

IN THE SUPREME COURT OF OHIO

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

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REPLY BRIEF OF APPELLANT,  
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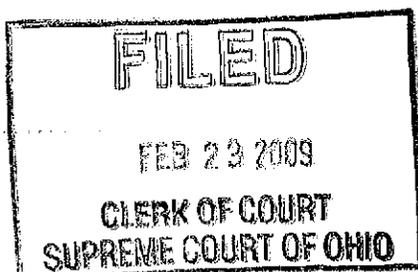
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## **I. STATEMENT OF FACTS AND CASE**

### **A. Introduction**

It is unrefuted that the Company bears the burden of proof to demonstrate that the straight fixed variable (“SFV”) rate design is just and reasonable.<sup>1</sup> The Office of the Ohio Consumers’ Counsel’s (“OCC”) appeal of the process that resulted in the implementation of the SFV rate design is based upon the fact that the Public Utilities Commission of Ohio (“PUCO” or “Commission”) approved this rate design based solely on speculation and conjecture with regard to the impact of the SFV rate design. The Commission’s Staff (“Staff”) who initially proposed the SFV rate design did not perform any studies or analysis to support the Commission’s approval of the SFV rate design. When Duke Energy Ohio, Inc. (“Duke” or “Company”) abandoned the rate design originally proposed in its rate increase application (“Application”), a decoupling mechanism, in favor of the SFV rate design, it was similarly done without supporting study or analysis. The Company’s burden could not be and was not met.

The harm to Duke’s approximately 380,000 residential customers from the SFV rate design is genuine and measurable. However, the Commission dismissed OCC’s arguments about the harm from the SFV rate design without the benefit of record evidence to support its decision. The Commission did not attempt to satisfy its need for evidence by ordering the necessary studies of the SFV rate design that would provide analysis of the impacts to Duke’s residential customers following the SFV rate design implementation. A manifest weight of the evidence argument is colorable where the Commission’s decision is void of evidence and without provisions to obtain the evidence by timely subsequent review of the decision.<sup>2</sup> Regulation, no

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<sup>1</sup> R.C. 4909.18 and R.C. 4909.19 (Appx. 000048-000052).

<sup>2</sup> *Cleveland Electric Illuminating Company v. Pub. Util. Comm.*, (1984), 12 Ohio St. 2d 320.

matter how much perceived discretion the regulator may have, cannot be permitted to withstand judicial review under these circumstances.

In addition to the lack of evidence supporting the Commission's decision to implement the SFV rate design, it is also noteworthy that the Commission did not have the benefit of an emerging national trend on its side. At the time the PUCO was contemplating implementation of the SFV rate design only two other states had approved an SFV rate design whereas six other states contemplating the SFV rate design had rejected it. OCC Exhibit No. 5 (Gonzalez Direct Testimony) at 21 (Supp. 000164).<sup>3</sup> A much more discernable national trend involved eleven states which had approved a decoupling mechanism and eleven other states that were considering a rate design incorporating a decoupling mechanism. That information was in the record of this case, but likewise disregarded. *Id.*

The Commission in its brief clouds the arguments by interchanging the SFV ("levelized") rate design and a decoupling mechanism. PUCO Merit Brief at 8, 9, 21 and 22. These are not the same concepts. While both will positively address the identified problem facing the utility -- revenue erosion caused by declining average use per customer -- each of these two rate designs impacts customers quite differently. The Commission decided to address this problem with the implementation of the SFV rate design, which will cause harm to Duke's residential customers. However, a decoupling mechanism would have addressed the identified problem for the Company, but would have done so in a more transparent and balanced manner without the unjust and unreasonable impacts to Duke's residential customers. A decoupling mechanism would have also allowed the Commission the opportunity to move towards the SFV rate design in a more gradual manner consistent with its own precedents and policies while affording the

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<sup>3</sup> See also, Amicus Brief of the National Resources Defense Council in Support of the Appellant Ohio Consumers' Counsel at 14-15 (December 15, 2008).

Company time to analyze and conduct necessary studies regarding the impacts of the SFV rate design prior to its implementation.

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

**B. Statement of Facts**

The OCC incorporates the facts as stated in its Merit Brief filed on December 15, 2008. On February 2, 2009, the Appellee, Public Utilities Commission of Ohio, and intervening Appellee, Duke Energy Ohio filed Merit Briefs that OCC will respond to herein.

**II. ARGUMENT**

**Proposition of Law I.**

**The PUCO Order Should Be Reversed Because It is Not Based Upon Findings of Fact and is Against the Manifest Weight of the Evidence (*Responsive to PUCO Proposition of Law I*).**

**A. The facts presented to the Commission do not support its decision to implement the Straight Fixed Variable rate design.**

The Commission puts forth its rationale for abandoning 30 years (PUCO Merit Brief at 9) of rate design in favor of the SFV rate design; however, a close review of this rationale demonstrates the significant extent to which it is skewed in favor of the Company. Examples of the rationale that the PUCO relies upon are as follows: "steadily-declining sales per customer consumption have caused *Duke* to experience significant revenue erosion;" PUCO Merit Brief at 10 (Emphasis added). "*Duke's* natural gas operations are earning a return of 5.62 percent;" PUCO Merit Brief at 11. (Emphasis added). "The financial instability caused by persistent revenue erosion threatens *the utility's* ability to continually provide adequate and reliable service to all customers;" PUCO Merit Brief at 11 (Emphasis added). These statements demonstrate an overarching concern, by the Commission, for Duke's circumstances. By implementing the SFV

rate design, the Commission addressed Duke's concerns, but failed to balance the residential customers' interest.

Historically, the Commission has approved customer charge increases by adhering to a measured and gradual policy. The Commission justifies its disregard for precedent and policy by rationalizing its actions in light of where it potentially could have taken the customer charge instead of looking from where the customer charge came. The Commission stated: "While the cost of service study supported a fixed charge as high as \$30/month, the Commission adopted a fixed charge of 20.25 in year one and 25.32 in year two." PUCO Merit Brief at 12. Contrary to the Commission's argument that an increase to the customer charge of \$14.25<sup>4</sup> in year one and \$19.32<sup>5</sup> in year two is a "cautious and gradual" implementation, these increases are neither cautious nor gradual. PUCO Merit Brief at 12. Nor are these increases "consistent with the principle of gradualism." Duke Merit Brief at 10. Rather these increases to the fixed portion of the customer charge represent enormous and unprecedented increases in the customer charge that violate the principle of gradualism. This is an unjust and unreasonable result. Therefore, this Court should reverse and remand the PUCO's Order in this case.

The PUCO considered its actions to be justified because it stated the SFV rate design "send[s] a more accurate price signal and provides consumers with better information regarding how to manage their gas." PUCO Merit Brief at 12, See also Duke Merit Brief at 10. These justifications are without merit. A price signal is a message sent to consumers and producers in the form of a price charged for a commodity, this is seen as indicating a signal for producers to increase or

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<sup>4</sup> \$20.25-\$6.00=\$14.25

<sup>5</sup> \$25.32-\$6.00=\$19.32

decrease supplies and/or consumers to increase or reduce demand.<sup>6</sup> In this case merely charging consumers a fixed price for the delivery portion of a natural gas bill, because these costs happened to be fixed, is not a price signal--it is merely a bill. In addition, because the PUCO has so significantly reduced the volumetric portion of the customer charge, customers' efforts to reduce their consumption will not translate into additional savings. The SFV rate design will take away the control that consumers previously had over their utility bills under a more traditional rate design (e.g. lower customer charge and greater variable rate). The stated justifications, therefore, do not benefit Duke's residential consumers.

Furthermore, the PUCO incorrectly perceives that a benefit exists for consumers due to levelizing the customer charge via the SFV rate design. The Commission stated: "the levelized rate design spreads recovery of fixed costs more evenly throughout the year." PUCO Merit Brief at 13. However, currently only approximately 20 percent of Duke's natural gas residential customers have voluntarily chosen to participate in Duke's budget billing program. Tr. Vol. I at 38 (Supp.000039). The evidence was uncontroverted and suggested that Duke's customers do not initiate budget billing because the natural leveling effect of their total energy bills - - gas and electric - - which form a natural budget billing plan in themselves. Tr. Vol. I at 38 (Supp. 000039). The fact that the vast majority (80 percent) of Duke's natural gas customers have not chosen the budget billing option is a revealed preference, and should be significant evidence to support the fact that they are not particularly interested in a levelized bill.

Moreover, budget billing is an option that customers can choose. The SFV rate design as approved by the Commission is not a choice. The Commission should not force customers who have largely rejected the budget billing option to accept it in the form of a SFV rate design and then

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<sup>6</sup> Paul A. Samuelson, Economics, Ninth Edition, McGraw-Hill, 1973 at 163.

be told that this form of a levelized billing is a benefit, contrary to their own preferences. It is further evidence to support OCC's argument that the Commission is more interested in establishing a rate design that favors the Company instead of finding a balanced rate design that does not harm Duke's residential customers.

It is interesting to note that the Company's Application did not seek the SFV rate design, but instead Duke had proposed a decoupling mechanism ("Sales Decoupling Rider"). The Commission relied upon unsubstantiated claims as a basis for disregarding the Company's rate design proposal contained in its Application by stating: "the levelized rate design is superior to the sales decoupling rider proposed by Duke because the SFV rate design is more straightforward and easier for customers to understand." PUCO Merit Brief at 13. The Commission's position is not buttressed by consumer research or testing.

Even more troubling is the Commission's unsubstantiated and incorrect statement that: "[the SFV rate design] eliminates the need for deferred cost recovery and *associated carrying charges*, and likely contentious annual rate adjustments, and is easier for customers to understand and rely upon in planning for their gas needs." PUCO Merit Brief at 13. However, there is no evidence that the Company had asked for recovery of carrying costs associated with its proposal for a decoupling mechanism. Tr. Vol. I at 237-239 (Puican) (March 5, 2008) (OCC Second App. 000012-000014).<sup>7</sup>

Furthermore, the Commission Staff admitted on cross-examination that it had conducted no studies or analysis or surveys to determine if customers would be accepting of the change in the SFV rate design. Tr. Vol. I at 210 (Puican March 5, 2008) (OCC Second App. 000007). Nor did the Staff conduct any workshops or any public process to gather input on its decision to implement an SFV

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<sup>7</sup> Q. Are you assuming here in your answer \* \* \* that carrying costs would be included in the decoupling mechanism? A. Yes. \* \* \* Q. So to the extent there are carrying costs, you see that as a negative, so the flip side if there are no carrying costs, there would not be a negative? A. If there are no carrying costs then \* \* \* that statement would not be relevant.

rate design. Tr. Vol. I at 216 (Puican) (March 5, 2008) (OCC Second App. at 000008). Finally, the Staff has not had the opportunity to determine what customer acceptance or understandability would be to the implementation of the SFV rate design. Tr. Vol. I at 231-233 (Puican) (March 5, 2008) (OCC Second App. 000009-000011). The Commission, without the benefit of supporting study or analysis, has reached its conclusions pertaining to the SFV rate design in a vacuum.

In light of this lack of record support, there is audacity in the statement in the PUCO's Brief that "following an *exhaustive analysis* of both [the Sales Decoupling Rider] and the levelized rate design \* \* \* it concluded that a fundamental rate design change better served Duke's customers. PUCO Brief at 14 (Emphasis added). There was no quantitative analysis of customer impacts that the Commission could cite to. In fact the Commission challenged OCC's argument that the Commission abused its discretion by implementing the levelized rate design without sufficient evaluation of customer impacts. The Commission cites to a Supreme Court case that decided the Commission has considerable discretion in rate design matters. PUCO Merit Brief 7 citing *Citywide Coalition for Utility Reform v. Pub. Util. Comm.*, (1993) 67 Ohio St. 3d 531. The *Citywide* case involved Cincinnati Gas and Electric's ("CG&E") declining block rate structure which was challenged as not being cost-justified. However, in the *Citywide* decision, the Court noted that "the Commission also ordered CG&E to *conduct further analysis on this issue for presentation and consideration in its next rate case.*" This is factually distinguishable from the present case wherein the Commission has implemented the SFV rate design without the benefit of requiring future studies of the impacts on consumers.

The Commission did not study customer impacts before the SFV rate design implementation or order a study be performed after the SFV rate design implementation. Instead the Commission is willing to rely only on "anticipated benefits to both Duke and its customers" as support for its

decision. PUCO Merit Brief at 14. The Commission even went so far as to state that parties to the Columbia Gas of Ohio Rate Case (“Columbia Case”) did not seek rehearing of the Commission’s implementation of the SFV rate design in that case. PUCO Brief at 9. However, the Commission knows all too well that OCC and other interested parties did not seek rehearing in that case because the Commission approved a study of customer impacts of the SFV rate design. The following description outlines the study that the Commission approved in the Columbia Case:

Columbia will fund and manage a comprehensive DSM/Conservation Program Evaluation study. The scope of study will be cooperatively developed by Columbia, Staff, OCC, OPAE and other interested parties, and will include, but not be limited to, the effects of a levelized rate design on: consumption decisions, conservation efforts and uncollectible account balances at all levels of income and usage levels; low use/low income customers consumption patterns; PIPP enrollments and arrearages; and, consumers energy efficiency investment decisions.<sup>8</sup>

It is incomprehensible that the Commission would rely solely on *anticipated benefits* when abandoning 30 years of Commission precedent. It is an obvious abuse of discretion. Arguably, if the benefits Duke was to derive from the SFV rate design were merely *anticipated benefits*, it is unlikely the Commission would have approved such a rate design under such speculative circumstances. The Commission’s failure to perform an exhaustive analysis, contrary to its arguments on brief, of the customer impacts resulting from a dramatic change in rate design before or after implementation to support its decision to move forward with the SFV rate design was an abuse of discretion, and must be addressed by this Court.

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<sup>8</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case No. 08-72-GA-AIR, et al., Opinion and Order at 21 (December 3, 2008). (Supp. 000218).

**B. There is no evidence to support the Commission’s conclusion that non-Percentage of Income Payment Plan low-income customers are above-average gas consumers; therefore, these customers would not benefit from the Straight Fixed Variable rate design.**

The Commission has unreasonably concluded that low-income customers will benefit from the SFV rate design because these customers are not low-use customers. PUCO Merit Brief at 15-19. It is also interesting to note that the Company made no attempt to support the Commission’s conclusion on this point in its Merit Brief. This conclusion was reached based on an analysis of Duke’s Percentage of Income Payment Plan (“PIPP”) customers that shows PIPP customers use more than the average residential customer, thereby benefiting from lower bills under the SFV rate design. PUCO Merit Brief at 15. The Commission; however, does not have a study that demonstrates what the average low-income non-PIPP customer consumes. This is an important fact that is, as of right now, still unproven. The Commission’s reliance upon the average PIPP customer’s usage as a surrogate for the average non-PIPP customer was unreasonable.

Rather than recognizing the SFV rate design as injurious to Duke’s low-income (non-PIPP) customers, Duke and the Staff witness assert and assume that an SFV rate design is beneficial. Staff Ex. No. 3 (Puican Direct Testimony) at 5-6 (Supp. 000181-000182).<sup>9</sup> The Commission accepted in its Order Duke and the Staff’s argument based upon the erroneous assumption that Duke’s PIPP customers, many of whom are high energy users, are representative of all of Duke’s low-income customers. Order at 15 (Appx.000028). Again, this conclusion was reached without the benefit of evidentiary support in the record of this case.

The Commission, in its Order, erroneously stated that: “OCC and OP&E insist that the levelized rates will harm low-income customers and that the Percentage of Income Payment Plan

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<sup>9</sup> Staff witness Puican stated, “Because high-usage customers will benefit from the SFV rate design, and low-income customers are more likely to be high usage customers, it is reasonable to conclude that low-income customers are more likely to actually benefit from SFV.”

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

The Commission unsuccessfully attempts to deflect scrutiny of the harm that the SFV rate design causes low-use low-income (non-PIPP) customers by raising a non-issue as support for its position. The Commission states:

To the 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.” PUCO Merit Brief at 17.

The Commission makes this subsidy argument without citation or support. In fact Duke’s witness Paul Smith admitted he was unaware of any prior Commission decision that identified such a subsidy:

Q. I understand that. But you are indicating that there was a subsidy so you are saying the Commission’s use of the other rate design over the last 25 years was consistently a subsidized rate design?

A. Given the cost of service provided in this case, there would be a subsidy if we don’t approve the proposed rate design as stipulated by 10 of the 12 parties.

Q. Do you know if the Commission has ever identified that as a subsidy in any of its orders?

A. I am not aware of that. Tr. Vol. I at 156-157 (Smith) (March 5, 2008) (Second Appx. 000005-000006).

This Court should not be distracted by this non-issue and should review the Commission’s Order and decide the SFV rate design is not just and reasonable.

The matter was raised by the Commission to misdirect the focus away from the issue of impacts of the SFV rate design on Duke's low-use low-income residential customers. Whether a prior subsidy existed, and whether or not the SFV rate design somehow remedies a prior intra-class subsidy is irrelevant to the issue at hand. This Court should instead focus on the issue of what evidence the Commission relied upon in its decision to approve the SFV rate design. To the extent the Commission relied on a prior subsidy which has never been proven to exist in any Commission Order demonstrates the lengths the Commission is willing to go to preserve its Order, but should illuminate for this Court the Commission's decision is against the manifest weight of the evidence.

Finally, the Commission through twisted logic has created a low-income pilot program. The Commission's position is irreconcilable and unsupportable. First the Commission argues that the SFV rate design is beneficial to low-income customers. However, the Commission has put into place a low-income program that the Commission considers to be "crucial to its decision." Order at 19 (App. at 000032). It is inconsistent to consider this program to be crucial to its decision because it was adopted to protect those very same low-income customers that the Commission has been so sure that its favored rate design would not harm. PUCO Merit Brief at 17. If the Commission's underlying premise was correct, this pilot program would not have been necessary.

Such a rate design is inherently unfair to low-usage, low-income customers, who because of their limited means, likely live in smaller dwellings, such as apartments, and use less natural gas than wealthy homeowners with large homes. The SFV rate design is not only unfair to these customers with small incomes, it is extremely insensitive in its timing; coming on the heels of several years of belt-tightening by America's working poor, amidst a nationwide mortgage foreclosure crisis and with the country in a deepening recession.

**C. There is no evidence to support the PUCO’s finding that the Straight Fixed Variable rate design encourages conservation efforts.**

Another area of disagreement in this case surrounds the impacts the SFV rate design has on customer conservation efforts. The SFV rate design does not promote customer efforts to engage in conservation of natural gas, and instead would encourage increased usage of natural gas. Such a rate design is contrary to Ohio policy which states:

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

\* \* \*

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

The Commission without citation to any supporting analysis or study of this issue, reached an unreasonable contrary conclusion by stating:

[t]he levelized rate design provided appropriate incentives, through a rational pricing scheme, to encourage a reduction in the consumption of natural gas. \* \* \* 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. PUCO Merit Brief at 19 (Emphasis omitted); See also Duke Merit Brief at 12.

The Commission cannot use the gas cost recovery mechanism as evidence to support its conclusion that the SFV rate design encourages conservation. The GCR mechanism is not changing as a result of the implementation of the SFV rate design. Instead there must be a review of the SFV rate design in isolation to evaluate what impact the SFV rate design has on consumers’ consumption decisions. Absent an analysis of the impacts of the SFV rate design on conservation efforts it is impossible for the Commission to sustain an argument that the SFV rate design encourages conservation.

The Commission unreasonably argues that “customers who invest in better insulation materials or more efficient appliances will continue to save money as they use gas more efficiently.” PUCO Merit Brief at 20. Again, the Commission focuses only on the savings that materialize through the gas cost recovery mechanism, not any preconceived notion of savings through the SFV

rate design which is the subject of this appeal. It is unrefuted in the record that those customers who have invested in additional home insulation and purchased more efficient furnaces and water heaters as a rational response to increasing gas costs (and in response to Ohio policy) will see their investment returns diminished and payback periods lengthened as a result of the SFV rate design. OCC Ex. No. 5 (Gonzalez Direct Testimony) at 18 (Supp. 000161); See also, *Id.* at Exhibit WG-3 (Supp. 000172-000174). The SFV rate design discourages customer conservation.

The Commission also unreasonably argued that the SFV rate design removes the Company's disincentive to promote conservation. PUCO Merit Brief at 21. In a prior proceeding, the Commission had approved sizeable energy efficiency programs for Duke which are currently in place.<sup>10</sup> In this case, the Commission relied on an argument that lacks merit as a means to support its decision to move to an SFV rate design. The Commission stated:

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

Therefore, the Commission's argument that the SFV rate design reduces the Company's disincentive to promote energy conservation is also without merit in this case because Duke previously has a three-year demand-side management ("DSM") program in place.<sup>11</sup> Further, the

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<sup>10</sup> *In the Matter of the Application for Recovery of Costs, Lost Margin and Performance Incentives Associated with Implementation of Natural Gas Demand-Side Management Programs by the Cincinnati Gas and Electric Company*, Case No. 06-93-GA-UNC, Amended Application, (August 16, 2006). See also OCC Ex. No. 5 (Gonzalez Direct Testimony) at 12-13. (Duke's DSM Program is designed to reduce the level of usage by, at a minimum, .75 percent to two percent of verified annual energy reductions as a result of implementing the Company's comprehensive energy efficiency programs) (Supp. 000155-000156).

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

decoupling mechanism as originally proposed by Duke in its Application would have accomplished the same objective. SFV is the invention of the Commission, not Duke's.

The DSM program was approved by the Commission prior to Duke's filing its Application in this case, and thus was done prior to and without the necessity of an SFV rate design. In addition, Duke has been spending \$2 million annually on low-income weatherization, and through this case has agreed to spend another \$1 million. Joint Ex. No. 1 (Stipulation) at 12, ¶12 (Supp. 000012). While Duke characterizes the DSM pilot programs as a "starting point and are complementary to the efficiencies enabled by the rate design which the Commission ordered in this case," Duke also states without commitment: "the [DSM] pilot programs approved by the Commission represent minor investments. \* \* \* [Duke] *hopes* to develop and implement gas energy efficiency programs in the future. Duke Merit Brief at 12 (Emphasis added). With the cost recovery opportunities Duke has from the DSM programs, the Company's incentive to promote energy efficiency was already in place.<sup>12</sup> In fact, the Commission should not have implemented a rate design with an "energy efficiency incentive" that exceeded the incentive the Company itself proposed in its Application. There was absolutely no need for the Commission to increase the fixed customer charge by an additional 68.9 percent.<sup>13</sup>

If the price signal encourages consumption or if customers invest in energy efficiency only to see their payback periods extended, this can have a chilling effect on continued investments in energy efficiency. Such an outcome is anathema to the intent of the law. Therefore, the residential rate design as approved by the Commission was unlawful and in violation of Ohio policy due to its failure to promote energy efficiency and encourage conservation and should, therefore, be reversed

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<sup>12</sup> Id. Order at 3 (July 11, 2007) (Supp. 000262). (Duke has authority to recover program costs, lost margins, and shared savings associated with the implementation of a set of DSM programs for residential small/medium size business consumers.)

<sup>13</sup>  $\$25.33 - \$15.00 = \$10.33$ ,  $\$10.33 / \$15.00 \times 100 = 68.9$  percent.

and remanded by this Court. This Court should find that the SFV rate design approved by the Commission will materially alter customer economies when contemplating an energy efficiency investment, and therefore is unlawful because it violates R.C. 4929.02.

The Commission inexplicably attempted to attribute a quote from OCC witness Gonzalez, as support of its SFV rate design. The Commission stated: “Gonzalez acknowledged that a decoupled rate design will promote the energy efficiency investments.” PUCO Merit Brief at 22. The decoupled rate design that Mr. Gonzalez was referring to addresses revenue stability and declining customer usage in a way that is more gradual in its application and with protection for customers of a reconciliation of any over-recovery or under-recovery. Decoupling continues the volumetric rate design so that those who use the most natural gas pay the most. Under decoupling, the company is essentially guaranteed the level of revenues approved by the Commission after certain appropriate adjustments. This occurs because at the end of the year, the Company’s revenues received are compared with the revenues authorized resulting in a reconciliation adjustment that is either credited or debited to customers through a rider. The transparent and balanced reconciliation mechanism of the decoupling rate design is absent in the levelized SFV rate design approved by the Commission which makes no year-end adjustment to the revenues over/under collected.

The Commission made further non-compelling arguments. The Commission stated “the levelized rate design does nothing to chill or dampen customer enthusiasm to save money.” PUCO Merit Brief at 21. However, that is not the standard in 4929.02. In the law, it is not enough for the Commission to merely get out of the way of energy conservation, but rather it is the Commission’s obligation to *encourage innovation and market access for cost-effective*

*supply-and demand-side natural gas services and goods.*<sup>14</sup> The Commission should be leading the energy efficiency initiative through affirmative and proactive means. While the Commission does not believe the SFV rate design does anything to “chill or dampen” a consumer’s desire to conserve. The SFV rate design does not do anything to “encourage” that desire either. The Court should find the Commission’s attitude, on this issue, to be unlawful.

The Commission’s argument that: “the fundamental reason that the Commission adopted the SFV residential rate design was to foster conservation, not discourage it” rings hollow. PUCO Brief at 23 (Emphasis omitted). A rate design that sends a price signal to consumers that encourages consumption, extends the payback period, and fails to encourage energy conservation is unjust and unreasonable because it violates R.C. 4929.02, and this Court should reverse and remand the Commission’s decision.

The PUCO argues that R.C. 4905.70 applies only to electricity conservation programs. PUCO Merit Brief at 22-23. While there is no doubt that the statute refers to electric conservation programs, the statute is not so limited. In fact, the statute is entitled “energy conservation programs,” which refers to both natural gas and electricity. Pursuant to the statute, the PUCO is to initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiency and take into account long-run incremental costs. If the statute were intended only to apply to electricity conservation programs, it would have said so. The plain reading of the statute, with its explicit reference to “energy” conservation, is broad enough to include electricity and natural gas.

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<sup>14</sup> R.C. 4929.02(B) “The Public Utilities Commission shall follow the policy specified in this section in carrying out sections 4929.03 to 4929.10 of the revised code.”

**D. The manifest weight of the evidence does not support the PUCO's Order.**

The Commission argued that it has explained, in its Order, how the levelized rate design addressed certain circumstances and why it is the *best choice for customers*. PUCO Merit Brief at 24. (Emphasis added). The Commission cited the following as justification for the SFV rate design from the customers' perspective: (1) levelized rate design corrects historical rate efficiencies, (2) addresses the revenue erosion problem (3) 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. *Id.* Each of the above listed reasons the Commission touts for the SFV rate design as being best for Duke's residential customers are instead all reasons why the rate design benefits the Company.

The Commission reached an unreasonable conclusion that again cannot be supported by evidence from the record in this case. The Commission stated: "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. PUCO Merit Brief at 25. (Emphasis added). The Commission failed to explain exactly what benefits Duke's residential customers derive from the SFV rate design or to quantify the minimal impacts that are outweighed in the yet to be seen analysis of the impacts the Commission is alluding to.

The Commission cannot distance itself from precedent that would protect consumers against the harms of the SFV rate design. The Commission makes the argument that: "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. PUCO Merit Brief at 25. Assuming *arguendo* that there was justification to redesign the residential rate structure; the Commission never fully explained why the SFV rate design as implemented in this

case, was preferable to a traditional rate design (low customer charge with higher volumetric rate) in conjunction with a decoupling mechanism. Such a rate design would have addressed the enumerated concerns facing the Company that were a result of declining average usage per customer, and would have in a more transparent manner protected the low-use and low-income customers from the rate shock that was implemented in the form of the SFV rate design.

**Proposition of Law II.**

**The PUCO'S Order Should Be Reversed Because Customers Did Not Receive Notice of the Straight Fixed Variable Rate Design As Approved by the PUCO (*Responsive to PUCO Proposition of Law II; Duke Argument A*).**

Duke makes an incorrect argument that "OCC waited silently until raising this issue in its Application for Rehearing." Duke Merit Brief at 5. In actuality, OCC raised this issue for the first time in its Post-Hearing Merit at pages 24-25 (March 17, 2008), Second App at 000002-000003. It is unrefuted that Duke sent notice to its customers regarding the substance of its Application; however, it was not until the PUCO approved the SFV rate design in its Opinion and Order (May 28, 2008) did Duke's notice become deficient because the rate design in Duke's Application was significantly different from the rate design approved by the PUCO. PUCO Merit Brief at 26. The notice requirements for a public utility's application to begin a traditional rate case and for an alternative rate case are found under R.C. 4909.18 (Appx. 000048), 4909.19 (Appx. 000051) and 4909.43 (Appx. 000053). In this case, the Commission failed to enforce the notice requirements, thus denying consumers adequate notice with sufficient detail of the residential rate design ultimately approved by the Commission, which differed significantly from Duke's Application.

Duke's notice provided customers with information that the percentage increase for its customers would be a 5.8 percent increase from current rates for a total bill comprised of delivery charges and commodity charges. Pre-Filing Notice at Tab 8 (OCC Supp. at 000187-000188). However, under the SFV rate design ultimately approved by the Commission, the

anticipated increase depends on a customer's usage and deviates significantly from the notice that Duke provided. OCC Merit Brief at 7 (Second App. at 000001B). In fact at the lower usage level (72 Mcf per year) the customer would see a 7.9 percent increase (includes delivery and commodity charges), whereas a higher usage customer (600 Mcf per year) would experience a 9.1 percent decrease (including delivery and commodity charges). OCC Merit Brief at 6-7 (Second App. at 00001A – 000001B). The comparison is even more dramatic when considering a bill comprised of the delivery charges only. In that comparison, the low use customer would experience a 24.7 percent increase over current delivery charges, and the higher use customer would experience a 42.3 percent decrease. OCC Merit Brief at 6-7 (Second App. at 000001A-00001B). Had Duke's notice provided its low-use customers with accurate information and sufficient detail regarding the extent of the impact of the rate design that was ultimately approved, these customers may have responded differently to the rate increase to protect their interests.

The Commission argued that R.C. 4909.19 requires copies of the Staff Report to be served upon municipalities affected by the rate application as well as "such other persons" as the Commission deems interested. PUCO Merit Brief at 27. The Company similarly argues that "the statutory notice requirement of the Commission regarding its report is *substantially identical* to the notice requirement applicable to [Duke] \* \* \*." Duke Merit Brief at 6 (Emphasis added).

While the service list for the Staff Report may be substantially identical to the distribution of Duke's Notice regarding its Application for the rate increase, it is unreasonable to believe that a lawful substitute for a notice of the "substance of the Application" could be the 154 page Staff Report filed on December 20, 2007, because the Commission made post-Application changes that were thus excluded from Duke's notice. The Company cannot be

permitted to hide behind post-Application changes, approved by the Commission, as lawful justification for providing consumers a deficient notice. The Commission argues that “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.” PUCO Merit Brief at 28. However, the Commission’s authority to design and establish customer rates should not supersede consumers’ right to be noticed of the rate increase that they ultimately will be asked to pay. To provide notice to consumers of a company’s application without provisions to send consumers notice of post-application alterations, then customers, as in this case, are never accurately notified of the rate increase they will be required to pay.

The Commission wrongly argues that reliance on the *Committee Against MRT*, (1977) 52 Ohio St. 3d 231 case is misplaced. PUCO Merit Brief at 27. Duke’s notice provided customers with the rate design included in its Application. That rate design was significantly altered by the Commission’s approval of the SFV rate design. No notice was provided to customers regarding the SFV rate design. Therefore, the practical result of this case is that the Duke’s customers were never provided notice that would allow affected persons or entities to respond to the application. The very same issue was addressed by the Court in the *Committee Against MRT*.

The PUCO’s failure to enforce the statutory notice requirements, regarding proposed changes to Duke’s rate design, results in an unreasonable and unlawful Order that should be reversed and remanded by this Court.

### **III. CONCLUSION**

For all the arguments contained in OCC’s Merit Brief, and for the reasons provided in response to the Commission’s and Company’s Merit Briefs contained herein, this Court should reverse and remand the Commission’s Order approving the SFV rate design in these cases.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Reply Brief on behalf of the Office of the Ohio Consumers' Counsel was served by regular U.S. mail, postage prepaid upon the counsel listed below this 23rd day of February, 2009.

  
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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**POST-HEARING BRIEF  
OF  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**March 17, 2008**

**000001**

#### IV. ARGUMENT

##### Proposition of Law 1.

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

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

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

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

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

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

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

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

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

to \$15.00 per month would force many customers to choose between groceries or medication and paying their utility bills.<sup>96</sup>

The evening local public hearing brought more testimony echoing similar concerns. Mr. Dennis Mendleson testified that the rate increase would lead to Duke Energy losing customers.<sup>97</sup> He also testified that with a flat rate, once the increase is put in place, he could not turn down his thermostat to lower his heating costs.<sup>98</sup> Mr. Doug Bell testified that he opposed the customer charge proposal because it would be a disincentive to home owners to enact energy efficiency. He added that increased base rates considerably lessened the impact of energy efficiency improvements.<sup>99</sup>

In addition to these individual and group representative complaints, the Village of South Lebanon passed Resolution No. 2009-03 which declared opposition to the proposed Duke Energy Increase.<sup>100</sup>

It must be noted that even all of this opposition and outcry was based on the original Company proposed customer charge increase from \$6.00 to \$15.00.<sup>101</sup> The Commission did not provide the public, as required under R.C. 4903.083, with public notice regarding the fact that the Company has now embraced the Staff's proposed customer charge of \$20.25 and \$25.33.<sup>102</sup> Had customers been given notice regarding

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<sup>96</sup> March 11, 2008, Local Public Hearing at 16.

<sup>97</sup> February 25, 2008, 6:30 p.m. Local Public Hearing Tr. at 17.

<sup>98</sup> February 25, 2008, 6:30 p.m. Local Public Hearing Tr. at 17.

<sup>99</sup> February 25, 2008, 6:30 p.m. Local Public Hearing Tr. at 20.

<sup>100</sup> Resolution filed in Case No. 07-589-GA-AIR on March 11, 2008.

<sup>101</sup> Duke Prefiling Notice at Current Tariff Sheet No. 30.13 (Customer Charge per month - \$6.00), and Duke Prefiling Notice at Proposed Tariff Sheet No. 30.14 (Customer Charge per month - \$15.00).

<sup>102</sup> Joint Ex. No. 1 (Stipulation) at Exhibit 2.

this even greater increase in the customer charge, the reaction would most likely have been even greater.

The Commission should give ample consideration to this level of customer opposition in light of how the Commission addressed this very issue in a prior Duke rate case. Specifically, in Case No. 95-656-GA-AIR, the Commission stated that:

We heard a great deal of testimony at the local hearings regarding the detrimental impact that an increase that the customer charge would have on low income customers (See Cincinnati Tr., 29-30, 54, 61, 93). We believe that it is appropriate in this case to keep the customer charge at its current level in order to minimize rate shock that would otherwise be experienced by residential customers.<sup>103</sup>

In Case No. 95-656-GA-AIR, the Commission took the step of freezing the customer charge when the then-current customer charge was \$5.50. The Company was requesting a change to nearly double the charge to \$10.00, and the Staff originally recommended a \$7.00 customer charge and then recommended a revised customer charge of \$5.50, the same as the then current rate.<sup>104</sup> To the extent that an increase to the customer charge of \$4.50 was determined to be too great, then the proposed customer charge increases of \$14.25 and \$19.33 warrant the same treatment.

In CEI, Case No. 79-537-EL-AIR, the Commission noted concern with customer acceptance of the customer charge despite the fact that the case would reduce the customer charge from \$3.05 to \$3.00. The Commission ruled:

In applicant's last case, the commission adopted a staff recommendation which introduced a customer charge component into applicant's residential and small commercial rate schedules for

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<sup>103</sup> See, *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in its Rates for Gas Service to All Jurisdictional Customers*, Case No. 95-656-GA-AIR, Opinion and Order (December 12, 1996) at 45-46.

<sup>104</sup> *Id.* at 45.



1 straight fixed variable, correct?

2 A. Some of them would benefit; some of them  
3 would be adversely affected. I think you have to  
4 keep in mind the straight fixed variable is the  
5 appropriate pricing signal. When we talk about  
6 better off or worse off, it's relative to where they  
7 were before. The extent they have been subsidized  
8 with past rate designs means they have benefited for  
9 years. This rate design is improving in providing a  
10 better price signal, so maybe it is correcting the  
11 subsidy they shouldn't have received in the past.

12 Q. The Commission has used the rate design  
13 other than straight fixed variable for at least the  
14 last 20 years, correct?

15 A. And we are proposing other than a  
16 straight fixed variable in this case.

17 Q. I understand that. But you are  
18 indicating that there was a subsidy so you are saying  
19 the Commission's use of the other rate design over  
20 the last 25 years was consistently a subsidized rate  
21 design?

22 A. Given the cost of service provided in  
23 this case, there would be a subsidy if we don't  
24 approve the proposed rate design as stipulated by 10

1 of the 12 parties.

2 Q. Do you know if the Commission has ever  
3 identified that as a subsidy in any of its orders?

4 A. I am not aware of that.

5 Q. That's a subsidy according to the  
6 company's position?

7 A. It's a subsidy according to the -- it's a  
8 subsidy that 10 of the 12 parties believe should be  
9 corrected in this case.

10 Q. Has the Commission ever identified that  
11 as a subsidy in the past?

12 A. I am not aware of that.

13 Q. Okay. Now, you have indicated that the  
14 company wants a straight fixed variable rate design  
15 in part because of a concern that there -- they would  
16 have an inability to recover fixed costs on a  
17 going-forward basis, correct?

18 A. The company's costs are fixed, incurred  
19 in a fixed manner throughout the year. The  
20 relatively fixed charge rate, there is still a  
21 volumetric charge, is a better matching for the costs  
22 that are incurred by the company, that's correct.

23 Q. Okay. My question was the company  
24 supports what the staff has identified as a fixed

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1           Q.    And I see there it says, "utilities want  
2 more certainty," and you indicate consumer groups  
3 were looking for energy efficiency. I notice you  
4 don't have in there anything about what residential  
5 consumers want. Has the staff done any studies or  
6 analysis or surveys to determine if customers would  
7 be accepting of the change in rate design the staff  
8 is contemplating?

9           A.    We have done no such surveys.

10          Q.    The bottom of page 4 -- I'm sorry, a  
11 little further down the page on page 4, about lines  
12 12 through 17, you talk about the decline in per  
13 customer usage being a reaction to high gas prices.  
14 Do you see that?

15          A.    Yes.

16          Q.    Essentially what's happened is consumers  
17 have turned back the thermostat because the price of  
18 gas went up.

19          A.    Turning back the thermostat is a  
20 short-run response. It also increases the demand for  
21 energy efficient appliances, weatherization  
22 techniques, that sort of thing.

23          Q.    In fact, doesn't the state of Ohio have a  
24 policy in the gas side to encourage conservation?

1 mechanism. That just didn't make any sense to us,  
2 and particularly the idea of staying at roughly a \$6  
3 customer charge and then having all of the  
4 underrecovery of fixed costs recovered through annual  
5 proceedings on -- in a decoupling rider. We just did  
6 not think it made sense.

7 Q. Did the staff conduct any workshops or  
8 any kinds of public process to get input on its  
9 decision to go to the straight fixed variable?

10 A. No. I am not aware that we did.  
11 Typically I do that in preparation of the staff  
12 report.

13 Q. I understand you don't do it in regards  
14 to a staff report. I am talking about with regards  
15 to the change in position from the one that you have  
16 had for the last 25 to 30 years.

17 A. That came about as part of our staff  
18 report investigation.

19 Q. Can you recall the last time the staff  
20 made a similar type change in policy as to the move  
21 to the straight fixed variable rate design on the gas  
22 side?

23 A. No. As I have said, this is the first  
24 time we have proposed it.

1 designed to do the same thing.

2 Q. Now, there are other factors that  
3 generally weigh in on rate design, like customer  
4 acceptance, understandability, fairness,  
5 consideration of customer's ability to pay, correct?

6 A. Yes.

7 Q. Was customer acceptance factored into the  
8 decision to move to the SFV rate design?

9 A. Yes.

10 Q. And I don't recall if you answered this  
11 question, did the staff do any surveys or analysis to  
12 determine that, in fact, customers would be accepting  
13 of the higher fixed charges? Or what do you base  
14 that customer acceptance on?

15 A. In comparison to the decoupling mechanism  
16 that was the alternative to the straight fixed  
17 variable, I would much rather explain to customers  
18 and I think they would be much more receptive of  
19 explaining the fixed versus variable concept and why  
20 this is being done as opposed to each and every year  
21 to have another proceeding to raise their variable  
22 rates and have to explain to customers how we  
23 adjusted for weather and looked at use per customer  
24 and went back to the rate case and compared that with

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1 use per customer back at the rate case and that's why  
2 your bill is going up. I would much rather explain  
3 straight fixed variable one time than every year have  
4 to explain what we are doing with that decoupling  
5 mechanism.

6 Q. That goes to understandability.

7 A. I thought that's what you asked me.

8 Q. I was asking you about customer  
9 acceptance.

10 A. I would make the same answer with regard  
11 to acceptance.

12 Q. You referenced the Vectren proceeding  
13 earlier. Is that the 1444 docket?

14 A. Yes.

15 Q. Do you know if any of the decoupling  
16 mechanisms have actually been implemented in that  
17 proceeding yet?

18 A. They have not. The calculations are  
19 being done and the results being deferred and the  
20 recovery will be determined in the rate case.

21 Q. So we haven't had the opportunity to  
22 determine what customer acceptance or customer  
23 understandability would be to that implementation of  
24 decoupling yet, correct?

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1           A.    At this point in time we have neither a  
2 decoupling or an SFV. Customers have no opportunity  
3 to respond to either the SFV or a decoupling.  
4 Neither has been implemented to date.

5           Q.    So we don't have any customer feedback on  
6 either one.

7           A.    Correct.

8           Q.    So to the extent that the staff was  
9 concerned that the decoupling would cause more --  
10 would result in less understandability or less  
11 customer acceptance, we haven't had the opportunity  
12 to see decoupling put in place to see if that  
13 actually would play out, correct?

14          A.    Correct.

15          Q.    Were you here previously when I asked  
16 Mr. Smith about the I think it was less than 10,000  
17 low usage customers on the Duke system?

18          A.    I was here for your cross-exam of  
19 Mr. Smith, yes.

20          Q.    Has the staff done any analysis to  
21 determine the impact of the higher customer charge  
22 from the SFV and whether that would result in any of  
23 the low usage customers that are currently on the  
24 system leaving the system?

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1 would implement a straight fixed variable rate design  
2 for the first time, that would mean that the  
3 Commission would not have the ability to review the  
4 implications or the fallout from that policy change  
5 until the company's next case at some unknown point  
6 in the future, correct?

7 MR. WRIGHT: Objection. That calls for a  
8 legal conclusion.

9 EXAMINER BULGRIN: Sustained.

10 Q. Mr. Puican, other than rate cases, what's  
11 your understanding of the other way the Commission  
12 can review the company's earnings?

13 A. It's typically done through a rate case,  
14 but, you know, we have seen all kinds of creative  
15 riders appear over the last few years. I am sure  
16 there's very little the Commission couldn't take care  
17 of if they desired.

18 Q. You are familiar with the decoupling  
19 mechanism that the company initially filed in its  
20 application?

21 A. Yes.

22 Q. Do you know if the company asked for  
23 carrying costs as part of that decoupling mechanism?

24 A. It was modeled after Vectren, and I

1 believe Vectren does allow carrying charges year to  
2 year prior to the new rates being put into effect.

3 Q. Do you know whether Duke specifically  
4 asked for carrying charges, though?

5 A. No, I guess I don't. They are modeled  
6 after VEDO so I am assuming that they do.

7 Q. On page 8 of your testimony, lines 10 and  
8 11, you indicate that: "It recovers costs as  
9 incurred by the LDC and eliminates the need for  
10 carrying cost associated with deferred recoveries."  
11 To the extent the company didn't ask for carrying  
12 costs, that wouldn't be a factor that would be  
13 considered one of the reasons not to do a decoupling  
14 mechanism, correct?

15 A. I'm sorry, if I could have it again.

16 Q. Are you assuming here in your answer on  
17 lines 10 and 11 that carrying costs would be included  
18 in the decoupling mechanism?

19 A. Yes, I am assuming, as with VEDO, there  
20 would be carrying charges.

21 Q. So to the extent there are carrying  
22 costs, you see that as a negative, so the flip side  
23 if there is no carrying costs, there would not be a  
24 negative?

1           A.    If there are no carrying costs then  
2 this -- then that statement would not be relevant.

3           Q.    Okay. Thank you. That's all I have,  
4 your Honor.

5                   EXAMINER BULGRIN: Mr. Rinebolt?

6                                   - - -

7                                   CROSS-EXAMINATION

8 By Mr. Rinebolt:

9           Q.    Mr. Puican, good afternoon.

10          A.    Good afternoon.

11          Q.    Like usually, my colleague from OCC has  
12 asked most of my questions so this should be brief.  
13 I do want to follow-up, however, on the Vectren  
14 decoupling issue just a little bit more. Would you  
15 say it's correct to characterize the two-year  
16 authorized decoupling in Vectren as a pilot program?

17          A.    I honestly don't recall that being  
18 referred to as a pilot program.

19          Q.    Well, let's put it this way, if that  
20 program is only authorized for two years, it's  
21 clearly an experiment.

22          A.    I am hesitating because I am trying to  
23 think back to the details of what we -- what the  
24 Commission approved. And I am just -- my

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