

**In The  
Supreme Court of Ohio**

**The Office of the Ohio Consumers'  
Counsel,**

and

**Ohio Partners for Affordable Energy,**

Appellants,

v.

**The Public Utilities Commission of  
Ohio,**

Appellee.

Case No. 08-1837

On appeal from the Public Utilities  
Commission of Ohio, Case Nos. 07-589-  
GA-AIR, 07-590-GA-ALT, and 07-591-  
GA-AAM, *In the Matter of the  
Application of Duke Energy Ohio Inc.  
for an increase in Gas Rates.*

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

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**MERIT BRIEF  
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**INTRODUCTION**

Rate design has always been an area where the Public Utilities Commission of Ohio (Commission) has unique experience. It has been designing, measuring the effectiveness of, and adjusting rates to meet changing circumstances since 1912. That is what happened in this case. The Commission implemented a better way to collect the costs of providing utility service. That method is called Straight Fixed Variable (hereinafter “levelized”) rate design.

The levelized rate design recognizes one simple but important fact that the prior system did not – most of the costs of distributing natural gas to customers are the same

winter and summer. These “fixed” costs do not vary with the amount of gas sold, and the levelized rate design recovers these fixed costs quite rationally through a fixed charge that does not vary from winter to summer. This method properly matches costs both with the customer who causes them and the time when the cost is incurred, while levelizing cost recovery throughout the year and mitigating winter heating bills. It is demonstrably superior and more economically efficient than the historical rate design that principally collected the costs of operating and maintaining the pipelines on a “volumetric” basis. Because recovery of fixed costs was formerly dependent upon the level of gas sales, the utility experienced wildly fluctuating revenues over the year, increasing its need for working capital artificially while customers perceived incorrect price signals.

Increasing sales of gas masked or dampened some of the negative consequences of the old rate design. Declining gas usage has highlighted the inefficiencies of the old system, and resulted in persistent revenue erosion that could threaten the utility’s capability to provide ongoing adequate and reliable service. By holding the utility’s opportunity to recover its reasonable, Commission-authorized costs hostage to fluctuations in natural gas sales, historical rates have served as a significant disincentive for the gas utility to actively promote and fund conservation and energy efficiency programs that benefit their customers. The facts dictated the need for a rate change, and the Commission chose a straight-forward rate design that addresses this problematic situation and carefully balances utility and customer interests.

The Commission should be affirmed.

## STATEMENT OF THE FACTS AND CASE

Unlike most base rate appeals where the Court is asked to review a myriad of issues, this case presents a narrow, technical challenge to how the Commission designs rates for residential gas distribution service. There is no dispute that Duke Energy Ohio, Inc. (Duke) needs (and under Ohio law is entitled to) a rate increase, nor is there any opposition to the amount of the increase. All parties, including the Office of the Ohio Consumers' Counsel (OCC) and Ohio Partners for Affordable Energy (OPAE), even agree upon what portion of the increase should be collected from residential customers.

Duke filed an application to increase its gas rates that had been in effect since May of 2002. Direct Test. of P. Smith at 3, Sec. Supp. at 2.<sup>1</sup> It sought an increase of 5.71 percent, or approximately \$34 million. Approximately 15 percent, or \$6 million of the revenue deficiency, was attributable to a net decline in average sales per customer. *Id.* at 4, Sec. Supp. at 3. Duke has experienced real financial impacts associated with this significant revenue erosion. Its gas operations were projected to earn a return of 5.62 percent, well below the 9.27 percent return authorized by the Commission in 2002. *Id.* at 3, Sec. Supp. at 2.

As a result of extensive negotiations among all parties, a settlement agreement was executed by all parties, including OCC and OPAE, and filed on February 28, 2008. All

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<sup>1</sup> References to the appendix of appellant OCC are denoted "OCC App. at \_\_\_\_;" references to the supplement of appellant OCC are denoted "OCC Supp. at \_\_\_\_;" references to the appendix of appellant OPAE are denoted "OPAE App. at \_\_\_\_;" references to appellee's appendix attached hereto are "App. at \_\_\_\_;" and, references to appellee's second supplement are denoted "Sec. Supp. at \_\_\_\_."

parties agreed to a much smaller overall rate increase, approximately 3 percent, and a revenue requirement of \$18.2 million, well below that originally sought by Duke in its application. *See In the Matter of the Application of Duke Energy Ohio Inc. for an Increase in Gas Rates*, Case Nos. 07-589-GA-AIR, *et al.* (hereinafter *In re Duke Energy Ohio, Inc.*) (Opinion and Order at 6-12) (May 28, 2008), OPAE App. at 20-26, OCC App. at 19-25); *see also* Settlement Supporting Test. of P. Smith at 5-9, Sec. Supp. at 29-33.

The settlement agreement expressly carved out residential rate design for litigation. To understand what this means, it is helpful to understand the makeup of a monthly gas bill. A residential customer's bill principally contains two components – a base rate component and a commodity (cost of the natural gas itself) component. The rate design issue before the Court applies only to the base rate portion that constitutes a relatively small (20-25 percent) part of the total monthly bill. Staff Report of Investigation at 30-31, OCC Supp. at 183D-183E. The costs of providing natural gas service (piping, meters, etc.) comprise the remaining 80 percent, and are largely fixed in nature and uniform among residential customers. *See, e.g.* Tr. I at 159, Sec. Supp. at 45; Settlement Supporting Test. of P. Smith at 10-11, Sec. Supp. at 34-35. Historical gas rate design has featured a relatively low, fixed customer charge and a higher variable or usage charge that is collected based upon the residential customer's actual gas usage. *Id.* Although the costs of providing natural gas distribution service are almost exclusively fixed in nature, the utility's recovery of such costs has been largely dependent upon the level of gas sales to its customers. *In re Duke Energy Ohio, Inc.* (Staff Report of Investigation at 31)

(December 20, 2007), OCC Supp. at 183E. High gas prices and declining gas sales have threatened Duke's ability to recover its reasonable costs of serving customers. *Id.*

Average residential gas usage has consistently declined or remained flat since 1990. *Id.* at 30-31, 46-47, OCC Supp. at 183D-183E, Sec. Supp. at 7-8. Faced with deteriorating revenues, Duke proposed a "decoupling" rider (Rider SD) to better recover its fixed costs and stabilize its financial situation. As proposed, Rider SD would be adjusted annually to account for over- or under-recovery of such costs. *Id.* at 46, Sec. Supp. at 7. Alternatively, the Commission's Staff chose to address the situation through a change in rate structure that included a higher fixed charge and a lower volumetric rate to be phased in over a two-year period. *Id.* at 31-33, 48, OCC Supp. at 183E-183G, Sec. Supp. at 9. Over two days of hearings in March of 2008, the Commission heard testimony from nine witnesses regarding rate design.

The Commission approved the settlement agreement and the levelized rate design proposed by its Staff. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 16-19) (May 28, 2008), OPAE App. at 30-33, OCC App. at 29-32. The Commission found this rate design to be superior to the Rider SD proposed by Duke because it embodied important ratemaking principles of cost causation and gradualism, and because it spreads recovery of costs more evenly throughout the year, serving to moderate winter heating bills. *Id.* at 18-20, OPAE App. at 32-34, OCC App. at 31-33. Under this rate design, the higher fixed distribution charge is substantially offset by a reduced volumetric base-rate charge for most residential customers and fully offset for Duke's average residential gas users who

should see little or no change in their monthly bills.<sup>2</sup> The Commission found the levelized design to be reasonable as part of an overall package with many benefits for residential customers. *Id.* This package included Duke's annual \$3 million commitment to fund energy efficiency programs. To assist low-income customers, the Commission also directed Duke to expand the size of its low-income pilot program to 10,000 customers (from 5,000) who are eligible to receive monthly rate discounts. *Id.* at 19-20, OPAE App. at 33-34, OCC App. at 32-33. Finally, the Commission ordered Duke to initially impose a smaller fixed charge, \$15.00, delaying full implementation of the new residential rate design by several months. *Id.* at 20, OPAE App. at 34, OCC App. at 33.

OCC and OPAE sought rehearing which was denied by the Commission. *In re Duke Energy Ohio, Inc.* (Entry on Rehearing) (July 23, 2008), OPAE App. at 8-14, OCC App. at 7-13. This appeal ensued.

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<sup>2</sup> Under the levelized rate design, the total amount paid over the course of a year would be the same for the average customer, because the higher fixed distribution charge is offset by a lower volumetric charge.

## ARGUMENT

### Proposition of Law No. I:

**Developing utility rates requires an exercise of judgment and discretion by the Public Utilities Commission of Ohio. *General Motors Corp. v. Pub. Util. Comm'n*, 47 Ohio St. 2d 58, 351 N.E.2d 183 (1976). The Commission's exercise of its considerable discretion in rate design matters will not be reversed unless shown to be against the manifest weight of the evidence. *Citywide Coalition for Utility Reform v. Pub. Util. Comm'n*, 67 Ohio St. 3d 531, 620 N.E.2d 832 (1993).**

The Court has recognized the broad and plenary authority delegated to the Commission to establish utility rates and terms of service. *See, e.g., Kazmaier Supermarkets, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 573 N.E.2d 655 (1991). Rate-making is not, nor has it ever been, an exact science.<sup>3</sup> It requires an application of seasoned and studied judgment. Where the Commission applies its discretion and judgment in a manner consistent with the evidence before it, it acts lawfully under its statutory ratemaking authority. Ohio Rev. Code Ann. § 4909.15 (Anderson 2009), OPAE App. at 50-53; *General Motors Corp. v. Pub. Util. Comm'n*, 47 Ohio St. 2d 58, 351 N.E.2d 183 (1976). The Commission's judgment and expertise in rate design matters should not be disturbed unless it is shown to be against the manifest weight of the evidence. *Citywide Coalition, supra*.

OCC and OPAE bear the burden of showing that the Commission's decision is against the manifest weight of the evidence or clearly unsupported by the record. *See,*

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<sup>3</sup> The United States Supreme Court has long recognized that rate design is "not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Colorado Interstate Co. v. FPC*, 324 U.S. 581, 589 (1945).

*e.g.*, *Ohio Partners for Affordable Energy v. Pub. Util. Comm'n*, 115 Ohio St. 3d 208, 210, 874 N.E.2d 764, 767 (2007); *Monongahela Power Co. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 571, 820 N.E.2d 921 (2004). There is ample record evidence supporting both the Commission's decision to "rethink" how it designs natural gas rates and its adoption of the levelized rate design. Appellants have not sustained their heavy burden.<sup>4</sup>

Despite the fact that most Duke residential customers will benefit under the levelized rate design, both OCC and OPAE oppose it, without regard to the ongoing financial consequences to Duke. The Commission's adoption of this rate design *does not* change the *overall amount* to be collected from residential customers; rather, it affects only how allowable revenues will be collected from customers within that class.<sup>5</sup> Here, the Commission was presented with uncontroverted evidence that showed Duke's existing rates were inadequate to recover its costs of serving residential customers, resulting in significant revenue erosion and financial instability. To address this problem, the Commission adopted a rational, balanced rate design that recovers more fixed costs through a flat, monthly fee, allowing Duke to better recover its costs of distributing gas to its customers. This encourages Duke to actively promote and fund customer conservation and

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<sup>4</sup> The brief of *amicus* Natural Resources Defense Council (NRDC), like the record below, demonstrates a growing trend among state regulators favoring *decoupled* rate designs, which is what the Ohio Commission did in this case. *See, e.g.* Tr. II at 90-93, Sec. Supp. at 58-61; Direct Test. of W. Gonzales at 11, OCC Supp. at 154. The fact that Kansas and Massachusetts chose a decoupled rate design different than the levelized rate design adopted by the Commission is neither surprising nor is it binding in any way upon the Ohio Commission.

<sup>5</sup> Neither OCC nor OPAE argues that the levelized rate design approved by the Commission over-recovers the revenue amount assigned to (and agreed upon by appellants) the residential class of customers.

energy efficiency programs without further degradation to the financial stability it needs to provide uninterrupted, adequate and reliable service. Unlike historical gas rates the levelized rate design “decouples” or separates Duke’s recovery of distribution costs from its level of gas sales. In other words, the former is no longer dependent upon the latter. The Commission ordered gradual implementation of the “decoupling” levelized rate design to mitigate any impacts upon residential customers. Just as the Court upheld the Commission’s approval of a particular type of rate design in *Citywide Coalition*, it should affirm the Commission’s reasoned exercise of judgment adopting the levelized rate design to achieve important regulatory goals.<sup>6</sup>

- A. The facts and circumstances presented to the Commission support both its decision to rethink traditional natural gas rate design and to adopt a levelized straight fixed variable rate design that no longer makes utility recovery of fixed costs dependent upon sales levels.**

We have done it this way for 30 years. Why change now? The Commission found that historical residential rate design was achieving sub-optimal results and the evidence supported a change. The uncontroverted facts relied upon by the Commission, and its findings, are as follows:

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<sup>6</sup> The Commission has unanimously approved the same type of “levelized” rate structure for Columbia Gas of Ohio, Inc. *In the Matter of the Applciation of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distrib ution Service*, Case Nos. 08-72-GA-GA-AIR, *et al.* (Opinion and Order) (December 3, 2008), OCC Supp. at 198-225. Although the rate design issue was litigated in this case, no party sought rehearing and the Commission’s order in that case is now final.

- Duke incurs costs to serve customers throughout the year. The costs of operating and maintaining the pipeline system to distribute gas are almost exclusively fixed and thus are largely independent of, and do not vary with, time of year or customer usage. *In re Duke Energy Ohio, Inc.* (Staff Report of Investigation at 30-33, 46) (December 20, 2007), OCC Supp. at 183D-183G, Sec. Supp. at 7. Tr. I at 33-34, 159, Sec. Supp. at 41-42, 45; Settlement Supporting Test. of P. Smith at 10-13, Sec. Supp. at 34-37; Prefiled Test. of S. Puican at 4-6, OCC Supp. at 180-182; Second Supplemental Test. of D. Storck at 14-15, Sec. Supp. at 13-14.
- Historically, natural gas rates contained an artificially low customer charge that minimally compensated the utility for its fixed costs of distributing natural gas. The vast majority of distribution costs were recovered through a volumetric rate collected through gas sales to customers. *In re Duke Energy Ohio, Inc.* (Staff Report of Investigation at 30-31, 46) (December 20, 2007), OCC Supp. at 183D-183E, Sec. Supp. at 7. As long as gas sales remained high, this rate structure provided the gas utility with a reasonable opportunity to recover its costs. *Id.* at 46, Sec. Supp. at 7.
- Steadily-declining sales and per customer consumption have caused Duke to experience significant revenue erosion. *Id.* Nearly \$6 million, or over 15 percent, of the revenue deficiency identified in Duke's rate application was attributable to this phenomenon. *In re Duke Energy Ohio, Inc.* (Opin-

ion and Order at 18) (May 28, 2008), OPAE App. at 32, OCC App. at 31; Direct Test. of P. Smith at 3-4, 6, 11, Sec. Supp. at 2-3, 4, 5; Tr. I at 235-236, Sec. Supp. at 52-53. OCC's own witness admitted that flat or declining sales have been widespread among gas utilities. Tr. II at 54-55, Sec. Supp. at 55-56.

- Duke's natural gas operations are earning a return of 5.62 percent, well below the 9.27 percent authorized by the Commission. Direct Test. of P. Smith at 3, Sec. Supp. at 2.
- The financial instability caused by persistent revenue erosion threatens the utility's ability to continually provide adequate and reliable service to all customers. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 17-18) (May 28, 2008), OPAE App. at 31-32, OCC App. at 30-31; Settlement Supporting Test. of P. Smith at 6, Sec. Supp. at 30.
- The levelized rate design "decouples" or removes the historical link that made utility revenues dependent upon gas sales, because it rationally recovers a greater percentage of *fixed* costs through a higher *fixed* charge. Pre-filed Test. of S. Puican at 5, OCC Supp. at 181. This rate design applies the principle of cost causation, recognizing that the cost to serve residential customers is predominantly fixed and effectively the same regardless of

customer usage. Settlement Supporting Test. of P. Smith at 11, Sec. Supp. at 35.

- The Commission implemented the levelized rate design in a cautious, gradual manner. *In re Duke Energy Ohio, Inc.* (Staff Report of Investigation at 30-31) (December 20, 2007), OCC Supp. at 183D-183E; *see, e.g.*, Tr. I at 33-34, 156, Sec. Supp. at 41-42, 44. While the cost of service study supported a fixed charge as high as \$30/month, the Commission adopted a phased-in rate design that includes a fixed charge of \$20.25 in year one and \$25.32 in year two, coupled with a reduced variable base rate component. As a further measured step, the Commission directed that the fixed charge be set initially at only \$15 for several months. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 17-20) (May 28, 2008), OPAE App. at 31-34, OCC App. at 30-33; Settlement Supporting Test. of P. Smith at 10-11, Sec. Supp. at 34-35; Tr. I at 208-209, Sec. Supp. at 48-49.
- The levelized rate design sends more accurate price signals and provides consumers with better information regarding how to manage their gas usage. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 19) (May 28, 2008), OPAE App. at 33, OCC App. at 32; *In re Duke Energy Ohio, Inc.* (Entry on Rehearing at 3-4) (July 23, 2008), OPAE App. at 10-11, OCC App. at 9-10; Settlement Supporting Test. of P. Smith at 13, Sec. Supp. at 37; Prefiled Test. of S. Puican at 6-8, Sec. Supp. at 19-21.

- The levelized rate design spreads recovery of fixed costs more evenly throughout the year, helping lower residential winter heating bills and assisting customers with budgeting for their gas service. This results in a more equitable recovery of costs among customers, regardless of usage, so that everyone pays his/her fair share of *fixed* system costs. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 17-19) (May 28, 2008), OPAE App. at 31-33, OCC App. at 30-32; *In re Duke Energy Ohio, Inc.* (Entry on Rehearing at 3-4) (July 23, 2008), OPAE App. at 10-11, OCC App. at 9-10; Second Supplemental Test. of D. Storck at 15, Sec. Supp. at 14; Settlement Supporting Test. of P. Smith at 12-13, Sec. Supp. at 36-37.
- The levelized rate design is superior to the sales decoupling rider (Rider SD) proposed by Duke because it is more straightforward, and recovers costs as they are incurred. It eliminates the need for deferred cost recovery and associated carrying charges, avoids inefficient and likely contentious annual rate adjustments, and is easier for customers to understand and rely upon in planning for their gas needs. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 18-20) (May 28, 2008), OPAE App. at 32-34, OCC App. at 31-33; Prefiled Test. of S. Puican at 8, Sec. Supp. at 21. *In re Duke Energy Ohio, Inc.* (Staff Report of Investigation at 46) (December 20, 2007), Sec. Supp. at 7.

The Commission did not ignore Duke's Rider DS decoupling proposal. Rather, following an exhaustive analysis of both it and the levelized rate design proposed by its Staff, it concluded that a fundamental rate design change better served Duke's customers. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 18-19) (May 28, 2008), OPAE App. at 32-33, OCC App. at 31-32; Tr. I at 224, Sec. Supp. at 51. The evidence shows, and the Commission found, that the levelized residential rate design promotes sound public and regulatory policies, fairly balances and addresses utility and customer concerns, and better facilitates customer understanding. Prefiled Test. of S. Puican at 5-7, Sec. Supp. at 18-20.

Appellants advance a variety of baseless arguments that should be readily rejected. For example, OPAE argues that the Commission should be reversed because it failed to test the acceptability of the levelized rate design to the public. *See, e.g.*, OPAE Brief at 12. While promoting customer understanding of rates is and has long been a goal of Commission ratemaking, seeking public acceptance of a rate design is neither practical nor required by law. Equally curious is OCC's assertion that the Commission abused its discretion by implementing the levelized rate design without sufficient evaluation of customer impacts. *See, e.g.*, OCC Brief at 43. This argument puts the proverbial "cart before the horse" because exact impacts cannot be assessed *before* the fact. What the evidence shows are many anticipated benefits to both Duke and its customers from the balanced, levelized rate design adopted below.

Appellants ask the Court to take a fresh look at the facts and reach a different conclusion. The Court's function has never been to reweigh the evidence or attempt to

second-guess the measured judgment exercised by the Commission, particularly in matters of rate design. *See, e.g. Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 76 Ohio St. 3d 163, 666 N.E.2d 1372 (1996). The Commission's order sets forth the factual basis and reasoning for its conclusions. *Payphone Ass'n v. Pub. Util. Comm'n*, 109 Ohio St. 3d 453, 849 N.E.2d 4 (2006). Applying measured and studied judgment, the Commission adopted a rate design that is reasonable and lawful. The Commission's decision should be affirmed.

**B. Because they are above-average gas consumers, Duke's low-income customers will see lower bills under the levelized rate design.**

OCC and OPAE rail against the Commission's rate design, principally because of what they claim will be disastrous impacts to low-income customers. The record shows just the opposite to be true. Because low-income residential customers tend to be above-average gas consumers, they will see lower bills under the levelized rate design. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 18) (May 28, 2008), OPAE App. at 32, OCC App. at 31; Tr. I at 55, Sec. Supp. at 43; Prefiled Test. of S. Puican at 5-6, OCC Supp. at 181-182. On a total bill basis, average residential customers, those who consume about 90 Mcf<sup>7</sup> per year, will pay no more under the levelized rate design than they would under the rate design historically used by the Commission. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 17-19) (May 28, 2008), OPAE App. at 31-33, OCC

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<sup>7</sup> An "Mcf" equals 1,000 cubic feet and is a common increment of gas measurement.

App. at 30-32. While lower-usage (not low-income) residential customers could experience slightly higher bills, that impact is minimal as the record shows and the Commission found. Tr. I at 222, OCC Supp. at 58; *In re Duke Energy Ohio, Inc.* (Opinion and Order at 19) (May 28, 2008), OPAE App. at 33, OCC App. at 32.

Low-income customers are, on average, not low-usage customers. Prefiled Test. of S. Puican at 5-6, OCC Supp. at 181-182. An analysis of Duke gas customers who participate in the Percentage of Income Payment Plan (PIPP) shows that low-income residential customers consume approximately 100 Mcf per year. This exceeds (by 10 Mcf) the consumption level of Duke's average residential customer. *Id.*; Tr. I at 162-163, Sec. Supp. at 46-47. Qualifying PIPP customers, those at or below 150 percent of the federal poverty guidelines, tend to reside in older, less energy-efficient homes, are more likely to rent than own, and typically lack sufficient resources to invest in energy efficiency products and appliances. *Id.*; *see also* Settlement Supporting Test. of P. Smith at 10-11, Sec. Supp. at 34-35; Prefiled Test. of S. Puican at 5, OCC Supp. at 181.

While OCC and OPAE may quibble with Mr. Puican's usage of PIPP customers to illustrate the point they do not challenge the analysis advanced by Mr. Puican and confirmed by Duke. Nor do the appellants offer any better evidence. Duke's low-income customers will benefit under the levelized rate design, and OCC and OPAE are simply wrong to suggest otherwise.<sup>8</sup> Prefiled Test. of S. Puican at 6, OCC Supp. at 182. To the

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<sup>8</sup> The relative reduction to PIPP customers' bills benefits all customers because it results in smaller levels of PIPP arrearages that must be collected from all other customers. Tr. II at 162, Sec. Supp. at 63.

extent that low-usage (as opposed to low-income) residential customers' bills are minimally impacted by a higher fixed monthly charge, it is simply because such customers have not been required to pay the entirety of their fixed costs under historical gas rates. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 19) (May 28, 2008), OPAE App. at 33, OCC App. at 32. In other words, the levelized rate design addresses past rate inequities, and, as the Commission found, promotes important regulatory objectives by equitably allocating costs among all residential customers. *Id.* at 18, OPAE App. at 32, OCC App. at 31. Appellants' assertions of unfair cost shifts are simply unfounded.

A further indication that the Commission is, and always has been, concerned about the gas bills of low-income customers is found in key provisions of the settlement agreement terms that it approved. One such provision created a Pilot Low-Income Program to assist low-income customers in paying their bills. *Id.* at 19-20, OPAE App. at 33-34, OCC App. at 32-33. This program provides monthly bill discounts to low-income customers whose financial situation places them just beyond the PIPP program. *Id.*; see also Stipulation at ¶ 25, OCC Supp. at 20; *In re Duke Energy Ohio, Inc.* (Entry on Rehearing at 5) (July 23, 2008), OPAE App. at 12, OCC App. at 11. Recognizing the potential of this program, the Commission directed that it be *expanded* to include up to 10,000 low-income customers at or below 175 percent of the poverty level. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 20) (May 28, 2008), OPAE App. at 34, OCC App. at 33. Additionally, Duke's annual \$3 million commitment for weatherization and conservation programs will provide information and services to assist low-income residential customers better manage their natural gas usage and bills. Stipulation at ¶ 12, OCC Supp. at 12.

The Commission found these additional factors to be “critical” to its approval of the levelized rate design as part of an overall residential rate package. *Id.* at 18, OPAE App. at 32, OCC App. at 31.

OCC argues that comments made by a Commissioner during the April 23, 2008 public meeting indicate a lack of evidence regarding the effects of the levelized rate design on low-income customers. OCC Brief at 39-41. OCC improperly relies upon matters that *were not part of the record* below. *In re Duke Energy Ohio, Inc.* (Entry on Rehearing at 6-7) (July 23, 2008), OPAE App. at 13-14, OCC App. at 12-13. OCC conveniently ignores that *all* Commissioners signed the written order, with only a single Commissioner dissenting in part.<sup>9</sup> More important, OCC’s assertions are contrary to settled law. It is axiomatic that Ohio courts and administrative agencies speak only through their entries and journals. *See, e.g. State v. King*, 70 Ohio St. 3d 158, 637 N.E.2d 903 (1994) citing *State, ex rel. Worcester v. Donnellon*, 49 Ohio St. 3d 117, 551 N.E.2d 183 (1990); *State, ex rel. Yellow Freight Systems v. Indus. Comm’n*, 71 Ohio St. 3d 139, 142, 642 N.E.2d 378, 380 (1994). So too does the Commission speak officially only through its written, journalized orders rather than through the verbal statements of any of its commissioners expressed in public meetings. Ohio Rev. Code Ann. §§ 4901.08, 4903.09, 4903.15 (Anderson 2009), App. at 1, OPAE App. at 48, App. at 1. The

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<sup>9</sup> The partial dissent of Commissioner Centolella did not oppose the majority’s decision to adopt the levelized rate design, but, rather, only the pace of its implementation. *In re Duke Energy Ohio, Inc.* (Opinion of Paul A. Centolella Concurring in Part and Dissenting in Part at 2) (May 28, 2008), OPAE App. at 45, OCC App. at 44.

Commission noted as much. *In re Duke Energy Ohio, Inc.* (Entry on Rehearing at 6-7) (July 23, 2008), OPAE App. at 13-14, OCC App. at 12-13.

The Commission considered the facts and circumstances relating to Duke's low-income customers and noted beneficial aspects of the new levelized rate design, particularly when applied in tandem with the low-income Pilot Program and Duke's annual, multi-million dollar commitment to fund weatherization and energy efficiency programs. Settlement Supporting Test. of P. Smith at 11-12, Sec. Supp. at 35-36. Where, as here, the record contains evidentiary support for the Commission's findings, the Court should affirm the Commission's order. *See, e.g., AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 51 Ohio St. 3d 150, 154, 555 N.E.2d 288 (1990).

**C. The levelized rate design balances and promotes important regulatory goals by encouraging conservation efforts without sacrificing the utility's financial condition.**

By asserting that the levelized rate design discourages conservation, OCC and OPAE tell a story that is both misleading and incomplete. Just the opposite is true. By adopting the levelized rate design, the Commission "provided appropriate incentives, through a rational pricing scheme, to *encourage a reduction in the consumption of natural gas.*" *In re Duke Energy Ohio, Inc.* (Concurring Opinion of Chairman Alan R. Schriber at 1) (May 28, 2008), OPAE App. at 41, OCC App. at 40 (emphasis added). Because customers still control the single largest cost component of their monthly bill, their gas consumption, there remains a strong incentive for them to manage their gas usage to save money. Unlike historical rates, the levelized rate design further assists

residential customers to conserve gas, because it encourages Duke to promote and fund energy efficiency programs. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 18) (May 28, 2008), OPAE App. at 32, OCC App. at 31.

A customer's ability to control his/her monthly bill is principally influenced by the cost of gas rather than the base rate that they pay. Tr. I at 223, Sec. Supp. at 50; Settlement Supporting Test. of P. Smith at 12-13, Sec. Supp. at 36-37. The primary incentive for customers to conserve natural gas has little to do with how fixed system costs are collected. Rather, it derives from money saved by *using less gas*, the cost of which constitutes 75 to 80 percent of a customer's monthly bill. This powerful incentive remains unaffected by the adoption of the levelized rate design that affects only how the remaining 20 to 25 percent of the bill (*i.e.*, fixed costs) is collected. Second Supplemental Test. of D. Storck at 12-16, Sec. Supp. at 11-15; Settlement Supporting Test. of P. Smith at 12-13, Sec. Supp. at 36-37; Prefiled Test. of S. Puican at 3-4, OCC Supp. at 179-180; Prefiled Test. of S. Puican at 6-7, Sec. Supp. at 19-20; *In re Duke Energy Ohio, Inc.* (Opinion and Order at 19) (May 28, 2008), OPAE App. at 33, OCC App. at 32; Tr. I at 223, Sec. Supp. at 50. Thus, appellants' singular preoccupation with only the level of the fixed monthly charge is misplaced and irrational.

The record is devoid of evidence that the base-rate design adopted by the Commission will dampen customer enthusiasm to save money. Customers who invest in better insulation materials or more efficient appliances will continue to save money as they use gas more efficiently. Second Supplemental Test. of D. Storck at 15-16, Sec. Supp. at 14-15. Any impact on a customer's recovery of such investments is "small" given the

Commission's gradual implementation of the levelized rate design. Tr. I at 208-209, 224, Sec. Supp. at 48-49, 51. In addition to spreading cost recovery more evenly throughout the year and lessening winter heating bills, the levelized rate design sends better pricing signals and provides better information for customers to effectively manage their gas consumption. Settlement Supporting Test. of P. Smith at 13, Sec. Supp. at 37.

While the Commission's order keeps the primary incentive to conserve in place, it also removes a significant disincentive to conservation. During prolonged periods of high gas prices and declining gas sales, the historical gas rate structure has hampered Duke's recovery of its reasonable costs of serving customers as the Commission found. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 17-18) (May 28, 2008), OPAE App. at 31-32, OCC App. at 30-31. Duke's inability to recover its costs of serving customers and to earn a reasonable return can negatively affect its ongoing financial stability and ability to attract new capital to invest in the gas delivery infrastructure and equipment. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 17) (May 28, 2008), OPAE App. at 31, OCC App. at 30; *In re Duke Energy Ohio, Inc.* (Entry on Rehearing at 4-5) (July 23 2008), OPAE App. at 11-12, OCC App. at 10-11. Unlike historical rate design that made Duke's ability to recover its costs so heavily dependent upon gas sales, the levelized rate design encourages and allows Duke to promote energy conservation and efficiency without further degradation to its financial condition. *See, e.g.* Prefiled Test. of S. Puican at 4-7, Sec. Supp. at 17-20. The information and funding resources provided by Duke will only compliment and enhance existing conservation initiatives. Appellant's (OCC) wit-

ness Gonzalez acknowledged that a decoupled rate design *will promote* energy efficiency investments. Tr. II at 70, Sec. Supp. at 57.

Appellants' legal arguments are misplaced. Just last year, the Court rejected a closely analogous argument made by appellant OPAE, finding that neither R.C. 4929.02(A)(4) nor R.C. 4905.70 required approval of or funding for demand side management and energy conservation programs. *Ohio Partners for Affordable Energy v. Pub. Util. Comm'n*, 115 Ohio St. 3d 208, 215, 874 N.E.2d 764, 771 (2007). The Court there noted that the policy pronouncements contained in R.C. 4929.02 are guidelines that cannot be considered in isolation. Here, appellants advance just such an argument. The Commission approved the levelized rate design as part of a balanced overall rate package, that also includes Duke's annual multi-million dollar commitment to fund energy efficiency and conservation programs and creation of a low-income pilot program that provides monthly credits to assist qualifying customers with their gas bills. The Commission found these to be "crucial" compliments to the levelized rate design that it adopted below. *See, e.g. In re Duke Energy Ohio, Inc.* (Opinion and Order at 19-20) (May 28, 2008), OPAE App. at 33-34, OCC App. at 32-33; *In re Duke Energy Ohio, Inc.* (Entry on Rehearing at 3) (July 23, 2008), OPAE App. at 10, OCC App. at 9. The Court should reject appellants' narrow, myopic argument. *Ohio Partners* 115 Ohio St. 3d at 215, 874 N.E.2d at 771-772.

OCC's assertion that the Commission violated R.C. 4905.70 is wrong as well. That statute was enacted to implement mandates associated with a federal statute that addresses *electricity*, not natural gas, matters. *Greater Cleveland Welfare Rights Organ-*

*ization, Inc. v. Pub. Util. Comm'n*, 2 Ohio St. 3d 62, 442 N.E.2d 1288 (1982). The history of the bill creating R.C. 4905.70 limits its conservation mandate to electricity providers. *City of Columbus v. Pub. Util. Comm'n*, 58 Ohio St. 2d 427, 429, 390 N.E.2d 1201, 1202-1203 (1979). The very language of R.C. 4905.70 confirms this as it refers to “methods of pricing *electricity*” and contains multiple textual references to “electric light company,” “kilowatt hours,” and “kilowatt of billing demand,” all of which pertain to the provision of electricity. Where the statutory language itself clearly expresses the legislative intent, courts need look no further. *Provident Bank v. Wood*, 36 Ohio St. 2d 101, 105, 304 N.E.2d 378 (1973). R.C. 4905.70 is simply inapplicable to this case.

The levelized rate design does nothing to chill or dampen customer enthusiasm to save money. By more efficiently using gas, customers can and will reduce their gas bills. To complement conservation efforts, the Commission has promoted greater utility promotion and funding of energy efficiency and conservation programs, while allowing Duke an opportunity to earn a fair return on its investment to adequately and reliably serve its customers. The *fundamental reason* that the Commission adopted the SFV residential rate design was to *foster conservation* not discourage it. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 17-19) (May 28, 2008), OPAE App. at 31-34, OCC App. at 30-32; *Id.* (Entry on Rehearing at 4) (July 23, 2008), OPAE App. at 11, OCC App. at 10.

**D. The Commission's order complies with R.C. 4903.09 because it sets forth the factual basis for and reasoning used by the Commission for each of its findings. *Payphone Ass'n v. Pub. Util. Comm'n*, 109 Ohio St. 3d 453, 849 N.E.2d 4 (2006).**

The purpose of R.C. 4903.09 is to inform interested parties of the reasons for the Commission's actions and, more important, to provide this Court with an adequate record on review. *See, e.g., Migden-Ostrander v. Pub. Util. Comm'n*, 102 Ohio St. 3d 451, 812 N.E.2d 955 (2004). This Court has found that strict compliance with the statute is not required. *Id.* The Commission's order must set forth some factual basis and reasoning used to reach its findings. *Payphone Ass'n v. Pub. Util. Comm'n*, 109 Ohio St. 3d 453, 849 N.E.2d 4 (2006).

The Commission explained that marked changes in the natural gas industry compelled it to re-think historical natural gas rate design for residential customers. *In re Duke Energy Ohio Inc.* (Opinion and Order at 17-20) (May 28, 2008), OPAE App. at 31-34, OCC App. at 30-33. High natural gas prices have driven steadily decreasing gas sales, and resulted in significant revenue erosion that, if left unchecked, could threaten Duke's ongoing responsibility to provide adequate and reliable gas service to its customers. The Commission explained how the levelized rate design addressed these circumstances and why it is the best choice for customers. *Id.* at 12-14, 17-20, OPAE App. at 26-28, 31-34, OCC App. at 25-27, 30-33. The levelized rate design corrects historical rate inefficiencies, addresses the revenue erosion problem, and encourages Duke to more actively promote and fund conservation and energy efficiency programs because it can now do so without sacrificing its financial stability. *See, e.g., In re Duke Energy Ohio*,

*Inc.* (Entry on Rehearing at 3-4) (July 23, 2008), OPAE App. at 10-11, OCC App. at 9-10. Finally, the record supports the Commission's factual finding that, on balance, the benefits to residential customers under the phased-in implementation of the levelized rate design outweigh any minimal impact associated with a higher fixed charge. *In re Duke Energy Ohio, Inc.* (Opinion and Order at 18-19) (May 28, 2008), OPAE App. at 32-33, OCC App. at 31-32.

While the Commission acknowledges the importance of following its precedent, that principle has never been applied to foreclose change when and where it is needed and fully explained. The Commission properly respected its precedent because it delineated, at length, why a redesigned rate structure was both necessary and timely. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 42 Ohio St. 2d 403, 330 N.E.2d 1 (1975).

The Commission's factual findings and reasoning are based upon and consistent with evidence in the record. There is no violation of R.C. 4903.09. *Payphone Ass'n*, 109 Ohio St. 3d at 453, 849 N.E.2d at 4. The Court should affirm the Commission's reasoned exercise of judgment in establishing rates for natural gas distribution service. *Citywide Coalition for Utility Reform v. Pub. Util. Comm'n*, 67 Ohio St. 3d 531, 620 N.E.2d 832 (1993).

## Proposition of Law No. II:

**Ohio law requires that the substance of a rate application be publicly noticed to customers and not post-application modifications subsequently approved by the Commission. *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 51 Ohio St. 3d 150, 555 N.E.2d 288 (1990).**

Because Duke did not propose the levelized rate design in its rate application, it had no obligation to publicly notice it. *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 51 Ohio St. 3d 150, 555 N.E.2d 288 (1990). OCC's assertions to the contrary ignore Court precedent and the plain words of the statutes that it cites.

R.C. 4909.19 requires the rate applicant to “forthwith publish the substance and prayer of such application. . .” (emphasis added). Likewise, R.C. 4909.18(E) requires as an exhibit *accompanying the application* “A proposed notice for newspaper publication fully disclosing the substance of the application” (emphasis added). Finally, R.C. 4909.43 requires that the rate applicant notify each municipality of its intent to file a *rate application* and of the proposed rates “to be contained therein.” Ohio Rev. Code Ann. § 4909.43 (Anderson 2009), OCC App. at 53 (emphasis added.) The thread common to all these statutes is that *the content of the utility's application* must be publicly noticed and not, as OCC mistakenly asserts, what the Commission subsequently approves.

There is no dispute that Duke proposed Rider DS and that is what it described in its notice. The Commission's Staff recommended the levelized rate design in its Staff

Report of Investigation issued *months after* Duke's rate application was filed.<sup>10</sup> Because Duke did not propose the levelized rate design approved by the Commission, that matter was obviously not within the "substance and prayer" of its rate application, and no notice was required under the aforementioned statutes. Thus, the Commission found that Duke properly published notice of the contents of its rate application.<sup>11</sup> *In re Duke Energy Ohio, Inc.* (Entry on Rehearing at 5-6) (July 23, 2008), OPAE App. at 12-13, OCC App. at 11-12. OCC's assertions are contrary not only to the Court's *AT&T* decision, but also the plain language of R.C. 4909.19, R.C. 4909.18, and R.C. 4909.43.

OCC's reliance upon the *Committee Against MRT* case is also misplaced. *Committee Against MRT v. Pub. Util. Comm'n*, 52 Ohio St. 3d 231, 371 N.E.2d 547 (1977). Unlike here, that case presented a situation where the *utility* sought a new rate plan but did not provide notice of the plan in its application. Instructive for this case was the Court's observation in that case that the plain language of R.C. 4909.18(E) makes clear that the *purpose* of the notice requirement is to allow affected persons or entities to respond to the application. *Committee Against MRT*, 52 Ohio St. 2d at 233, 371 N.E.2d at 549.

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<sup>10</sup> It should be noted that R.C. 4909.19 requires that copies of the Staff Report be served upon municipalities affected by the rate application as well as "such other person" as the Commission deems interested. There is no dispute that this statutory requirement was met.

<sup>11</sup> The Commission observed that Duke's published notice to customers stated that "recommendations which differ from the filed application . . . may be adopted by the Commission." *In re Duke Energy Ohio, Inc.* (Entry on Rehearing at 6) (July 23, 2008), OPAE App. at 13, OCC App. at 12.

Duke's rate application sought approval for Rider DS and that is what it described in its notice and all that Ohio law required it to do. The Commission's adoption of a different rate design did not invalidate Duke's earlier public notice, nor did the substance of that notice limit or constrain the Commission's ratemaking authority. To find otherwise would unduly hamstring the Commission's broad authority to design and establish customer rates.

### **CONCLUSION**

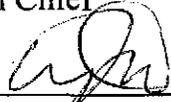
Effective regulation is neither stagnant nor blind to the need for change where the facts and circumstances compel it. Faced with a chronic, difficult situation, the Commission adopted a straightforward, levelized rate design that (1) recovers fixed costs through a fixed charge, (2) levelizes gas bills throughout the year to lessen high winter heating bills, (3) encourages Duke's promotion and funding of energy efficiency and conservation programs, and, (4) provides Duke with the necessary financial stability to adequately and reliably serve its customers. The judgment exercised by the Commission applies established rate-setting principles and fairly balances important customer and utility interests.

Based upon the foregoing, the Commission respectfully requests that its decision be affirmed.

Respectfully submitted,

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## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief**, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 2<sup>nd</sup> day of February, 2009.



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# APPENDIX

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#### **4901.08 Quorum.**

A majority of the public utilities commissioners constitutes a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the public utilities commission. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all powers of the commission. The act of a majority of the commission, when in session as a board, is the act of the commission. Any investigation, inquiry, or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner designated for such purpose by the commission, and every finding, order, or decision made by a commissioner so designated, pursuant to such investigation, inquiry, or hearing, and approved and confirmed by the commission and ordered filed in its office, is the finding, order, or decision of the commission.

#### **4903.15 Orders effective immediately - notice.**

Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission. Every order shall be served by United States mail in the manner prescribed by the commission. No utility or railroad shall be found in violation of any order of the commission until notice of said order has been received by an officer of said utility or railroad, or an agent duly designated by said utility or railroad to accept service of said order.

#### **4929.01 Alternate rate plan for natural gas company definitions.**

As used in this chapter:

(A) "Alternative rate plan" means a method, alternate to the method of section 4909.15 of the Revised Code, for establishing rates and charges, under which rates and charges may be established for a commodity sales service or ancillary service that is not exempt pursuant to section 4929.04 of the Revised Code or for a distribution service. Alternative rate plans may include, but are not limited to, methods that provide adequate and reliable natural gas services and goods in this state; minimize the costs and time expended in the regulatory process; tend to assess the costs of any natural gas service or goods to the entity, service, or goods that cause such costs to be incurred; afford rate stability; promote and reward efficiency, quality of service, or cost containment by a natural gas company; provide sufficient flexibility and incentives to the natural gas industry to achieve high quality, technologically advanced, and readily available natural gas services and goods at just and reasonable rates and charges; or establish revenue decoupling mechanisms. Alternative rate plans also may include, but are not limited to, automatic adjustments based on a specified index or changes in a specified cost or costs.

(B) "Ancillary service" means a service that is ancillary to the receipt or delivery of natural gas to consumers, including, but not limited to, storage, pooling, balancing, and transmission.

(C) "Commodity sales service" means the sale of natural gas to consumers, exclusive of any distribution or ancillary service.

(D) "Comparable service" means any regulated service or goods whose availability, quality, price, terms, and conditions are the same as or better than those of the services or goods that the natural gas company provides to a person with which it is affiliated or which it controls, or, as to any consumer, that the natural gas company offers to that consumer as part of a bundled service that includes both regulated and exempt services or goods.

(E) "Consumer" means any person or association of persons purchasing, delivering, storing, or transporting, or seeking to purchase, deliver, store, or transport, natural gas, including industrial consumers, commercial consumers, and residential consumers, but not including natural gas companies.

(F) "Distribution service" means the delivery of natural gas to a consumer at the consumer's facilities, by and through the instrumentalities and facilities of a natural gas company, regardless of the party having title to the natural gas.

(G) "Natural gas company" means a natural gas company, as defined in section 4905.03 of the Revised Code, that is a public utility as defined in section 4905.02 of the Revised Code and excludes a retail natural gas supplier.

(H) "Person," except as provided in division (N) of this section, has the same meaning as in section 1.59 of the Revised Code, and includes this state and any political subdivision, agency, or other instrumentality of this state and includes the United States and any agency or other instrumentality of the United States.

(I) "Billing or collection agent" means a fully independent agent, not affiliated with or otherwise controlled by a retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code, to the extent that the agent is under contract with such supplier or aggregator solely to provide billing and collection for competitive retail natural gas service on behalf of the supplier or aggregator.

(J) "Competitive retail natural gas service" means any retail natural gas service that may be competitively offered to consumers in this state as a result of revised schedules approved under division (C) of section 4929.29 of the Revised Code, a rule or order adopted or issued by the public utilities commission under Chapter 4905. of the Revised

Code, or an exemption granted by the commission under sections 4929.04 to 4929.08 of the Revised Code.

(K) "Governmental aggregator" means either of the following:

(1) A legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting exclusively under section 4929.26 or 4929.27 of the Revised Code as an aggregator for the provision of competitive retail natural gas service;

(2) A municipal corporation acting exclusively under Section 4 of Article XVIII, Ohio Constitution, as an aggregator for the provision of competitive retail natural gas service.

(L)(1) "Mercantile customer" means a customer that consumes, other than for residential use, more than five hundred thousand cubic feet of natural gas per year at a single location within this state or consumes natural gas, other than for residential use, as part of an undertaking having more than three locations within or outside of this state. "Mercantile customer" excludes a customer for which a declaration under division (L)(2) of this section is in effect pursuant to that division.

(2) A not-for-profit customer that consumes, other than for residential use, more than five hundred thousand cubic feet of natural gas per year at a single location within this state or consumes natural gas, other than for residential use, as part of an undertaking having more than three locations within or outside this state may file a declaration under division (L)(2) of this section with the public utilities commission. The declaration shall take effect upon the date of filing, and by virtue of the declaration, the customer is not a mercantile customer for the purposes of this section and sections 4929.20 to 4929.29 of the Revised Code or the purposes of a governmental natural gas aggregation or arrangement or other contract entered into after the declaration's effective date for the supply or arranging of the supply of natural gas to the customer to a location within this state. The customer may file a rescission of the declaration with the commission at any time. The rescission shall not affect any governmental natural gas aggregation or arrangement or other contract entered into by the customer prior to the date of the filing of the rescission and shall have effect only with respect to any subsequent such aggregation or arrangement or other contract. The commission shall prescribe rules under section 4929.10 of the Revised Code specifying the form of the declaration or a rescission and procedures by which a declaration or rescission may be filed.

(M) "Retail natural gas service" means commodity sales service, ancillary service, natural gas aggregation service, natural gas marketing service, or natural gas brokerage service.

(N) "Retail natural gas supplier" means any person, as defined in section 1.59 of the Revised Code, that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of a competitive retail natural gas service to consumers in this state that are not mercantile customers. "Retail natural gas supplier" includes a marketer, broker, or aggregator, but excludes a natural gas company, a governmental aggregator as defined in division (K)(1) or (2) of this section, an entity described in division (B) or (C) of section 4905.02 of the Revised Code, or a billing or collection agent, and excludes a producer or gatherer of gas to the extent such producer or gatherer is not a natural gas company under section 4905.03 of the Revised Code.

(O) "Revenue decoupling mechanism" means a rate design or other cost recovery mechanism that provides recovery of the fixed costs of service and a fair and reasonable rate of return, irrespective of system throughput or volumetric sales.

#### **4929.05 Requesting approval of alternative rate plan.**

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

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

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

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

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