

Colleen L. Mooney, Counsel of Record  
David C. Rinebolt  
Ohio Partners for Affordable Energy  
1431 Mulford Road  
Columbus, Ohio 43212

William Wright  
Public Utilities Commission of Ohio  
180 East Broad Street, 9<sup>th</sup> Floor  
Columbus, Ohio 43215-3793

Paul A. Colbert  
Rocco D'Ascenzo  
Amy Spiller  
Elizabeth Watts  
Duke Energy Ohio, Inc.  
155 East Broad Street, 21<sup>st</sup> Floor  
Columbus, Ohio 43215