ORIGINAL

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,	:	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
	:	07-591-GA-AAM

FILED
APR 27 2009
CLERK OF COURT
SUPREME COURT OF OHIO

DUKE ENERGY OHIO, INC.'S MEMORANDUM IN OPPOSITION TO APPELLANT, THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S MOTION FOR A STAY OF EXECUTION

Amy B. Spiller
(Reg. No. 0047277)
Counsel of Record
Associate General Counsel
Duke Energy Ohio, Inc.
139 East Fourth Street, 25 AT II
Cincinnati, Ohio 45201
(513) 419-1810 (telephone)
(513) 419-1846 (facsimile)
Amy.Spiller@duke-energy.com

Elizabeth H. Watts
(Reg. No. 0031092)
Rocco O. D'Ascenzo
(Reg. No. 0077651)
Duke Energy Ohio, Inc.
139 East Fourth Street, 25 AT II
Cincinnati, Ohio 45201-0960
(513) 419-1852 (telephone)
(513) 419-1846 (facsimile)

Counsel for Intervening Appellee
Duke Energy Ohio, Inc.

Richard A. Cordray
(Reg. No. 0038034)
Ohio Attorney General

Duane W. Luckey, Section Chief
(Reg. No. 0023557)

William L. Wright, Counsel of Record
(Reg. No. 0018010)
Thomas G. Lindgren
(Reg. No. 0039210)
Assistant Attorneys General

Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215
(614) 644-8698 - Telephone
(614) 644-8764 – Facsimile
william.wright@puc.state.oh.us
thomas.lindgren@puc.state.oh.us

Counsel for Appellee,
Public Utilities Commission of Ohio

Janine L. Migden-Ostrander
(Reg. No. 0002310)
Consumers' Counsel
Larry S. Sauer, Counsel of Record
(Reg. No. 0039223)
Counsel of Record
Joseph P. Serio
(Reg. No. 0036959)
Michael E. Idzkowski
(Reg. No. 0062839)
Assistant Consumers' Counsel

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

Counsel for Appellant,
Office of the Ohio Consumers' Counsel

Colleen L. Mooney
Counsel of Record
David C. Rinebolt
Ohio Partners for Affordable Energy
1431 Mulford Rd.
Columbus, Ohio 43212
(614) 488-5739 (telephone)
(419) 425-8862 (facsimile)
Cmooney2@columbus.rr.com
drinebolt@aol.com-

Counsel for Appellant,
Ohio Partners for Affordable Energy

Henry W. Eckhart (0020202)
Natural Resources Defense Council
50 West Broad Street #2117
Columbus, Ohio 43215
(614) 461-0984 (telephone)
(614) 221-7401 (facsimile)
henryeckhart@aol.com

Counsel for Intervening Appellant,
Natural Resource Defense Council

DUKE ENERGY OHIO, INC.'S MEMORANDUM IN OPPOSITION TO APPELLANT, THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S MOTION FOR A STAY OF EXECUTION

Comes now Duke Energy Ohio, Inc. (DE-Ohio), Intervening Appellee in this matter, and responds to the Motion for a Stay of Execution submitted by the Office of the Ohio Consumers' Counsel. DE-Ohio respectfully requests that this Honorable Court deny the Motion for Stay for reasons set forth more fully in the attached Memorandum in Support.

Respectfully submitted,

Amy B. Spiller (0047277)
Associate General Counsel

Elizabeth H. Watts
(Reg. No. 0031092)
Assistant General Counsel
Rocco O. D'Ascenzo
Senior Counsel
(Reg. No. 0077651)
Duke Energy Ohio, Inc.
139 East Fourth Street, 25 AT II
Cincinnati, Ohio 45201-0960
(513) 419-1810 (telephone)
(513) 419-1846 (facsimile)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STANDARD OF REVIEW 3

LAW AND ARGUMENT 5

Proposition of Law No. I: 5

The OCC Will Not Succeed on the Merits in this Case. 5

Proposition of Law No. II: 7

The OCC Cannot Now Assert that its Residential Customers Will Suffer Irreparable Harm to Appellant. 7

Proposition of Law No. III: 8

Implementation of a Stay Order Will Significantly Harm DE-Ohio. 8

Proposition of Law No. IV: 10

The Stay Would be Contrary to Public Policy. 10

Proposition of Law No. V: 11

The OCC Must Comply With the Law Set Forth in R.C. 4903.16 11

CONCLUSION 12

CERTIFICATE OF SERVICE 14

APPENDIX

Page

In re Duke Energy Ohio, Inc., Case No. 07-589-GA-AIR, *et al.* (Opinion and Order) (May 28, 2008) (EXCERPTS) 1

In re Duke Energy Ohio, Inc., Case No. 07-589-GA-AIR, *et al.* (Entry) (September 5, 2007) 14

In re Duke Energy Ohio, Inc., Case No. 07-589-GA-AIR, *et al.*
Legal Notice Excerpts from Volume 2, part 3, 5-3 (Filing) (July 18, 2007) 20

In re Duke Energy Ohio, Inc., Case No. 07-589-GA-AIR, *et al.*
(Entry on Rehearing) (July 23, 2008) 31

In re Modification of Interstate Access Charges, Case No. 00-127-TP-COI
(Entry on Rehearing) (February 20, 2003) 38

TABLE OF AUTHORITIES

Page

Cases

City of Columbus v. Pub. Util. Comm., (1959) 170 Ohio St. 105, 109, 163 N.E. 2d 167, 171 11

Cleveland Elec. Ilum. Co. v. Pub. Util. Comm. (1976) 46 Ohio St. 2d 105, 75 O.O. 2d 172, 346 N.E. 2d 778 ..... 4, 5

Green Cove Resort Owners Ass'n v. PUC, 103 Ohio St. 3d 125 (Ohio 2004) *citing Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1976), 46 Ohio St. 2d 105, 108, 75 O.O. 2d 172, 346 N.E. 2d 778 5

Office of Consumers' Counsel v. Pub. Util. Comm. (1979), 58 Ohio St. 2d 108, 110, 12 Ohio Op. 3d 115, 388 N.E. 2d 1370 4

Office Of Consumers' Counsel v. Pub. Util. Comm., (1986) 25 Ohio St. 3d 213 5

Ohio Consumers' Counsel v. Pub. Util. Comm., (1991) 61 Ohio St. 3d 396, 403, 575 N.E.2d 157, 162 11

Ohio Edison Co. v. Pub. Util. Comm. (1997), 78 Ohio St. 3d 466, 469, 1997 Ohio 196, 678 N.E. 2d 922 4

Statutes

Ohio Rev. Code Ann. Title 49 12

Other Authorities

In re Modification of Intrastate Access Charges, Case No. 00-127-TP-COI (Entry on Rehearing)(February 20, 2003) 3

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates, Case No. 07-589-GA-AIR, Entry on Rehearing (July 23, 2008) 7

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates, Case No. 07-589-GA-AIR, Entry at 3 (September 5, 2007) 7

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates, Case No. 07-589-GA-AIR, et al., Entry (June 4, 2008) 1

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates, Case No. 07-589-GA-AIR, et al., Opinion and Order (May 28, 2008) 1, 4, 6, 8

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates, Case No. 07-589-GA-AIR, Excerpt from Volume 2, part 3, S-3 (July 18, 2007) 7

MEMORANDUM IN SUPPORT

This matter comes before the Court on motion by the Office of the Ohio Consumers' Counsel (OCC) from an Opinion and Order and an Entry of Appellee, The Public Utilities Commission of Ohio (Commission) dated May 28, 2008[1] and June 4, 2008[2], respectively. In its untimely motion, the OCC seeks to stay the implementation of the third phase of a Commission Order that has already been in effect since June 1, 2008. Appellant agreed in a Stipulation submitted to the Commission that Duke Energy Ohio, Inc. (DE-Ohio) was entitled to a rate increase and further agreed to the amount of that increase. In its memorandum in support, the OCC readily admits that the rate design, of which it complains, does not implement or affect a rate increase for Duke Energy Ohio, Inc.'s (DE-Ohio) customers. Rather, it represents a method for phasing in of rates and the OCC simply opposes that method of phase-in. Notwithstanding Appellant's opposition to this method, Appellant has delayed at least seven months in appealing the Commission's Opinion and Order. There is no basis for a stay of execution in this matter and the OCC's motion is untimely and not supportable.

I. INTRODUCTION

On May 28, 2008, the Commission issued an Opinion and Order (Opinion) in which it approved a levelized rate design for natural gas distribution rates.[3] In doing so,

---

[1] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, et al., Opinion and Order (May 28, 2008).
[2] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, et al., Entry (June 4, 2008).
[3] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, et al., Opinion and Order (May 28, 2008).

the Commission acknowledged that this rate design was a departure from a more traditional rate design that allocated a smaller percentage of actual, fixed costs to a customer charge, with the balance of the fixed costs recovered through a volumetric charge.[4] But existing circumstances – price volatility, declining sales, and conservation efforts – undeniably compelled the adoption of the new rate design.[5] The OCC now seeks to stay the Commission's Opinion implementing this rate design after it has been in effect for ten months. The OCC asserts that the rate design is unreasonable and unlawful. However, the approval of a levelized or straight fixed variable (SFV) rate design is consistent with established regulatory principles, encourages energy efficiency by both customers and the natural gas utility, and removes any potential subsidy by allocating the fixed costs of service fairly among all customer classes. The effect of the Commission's Opinion was to allocate costs with cost causation, aligning fixed costs with the fixed portion of the customer's bill and variable costs with the variable portion of the customer's bill.

Additionally, the Commission's Opinion in this matter has been in effect for ten months and it is therefore somewhat perplexing that the OCC would attempt to argue, at this late date, that the rate design will result in irreparable harm to residential customers. Additionally, the OCC cannot demonstrate a likelihood of success on the merits of its claim. Furthermore, assuming *arguendo*, that the OCC could properly demonstrate its likelihood of success, it would be impossible for the Commission to fashion a remedy that would equitably redistribute rates in a logical and reasonable fashion. The rate

---

[4] *Id.* at 17-20. Appendix at 9 - 12
[5] *Id.* at 13, 17. Appendix at 6, 9

design implemented in this case is part of a complex set of variables, all of which were part of the Commission's Opinion. A stay of the Commission's Opinion at this juncture, would necessarily involve staying a result that has been previously implemented and that involves many more factors and issues than just this one issue. The OCC's motion is indeed untimely and fails as a matter of law.

II. STANDARD OF REVIEW

The Commission has urged adoption of the following four part test to assess motions for stay:

(a) Whether there has been a strong showing that movant is likely to prevail on the merits;

(b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;

(c) Whether the stay would cause substantial harm to other parties; and

(d) Where the public interest lies.[6]

As will be demonstrated more fully below, the OCC's motion fails on all four prongs of this test and this Court must deny its motion.

In addition to the fact that the OCC's motion fails to meet the requirements that would justify a stay, the motion is unfounded for many other reasons. Among these is the fact that the OCC is seeking to stay only a part of the Commission's Opinion, and then only the last stage of that part of the Opinion. Parsing a Commission decision under these circumstances will dissemble a carefully crafted overall product that has been the subject of much negotiation and consideration. Additionally, where only part of a

---

[6] *In re Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI (Entry on Rehearing)(February 20, 2003). Appendix at 38.

Commission decision is stayed, it places this Court in the position of "rate making", which is not the proper function of the Court. [7]

This Court has "complete and independent power of review as to all questions of law" in appeals from the Commission.[8] The Court has explained that it may rely on the expertise of a state agency in interpreting a law where "highly specialized issues" are involved and "where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly.[9] This case represents a clear example of one that merits reliance upon the expertise of the agency. Rate design is a very detailed and technical application of the Commission's expertise and an area of ratemaking that consumes a significant portion of the hearing process before the Commission and in settlement discussions when the parties to a rate case engage in settlement. In this instance, the issue of rate design was the subject of a stipulated settlement among most of the parties and was thoroughly considered and documented in the Commission's Opinion.[10] It is also one element of an overall rate case decision that includes intertwining parts. The stay of one part of the Commission's Opinion undoubtedly unbalances the whole. The Court should defer to the Commission in this case and deny the motion to stay.

---

[7] *Cleveland Elec. Ilum. Co. v. Pub. Util. Comm.* (1976) 46 Ohio St. 2d 105, 75 O.O. 2d 172, 346 N.E. 2d 778.

[8] *Ohio Edison Co. v. Pub. Util. Comm.* (1997), 78 Ohio St. 3d 466, 469, 1997 Ohio 196, 678 N.E. 2d 922.

[9] *Office of Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 108, 110, 12 Ohio Op. 3d 115, 388 N.E. 2d 1370.

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

LAW AND ARGUMENT

Proposition of Law No. I:

The OCC Will Not Succeed on the Merits in this Case.

The Court has recognized its own limitations in reviewing decisions from the Commission regarding rate structures, such as the levelized rate design at issue in this case.[11] The Court's function "is not to weigh the evidence or to choose between alternative, fairly debatable rate structures. That would be to interfere with the jurisdiction and competence of the commission and to assume powers which this court is not suited to exercise."[12] Granting a stay here, would significantly interfere with a carefully crafted decision which includes many related component parts. There is no basis for altering a decision which was founded upon a complete record and explained at length in the Commission's Opinion. The record below shows that the order of the Commission respecting the rate structure at issue is neither "manifestly against the weight of the evidence" nor "so clearly unsupported by the record as to show misapprehension or mistake or willful disregard of duty."[13]

The record evidence demonstrated that the levelized rate design removes DE-Ohio's disincentive to promote conservation and energy efficiency, sends more accurate price signals, better aligns costs causation with the rate design, is simpler and easier to understand, levelizes customer bills throughout the year, and avoids a significant regulatory burden on the parties by avoiding annual decoupling rider update

---

[11] *Green Cove Resort Owners Ass'n v. PUC*, 103 Ohio St. 3d 125 (Ohio 2004) *citing Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1976), 46 Ohio St. 2d 105, 108, 75 O.O. 2d 172, 346 N.E. 2d 778.

[12] *Cleveland Elec. Ilum. Co. v. Pub. Util. Comm.* (1976) 46 Ohio St. 2d 105, 75 O.O. 2d 172, 346 N.E. 2d 778.

[13] *Office Of Consumers' Counsel v. Pub. Util. Comm.*, (1986) 25 Ohio St. 3d 213.

proceedings.[14] In its Opinion, the Commission provided a detailed analysis of the OCC's position and the specifically addressed each element.[15] It is undeniable, the Parties all understood the matters in contention and all Parties were heard on these issues. Thereafter, the Commission, after careful deliberation, reached its own conclusion. The OCC's case is founded solely on the basis that it disagrees with the Commission's determination of the evidence and the proper application of this case.

The OCC was only one of a many Parties involved in litigating and ultimately reaching settlement in this case. The additional intervening Parties included People Working Cooperatively, Inc. (low income weatherization agency), the Ohio Partners for Affordable Energy (community action agencies), The Kroger Company (mercantile customer), Integrys, Stand Energy, Interstate Gas Supply (competitors), the City of Cincinnati, and Ohio Energy Group (representing large industrials).[16] Thus all customers were represented in some fashion and all parties had ample opportunity for discovery and participation. The Parties entered into a Stipulation and Recommendation that resolved all issues in the case except the issue of rate design.[17] The Parties filed additional testimony and the matter was heard on March 5 and 6, 2008.[18] At hearing, the reasonableness of the Stipulation was not contested and the levelized rate design was supported by nine of the twelve settling Parties.

---

[14] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, et al., Opinion and Order (May 28, 2008).
[15] *Id.* at 12-15. Appendix at 5 – 8.
[16] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, et al., Opinion and Order (May 28, 2008).
[17] *Id.* at 6. Appendix at 3.
[18] *Id.* at 4. Appendix at 2.

In its motion to stay, the OCC argues that DE-Ohio allegedly failed to provide customers with statutorily required notice. This argument patently ignores the published notices that were given by DE-Ohio and it fails to provide a legitimate reason for injunctive relief.

In criticizing the notification provided by DE-Ohio, the OCC overlooks the published notice identified as Schedule S-3 to DE-Ohio's application.[19] Therein, DE-Ohio detailed the notice that it intended to provide to its customers. Subsequently, the Commission issued an Entry on September 5, 2007, in which it approved, with slight modification, the notice previously submitted by DE-Ohio.[20] Consistent with the Commission's direction, DE-Ohio then published the notice of its application for an increase in gas rates in area newspapers. It is therefore undeniable that DE-Ohio complied with the requirements of Ohio Revised Code Ann. § 4909.19 (Baldwin 2009), and the OCC's assertion to the contrary is unfounded.

Proposition of Law No. II:

The OCC Cannot Now Assert that its Residential Customers Will Suffer Irreparable Harm.

The Commission Opinion in this matter has been in effect for ten months and is at least two-thirds implemented. The rates were effective June 1, 2008, and the OCC's Application for Rehearing was denied on July 23, 2008.[21] The OCC filed its appeal of

---

[19] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, Excerpt from Volume 2, part 3, S-3 (July 18, 2007). Appendix at 20.

[20] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, Entry at 3 (September 5, 2007). Appendix at 16.

[21] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, Entry on Rehearing (July 23, 2008). Appendix at 37.

the Commission's Opinion on September 16, 2008.[22] It is not possible for the OCC to now suggest to this Court that DE-Ohio's customers will be irreparably harmed by the implementation of the third phase of this rate design.

The Commission's Opinion considered all of the competing arguments regarding this rate design and carefully balanced the interests of customers with DE-Ohio's financial viability and interests. In so doing, the Commission opted to implement levelized rates as a means to "decouple" the need for DE-Ohio to recover its fixed costs from the variable amount of gas that customers actually use. The Commission specifically noted that it believed that there was a societal benefit to remove from rate design the current built-in incentive for DE-Ohio to increase its sales of gas.[23] As the Commission found, a rate design that disincentivizes the utility company's interest in promoting conservation is not in the public interest.[24] Staying the implementation of these rates would not only have a severe and immediate impact on DE-Ohio's revenues, it is contrary to societal interest.

Proposition of Law No. III:

Implementation of a Stay Order Will Significantly Harm DE-Ohio.

The OCC argues that DE-Ohio will suffer no harm as a result of a stay order. The OCC further asserts that the implementation of these rates will not affect the total revenue collected by DE-Ohio, but will merely freeze the rates at the Stage 2 implementation. The OCC is wrong. Refusing DE-Ohio the ability to implement approved rates consistent with the Commission's Opinion only compounds the ongoing problem of revenue

---

[22] *See Appellant's Notice of Appeal* at Record ICN 220 (September 16, 2008).
[23] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, et al., Opinion and Order (May 28, 2008).
[24] *Id.* at 18. Appendix at 10.

erosion. Thus, OCC's proposed "rate freeze" mitigates against proactive energy conservation measures while unjustifiably exposing DE-Ohio to lost revenue. The Commission implemented the levelized rate design specifically recognizing that DE-Ohio was experiencing revenue erosion as a result of volatility in the market for natural gas.[25] The high prices and price volatility cause customers to conserve. Because DE-Ohio's costs remain constant, the negative trend on sales prevents DE-Ohio from fully recovering its fixed costs. A negative trend in sales has a negative effect on DE-Ohio's ongoing financial stability, its ability to attract new capital to invest in its network and its incentive to encourage energy efficiency and conservation. Thus, freezing DE-Ohio's rates at Stage 2 of the phase-in will undeniably affect its bottom line in significant ways. The existing rate design was crafted to yield the expected revenue requirement. This revenue loss has direct impact on customers as well in that it reduces DE-Ohio's ability to meet its financial obligations and invest in its infrastructure. Additionally, as noted, it removes the incentive for DE-Ohio to participate in energy conservation because such conservation, in the event the levelized rate is stayed, would further decrease sales and its concomitant revenue. Although the rate structure, as set forth in the OCC's memorandum in support, is designed to allow for the same revenue flow in either event, in practice it just does not work that way. The result of a stay has substantial negative impact on DE-Ohio. This harm, coupled with the fact that the OCC is unlikely to be successful on the merits, that there is no harm to OCC's customers certainly supports a denial of the motion.

[25] *Id.* at 17-20. Appendix at 9 – 12.

Proposition of Law No. IV:

The Stay Would be Contrary to Public Policy.

DE-Ohio agrees with the OCC that the public interest in this case focuses on the need to carry out the state policy encouraging conservation and energy efficiency efforts in Ohio. DE-Ohio also agrees that section Ohio Rev. Code Ann. § 4929.02(A)(4) (Baldwin 2009) encourages "innovation and market access for cost-effective supply and demand." DE-Ohio further agrees that recent developments in energy efficiency furnaces and thermostats, etc. promote conservation because individual customers are motivated to lower their utility bills by conserving purchased fuel and using it more efficiently. DE-Ohio disagrees, however, with the belief that the levelized rate design fails to reward customer conservation efforts. The variable portion of the customer's bill continues to vary depending on customer usage. To the extent the customer opts to conserve, the customer's bill will reflect this savings in less usage of energy and a reduction in the variable portion of the bill. Then to enhance this effect, DE-Ohio's fixed costs are covered by the fixed portion of the customer's bill and DE-Ohio is therefore properly motivated to enhance conservation measures for the customer's benefit. This is a win-win for both the utility company and the customer. And this is the inevitable conclusion that all five Commissioners supported in the Commission's Opinion. It is difficult to understand how the OCC views this as contrary to public policy. It is undisputed that the facts weigh in favor of the complete implementation of the levelized rate design in order to promote the interests of the public.

Proposition of Law No. V:

The OCC Must Comply With the Law Set Forth in R.C. 4903.16

In its memorandum in support of its motion, the OCC makes the novel argument that the Court should be guided by a predecessor statute that was effective in 1911 and has long since been superceded by the Revised Code. Additionally, the OCC asserts that its status is akin to that of a "public officer" and, therefore, it is not required to post a supersedeas bond when acting in a representative capacity. This, too, is a somewhat novel argument as a supersedeas bond is irrelevant to the requested stay. Finally, the OCC argues that the applicable statute, Ohio Rev. Code Ann. § 4903.16 (Baldwin 2009) is unconstitutional. The OCC is not excepted from the statutory requirement to post a bond and its failure to do so now necessarily precludes the issuance of a stay.

The OCC relies on R.C. 2505.12, which states that a public officer need not post a supersedeas bond when acting in a representative capacity for the State. But its reliance on this statutory provision is misplaced. Indeed, the OCC blatantly ignores the fact that R.C. 2505.12 is irrelevant here.

This Court has specifically recognized that the bond requirements set forth in Ohio Rev. Code Ann. § 4903.16 (Baldwin 2009) applies to government appellants.[26] In fact, this Court reached that conclusion in a case involving the Appellant in this case. The Court has also upheld this requirement as it related to an appellant municipality.[27] Significantly, R.C, § 4903.16 contains no mention of a supersedeas bond. In fact, the

---

[26] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, (1991) 61 Ohio St. 3d 396, 403, 575 N.E.2d 157, 162.

[27] *City of Columbus v. Pub. Util. Comm.*, (1959) 170 Ohio St. 105, 109, 163 N.E. 2d 167, 171.

plain reading of this provision demands that the OCC post a bond in conjunction with its request for a stay. .

The OCC's continuing effort to obviate the requirements of statute with respect to appeals from the Commission are unfounded. And its failure to post the requisite bond here is fatal to its request.

The OCC's argument that the General Assembly oversteps its bounds in enacting law that prescribes the requirement for posting bond is akin to suggesting that all of the appellate procedures set forth in statute are unconstitutional. This makes no logical sense. The Revised Code is replete with provisions dealing with appropriate appellate procedure for various agencies and state government.[28] If one were to accept the OCC's arguments, the appellate procedure in Ohio would be somewhat chaotic. The OCC has simply neglected to comply with statute and has provided the Court with yet another reason why the OCC's motion should be denied.

V. CONCLUSION

The OCC's Motion for Stay fails to meet the standards for a stay. It is also untimely and based on erroneous allegations previously rejected by the Commission. For the reasons set forth above, Duke Energy Ohio, Inc. respectfully requests that this Honorable Court deny Appellant, The Office of the Ohio Consumers' Counsel's Motion to Stay.

[28] Ohio Rev. Code Ann. Title 49

Respectfully submitted,

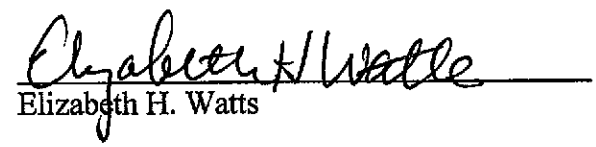
Amy B. Spiller /EHW

Amy B. Spiller (0047277)
Associate General Counsel

Elizabeth H. Watts
(Reg. No. 0031092)
Rocco D'Ascenzo
(Reg. No. 0077651)
Duke Energy Ohio, Inc.
139 East Fourth Street, 25 AT II
Cincinnati, Ohio 45201-0960
(513) 419-1810 (telephone)
(513) 419-1846 (facsimile)
Amy.Spiller@duke-energy.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memo Contra and Appendix was served on the following by first class U.S. mail, postage prepaid, upon the following, this 27 day of April 2009.



Elizabeth H. Watts

Richard Corday
Ohio Attorney General
Duane W. Luckey
Chief, Public Utilities Section
Stephen Reilly
Assistant Attorney General
180 East Broad Street
Columbus, Ohio 43215

Janine L. Migden-Ostrander
Consumers' Counsel
Ann M. Hotz
Counsel of Record
Jeffrey L. Small
Jacqueline Lake Roberts
Michael E. Idzkowski
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (telephone)
(614) 466-9475 (facsimile)
hotz@occ.state.oh.us

Colleen L. Mooney
Counsel of Record
David C. Rinebolt
Ohio Partners for Affordable Energy
1431 Mulford Road
Columbus, Ohio 43212

Henry W. Eckhart
Natural Resources Defense Council
50 West Broad Street, 2117
Columbus, Ohio 43215

APPENDIX

APPENDIX
TABLE OF CONTENTS

Page

In re Duke Energy Ohio, Inc., Case No. 07-589-GA-AIR, *et al.*
(Opinion and Order) (May 28, 2008) (EXCERPTS) 1

In re Duke Energy Ohio, Inc., Case No. 07-589-GA-AIR, *et al.*
(Entry) (September 5, 2007) 14

In re Duke Energy Ohio, Inc., Case No. 07-589-GA-AIR, *et al.*
Legal Notice Excerpts from Volume 2, part 3, 5-3 (Filing) (July 18, 2007) 20

In re Duke Energy Ohio, Inc., Case No. 07-589-GA-AIR, *et al.*
(Entry on Rehearing) (July 23, 2008) 31

In re Modification of Interstate Access Charges, Case No. 00-127-TP-COI
(Entry on Rehearing) (February 20, 2003) 38

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OPINION AND ORDER

The Commission, considering the applications, testimony, the applicable law, proposed Stipulation, and other evidence of record, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

John J. Finnigan, Jr., Paul A. Colbert, and Elizabeth Watts, 139 East Fourth Street, Room 25, AT II, Cincinnati, Ohio 45201-0960, on behalf of Duke Energy Ohio, Inc.

Janine Migden-Ostrander, The Office of Ohio Consumers' Counsel, by Larry Sauer, Joseph Serio, and Michael Idzkowski, Assistant Consumers' Counsel, 10 West Broad Street, 18th Floor, Columbus, Ohio 43215-3485, on behalf of the residential consumers of Duke Energy Ohio, Inc.

David C. Rinebolt and Colleen Mooney, 231 West Lima Street, Findlay, Ohio 45840-3033, on behalf of Ohio Partners for Affordable Energy.

Bricker & Eckler LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215-4236, on behalf of the city of Cincinnati.

Boehm, Kurtz & Lowry, by David F. Boehm and Michael L. Kurtz, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group and The Kroger Company.

Chester, Wilcox & Saxbe, LLP, by John W. Bentine, 65 East State Street, Suite 1000, Columbus, Ohio 43215-4213, on behalf of Interstate Gas Supply, Inc.

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

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

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

A. Duke's Motion for Protective Order

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

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

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

II. SUMMARY OF THE EVIDENCE

A. Summary of the Proposed Stipulation

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

(1) Duke will receive a revenue increase of $18,217,566, which represents a percentage increase of 3.05 percent and is based on a 8.15 percent rate of return. Duke will not be required to file the 60-day update filing of actual financial data for the test year (Jt. Ex. 1, at 5 and Stipulation Ex. 1).

(2) Duke's revenue distribution, billing determinants, and rates to be adopted are shown on Exhibit 2 of the Stipulation, and assume the adoption of the new residential rate design. The rates also reflect the shift of $6,000,000 to the residential class, phased-in over two years, based upon the agreed revenue requirement and Duke's updated cost of service study (*Id.* at 5; Stipulation Ex. 2).[1]

(3) Duke will amortize deferred rate case expenses requested for recovery in its filing in these cases as recommended in the Staff Report (*Id.* at 6).

(4) Duke will implement new depreciation rates that reflect the mid-point between Duke's proposed depreciation rates and the rates proposed in the Staff Report, as shown on Stipulation Exhibit 5 (*Id.*).

(5) The allocation of common plant related to the provision of gas distribution service will be based on an updated allocation

---

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

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

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

(7) Following the implementation of new Rider AMRP rates, Duke will file a pre-filing notice and application annually to implement subsequent adjustments to Rider AMRP, beginning in November 2008.[2] The annual filing will support the adjustment to Duke's revenue requirement for any increase to Rider AMRP. Duke shall continue to make its Rider AMRP annual filing until the effective date of the Commission's order in Duke's next base rate case (*Id.* at 8-9).

---

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

(21) Duke shall review and fully consider the merits of adopting any new payment plans submitted by any party and, if Duke elects not to implement such new payment plan, Duke shall respond to the stakeholder in writing to state the reason for its decision (*Id.* at 18).

(22) Duke shall review its use of payday lenders as authorized payment stations and will use its best efforts to eliminate the use of payday lenders as authorized payment stations if other suitable locations for the payment stations are available in the same geographic area. Duke shall provide a list of all payday lenders utilized as authorized payment stations to Staff and other interested parties annually. The annual payday lenders list is to be provided initially on May 1, 2008, and on May 1, each year thereafter (*Id.* at 18-19).

(23) Duke shall communicate with its customers to educate them about the difference between authorized and non-authorized payment stations. Duke shall work with members of the Collaborative to develop the educational materials and communication strategy (*Id.* at 19).

B. Summary of the Residential Rate Design Issue

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

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

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

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

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

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

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

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

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

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

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

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

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

III. DISCUSSION AND CONCLUSION

A. Consideration of the Stipulation

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

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

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

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

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

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559 (1994) *(citing Consumers' Counsel, supra,* at 126). The court stated in that case that the Commission may

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

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

B. Consideration of the Residential Rate Design

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Rate Determinants:

1. Rate Base

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

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

2. Operating Income:

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

3. Rate of Return and Authorized Increase:

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

4. Rates and Tariffs:

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

FINDINGS OF FACT:

(1) On June 18, 2007, Duke filed notice of its intent to file an application to increase its rates. In that notice, the company also requested a test year beginning January 1, 2007, and ending December 31, 2007, with a date certain of March 31, 2007.

(2) By entry issued July 11, 2007, the Commission approved Duke's request to establish the test period of January 1, 2007, through December 31, 2007, for the rate increase proposal and a date certain of March 31, 2007.

(3) Duke filed its rate increase application on July 18, 2007. On July 18, 2007, Duke also separately filed requests for approval

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

ENTRY

The Commission finds:

(1) Duke Energy Ohio, Inc., (Duke) is a natural gas company as defined by Section 4905.03(A)(6), Revised Code, and a public utility as defined by Section 4905.02, Revised Code. Duke is, therefore, subject to the jurisdiction of this Commission pursuant to Sections 4905.04, 4905.05 and 4905.06, Revised Code.

(2) The notice of intent to file an application for an increase in gas rates was received on June 18, 2007, pursuant to Section 4909.43(B), Revised Code, and in compliance with Rule 4901-7-01, Ohio Administrative Code (O.A.C.), Appendix A, Chapter I, paragraphs (A) and (B). (Appendix A to Rule 4901-7-01, O.A.C., may be referred to in this entry as the Standard Filing Requirements.)

(3) With the filing of its notice of intent to file an application seeking Commission authority to increase its gas rates, Duke moved that its test period begin January 1, 2007, and end December 31, 2007, and that the date certain be March 31, 2007. Duke's proposed test period and date certain were determined to be in compliance with Section 4909.15(C), Revised Code, and were, therefore, approved by Commission entry dated July 11, 2007.

(4) The application seeking Commission authority to increase gas rates was received by this Commission on July 18, 2007, and is subject to Sections 4909.17 to 4909.19 and 4909.42, Revised Code.

(5) In its notice of intent to file an application for an increase in rates, Duke requested several waivers from filing various informational data required by the Commission's Standard

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician Ard Date Processed 9/5/07

Filing Requirements. By entry dated July 11, 2007 Entry, the Commission granted these waivers.

(6) On July 18, 2007, Duke filed a motion for a waiver of the requirements of Rule 4901:1-19-05(C)(2)(g) and (h), O.A.C. On August 20, 2007, Duke filed a letter with the Commission withdrawing that waiver request and, instead, requesting a waiver of Rule 4901:1-19-05(C)(2)(h) and (i), O.A.C. These filing requirements instruct Duke to file the projected financial data required in Section F of the Standard Filing Requirements through the term of the Alternative Rate Plan, showing the effects of the Plan and showing the effects if the Plan is not adopted. Duke states it does not normally maintain the information at issue in a form that would readily allow Duke to comply with this filing requirement. Another factor in the waiver request is the expense to the utility in compiling the information. Duke estimates that it would require a substantial amount of management time to compile this information in a suitable format. Duke contends that other information submitted with the application is sufficient to allow the Commission staff to evaluate this rate application. Also, if Commission staff should require any additional information to evaluate this subject matter, Duke will provide in a timely manner such information in response to a data request, allowing the process to proceed in an effective and efficient manner.

(7) Upon consideration of Duke's motion, the Commission finds that it is reasonable and should be granted.

Further, the Commission commends Duke for filing an active spreadsheet with its application. This format will greatly assist Staff in its investigation and is an excellent example for other companies to follow.

(8) The application meets the requirements of Section 4909.18, Revised Code, which enumerates the statutory requirements for an application to increase rates and this Commission's Standard Filing Requirements. As such, the Staff recommends the application be accepted for filing as of July 18, 2007.

(9) Duke's proposed notice for publication, Schedule S-3, complies with the requirements of Section 4909.18(E), Revised Code, and

should be approved, with the following modification. The Commission directs Duke to insert the below-listed paragraph in each newspaper notice. The Commission is of the opinion that the inclusion of this additional paragraph in the notice of publication will enhance interested parties' ability to access the application and its content. Duke shall begin publication of these newspaper notices, pursuant to Section 4909.19, Revised Code, within 30 days of the date of this entry and such notices shall not appear in the legal notice section of the newspaper.

> Any interested party seeking detailed information with respect to all affected rates, charges, regulations and practices may inspect a copy of the application, including supporting schedules and present and proposed rate sheets, at the offices of the Commission at 180 East Broad Street, 13th floor, Columbus, Ohio, 43215-3793; by visiting the Commission's web site at http://www.puco.ohio.gov, selecting DIS, inputting 07-0589 in the case-lookup box, and selecting the date the application was filed; or by telephoning the Commission at 1-800-686-7826. In addition, a copy of the application and supporting documents may be viewed at the business office of the company at 644 Linn Street, Cincinnati, Ohio.

(10) Moreover, on August 1, 2007, the Commission issued an entry finding that, in order to complete our review of the applications, the necessary audit should be conducted by a qualified independent auditing firm. Therefore, the Commission ordered staff to issue a request for proposals (RFP) from qualified independent auditors, with proposals due by August 29, 2007.

(11) Staff mailed RFP No. U07-FA-1 on August 16, 2007. One auditor submitted a timely proposal.

(12) Staff has evaluated the proposal received in response to the RFP. After consideration of the proposal received, the Commission selects Blue Ridge Consulting Services, Inc., (Blue Ridge) to conduct the audit. The Commission finds that Blue

Ridge has the necessary experience to complete the required work under the RFP.

(13) Duke shall enter into a contract with Blue Ridge for the purpose of providing payment for its auditing services. The contract shall incorporate the terms and conditions of the RFP, the auditor's proposal, and relevant Commission entries in this case.

(14) Blue Ridge will execute its duties pursuant to the Commission's statutory authority to investigate and obtain records, reports, and other documentation under Sections 4903.02, 4903.03, 4905.06, 4905.15, and 4905.16, Revised Code. The auditor shall be subject to the Commission's statutory duty under Section 4901.16, Revised Code, which states, in relevant part:

> Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent. Whoever violates this section shall be disqualified from acting as agent or acting in any other capacity under the appointment or employment of the commission.

(15) Upon request of the auditor or staff, Duke shall provide any and all documents or information requested. Duke may conspicuously mark such documents or information "confidential." In no event, however, shall Duke refuse or delay in providing such documents or information.

(16) Once the exceptions set forth in Section 4901.16, Revised Code, are satisfied, the following process applies to the release of any document or information Duke marks as "confidential." The staff or auditor shall not publicly disclose any document marked "confidential" by Duke, except upon three days' prior written notice of intent to disclose served upon Duke's counsel. Three days after such notice, staff or auditor may disclose or

otherwise make use of such documents or information for any lawful purpose, unless Duke moves the Commission for a protective order pertaining to such documents or information within the three-day notice period. The three-day notice period will be computed according to Rule 4901-1-07, O.A.C. Service shall be complete upon mailing or delivery in person.

(17) The auditor shall perform its duties as an independent contractor. Neither the commission nor its staff shall be liable for any acts committed by the auditor in the performance of its duties.

It is, therefore,

ORDERED, That Duke's application be accepted for filing as of July 18, 2007. It is, further,

ORDERED, That the proposed newspaper notice submitted by Duke be approved for publication with the modification specified by the Commission as set forth above. It is, further,

ORDERED, That Duke's motion for a waiver be granted. It is, further

ORDERED, That Blue Ridge Consulting Services, Inc., is hereby selected to perform the consulting activities set forth above. It is, further,

ORDERED, That Duke and Blue Ridge shall observe the requirements set forth in this entry. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Donald L. Mason

GAP/HW:ct

Entered in the Journal
SEP 0 5 2007

Reneé J. Jenkins
Secretary

LEGAL NOTICE

NOTICE OF APPLICATION TO THE PUBLIC UTILITIES COMMISSION OF OHIO FOR AN INCREASE IN GAS RATES TO ALL JURISDICTIONAL CUSTOMERS AND FOR APPROVAL OF AN ALTERNATIVE REGULATION PLAN FOR DUKE ENERGY OHIO, INC.

TO WHOM IT MAY CONCERN:

Pursuant to the requirements of Section 4909.19 of the Revised Code of Ohio, Duke Energy Ohio, Inc. (DE-Ohio) hereby gives notice that on July 18, 2007, it filed with The Public Utilities Commission of Ohio (Commission) an application for authority to change its gas rates and charges in incorporated communities and the unincorporated territory within its service area which includes all or part of Adams, Brown, Butler, Clinton, Clermont, Hamilton, Highland, Montgomery, and Warren Counties in Ohio. The Application also contains a request for approval of annually adjusted rate mechanisms and an Alternative Regulation Plan (Plan). Such Application has been assigned Case Nos. 07-589-GA-AIR, 07-590-GA-ALT, and 07-591-GA-AAM by the Commission. The substance of the application follows.

Each 100 cubic feet of gas (Ccf) under the sales service rate schedules shall be subject to an adjustment per Ccf determined in accordance with the "GAS COST RECOVERY" provision set forth on Sheet No. 71 of the Company's P.U.C.O. Gas No. 18 tariff (gas tariff). The gas cost recovery rate charged under the present and proposed rate sheets shall be determined in accordance with the provisions of Section 4901:1-14 of the Ohio Administrative Code. The average expected gas cost rate, used for purposes of determining the impact on customers who purchase natural gas from the Company, is $0.8883 per Ccf.

Monthly charges computed under the sales service and firm transportation rate schedules described herein shall be adjusted by the interim emergency and temporary rider, Rider PIPP, Percentage of Income Payment Plan (PIPP) as set forth on Sheet No. 63 of the Company's gas tariff. The current PIPP rider increases monthly charges by $0.0190 per Ccf. Monthly charges are adjusted for Rider STR, State Tax Rider, as set forth on Sheet No. 68 of the Company's gas tariff. The current charges for Rider STR per Ccf are $0.01593 for the first 1,000 Ccf; $0.00877 for the next 19,000 Ccf; and $0.00411 for all additional Ccf. The monthly charges shall be further adjusted for Rider ETR, Ohio Excise Tax Liability Rider, as set forth on Sheet No. 64. The current charge under Rider ETR, stated in terms of a specific percent, to be applied to customer bills is 4.89%. Under Rider CCCR, as set forth on Sheet No. 76, all firm customers served pursuant to Rates RS, GS, FT, and RFT shall be assessed a surcharge to enable the

Company to fully recover all costs which were incurred to supply gas to firm sales service customers who have elected to switch to gas transportation service. The amount of this surcharge shall be $0.0039 per Ccf. This rate is currently in effect during the months of June 2007 through August 2007 and is updated quarterly, concurrent with the Company's Gas Cost Recovery filings, to reflect the cost of unneeded capacity, net of any costs that the Company is able to recover via its mitigation efforts, including, but not limited to, capacity release transactions.

The following is a description of the proposed changes to the Company's existing gas rates.

RESIDENTIAL SERVICE RATE

RATE RS, RESIDENTIAL SERVICE, SHEET NO. 30.14

APPLICABILITY
Applicable to gas service required for residential purposes when supplied at one point of delivery where distribution mains are adjacent to the premises to be served.

NET MONTHLY BILL
Computed in accordance with the following charges:

Customer Charge per month	$15.00
Plus the applicable charge per month as set forth on Sheet No. 65, Rider AMRP, Sheet No. 88, Rider AU, Advanced Utility Rider, and Sheet No. 89, Rider SD, Sales Decoupling Rider.	

Plus a charge for all Ccf delivered at

Year 1	$ 0.22796 per Ccf
Year 2	$ 0.24714 per Ccf
Year 3 and beyond	$ 0.26575 per Ccf

The average percentage increase in the total bill of customers, under Rate RS in year 3, including the cost of natural gas, should the increase be granted in full is 10.0%.

GENERAL SERVICE RATE

RATE GS, GENERAL SERVICE, SHEET NO. 32.10

APPLICABILITY
Applicable to gas service required for any purpose by an individual customer at one premises when supplied at one point of delivery where distribution mains are adjacent to the premises to be served.

NET MONTHLY BILL

Computed in accordance with the following charges:

Customer Charge per Month	$40.00
Plus the applicable charge per month as set forth on Sheet No. 65, Rider AMRP, Sheet No. 88, Rider AU, Advanced Utility Rider, and Sheet No. 89, Rider SD, Sales Decoupling Rider.	

Plus a charge for all Ccf delivered at

Year 1	
First 1,000 Ccf delivered at	$0.19474 per Ccf
Next 4,000 Ccf delivered at	$0.18774 per Ccf
Additional Ccf delivered at	$0.18373 per Ccf
Year 2	
First 1,000 Ccf delivered at	$0.16980 per Ccf
Next 4,000 Ccf delivered at	$0.16280 per Ccf
Additional Ccf delivered at	$0.15880 per Ccf
Year 3 and beyond	
First 1,000 Ccf delivered at	$0.14560 per Ccf
Next 4,000 Ccf delivered at	$0.13860 per Ccf
Additional Ccf delivered at	$0.13463 per Ccf

The average percentage increase in the total bill for customers under Rate GS in year 3, including the cost of natural gas, should the increase be granted in full is (3.6%).

RESIDENTIAL FIRM TRANSPORTATION SERVICE RATE

RATE RFT, RESIDENTIAL FIRM TRANSPORTATION SERVICE, SHEET NO. 33.11

AVAILABILITY

Firm full requirements transportation service, which is provided from the Company's city gate receipt points to the outlet side of Company's meter, is available to all residential customers, except those customers whose utility service accounts are past due at the time customer desires to utilize this service, or whose accounts fall into arrears, as defined in Rate FRAS, after choosing this service.

NET MONTHLY BILL

Customer Charge per month	$15.00
Plus the applicable charge per month as set forth on Sheet No. 65, Rider AMRP, Sheet No. 88, Rider AU, Advanced Utility Rider, and	

Sheet No. 89, Rider SD, Sales Decoupling Rider.

Plus a charge for all Ccf delivered at

Year 1	$ 0.22796 per Ccf
Year 2	$ 0.24714 per Ccf
Year 3 and beyond	$ 0.26575 per Ccf

The average percentage increase in the total bill for customers under Rate RFT in year 3, should the increase be granted in full is 32.3%.

RATE SAC, RETAIL NATURAL GAS SUPPLIER AND AGGREGATOR CHARGES, SHEET NO. 45.2

AVAILABILITY

These Charges apply to Retail Natural Gas Suppliers and Aggregators providing Competitive Retail Natural Gas Service to Customers located in the Company's service territory.

TYPES OF CHARGES

General Fees

Registration Fee	$145.00
Retail Natural Gas Supplier and Aggregator Financial Evaluation Fee	$50.00/Evaluation
Retail Natural Gas Supplier Customer Information List Fee	$150.00/List
Governmental Aggregator Eligible Customer List Fee (based on zip codes only)	$400.00/List
Governmental Aggregator Eligible Customer List Fee (includes best efforts verification of governmental boundaries)	$1,200.00/List
Returned Check Charge	$13.50/Check

Bill Preparation and Request Charges

Consolidated Bill Preparation

Hourly charge for administrative and technical support to institute program modifications associated with the implementation of consolidated billing on non-standard rates requested by the Retail Natural Gas Supplier or Aggregator	$75.00/Hour

Other Bill Preparation Requests

Request by Retail Natural Gas Supplier or Aggregator for a one page Duplicate Bill	$0.26/Bill
Fee for Providing Commission Mandated Abandonment Notices as Bill Messages	$0.225/Bill

PURCHASE OF ACCOUNTS RECEIVABLE

The Company will negotiate a discount rate for purchase of supplier accounts receivable with each individual Retail Natural Gas Supplier or Aggregator, consistent with the guidelines approved by the Commission.

BILLING TERMS AND CONDITIONS

The billing terms and conditions for the above stated charges shall be in conformance with those specified in Rate FRAS.

The supplying and billing for service and all conditions applying thereto are subject to the jurisdiction of the Public Utilities Commission of Ohio, and to Company's Service Regulations currently in effect, as filed with the Public Utilities Commission of Ohio.

INTERRUPTIBLE TRANSPORTATION SERVICE RATE

RATE IT, INTERRUPTIBLE TRANSPORTATION SERVICE, SHEET NO. 51.14

AVAILABILITY

Curtailable natural gas local delivery service available to any customer who: (1) signs a contract with the Company for service under Rate IT; (2) utilizes a minimum of 10,000 Ccf per month during each of the seven consecutive billing periods commencing with customer's first meter reading taken on or after April 1; (3) has arranged for the delivery of gas into the Company's system, for customer's sole use at one point of delivery where distribution mains are adjacent to the premises to be served; and (4) has become a member of a pool under Rate AS and elected interruptible monthly balancing service under Rate IMBS.

NET MONTHLY BILL

The Net Monthly Bill is determined as follows:
All gas consumed is billed in units of 100 cubic feet (Ccf).

Administrative Charge per month	$595.86

Commodity Charge:

Company will deliver the arranged-for gas, less shrinkage which is equal to the Company's system average unaccounted for percentage, at a rate of

Year 1	$ 0.06072 per Ccf
Year 2	$ 0.05843 per Ccf
Year 3 and beyond	$ 0.05620 per Ccf

Plus the throughput charge for the service level selected under Rate IMBS, Interruptible Monthly Balancing Service.

Plus, if applicable, all delivered gas shall be subject to an adjustment per Ccf as set forth on:
Sheet No. 65, Rider AMRP, Accelerated Main Replacement Program.
Sheet No. 88, Rider AU, Advanced Utility Rider.

The customer will be subject to a monthly minimum bill requirement equivalent to the Administrative Charge shown above, plus the Excise Tax Liability Rider and the State Tax Rider and in addition, during the seven consecutive billing periods beginning each April, a 10,000 Ccf per month throughput volume minimum.

If customer fails to take delivery of 10,000 Ccf per month during the months of April through October, customer will be charged, in addition to the Administrative Charge and the charges for the delivered volume and the charges for the delivered volume and the applicable Excise Tax Liability Rider and State Tax Rider, an amount equal to the difference between 10,000 Ccf and the delivered volume billed at Rate GS, plus all applicable riders.

COMPETITIVE FLEXIBILITY

The Company may, on an individual customer basis, charge a rate lower than that specified in the "Net Monthly Bill" provision to meet competition from alternative fuels or other energy sources. The decision to charge a lower rate will be made by the Company at its sole discretion based on its interpretation of competitive conditions.

The average percentage increase in the total bill for customers under Rate IT in year 3, should the increase be granted in full is 6.3%.

FIRM TRANSPORTATION SERVICE RATE

RATE FT, FIRM TRANSPORTATION SERVICE, SHEET NO. 52.21

AVAILABILITY
Firm full requirements transportation service, which is provided from the Company's city gate receipt points to the outlet side of Company's meter used to serve the customer. This service is available within the Company's entire service territory, and at the customer's option, to serve the firm service requirements of interruptible customers in combination

with service under Rate IT, and to all non-residential customers except for those customers whose utility service accounts are past due at the time customer desires to utilize this service, or whose accounts fall into arrears, as defined in Rate FRAS, after choosing this service.

NET MONTHLY BILL

The Net Monthly Bill is determined as follows:

Customer Charge per Month	$40.00
Plus the applicable charge per month as set forth on Sheet No. 65, Rider AMRP, Sheet No. 88, Rider AU, Advanced Utility Rider, and Sheet No. 89, Rider SD, Sales Decoupling Rider..	
Plus a charge for all Ccf delivered at	
Year 1	
First 1,000 Ccf delivered at	$0.19474 per Ccf
Next 4,000 Ccf delivered at	$0.18774 per Ccf
Additional Ccf delivered at	$0.18373 per Ccf
Year 2	
First 1,000 Ccf delivered at	$0.16980 per Ccf
Next 4,000 Ccf delivered at	$0.16280 per Ccf
Additional Ccf delivered at	$0.15880 per Ccf
Year 3 and beyond	
First 1,000 Ccf delivered at	$0.14560 per Ccf
Next 4,000 Ccf delivered at	$0.13860 per Ccf
Additional Ccf delivered at	$0.13463 per Ccf

The average percentage increase in the total bill for customers under Rate FT in year 3, should the increase be granted in full is (12.5)%.

RIDER FOR ACCELERATED MAIN REPLACEMENT PROGRAM

ACCELERATED MAIN REPLACEMENT PROGRAM RIDER, SHEET NO. 65.6

APPLICABILITY

Applicable to all customers receiving service under the Company's sales and transportation rate schedules.

All customers receiving service under Rate RS, Rate RFT, Rate FT, Rate GS, or Rate DGS shall be assessed a monthly charge, in addition to the Customer Charge or Administrative Charge component of their applicable rate schedule, that will enable the Company to recover the costs of the Company's cast iron and bare steel main replacement program and its riser replacement program. Customers receiving service under Rate IT

and Rate SSIT will be assessed a throughput charge in addition to their commodity delivery charge for that purpose.

Rider AMRP will be updated annually, in order to reflect the impact on the Company's revenue requirements of net plant additions as offset by maintenance expense reductions during the most recent twelve months ended December. Such adjustments to the Rider will become effective with the first billing cycle of May, and during the first three years will reflect the allocation of the required revenue increase based on the phased-in revenue distribution approved in the Company's last rate proceeding. In subsequent years, the allocation will be made on the basis of the actual base revenues excluding Rider AMRP revenues by rate class for the just completed calendar year. New allocations will be contained within the Company's annual filings.

RATE GSR, GAS SURCREDIT RIDER, SHEET NO. 66

AVAILABILITY
Amended Substitute House Bill No. 9 (HB9) requires the Company to remove from the Company's base rates, the amount of the assessments for the Public Utilities Commission of Ohio and the Office of Consumers' Counselor that is attributable to commodity sales service for those customers that do not purchase that service from the Company. This rider is applicable to all customers who receive their gas supply from a Competitive Retail Natural Gas Service (CRNGS) provider.

This rider will remain in effect until such time as the Company establishes new base rates and this rider is re-calculated.

SURCREDIT AMOUNT
All customers who receive their gas supply from a CRNGS shall have the following surcredit rate applied to the gas distribution charge rendered by the Company:

$0.0012479 per 100 cubic feet

PROPOSED RIDER FOR ADVANCED UTILITY PROGRAM

ADVANCED UTILITY RIDER, SHEET NO. 88.0

APPLICABILITY
Applicable to all customers receiving service under the Company's sales and transportation rate schedules.

All customers receiving service under Rate RS, Rate RFT, Rate GS, Rate FT, Rate DGS, Rate IT and Rate SSIT shall be assessed a monthly charge in addition to the Customer Charge component of their applicable rate schedule that will enable the Company to complete the Utility of the Future program. Customers receiving service under Rate IT

and Rate SSIT will be assessed a throughput charge in addition to their commodity delivery charge, for that purpose.

Rider AU will be updated annually, in order to reflect the impact on the Company's revenue requirements of net plant additions as offset by operations and maintenance expense reductions during the most recent twelve months ended December. Such adjustments to the Rider will become effective with the first billing cycle of May and, during the first year, will reflect the allocation of the required revenue increase based on the revenue distribution approved in the Company's last rate proceeding. In subsequent years, the allocation will be made on the basis of the actual base revenues excluding Rider AU revenues by rate class for the just completed calendar year. New allocations will be contained within the Company's annual filings.

PROPOSED RIDER FOR SALES DECOUPLING

SALES DECOUPLING RIDER, SHEET NO. 89.0

APPLICABILITY
Applicable to all customers receiving service under the Company's sales and transportation rate schedules, except Rate IT.

All customers receiving service under Rate RS, Rate RFT, Rate GS, Rate FT, and Rate DGS shall be assessed a throughput charge in their applicable rate schedule that will enable the Company to recover the difference between Actual Base Revenues and Adjusted Order - Granted Base Revenues.

Actual Base Revenues are defined as weather-normalized monthly base revenues for each rate schedule, prior to Rider SD adjustments.

Adjusted Order-Granted Base Revenues are defined as the monthly base revenues for each applicable Rate Schedule as approved by the Commission's Order in the Company's last base rate case, as adjusted to reflect the change in the number of customers from levels approved in the Order. To reflect the change in the number of customers, Order-granted base revenue per customer is multiplied by the net change in number of customers since the like month during the test year, with the product being added to the Order-granted base revenues for such month.

TEXT CHANGES IN TARIFF SCHEDULES

In addition to the foregoing proposed changes in DE-Ohio's rates and charges, DE-Ohio proposes certain text changes to its tariff. Such text changes consist of: (1) changes to its service regulations to state that DE-Ohio assumes responsibility for the installation, maintenance, repair and replacement of the curb-to-meter service line, including the riser; (2) text changes to Rate FRAS – Full Requirements Aggregation

Service, Sheet No. 44; and (3) text changes to Rider EFBS, Enhanced Firm Balancing Service, Sheet No. 50.

WITHDRAWAL OF TARIFF SCHEDULES

DE-Ohio proposes to withdraw Rider MSR-G – Merger Savings Credit Rider – Gas, Sheet No. 69 and the Residential Conservation Service Program, Sheet No. 80.

REQUEST FOR APPROVAL OF ANNUAL AUTOMATIC RATE ADJUSTMENTS AND FOR APPROVAL OF ALTERNATIVE REGULATION PLAN

DE-Ohio also requests approval of annual automatic rate adjustments and approval of an Alternative Regulation Plan. Such annual automatic rate adjustments and Alternative Regulation Plan consist of the Accelerated Main Replacement Rider, the Advanced Utility Rider and the Sales Decoupling Rider, as described above.

The above proposed provisions, rates, and charges are subject to changes, including changes as to amount and form, by The Public Utilities Commission of Ohio following a public hearing on the filed application. Recommendations which differ from the filed application may be made by the Staff of The Public Utilities Commission of Ohio or by intervening parties and may be adopted by the Commission.

Any person, firm, corporation or association may file, pursuant to Section 4909.19 of the Revised Code, an objection to such proposed increased rates by alleging that such proposals are unjust and discriminatory or unreasonable.

Any person, firm, corporation or association may file a motion to intervene. Intervenors may obtain copies of the application and other filings made by the Company by contacting Ms. Dianne Kuhnell at (513) 287-3402, Duke Energy Ohio.

WHEREFORE, since the rates, prices, charges and other provisions in the current rate schedules do not yield just and reasonable compensation to DE-Ohio for supplying gas service to the customers to which they are applicable, do not yield a just and reasonable return to DE-Ohio on the value of the property used for furnishing gas service to such customers, and result in the taking of DE-Ohio's property for public use without compensation and without due process of law, DE-Ohio respectfully prays that your Honorable Commission:

(a) Accept this Application for filing;

(b) Find that this Application and the attached Schedules filed herewith and incorporated herein, are in accordance with R.C. 4909.18, 4929.11 and 4929.05, and the Rules of the Commission;

(c) Approve the Form of Notice in Schedule S-3 filed herewith;

(d) Find that the current rates, prices and charges for gas service are unjust, unreasonable and insufficient to yield reasonable compensation to DE-Ohio for the gas service rendered;

(e) Find that the proposed rates, prices, and charges are just and reasonable based upon the test period for the twelve months ending December 31, 2007 and approve such schedules in the form tendered herewith;

(f) Find that DE-Ohio is in compliance with R.C. 4905.35; that DE-Ohio is in substantial compliance with the state policies specified in R.C. 4929.02; and that DE-Ohio is expected to continue to be in substantial compliance with the state policies specified in R.C. 4929.02 after the plan is implemented;

(g) Approve DE-Ohio's requested automatic rate adjustments pursuant to R.C. 4929.11;

(h) Approve DE-Ohio's Alternative Rate Plan and authorize DE-Ohio to implement its Alternative Rate Plan;

(i) Approve DE-Ohio's Application for Approval to Change Accounting Methods consistent with proposed Riders AMRP, AU and SD, including: (i) capitalizing its investment in service lines and risers; (ii) deferring costs related to Rider AMRP and Rider AU for subsequent recovery through the respective riders; and (iii) the calculated monthly Rider SD amounts for and reconciliation amounts for later recovery or pass-through to customers; and

(j) Fix the date on or after which deliveries made are subject to the proposed rates.

A copy of the Application, including a copy of the present and proposed rate sheets, may be inspected by any interested party at the office of the Commission, 180 East Broad Street, Columbus, Ohio 43266-0573; or at the business offices of the Company at 644 Linn Street, Cincinnati, Ohio.

DUKE ENERGY OHIO, INC.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY ON REHEARING

The Commission finds:

(1) On July 18, 2007, Duke Energy of Ohio, Inc. (Duke) filed applications to increase its gas distribution rates, for authority to implement an alternative rate plan for its gas distribution services, and for approval to change accounting methods. On February 28, 2008, the parties filed a Joint Stipulation and Recommendation (Stipulation) resolving all the issues raised in the application except the issue of residential rate design. By Opinion and Order issued May 28, 2008, the Commission approved the Stipulation and, based on the record presented, adopted a "levelized" residential rate design to decouple Duke's revenue recovery from the amount of gas actually consumed.

(2) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

(3) On June 27, 2008, the Office of the Ohio Consumers' Counsel (OCC) and Ohio Partners for Affordable Energy (OPAE) filed applications for rehearing. Both applications assert that the May 28, 2008 Order is unreasonable, unlawful and/or an abuse of the Commission's discretion on the following grounds:

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician TM Date Processed 7/22/2008

(a) The Commission erred by approving a rate design that unreasonably violates prior Commission precedent and policy, and does not produce just and reasonable rates in violation of Sections 4905.22 and 4909.18, Revised Code.

(b) The Commission erred by approving a rate design that discourages customer conservation efforts in violation of Sections 4929.05 and 4905.70, Revised Code.

(c) The Commission erred when it failed to comply with the requirements of Section 4903.09, Revised Code, and provide specific findings of fact and written opinions that were supported by record evidence.

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

(4) On July 7, 2008, Duke filed a memorandum in opposition to the applications for rehearing.

(5) Before addressing these arguments, we would note that the opinion contains a clerical error which we now correct, *nunc pro tunc*. In the summary of the stipulation on page 6, the Opinion incorrectly states that Duke's revenue increase of $18,217,566 is based on an 8.15 percent rate of return. The stipulated revenue increase was based upon a rate of return of 8.45 percent.

(6) With respect to the applications for rehearing, we first observe that neither OCC nor OPAE raises any issues which were not fully considered and rejected in the Opinion at pages 12-15 and 17-20. As noted therein, the only unstipulated issue left to the Commission in this proceeding is the adoption of a new residential gas distribution rate design which would reduce or eliminate the link between natural gas sales volumes and the utility's revenue requirement in order to more closely match costs and revenues such that customers pay their fair share of distribution costs, to reduce or eliminate any disincentive for

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

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

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

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

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

(10) OCC also identifies a fourth basis for rehearing in arguing that our approval of the new levelized rate design violates Sections 4909.18, 4909.19 and 4909.43, Revised Code, by increasing the monthly residential customer charge without providing consumers adequate notice.

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

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

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

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

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

It is, therefore,

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

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

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

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

Reneé J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Investigation Into the Modification of Intrastate Access Charges.	)))	Case No. 00-127-TP-COI

ENTRY ON REHEARING

The Commission finds:

(1) On June 27, 2002, after careful consideration of a Motion to Amend and Supplement Access Recovery Charge or, in the Alternative, Motion for Stay, filed by Verizon North Inc. (Verizon) as well as the memoranda contra filed by the Ohio Consumer's Counsel (OCC) and the joint filing by AT&T Communications of Ohio, Inc., TCG Ohio, and WorldCom, Inc. (IXCs), the Commission issued an entry denying the substance of Verizon's motion and ordering Verizon to continue mirroring interstate charges on an intrastate basis. Recognizing the utility of the settled results from similar issues in the past, the Commission granted Verizon's request for a stay of the ordered reductions for a six-month period, until January 2, 2003, as a means to encourage another settled result of the issues. To further this effort, the Commission directed Verizon to file updated information and detailed supporting documentation for the company's revised earnings calculations. The Commission stated that, if the company believes that an increase to the access recovery charge (ARC) is still necessary after reviewing the revised earning calculations, Verizon should meet with the various interested parties (Staff, OCC, and the IXCs) to discuss issues associated with the reductions and Verizon's proposal to increase the ARC. By the same entry, Verizon was ordered to resume mirroring of the interstate charges consistent with the Commission's previous access decisions in this proceeding, the policy dating back to Case No. 83-464-TP-COI, and to file the necessary tariffs or documentation to ensure the ordered mirroring on January 2, 2003. The Commission set up a process for the parties to achieve a settled result, but let the parties know that, absent a Commission entry otherwise, the mirroring would absolutely take affect on January 2, 2003.

(2) On December 3, 2002, Verizon filed a Renewed Motion to Alter Access Recovery Charge or, in the Alternative, Motion for Stay and Hearing. Among other things, Verizon's motion requests that the Commission grant an extension to the existing access charge reduction stay beyond January 2, 2003, in order to allow the Commission time to hear, examine, and rectify the alleged

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business
Technician 3 Date Processed 2-20-03

annual revenue reduction that would result from mirroring the interstate access charge reductions on an intrastate basis without also implementing a corresponding increase to the ARC. Verizon asserts that the impact on an intrastate basis results in a 7.69 percent intrastate regulated rate of return. The motion further requests that Verizon be directed to file tariffs appropriate to such stay. Verizon maintains that, should the Commission reject its proposed amendment to the ARC, the additional mirrored reduction would be unlawful and would reduce Verizon's rate of return to a per se confiscatory level.

(3) On January 23, 2003, the Commission issued an entry denying Verizon renewed motion filed on December 3, 2002. In denying Verizon's renewed motion, the Commission found that Verizon's original request to alter the access recovery charge was fully considered and rejected in our June 27, 2002, decision in this docket. As a result, Verizon's December 3, 2002, renewed motion constituted an untimely challenge of the June 27, 2002 decision. The Commission further found in the January 23, 2003, entry that, as a result of an earlier stipulation approved by the Commission on July 19, 2001, in this matter, Verizon had been made whole for the incremental impact of mirroring the Coalition for Affordable Local and Long Distance Services' (CALLS') proposal in Ohio beyond the Commission's longstanding policy of mirroring traffic-sensitive interstate access charges on an intrastate basis. The Commission concluded by stating that, should Verizon believe that its earnings are deficient, the more appropriate remedy is to file a traditional rate case or propose an alterative regulation plan.

(4) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for an application for rehearing with respect to any matters determined by filing an application within 30 days after the entry of the order upon the journal of the Commission.

(5) On February 3, 2003, Verizon filed an application for rehearing of the Commission's January 23, 2003 entry and, simultaneously, a motion for stay and request for expedited ruling. In its application for rehearing, Verizon maintains that the January 23, 2003, entry is arbitrary, unreasonable, unconstitutional, and an abuse of discretion for the following reasons:

(a) The January 23, 2003, entry arbitrarily and unreasonably directs revenue reductions without directing simultaneous revenue offsets, resulting in confiscation without due process of law.

(b) The January 23, 2003, entry engages in single-issue ratemaking, contrary to the Ohio Revised Code.

(c) The January 23, 2003, entry improperly and unreasonably finds that Verizon's renewed motion filed December 3, 2002, was an untimely request for rehearing.

(d) The January 23, 2003, entry is arbitrary and unreasonable because it does not mirror all changes to interstate access charges directed by the CALLS order on a permanent basis despite precedent to the contrary.

(e) The January 23, 2003, entry is contrary to the Commission's own precedent with respect to mirroring federal access charges.

In support of its motion for stay pending rehearing and appeal, Verizon submits that with each passing day the company losses approximately $27,000 and that the company is unable to recover retroactively those lost revenues. Consequently, according to Verizon, it would be unjust and unlawful to deprive the company of those revenues during the pendency of this review. Further, for these same reasons, Verizon submits that an expedited ruling on its motion is warranted pursuant to Rule 4901:1-1-12(C), Ohio Administrative Code.

(6) Memoranda contra Verizon's application for rehearing were filed by AT&T Communications of Ohio, Inc. and TCG Ohio (jointly AT&T) on February 13, 2003, and by the OCC on February 18, 2003. In its memorandum contra, AT&T submits that Verizon has raised no new argument not already considered by the Commission on at least three previous occasions. Further, AT&T claims that Verizon's most recent application for rehearing is nothing more than an untimely collateral attack on the June 27, 2002, entry and must be dismissed.

In its memorandum contra Verizon's application for rehearing, the OCC asserts that Verizon has failed to show that the access charge rates resulting from the January 23, 2003, entry are confiscatory and, in any event, Verizon has failed to take advantage of the ratemaking options available to the company should Verizon believe that the current earnings are below a reasonable level for whatever reason, including reduction of access charges.

(7) Verizon's application for rehearing filed on February 3, 2003, is denied in its entirety. Initially, we note that four of the five grounds for rehearing outlined in Verizon's February 3, 2003, application for rehearing have been addressed previously by the Commission. Importantly, after reviewing hundreds of pages of documents filed in two rounds of comments, including comments from Verizon, the Commission, on January 11, 2001, issued an opinion and order adopting the rate caps and rate reductions of the CALLS plan on an intrastate basis for the four largest incumbent local exchange carriers in Ohio including Verizon. On February 12, 2001, Verizon filed an application for rehearing of the Commission's January 11, 2001 order. The Commission denied Verizon's assignments of error in its entry on rehearing issued March 15, 2001. Thereafter, Verizon again filed for rehearing of the March 15, 2001 entry on rehearing and again the Commission denied Verizon's application for rehearing in an entry on rehearing issued May 5, 2001.

Having previously addressed Verizon's arguments contained in its first, second, fourth, and five assignments of error on at least two prior occasions in this docket, the Commission need not further address those arguments at this time. The Commission notes that Verizon had a procedure available to it in order to challenge the Commission's adoption of the CALLS' rate caps and rate reductions and Verizon failed to avail itself of that procedure. The four assignments of error listed above are nothing more than a collateral attack on those prior decisions. Accordingly, the Commission will not further address those assignments of error.

(8) Verizon's final assignment of error is that the January 23, 2003, entry improperly and unreasonably finds that Verizon's December 3, 2002, motion was an untimely request for rehearing. Verizon continues that the company had no reason to seek rehearing of the June 27, 2002, entry insofar as the entry did not adversely impact Verizon.

Rehearing on this assignment of error is likewise denied. The Commission very clearly indicated in the June 27, 2002, entry that we gave no credence to Verizon's arguments seeking to amend and supplement the access recovery charge. It is equally clear in the June 27, 2002, entry at page three that "unless otherwise ordered, on January 2, 2003, the company (Verizon) shall be required to resume the mirroring of interstate charges on an intrastate basis...." There is no question that the very same reductions of Verizon's intrastate access charges ordered by the June 27, 2002 entry are the

subject of Verizon's current challenge. Verizon apparently confuses the Commission's willingness to afford the company time to avail itself of the settlement opportunity or ratemaking remedies available to it. But that confusion is disingenuous, given that Verizon previously effectuated the access charge reductions ordered by the June 27 entry through a June 28, 2002 tariff filing. The time to seek rehearing or clarification of the Commission's June 27, 2002, entry has run. Accordingly, the arguments made in Verizon's February 3, 2003, application for rehearing must be denied.

(9) Concurrent with the filing of its application for rehearing, Verizon filed a motion for stay of the January 2, 2003, rate reductions as well as a request for an expedited ruling. As noted above, Verizon's sole argument offered in support of a stay is that it would be unjust and unlawful to deprive Verizon of the revenues accruing during the pendency of review of the January 23, 2003 entry.

Verizon's request for a stay of the January 2, 2003, rate reductions during the pendency of the appeal of this matter is denied. There is no controlling precedent in Ohio setting forth the conditions under which the Commission will stay one of our own orders. Yet the Commission has urged the adoption of a four-factor test governing a stay that was strongly supported in a dissenting opinion by Justice Douglas in *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St.3d 604. This four-factor test has been deemed appropriate by courts when determining whether to stay an administrative order pending judicial review. This test includes and examination of:

(a) Whether there has been a strong showing that movant is likely to prevail on the merits;

(b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;

(c) Whether the stay would cause substantial harm to other parties; and

(d) Where lies the public interest.

Verizon's motion for stay does not even address these factors let alone prevail on them. Moreover, as previously noted, Verizon does have ratemaking options available to it if the company believes that it has just and reasonable grounds for a rate increase to offset the alleged access charge revenue loss.

Verizon has not met the recognized test for a stay of the Commission's decision and has elected not to avail itself of the options available to offset alleged access charge revenue losses. Accordingly, the Commission denies the motion for a stay.

It is, therefore,

ORDERED, That the application for rehearing filed by Verizon North Inc. on February 3, 2003, is denied as discussed herein. It is, further,

ORDERED, That the motion for stay and request for expedited ruling filed on February 3, 2003, is denied as discussed herein. It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record to this proceeding.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

JRJ/vrm

Entered in the Journal
FEB 20 2003

Reneè J. Jenkins
Secretary