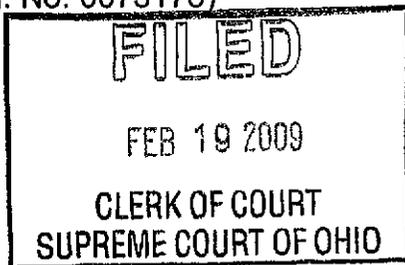


IN THE SUPREME COURT OF OHIO
On Appeal from the Public Utilities Commission of Ohio

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| Ohio Partners for Affordable Energy, |) | Case No. 08-1837 |
| |) | |
| Appellant, |) | |
| |) | Appeal from the Public |
| |) | Utilities Commission of Ohio |
| v. |) | |
| |) | |
| |) | |
| The Public Utilities Commission of Ohio, |) | Public Utilities |
| |) | Commission of Ohio |
| Appellee. |) | Case Nos. 07-589-GA-AIR, |
| |) | 07-590-GA-ALT, |
| |) | 07-591-GA-AAM |

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I. INTRODUCTION

Ohio Partners for Affordable Energy (“OPAE”), a non-profit Ohio corporation with the stated purpose of advocating for affordable energy policies for low- and moderate-income Ohioans, herein submits its reply to the merit briefs filed by the appellee Public Utilities Commission of Ohio (“PUCO”) and the intervening appellee Duke Energy Ohio, Inc. (“Duke”). The merit briefs filed by the PUCO and Duke present no basis upon which the Court should affirm the PUCO’s unlawful and unreasonable orders in this case.

This case concerns applications made by Duke to increase the rates charged for its natural gas distribution service. In its orders, the PUCO established a radical, unprecedented residential rate design, called the straight fixed variable (“SFV”) rate design, to address essentially non-existent problems. The radical, unprecedented residential rate design violates Ohio statutory law and PUCO policy and precedent. The radical residential rate design also violates the policy of the state of Ohio to encourage customer conservation and energy efficiency. Finally, the PUCO approved the radical residential rate design against the weight of the evidence.

On behalf of low- and moderate-income customers and the nonprofit agencies that provide these customers with bill payment assistance and energy efficiency services, OPAE asks the Court to reverse the PUCO’s unlawful and unreasonable orders and remand this case for further PUCO consideration. On remand, the PUCO should be ordered to adopt a residential rate design that comports with Ohio law, the policy of the state of Ohio, and PUCO policy and precedent.

II. THE PUCO'S RADICAL RESIDENTIAL RATE DESIGN VIOLATES REGULATORY PRINCIPLES AND PUCO PRECEDENT AND DOES NOT PRODUCE JUST AND REASONABLE RATES AS REQUIRED BY OHIO LAW SET FORTH AT R.C. §§4905.22 AND 4909.18.

The PUCO acknowledges that the residential rate design adopted in this case is a sharp break from PUCO precedent. The straight fixed variable ("SFV") rate design seeks to recover distribution charges primarily through a high fixed customer charge. The PUCO presents itself as a promoter of equity and regulatory principles. In fact, the PUCO embraces only those regulatory principles that favor the utility, while disregarding regulatory principles that protect consumers. The PUCO ignores the fact that high fixed customer charges are harmful to the majority of residential customers; they are also not supported by public policy or PUCO precedent.

The PUCO and Duke find it beneficial that the utility will almost certainly recover its full revenue requirement when the largest possible amount of charges are fixed and not based on customer usage. This outcome violates the important regulatory principle of balancing the interests of utilities and their customers. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L. Ed. 333 (1944). The PUCO and Duke support the SFV rate design because it virtually guarantees Duke will recover the entirety (100%) of its revenue requirement established in this rate case. Such a guarantee is inconsistent with regulatory principles. Under the regulatory compact, the utility is responsible for making the required investments necessary to provide essential utility service to customers. In return, customers are required to compensate the utility, through rates, for the cost of providing utility service. State public utilities commissions regulate the utilities to

achieve the provision of adequate service at reasonable prices. As part of this responsibility, state regulators oversee the design of rates, which collect the revenues to pay the approved expenditures. R.C. §4909.15. OPAE Appendix to Merit Brief (“App.”) 050. The rates and the rate design provide the utility with an adequate opportunity to earn the authorized revenue requirement, balanced with the need of customers for rates that are just and reasonable.

Under the SFV rate design, Duke is guaranteed a far larger share of the revenue requirement than a utility traditionally receives. The guaranteed recovery from such a large fixed charge per residential customer regardless of customer usage is unprecedented in PUCO ratemaking and violates the regulatory principle requiring a balancing of interests between the utility and customers. There is no balance between the utility and customers when the utility is virtually guaranteed recovery of its entire revenue requirement while customers are subject to huge fixed charges regardless of their usage and far in excess of any prior customer charges approved by the PUCO.

The PUCO finds the fixed charge “superior” to the historical rate design that collects distribution costs on the basis of customer usage and argues (against decades of precedent and policy) that distribution costs are fixed so that distribution charges should be fixed. The PUCO finds it beneficial that low-usage customers are adversely affected by the high fixed charge because such customers have not historically paid the entirety of the fixed costs that could have been collected from them. Therefore, according to the PUCO, the SFV rate design addresses past inequities. PUCO Brief at 17.

The Court should not agree that high fixed charges result in more equitable rates or even rates reflecting cost causation. Under the SFV rate design, low-use customers will bear a disproportionate increase in their bills even if they maintain their current usage. The SFV shifts costs from high-usage, high-income customers to low-usage, low-income customers. This is inequitable because high users make greater use of the distribution system. Those who make greater use of the distribution system should bear a greater share of its costs. An estimated 65% of Duke's customers will have higher bills and be worse off under the SFV rate design than if the customer charge had remained at \$6 and the volumetric charges were increased to accommodate the revenue increase authorized in this case. OCC Ex. 5, Testimony of Wilson Gonzalez at 17; OPAE Supplement to Merit Brief ("Supp.") 01.

Moreover, the PUCO ignores the important regulatory principle of gradualism (or stability) in rate design. Stability of rates, with a minimum of unexpected changes seriously adverse to existing customers, is an important regulatory principle. Bonbright, James C., *Principles of Public Utilities Rates*, OPAE Appendix to Merit Brief ("App.") 088, 095. Gradualism requires that abrupt changes in rate design be avoided in order that one group of customers does not bear the burden of radical changes to its responsibility to provide for the utility's revenue requirement. Abrupt changes to the amount of the fixed customer charge, which customers pay regardless of usage, are inconsistent with the regulatory principle of gradualism.

PUCO precedent has been to make only slight changes in rate design, and specifically in the level of the fixed customer charge, in order to minimize rate shock that would otherwise be experienced by residential customers. PUCO decisions in

this area have identified the principles of gradualism and rate continuity as important factors to be considered in setting rates. *In the Matter of the Application of The Cincinnati Gas & Electric Company*, Case No. 95-656-GA-AIR, Opinion and Order, (December 12, 1996) at 29, App. 85. The precedent in Ohio ratemaking is to establish a low fixed charge and raise it only in small increments.

In prior PUCO cases, following the relevant precedent and regulatory principles, customer charges have been set relatively low, usually in the \$5 to \$6 range, and volumetric charges have been set correspondingly high. OCC Ex. 17; Supp. 042. In fact, a traditional rate design, following regulatory principles and precedent, would seek the lowest possible fixed charge and correspondingly high volumetric charges. In addition, when designing new rates, increases in the customer charge have been modest – in the \$1 to \$2 range at most. OCC Ex. 18 at WG-2; Supp. 062.

Clearly, the residential fixed customer charge increase in this case is far beyond anything the PUCO has previously sanctioned. The SFV rate design produces a 320% increase in the customer charge from the current \$6 to \$25.33. Such a huge increase clearly does not satisfy the regulatory principle of gradualism, which, even the PUCO acknowledges, has been the regulatory principle governing rate design for at least thirty years. *In the Matter of the Application of The Cincinnati Gas & Electric Company*, Case No. 95-656-GA-AIR, Opinion and Order, (December 12, 1996) at 29, App. 85. Even if a low fixed charge did not assign all possible costs to certain ratepayers, raising the fixed charge by 320% in one rate case, as the PUCO did here, is so far removed from regulatory practice as to be unconscionable.

The PUCO has maximized rate shock to low- and average-use customers by issuing orders entirely inconsistent with past cases where the principles of gradualism and rate continuity were important factors in setting rates.

Duke and the PUCO claim that the rate design is consistent with the principle of gradualism because of the phase-in of the customer charge over a two-year period. Duke Brief at 10. The PUCO also claims that the SFV rate design was implemented in a cautious gradual manner because of the phased-in rate design. PUCO Brief at 12, 25. In reality, the three step increases violate the principle of gradualism at each step. The increase from the current \$6 to \$15 is a 150% increase. The subsequent increase to \$20.25 is roughly a 233% increase. The final step to \$25.33 is approximately a 320% increase when compared to the \$6 current service charge. The huge impact of this radical rate design on low- and average-use customers is not mitigated by the three-step phase-in approved by the PUCO.

The PUCO also claims that a customer's ability to control his monthly bill is principally influenced by the cost of gas, which constitutes 75-80% of a customer's monthly bill, rather than the base rate that only affects the remaining 20-25% of the bill. PUCO Brief at 20. The PUCO states that the "record is devoid of evidence that the base rate design adopted by the Commission will dampen customer enthusiasm to save money." PUCO Brief at 20. Duke also argues that 75% of the residential customer rates remain on a variable volumetric charge. Duke Brief at 12.

This case concerns the distribution base rates, which the PUCO set upon an application by a utility for an increase in rates. The PUCO should not point to other charges not even under consideration in this case as a basis to justify its actions in

this case. Moreover, even if consumers remain enthusiastic to save money, under the PUCO's rate design, the consumer will be unable to do so. The huge fixed monthly charge discourages efforts by consumers to save money, because they must pay Duke this huge fixed charge regardless of how much gas they use.

The PUCO also claims that low-income residential customers tend to be above-average gas consumers, so that they will see lower bills under the SFV rate design. PUCO Brief at 15. This false claim is based on an analysis of customers who participate in the Percentage of Income Payment Plan ("PIPP") program. PUCO Brief at 16. The PUCO creates a false impression by equating PIPP customers with low-income customers. There are far more low-income customers than customers on the PIPP program. Moreover, PIPP customers pay a percentage of their monthly income toward their utility bills, while low-income customers are extremely sensitive to gas usage. The efforts of low-income customers to conserve will be thwarted by the SFV rate design. The PUCO is incorrect to equate PIPP customers with low-income customers.

An additional regulatory principle in ratemaking is to discourage wasteful use of service. Bonbright, App. 088, 095. This principle is increasingly important given the recent price increases for natural gas and the future decline of recoverable reserves. While the PUCO and Duke claim that the SFV rate design sends the proper price signal to consumers, nothing could be further from the truth. The SFV rate design subsidizes large users by rewarding them for excessive usage. Rather than encouraging those with big, inefficient homes to make the necessary investments to reduce the use of natural gas, the SFV sends customers the price

signal to use more. Encouraging wasteful use is a violation of regulatory principles and Ohio law. R.C. §4929.02(A)(4). App. 058. Meanwhile for those who control their usage, live in a small residence, and invest in energy efficiency and conservation, the SFV brings about the highest bill increases.

Another regulatory principle is acceptability of the rate design to the public. Bonbright, App. 088, 095. The PUCO claims that seeking public acceptance of a rate design is neither practical nor required by law. PUCO Brief at 14. The PUCO also claims that there is no need for evaluation of customer impacts because this puts the "cart before the horse" because exact impacts cannot be assessed before the fact. PUCO Brief at 14. In short, the PUCO scoffs at the notion that public acceptability of the rate design should be a factor in its rate-design decision making. The PUCO has no idea how the public will accept the radical SFV rate design and does not care. The PUCO's Staff acknowledged that it failed to investigate customer views on the SFV versus traditional rate design. Tr. I at 210, 244 (Cross Examination of Staff Witness Puican), Supp. 035. The Staff also acknowledged that it had not reviewed the impact of the SFV rate design for any of the other three utilities spread across three states that have adopted it. Id.

In spite of the PUCO's failure to concern itself with the acceptability to the public of the radical new residential rate design, the evidence of record demonstrates that the new rate design is clearly not acceptable to the public. Attendees at the public hearings based their comments on the notice approved by the PUCO and published by Duke. The notice referred only to an increase in the customer charge from \$6 to \$15, not the \$25.33 ultimately approved. Nonetheless,

the comments of customers were universally opposed to the 150% increase in the customer charge from \$6 to \$15. Had customers been noticed of the higher 320% increase to \$25.33 approved by the PUCO, the opposition of low- and moderate use customers, who, based on relevant data, have low and moderate incomes and depend on natural gas to heat their homes, would certainly have been even greater. This SFV rate design is unacceptable to residential customers.

The PUCO failed to follow established regulatory principles, its own precedent, and ultimately Ohio law. The SFV rate design does not represent a gradual change in the residential rate structure; thus, the established regulatory principle of gradualism has been violated by the adoption of the SFV rate design. Other regulatory principles violated by the adoption of the SFV rate design are the principles of cost causation, the discouragement of wasteful use of service, the acceptability of the rate design to the public, and the balancing of interests between the utility and its customers.

The PUCO's failure to adhere to these regulatory principles violates PUCO precedent. The Court has ruled that the PUCO should respect its own precedents and not depart from them without a clear need. While the PUCO should change its position when the need for change is clear and its prior decisions were in error, the PUCO is required to respect its own precedents in order to assure the predictability which is essential in all areas of the law, including administrative law. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 431; *Consumers' Counsel v. Pub. Util. Comm.* (1984) 10 Ohio St.3d 49. In violating the regulatory principles discussed above, the PUCO showed no respect for its own precedent and

did nothing to assure the predictability that is essential in all areas of law, including administrative law.

The PUCO derives its authority to design distribution rates from R.C. §§4905.22 and §4909.18. App. 054, 056. R.C. §§4905.22 and 4909.18 require that utility rates established by the PUCO be just and reasonable. App. 049, 054. Just and reasonable utility rates are set according to long-standing regulatory principles that govern public utility ratemaking. The PUCO has, prior to the order issued in this case, followed traditional regulatory principles in designing rates and setting the level of the customer charge. The SFV rate design does not result in just and reasonable rates, violating Ohio law at R.C. §§4905.22 and 4909.18. App. 049, 054. The PUCO is a creature of statute and lacks authority to deviate from the statutory requirements related to ratemaking. *Canton Storage and Transfer Co. v. Pub. Util. Comm. (1995)*, 72 Ohio St.3d 1. The PUCO may not ignore the statutory requirements that rates be just and reasonable. The Court should reverse the PUCO's orders unlawfully ignoring the statutory requirements for just and reasonable rates.

III. THE COMMISSION'S RESIDENTIAL RATE DESIGN DISCOUNTS THE VALUE OF AND CREATES A DISINCENTIVE FOR CUSTOMER CONSERVATION EFFORTS.

The PUCO's SFV rate design discounts the value of and creates a disincentive for customer conservation efforts. R.C. §4929.02 states that it is the policy of the State of Ohio to "[e]ncourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods." App. 058. The

PUCO is required to follow this state policy. R.C. §4929.02(B) states, “The public utilities commission *shall* follow the policy specified in this section...” [emphasis added]. *Id.* The PUCO contends that OPAE’s argument based on the policy of the state set forth at R.C. §4929.02 is misplaced because the Court rejected a “closely analogous” argument that R.C. §4929.02(A)(4) requires demand-side management and energy conservation programs. *Ohio Partners for Affordable Energy v. Pub. Util. Comm.* (2008), 115 Ohio St. 3d 208, 215. According to the PUCO, the state policy serves merely as guidelines, which require no PUCO response.

The issue in this case is not whether the policy of the state requires demand-side programs but whether the policy has any meaning at all. Even if the policy sets forth only guidelines, the SFV rate design runs counter to the policy by actually discouraging conservation and energy efficiency. The issue here is whether the PUCO is free not merely to ignore the policy because it is only a guideline, but whether the PUCO may violate the policy by issuing orders that run counter to it, i.e., orders that actually discourage demand-side programs.

The PUCO also claims falsely that the “fundamental reason” it adopted the SFV residential rate design was to foster conservation. PUCO Brief at 23. The reason for the SFV rate design is to guarantee the utility a certain revenue requirement. The PUCO claims that guaranteeing revenues to utilities removes a disincentive to promote and fund conservation and energy efficiency programs. PUCO Brief at 2, 21. Thus, anything that helps Duke to recover its charges will promote energy conservation and efficiency. PUCO Brief at 21. Duke also claims that the SFV rate design promotes energy efficiency by removing barriers to energy

efficiency investment by Duke. Duke Brief at 11. In short, the PUCO and Duke advance a trickle down theory that if the utility is sufficiently enriched, the utility will have some spare change to promote conservation. Such trickle down theories are rightly discredited in the real world, but the PUCO continues to believe that the enrichment of the utility somehow benefits its customers and promotes state policy.

The PUCO also claims that Duke has an annual “multi-million dollar commitment” to fund energy efficiency and conservation programs and has created a low-income pilot program that provides monthly credits to assist qualifying customers with their gas bills. PUCO Brief at 17, 19, 22. This PUCO argument actually contradicts the previous PUCO argument that the SFV rate design is needed to encourage energy efficiency programs. Regardless of this contradiction, the PUCO’s argument is incorrect. First, the low-income pilot program is far too small to have any impact on anything; it certainly does not mitigate the regressive impact of the SFV rate design. Low-use customers still see a disproportionate increase in rates. Second, Duke’s customers have funded energy efficiency and conservation programs for many years and will continue to do so. Supp. 010; *The Cincinnati Gas & Electric Company*, Case No. 95-656-GA-AIR, Finding and Order, July 11, 2007. App. 078. The cost of Duke’s energy efficiency programs is included in its revenue requirement. The purpose of the SFV rate design is not to promote energy efficiency (because it will do the opposite) but to guarantee Duke’s recovery of its revenue requirement.

The PUCO and Duke also claim that the SFV rate design sends consumers more accurate price signals. PUCO Brief at 12; Duke Brief at 10. In fact, under the

traditional rate design using a low fixed customer charge and relatively high usage charges, the more gas a customer uses, the more he or she pays. The traditional rate design results in a price signal encouraging conservation and energy efficiency in compliance with the policy of the State of Ohio. The SFV high fixed customer charge eliminates the price signal sent to customers as usage increases. Under the SFV rate design, the customer pays more the less gas he uses while a person using more than the average pays less. This is not sending a price signal to conserve. OCC Ex. 17 at 19 (Rebuttal Testimony of OCC Witness Yankel), Supp. 042.

Consumers should be rewarded with lower bills when their consumption decreases, and penalized with higher bills when consumption increases. The SFV rate design does the opposite. It penalizes customers who conserve, with the smallest users harmed the most. Every reduction in consumption increases the customer charge on a per ccf basis. The SFV rate design frustrates conservation efforts and actually forces the customer to pay more for less gas used. The SFV rate design not only fails to promote conservation, it actually discourages conservation. In short, a high fixed customer charge is precisely the opposite rate design to encourage investments in demand-side and energy efficiency goods and services as set forth in Ohio law. R.C. §4929.02(A)(4).

The SFV rate design also discounts the value of energy efficiency investments. Under the SFV, investments in energy efficiency will suffer, because each ccf saved from energy efficiency investments is worth less under the SFV rate design. OCC Ex. 17. Supp. 042. When the bill is less dependent on usage, the value of the energy efficiency investment decreases. The SFV rate design also

extends the payback period for energy efficiency investments. Cost effectiveness for energy efficiency investments is generally determined over the life of the efficiency measure, which is assumed to be twenty years for an energy-efficient furnace and insulation. Financing requires payback over the life of the measure, or twenty years. If the higher customer charge extends the payback period to over twenty years, the investment cannot be financed under current standards that require a twenty-year payback period. This means that fewer investments in energy efficiency will be made because the payback period is too long.

Thus, the SFV rate design must be rejected as contrary to state policy because it actually discourages innovation and market access for demand-side natural gas services. R.C. §4929.02(A)(4). App. 058. The PUCO is a creature of statute and lacks authority to deviate from the statutory requirements of R.C. §4929.02. *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1. The PUCO may not violate the statutory policy that encourages demand-side natural gas initiatives and may not issue orders that run counter to the policy. Even if the policy represents guidelines and not requirements, there is no legal support for violations of state policy. The Court should reverse the PUCO's orders unlawfully violating the policy of the state set forth at R.C. §4929.02. App. 058.

IV. THE EVIDENCE OF RECORD DID NOT SUPPORT ADOPTION OF AN UNTESTED, RADICAL RESIDENTIAL RATE DESIGN.

The PUCO claims that it delineated at length why a redesigned rate structure was both necessary and timely. PUCO Brief at 25. The PUCO also claims there was evidence of an extraordinary situation, which necessitated the radical approach

to residential rate design. Nothing is further from the truth. The evidence of record clearly did not support adoption of the radical SFV rate design.

First, the PUCO states it 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. PUCO Brief at 8. The PUCO continues that the revenue erosion, if left unchecked, could threaten Duke’s ongoing responsibility to provide adequate and reliable gas service to its customers. PUCO Brief at 24. The Court should not be confused by this seemingly dire language regarding Duke’s financial health. Such language (as existing rates being inadequate to recover costs and significant revenue erosion) is mere boilerplate used in any rate increase application to describe the need for an increase in rates. There was nothing in this case but a garden-variety request by a utility for an increase in rates. Duke received its rate increase, and no party opposed it. There was certainly nothing extraordinary about Duke’s financial condition, nor about its request for an increase in rates. In short, there was no basis to justify the radical residential rate design.

The PUCO cites declining gas usage that, it claims, resulted in persistent revenue erosion that could threaten the utility’s capability to provide ongoing adequate and reliable service. PUCO Brief at 2, 11. Duke also refers to the SFV rate design’s mitigation of problems of declining average customer usage. Duke Brief at 13. Beyond the fact that there was nothing unusual about Duke’s financial condition, there was also nothing extraordinary about its level of sales. The evidence shows that only 15% of Duke’s revenue deficiency in this rate case was

attributable to declining customer usage. Opinion and Order at 17. App. 015. Thus, declining customer usage was not shown to be the primary reason for the need for a rate increase. In fact, declines in usage have been modest, and such declines have had a negligible impact on revenues, a dip on average of only 3% per year.

Moreover, the PUCO ignored the fact that residential usage actually increased in three of the past five years over the level of use in the test year in the *previous* rate case, meaning that Duke over-recovered its revenue requirements during those years. Tr. I at 75, Supp. 026; OCC Exhibit 12, Supp. 017. There have been only intermittent reductions in throughput. The reductions, based on the record, are negligible at best, and there is no clear trend over the past five years. The evidentiary record is also devoid of any evidence that throughput will continue to decline in the period that the rates set in this case will be in effect.

What little revenue erosion Duke has experienced due to declining sales per customer would be more than offset by future increases in the number of residential customers. The record shows that, while sales per customer have not consistently declined, the number of residential customers has consistently increased. There is no evidentiary support for adopting a radical rate design that assumes reductions in customer usage and revenue shortfalls resulting from such reductions.

In addition, the proper remedy for Duke, in the event of reduced customer usage and revenue shortfall, is to do exactly what Duke has done every six years for the last two decades – file a rate case application to increase rates. The proper regulatory remedy for a revenue shortfall, if such shortfall exists, is an application for

an increase in rates, not the institution of a radical, unreasonable, and unlawful residential rate design.

The PUCO also claimed that “a negative trend in sales has a corresponding negative effect on the utility’s ongoing financial stability, [and] its ability to attract new capital to invest in its network.” Opinion and Order at 17. App. 015. The record did not demonstrate that Duke’s financial stability was in any way threatened, merely that Duke’s earnings had dropped below its authorized rate of return. Moreover, the PUCO has allowed Duke a rider called the Accelerated Main Replacement Rider (“AMRP”) that mitigates any difficulty Duke may have in attracting new capital. Under Rider AMRP, new capital is supplied by customers annually. With the Rider AMRP and regular rate cases incorporating new plant into rate base, there is no concern about the ability of Duke to obtain adequate capital. In short, there is no evidentiary basis to justify the SFV rate design as a response to Duke’s need for capital because there is no evidence of a lack of capital.

The PUCO also claims that there is no need for evaluation of the SFV rate design’s impacts on customers because this puts the “cart before the horse” and because exact impacts cannot be assessed before the fact. PUCO Brief at 14. The PUCO Staff acknowledged that it had not reviewed or analyzed the impact of the SFV rate design in the three other utility service territories where it has been adopted. Tr. I at 240; 244, Supp. 035. As a result there is no evidence to show that the SFV rate design will address problems that the PUCO claims it is addressing. The PUCO also has no evidence that the SFV rate design has produced financial

stability for utilities, nor improved their access to capital. Therefore, there is no evidence that the SFV rate design would address such problems if they existed.

There is no evidence to support the movement to the SFV rate design. While reducing work demands on Duke and the Staff of the PUCO resulting from frequent rate cases is apparently driving the move to the SFV, even this justification has no basis in fact. The continuation of Rider AMRP and the related infrastructure improvement program guarantees regular rate cases to incorporate the new plant into rate base. The SFV rate design does not eliminate the demand on Staff to perform its regulatory functions.

Thus, Duke failed to prove that the new SFV rate design is just and reasonable as required by Ohio law. R.C. §§4905.22, 4909.18, App. 0049, 054. The law requires the applicant to meet the burden of proving the new rate design is consistent with Ohio law and policy – Duke has not done so. R.C. §4909.19, App. 056. The law also requires the PUCO to base its findings and orders on the evidence of record. R.C. §4903.09. App. 048. The PUCO has not done so. The evidentiary record does not support adoption of the SFV rate design.

IV. CONCLUSION

The PUCO notes that it approved the same type of residential rate design for Columbia Gas of Ohio, Inc., but that no appeals were filed in that case. *Columbia Gas of Ohio, Inc.*, Case No. 08-72-GA-AIR, et al., Opinion and Order, December 3, 2008. PUCO Brief at 9. OPAE has filed this appeal, as well as an appeal in the SFV case of The East Ohio Gas Company. Case No. 09-314, Notice of Appeal

(February 11, 2009). Whereas it is obvious that the PUCO is moving toward fixed charges for distribution service, the Court should make nothing of the lack of appeals in each and every case. The resources of parties are limited, and they must choose among many cases that deserve to be appealed.

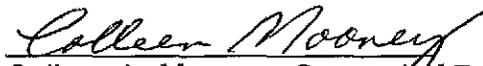
The Supreme Court is required to reverse, vacate or modify the PUCO's final orders where the orders are unreasonable or unlawful. *Consumers' Counsel v. Pub. Util. Comm.*, (1979) 58 Ohio St.2d 108, 110. The Court should reverse and vacate the unlawful and unreasonable PUCO decision in this case to deny ratepayers the benefit of just and reasonable rates and the policy of the state of Ohio to promote demand-side initiatives. The SFV rate design, which is a huge increase in the fixed monthly customer charge, does not result in just and reasonable rates as required by R.C. §§4905.22 and 4909.18. App. 048, 054. While the SFV rate design virtually guarantees Duke recovery of its revenue requirement, it achieves this goal unfairly on the backs of residential customers with low and average usage who cause less cost to the system than high-usage residential customers. For most customers, the SFV rate design means higher bills than they would have expected under a rate design that adheres to regulatory principles and PUCO precedent. The SFV rate design also transfers wealth from low-use and low-income customers to high-use customers who are predominantly high-income customers. App. 015, 028.

The SFV rate design also sends an anti-conservation price signal to consumers, penalizes low-use customers and customers who have invested in energy efficiency, extends the payback period for such investments, and takes away the ability of customers to control their energy bills by altering their usage. State

policy is to encourage demand-side investments. R.C. §4929.02. App. 058. The PUCO has chosen instead to discourage them in contravention of the state's policy.

The lack of evidence supporting the SFV rate design demonstrates that it is a solution in search of a problem. The record evidence does not support adoption of the SFV. R.C. §4909.18 requires that "the burden of proof to show that proposals in the application are just and reasonable shall be upon the public utility." App. 054. Duke has failed to meet its burden of proof. The PUCO has failed to issue orders that are based on the evidence of record. R.C. §4903.09. App. 048.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant, Ohio Partners for Affordable Energy, was served upon all parties to this proceeding by hand delivery or regular U. S. Mail this 19th day of February 2009.


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