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**In The  
Supreme Court of Ohio**

<b>Ohio Partners for Affordable Energy,</b>	:	Case No. 09-0314
	:	
and	:	
	:	On appeal from The Public Utilities
<b>The Office of the Ohio Consumers' Counsel,</b>	:	Commission of Ohio, Case Nos. 07-829-GA-
	:	AIR, 07-830-GA-ALT, 07-831-GA-AAM,
	:	08-169-GA-ALT, 06-1453-GA-UNC, <i>In the</i>
Appellants,	:	<i>Matter of the Application of The East Ohio</i>
	:	<i>Gas Company d.b.a. Dominion East Ohio for</i>
v.	:	<i>Authority to Increase Rates for its Gas</i>
	:	<i>Distribution Service.</i>
<b>The Public Utilities Commission of Ohio,</b>	:	
	:	
Appellee.	:	

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

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**INTRODUCTION**

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

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

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

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

The Commission should be affirmed.

### STATEMENT OF THE FACTS AND CASE

This case presents a narrow, technical challenge to how the Commission designs rates for residential gas distribution service. There is no dispute that East Ohio Gas Company d/b/a Dominion East Ohio (Dominion) needs (and under Ohio law is entitled to) a rate increase, nor is there any opposition to the amount of the increase. All parties, including the appellants and *amicus*, agreed upon the amount of the increase to be collected from residential customers. Stipulation and Recommendation at 3, OCC Supp. at 3.<sup>1</sup>

Dominion filed an application to increase its gas rates that had been in effect since August of 1995. Direct Test. of J. Murphy at 7-8, Sec. Supp. at 4-5. It sought an increase of 4% to the average residential bill, or approximately \$75 million overall. This would increase the average residential bill by less than \$4.50 per month. *Id.* Like other gas utilities, Dominion's average weather-normalized use per customer declined at a rate of 1-2% per year, ultimately reaching a year-over-year decline of 6% when gas prices reached their peak during the winter of 2005-2006. *Id.* at 41-42, Sec. Supp. at 7-8. As a result of that decline in sales, Dominion's recovery of distribution costs deteriorated.

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

Staff Report at 34, OCC Supp. at 23; Direct Test. of J. Murphy at 41-42, Sec. Supp at 7-8 Dominion has experienced real financial impacts associated with this significant revenue erosion. This negative sales trend results in Dominion under-recovering revenues associated with its fixed costs (distribution costs are essentially fixed in nature) and creates a disincentive for Dominion to promote and fund conservation measures, such as demand-side management programs. *Id.*

As a result of extensive negotiations, a settlement agreement was executed by all parties, including appellants Ohio Consumers' Counsel (OCC) and Ohio Partners for Affordable Energy (OPAE), and filed on August 22, 2008. The settlement provided for a much smaller overall rate increase of \$40,500,000, well below that originally sought by Dominion in its application. *See In the Matter of the Application of The East Ohio Gas Co. d.b.a. Dominion East Ohio for an Increase in Gas Rates*, Case Nos. 07-829-GA-AIR, *et al.* (hereinafter *In re Dominion*) (Opinion and Order at 6-11) (October 15, 2008), OCC App. at 28-33; *see also* Fourth Supplemental Direct Test. of J. Murphy at 1, Sec. Supp. at 11.

The settlement agreement expressly carved out residential rate design for litigation. To understand what this means, it is helpful to understand the makeup of a monthly gas bill. A residential customer's bill principally contains two components – a base rate component and a commodity (the cost of the natural gas) component. The rate design challenged here applies only to a relatively small (20-25 percent) base-rate portion of a

total monthly bill that recovers the fixed and largely uniform costs of providing natural gas service (piping, meters, etc.) to residential customers. Staff Report at 34-36, OCC Supp. at 23-25; *In re Dominion* (Entry on Rehearing at 12) (December 19, 2008), OCC App. at 17; Tr. V at 22-23, Sec. Supp. at 61-64; Tr. IV at 66, 87, Sec. Supp. at 55-56, 57-58. The cost of natural gas constitutes the lion's share balance of the customer's monthly bill. Historical gas rate design has featured a relatively low, fixed customer charge and a higher variable or usage charge that is collected based upon the residential customer's actual gas usage. *Id.* Although the costs of providing natural gas distribution service are almost exclusively fixed in nature, the utility's recovery of such costs has been largely dependent upon the level of gas sales to its customers. Staff Report at 34, OCC Supp. at 23. High gas prices and declining gas sales have threatened Dominion's ability to recover its reasonable costs of serving customers. *Id.*

Average residential gas usage has consistently declined or remained flat since 1990. *Id.* Faced with deteriorating revenues, Dominion proposed a "decoupling" rider (Rider SRR) to better recover its fixed costs and stabilize its financial situation. *See* Direct Test. of J. Murphy at 8, 40-42, Sec. Supp. at 5, 6-8. As proposed, Rider SRR would have been adjusted annually to account for over- or under-recovery of such costs. Schedule S-3 at 2, OCC Supp. at 27. Alternatively, the Commission's Staff chose to address the situation through a change in rate structure that included a higher fixed charge and a lower volumetric rate. Staff Report at 34-36, OCC Supp. at 23-25. Over six days

of hearing in August of 2008 the Commission heard testimony from four witnesses regarding rate design.

The Commission approved the settlement agreement and the levelized rate design proposed by its Staff. *In re Dominion* (Opinion and Order at 11-27) (October 15, 2008), OCC App. at 33-49. The Commission found this rate design to be superior to the Rider SRR proposed by Dominion because it embodies important ratemaking principles of cost causation and gradualism, and because it spreads recovery of costs more evenly throughout the year, serving to moderate winter heating bills. *Id.* at 21-27, OCC App. at 43-49. Under this rate design, the higher fixed distribution charge is substantially offset by a reduced volumetric base-rate charge for most residential customers and fully offset for Dominion's average residential gas users who should see little or no change in their monthly bills. The Commission found the levelized design to be reasonable as part of an overall package with many benefits for residential customers. *Id.* This package included Dominion's annual \$9.5 million commitment to fund energy efficiency programs, the commitment of Dominion shareholders to fund \$1.2 million in assistance to low-income programs and consumers, and a low-income pilot program offering a \$4.00 monthly discount to low-usage customers. *Id.* at 20-27, OCC App. at 42-49.

OCC, the city of Cleveland, The Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, Cleveland Housing Network, The Consumers for Fair Utility Rates, and OPAE jointly sought rehearing which was denied

by the Commission. *In re Dominion* (Entry on Rehearing) (December 19, 2008), OCC App. at 6-22. OPAE filed its Notice of Appeal on February 11, 2009 and OCC filed its Notice of Appeal on February 17, 2009.

## ARGUMENT

### Proposition of Law No. I:

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

Rate design is the only issue in this case. *In re Dominion* (Opinion and Order at 21-22) (October 15, 2008), OCC App. at 43-44. The parties to this appeal, and others, presented the Commission with a stipulation and recommendation resolving all issues except one - rate design. *Id.* The Commission adopted the stipulation and recommendation. After a hearing and extensive analysis, the Commission also adopted a levelized rate design rather than the rate design advocated by appellants. *Id.* at 25, OCC App. at 47. As a result, appellants now challenge the well-established authority and discretion of the Commission designing customer rates for utility services.

This Court has recognized the broad and plenary authority delegated to the Commission to establish utility rates and terms of service. *See, e.g., Kazmaier Supermarkets, Inc. v. Toledo Edison Co.*, 61 Ohio St. 3d 147, 573 N.E.2d 655 (1991). Rate-

making is not, nor has it ever been, an exact science.<sup>2</sup> Ratemaking constantly requires an application of seasoned and studied judgment. Where the Commission applies its discretion and judgment in a manner consistent with the evidence before it, it acts lawfully under its statutory ratemaking authority. Ohio Rev. Code Ann. § 4909.15 (West 2009), Appendix at 1; *General Motors Corp. v. Pub. Util. Comm'n*, 47 Ohio St. 2d 58, 351 N.E.2d 183 (1976). The Commission's judgment and expertise in rate design matters should not be disturbed unless it is shown to be against the manifest weight of the evidence. *Citywide Coalition for Utility Reform v. Pub. Util. Comm'n*, 67 Ohio St. 3d 531, 620 N.E.2d 832 (1993).

Appellants bear a difficult burden of showing that the Commission's decision is against the manifest weight of the evidence or so clearly unsupported by the record as to exhibit mistake, misapprehension or dereliction of duty. *See, e.g., Ohio Partners for Affordable Energy v. Pub. Util. Comm'n*, 115 Ohio St. 3d 208, 210, 874 N.E.2d 764, 767 (2007); *Monongahela Power Co. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 571, 820 N.E.2d 921 (2004). There is ample record evidence supporting both the Commission's decision to "rethink" how it designs natural gas rates and its adoption of the levelized rate design in this case. Appellants have not sustained their heavy burden.

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<sup>2</sup> The United States Supreme Court has long recognized that rate design is "not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Colorado Interstate Co. v. FPC*, 324 U.S. 581, 589 (1945).

**A. The Commission's decision to adopt the levelized rate design is supported by the evidence of record in this case.**

In a thorough and thoughtful exercise of discretion, the Commission took evidence, reviewed briefs and heard arguments in evaluating alternative rate designs and deciding this case. The Commission Staff, Dominion and the Ohio Oil and Gas Association advocated a levelized rate design that recovers most of the company's fixed costs through a fixed customer charge and a small portion through a variable charge based on consumption. Stipulation and Recommendation at 4, OCC Supp. at 4. The alternative to the levelized rate design involved a three-part rate structure that recovered most of the fixed costs through a variable charge based on consumption, a fixed charge, *and* a rider charge based on an annual true-up of any shortfalls in Dominion's revenues in the previous year. *Id.*; Schedule S-3 at 2, OCC Supp. at 27. As a review of the Commission's orders demonstrates, the Commission carefully reviewed and evaluated the evidence and arguments in adopting the levelized rate design.

The evidence, much of which is not contested, shows that the levelized rate design adopted by the Commission was necessary, grounded in sound ratemaking principles, and beneficial to Dominion's residential customers, including lower-income residential customers. The evidence shows:

- Dominion incurs costs to serve customers throughout the year. The costs of operating and maintaining the pipeline system to distribute gas are almost exclusively fixed and thus are largely independent of, and do not vary with,

time of year or customer usage. Staff Report at 28-35, Sec. Supp. at 82-88; Fourth Supplemental Direct Test. of J. Murphy at 9-10, Sec. Supp. at 14-15; Prefiled Test. of S. Puican at 4-6, OCC Supp. at 276-278; Tr. V at 22-26, Sec. Supp. at 61-70.

- Steadily declining sales and per customer consumption have caused Dominion to experience significant revenue erosion. Staff Report at 34, OCC Supp. at 23.
- Conditions in the natural gas industry have changed markedly in recent years. The Commission, its Staff, and the company all recognized that the natural gas market is now characterized by volatile and sustained price increases that motivate customers to increase conservation efforts. *In re Dominion* (Opinion and Order at 21-22) (October 15, 2008), OCC App. at 43-44; Direct Test. of J. Murphy at 41, Sec. Supp. at 7; Staff Report at 32-36, 44-46, Sec. Supp. at 86-90, 91-93; Direct Test. of S. Puican at 3-4, OCC Supp. at 275-276.
- The financial instability caused by persistent revenue erosion threatens the utility's ability to continually provide adequate and reliable service to all customers. *In re Dominion* (Opinion and Order at 21-22) (October 15, 2008), OCC. App. at 43-44; Direct Test. of J. Murphy at 40-42, Sec. Supp. at 6-8; Fourth Supplemental Test. of J. Murphy at 9, Sec. Supp. at 14.

- The levelized rate design removes the historical link that made utility revenues dependent upon gas sales, because it rationally recovers a greater percentage of *fixed* costs through a higher *fixed* charge. Prefiled Test. of S. Puican at 3-5, OCC Supp. at 275-277. This rate design applies the principle of cost causation, recognizing that the cost to serve residential customers is predominantly fixed and effectively the same regardless of customer usage. Fourth Supplemental Direct Test. of J. Murphy at 8-9, Sec. Supp. at 13-14.
- The Commission implemented the levelized rate design in a cautious, gradual manner. Staff Report at 34-35, OCC Supp. at 23-24; *In re Dominion* (Opinion and Order at 25) (October 15, 2008), OCC. App. at 47. While the Staff Report supported a fixed charge as high as \$17.50/month, the Commission adopted a phased-in rate design that includes a fixed charge of \$12.50 in year one and \$15.40 in year two, coupled with a reduced variable base rate component. *Id.*; Stipulation and Recommendation at 4, OCC Supp. at 4; Fourth Supplemental Direct Test. of J. Murphy at 7-9, Sec. Supp. at 12-14.
- Further evidence of the Commission's measured approach in the shift in rate design is that the Year 1 \$12.50 fixed monthly charge in year one for the average residential customer generates only 71% of annual base rate revenues. In year 2, the \$15.40 monthly charge increases the recovery of annual base rate

revenues to 84%. Fourth Supplemental Direct Test. of J. Murphy at 7-8, Sec. Supp. at 12-13.

- The levelized rate design sends more accurate price signals and provides consumers with better information regarding how to manage their gas usage than the decoupling rider. *In re Dominion* (Opinion and Order at 24) (October 15, 2008), OCC App. at 46; *In re Dominion* (Entry on Rehearing at 11-14) (December 19, 2008), OCC App. at 16-19; Fourth Supplemental Direct Test. of J. Murphy at 8-9, Sec. Supp. at 13-14; Prefiled Test. of S. Puican at 3-6, OCC Supp. at 275-278.
- The levelized rate design spreads recovery of fixed costs more evenly throughout the year than the decoupling rider, helping lower residential winter heating bills and assisting customers with budgeting for their gas service. This results in a more equitable recovery of costs among customers so that everyone pays his/her fair share of *fixed* system costs. *In re Dominion* (Opinion and Order at 23-25) (October 15, 2008), OCC App. at 45-47; *In re Dominion* (Entry on Rehearing at 11-14) (December 19, 2008), OCC App. at 16-19; Fourth Supplemental Direct Test. of J. Murphy at 13, Sec. Supp. at 16.
- The levelized rate design fairly apportions fixed costs of service among all customers so that everyone pays their fair share because fixed costs do not vary

with usage. *In re Dominion* (Opinion and Order at 24) (October 15, 2008), OCC App. at 46.

- The levelized rate design is straightforward, transparent, and easier for customers to understand than the decoupling rider. It recovers costs as they are incurred. It eliminates the need for deferred cost recovery and associated carrying charges, avoids inefficient and likely contentious annual rate adjustments, and is easier for customers to understand and rely upon in planning for their gas needs than the decoupling rider. *In re Dominion* (Opinion and Order at 23-25) (October 15, 2008), OCC App. at 45-47; Prefiled Test. of S. Puican at 5-6, OCC Supp. at 277-278; Staff Report at 44-46, Sec. Supp. at 91-93.
- In short, the levelized rate design promotes sound public and regulatory policies, fairly balances and addresses utility and customer concerns, and better facilitates customer understanding. Prefiled Test. of S. Puican at 5-6, OCC Supp. at 277-278.

The Commission fully explained its decision to adopt the levelized rate structure and why changed circumstances required the change. *In re Dominion* (Opinion and Order at 21-22) (October 15, 2008), OCC App. at 43-44. The Commission explained how the levelized rate design addressed problem circumstances and why it constituted the best choice for Dominion's customers. *Id.* at 21-25, OCC App. at 43-47. Based on the record, the Commission concluded, on balance, the benefits to residential customers

under the phased-in implementation of the levelized rate design outweighed any minimal impact associated with a higher fixed charge. *Id.* at 23-27, OCC App. at 45-49. The Commission's order complies with R.C. 4903.09 and it fully explains why the levelized rate design is superior to the former rate design and the decoupling rider.

The Court's function has never been to reweigh the evidence or attempt to second guess the measured judgment exercised by the Commission, particularly where, as here, the subject is one of designing customer rates. *See, e.g. Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 76 Ohio St. 3d 163, 666 N.E.2d 1372 (1996); *Payphone Ass'n v. Pub. Util. Comm'n*, 109 Ohio St. 3d 453, 849 N.E.2d 4 (2006). There is significant probative evidence supporting the Commission's decision and affirmance by this Court.

**B. Appellant's arguments do not show the Commission's order adopting the levelized rate design was against the manifest weight of the evidence.**

Despite the evidence supporting, and leading to, the Commission's decision, appellants claim it is not enough. Appellants merely invite the Court to re-weigh the evidence and, to second-guess the Commission's determination. Appellants also claim more study, with attendant delay, is necessary, ignoring the record underlying the Commission's decision. That record, discussed previously, contradicts appellants' claims; the Commission did not need further study to decide upon the levelized rate design. *In re Dominion* (Entry on Rehearing at 6-9) (December 19, 2008), OCC App. at

11-14. Indeed, the information appellants seek is not relevant to the Commission's determination to adopt a levelized rate design in Dominion's service territory. *Id.*

For example, OCC highlights two Commission ordered studies. The Commission ordered a cost of service study to evaluate whether Dominion should split the residential from the non-residential customers in the GSS/ECTS rate classes and not to evaluate the wisdom of the levelized rate design. *In re Dominion* (Opinion and Order at 25) (October 15, 2008), OCC App. at 47; *In re Dominion* (Entry on Rehearing at 7) (December 19, 2008), OCC App. at 12. That study was not relevant to the Commission's decision to adopt the levelized rate. *In re Dominion* (Entry on Rehearing at 7) (December 19, 2008), OCC App. at 12. The Commission also ordered a study concerning Dominion's demand side management programs merely to obtain information about those programs after the implementation of the levelized rate design. *Id.* at 8-9, OCC App. at 13-14. That information also was not relevant to the Commission's decision to adopt the levelized rate design. *Id.* at 9, OCC App. at 14.

The Commission ordered a low-income assistance pilot program to help those needing assistance. *Id.* at 7-8, OCC App. at 12-13. OCC suggested this pilot program and a subsequent study of its effectiveness evidenced defects in the levelized rate design. As the Commission described that is not true. *Id.* The Commission recognized that change in rate design "will leave some customers better off and some customers worse off, as compared with the existing rate design." *Id.* at 8. OCC App. at 13. The

Commission was concerned with the impact on Dominion's low-income, low-use customers and attempted to mitigate any impact. *Id.* That does not suggest any defect in the levelized rate design as OCC suggests.

Appellants have only shown that they disagree with the Commission. But their mere disagreement is not enough to satisfy their burden of proof to show the Commission's decision is against the manifest weight of the evidence. The Commission's orders demonstrate the Commission had a command of the issues, the evidence, and the arguments. The Commission's orders are a testament to the fact the Commission's decisions were consistent with the evidence and are supported by it.

**Proposition of Law No. II:**

**A factual determination by the Commission that a levelized rate design of a natural gas company does not preclude or discourage residential customers from pursuing energy conservation and efficiency investments and encourages their natural gas utility to promote and participate in energy efficiency programs will not be reversed unless it is shown to be against the manifest weight of the evidence. *Ohio Partners for Affordable Energy v. Pub. Util. Comm'n*, 115 Ohio St. 3d 208, 210, 874 N.E. 2d 764, 767 (2007).**

- A. Appellants' arguments fail to demonstrate that the levelized rate design precludes or discourages customers from managing their gas usage to reduce their bills.**

Appellants claim the Commission-approved levelized rate design will discourage customers from pursuing conservation and energy efficiency investments. In a nutshell, appellants argue "the higher the variable, consumption charge of a consumer's bill, the better." From this premise, they argue any reduction in that charge violates the

guidelines the General Assembly provided in R.C. 4929.02, and the requirements of R.C. 4905.70. But the statutes they cite do mandate any rate structure or forbid the Commission from adopting the levelized rate design. Ohio Rev. Code Ann §§ 4905.70, 4929.02 (West 2009), App. at 7.

The record and the Commission's decision demonstrate the levelized rate design will not discourage customers from pursuing conservation and energy efficiency investments. As the Commission noted, "customers make conservation decisions based on their *total bill*." *In re Dominion* (Opinion and Order at 24) (October 15, 2008) (emphasis added), OCC App. at 46; Direct Test. of S. Puican at 4, OCC Supp. at 276. There is no question about that; even OCC witness Radigan agreed. Tr. V at 23, Sec. Supp. at 63-64. The largest component of the total bill is the cost of natural gas and that is also undisputed. *In re Dominion* (Opinion and Order at 24) (October 15, 2008), OCC App. at 46; Direct Test. of S. Puican at 4, OCC Supp. at 276; Tr. V at 23, Sec. Supp. at 63-64. Approximately 75%-80% of that bill is the cost of natural gas. *In re Dominion* (Entry on Rehearing at 12) (December 19, 2008), OCC App. at 17; Tr. IV at 66, 87, Sec. Supp. at 55-56, 57-58. Dominion's customers will always achieve the full value of gas cost savings from conservation measures regardless of the distribution rate. Direct Test. of S. Puican at 4, OCC Supp. at 276. In other words, the cost of natural gas drives the size of total bills and, accordingly, conservation decisions. That remains a variable charge.

The levelized rate design will benefit consumers making conservation investment decisions. This rate design sends better price signals. *Id.* at 3-6, OCC Supp. at 275-278.

The simple fact is including fixed costs in a variable rate distorts price signals. *Id.*

Because the levelized rate design aligns fixed costs with fixed rate components and variable costs with variable rate components better than Dominion's prior rate structure, it provides better price signals for consumers' investment decisions. *Id.* Put another way:

The variable rate component of rates should reflect a utility's true avoided costs, *i.e.* the costs that a utility does not incur with a unit reduction in sales. The SFV ["straight-fixed-variable" or "levelized"] rate design satisfies this condition by more closely matching fixed and variable cost recovery to those actual costs incurred. Artificially inflating the volumetric rate beyond its cost basis skews the analysis and will cause an over-investment in conservation.

*Id.*

The Commission's order embraced this policy when it made the determination "that a levelized rate design sends better price signals to consumers." *In re Dominion* (Opinion and Order at 24) (October 15, 2008), OCC App. at 46.

Further, the Commission recognized that a rate design that separates a gas company's recovery of distribution costs from the amount customers actually consume eliminates the gas utility's disincentive for promoting energy conservation. *Id.* at 22, OCC App. at 44. All customers benefit when Dominion has adequate and stable revenues to

cover its cost of doing business, and there is a broader societal benefit to promoting conservation by removing Dominion's rate incentive to increase gas sales. *Id.*

Additionally, the Commission found from the record that the levelized rate design is far more beneficial than the use of the Dominion proposed Rider SRR. First, the levelized rate design produces more stable customer bills year round because fixed costs will be recovered evenly throughout the year. *Id.* On the other hand, a rider would still result in customers paying a greater portion of their fixed costs during the winter months when bills are at their peak, and customers' rates would be less predictable due to the annual adjustments for sales fluctuations. *Id.* Second, the levelized rate design is easier to understand in comparison to the application of a rider because of the appearance, under the rider approach, that customers are being penalized for conserving. *Id.* Third, as discussed previously, this rate design sends better price signals. Customers will see the impact that conservation efforts have on the approximately 75%-80% of their bill that represents the cost of the commodity. *In re Dominion* (Entry on Rehearing at 12) (December 19, 2008) OCC App. at 17; Tr. IV at 66, 87 Sec. Supp. at 55-56, 57-58. Finally, the levelized rate design promotes the regulatory objective of more equitably allocating fixed costs among customers, regardless of usage. *Id.*

Given that approximately 75%-80% of a residential customer's monthly bill is variable (the cost of natural gas) and controllable, residential customers can and will save money by choosing to invest in more efficient household appliances and other energy

saving measures. Adoption of the levelized rate design does little to change this fact. The Commission's order keeps the primary incentive to conserve in place while, importantly, removing a significant disincentive for Dominion to promote and participate in energy efficiency programs.

**B. Ohio Revised Code Sections 4929.04 and 4905.70 do not prevent The Public Utilities Commission of Ohio from adopting the levelized rate design in this case.**

Appellants' legal claims are also misplaced. The Court rejected a closely analogous argument previously made to this Court by OP&E, finding that neither R.C. 4929.02(A)(4) nor R.C. 4905.70 required approval of or funding for demand side management and energy conservation programs. *Ohio Partners*, 115 Ohio St. 3d at 215, 874 N.E.2d at 771. The Court there noted that the policy pronouncements contained in R.C. 4929.02 are guidelines that cannot be considered in isolation. Here, appellants advance just such an argument that the guidelines dictate the outcome. The Commission approved the levelized rate design as part of a balanced overall rate package that also includes Dominion's annual multi-million dollar commitment to fund energy efficiency and conservation programs and the creation of a low-income pilot program that provides monthly credits to assist qualifying customers with their gas bills. The Commission found these to be "crucial" complements to the levelized rate design that it adopted below. *See, e.g. In re Dominion* (Opinion and Order at 22-24) (May 28, 2008), OCC

App. at 44-46; *In re Dominion* (Entry on Rehearing at 7-9) (December 19, 2008), OCC App. at 12-14. The Court should reject appellants' narrow argument.

Appellants' assertion that the Commission violated R.C. 4905.70 is wrong as well. That statute was enacted to implement mandates associated with a federal statute that addresses *electricity*, not natural gas, matters. *Greater Cleveland Welfare Rights Organization, Inc. v. Pub. Util. Comm'n*, 2 Ohio St. 3d 62, 442 N.E.2d 1288 (1982). The history of the bill creating R.C. 4905.70 limits its conservation mandate to electricity providers. *City of Columbus v. Pub. Util. Comm'n*, 58 Ohio St. 2d 427, 429, 390 N.E.2d 1201, 1202-1203 (1979). The very language of R.C. 4905.70 confirms this, as it refers to "methods of pricing *electricity*" and contains multiple textual references to "electric light company," "kilowatt hours," and "kilowatt of billing demand," all of which pertain to the provision of electricity. Ohio Rev. Code Ann. § 4905.70 (West 2009), App. at 7. Where the statutory language itself clearly expresses the legislative intent, courts need look no further. *Provident Bank v. Wood*, 36 Ohio St. 2d 101, 105-106, 304 N.E.2d 378-381 (1973). R.C. 4905.70 is simply inapplicable to this gas rate case.

The levelized rate design does nothing to chill or dampen customer enthusiasm to save money. By more efficiently using gas, customers can and will reduce their gas bills. To complement conservation efforts, the Commission has promoted greater utility promotion and funding of energy efficiency and conservation programs, while allowing Dominion an opportunity to earn a fair return on its investment to adequately and reliably

serve its customers. A *fundamental reason* the Commission adopted the levelized rate design was to foster conservation rather than to discourage it. *In re Dominion* (Entry on Rehearing at 13) (December 19, 2008), OCC App. at 18.

**Proposition of Law No. III:**

**The Public Utilities Commission of Ohio may change from earlier orders where it justifies the change and that decision is explained and supported by the record. *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 114 Ohio St. 3d 340, 872 N.E.2d 269 (2007).**

**A. The Commission justified the change in rates and its adoption of a levelized rate design.**

The Public Utilities Commission of Ohio may change earlier orders where it justifies the change. *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 114 Ohio St. 3d 340, 343-344, 872 N.E. 2d 269, 273-274 (2007). The Commission justifies the change when the record supports and the Commission explains its reasons for the change. *Id.* But that does not shift the burden of proof in this proceeding from appellants, as they suggest, and it does not lighten that burden. The record in this case supports a change in the Commission's prior orders.

The case underlying this appeal inherently involves change. This case includes an application by Dominion to increase its rates. Any proceeding to change rates involves a change from the rates established under a prior Commission order. *See*, Ohio Rev. Code §§ Ann. 4909.18 (West 2009), App. at 4. Dominion needed a rate increase. The parties, including appellants, stipulated Dominion's rates were not sufficient and that a rate increase was appropriate. Stipulation and Recommendation at 3, OCC Supp. at 3. The

Commission accepted the parties' stipulation. *In re Dominion* (Opinion and Order at 12) (October 15, 2008), OCC App. at 34. As a result, the rate change was justified. Ohio Rev. Code §§ Ann. 4909.15, 4909.18 (West 2009), App. at 1, 4.

Moreover, the Commission's decision to adopt a levelized rate design is also supported by the record.<sup>3</sup> The Commission fully explained its reasons for adopting the levelized rate design. *In re Dominion* (Opinion and Order at 22-24) (October 15, 2008), OCC App. at 44-46. And the Commission explained its reasons for rejecting appellants' arguments. *In re Dominion* (Entry on Rehearing at 5-14) (December 19, 2008), OCC App. at 10-19. Because the Commission's decision is supported by the record and the Commission explained its reasons for adopting the levelized rate design, the Commission ordered change in Dominion's rate design was justified. *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 114 Ohio St. 3d 340, 872 N.E.2d 269 (2007).

The dispute in this appeal is about *discretion* - whether the Commission properly exercised its discretion when establishing the levelized rates. The nature of this dispute is not transformed because the Commission, exercising its discretion, reacted to changed circumstances by following the cost-causation rate design principle more closely than in the past. Appellants, not the Commission, bear the burden of proof on this issue, as this

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<sup>3</sup> See, *infra* at 9-14.

Court knows well. *Ohio Partners*, 115 Ohio St. 3d at 210, 874 N.E.2d at 767.

Appellants failed to sustain their burden.<sup>4</sup>

**B. The Commission considered gradualism in its determinations.**

Appellants argue about gradualism as if the Commission did not consider it. That is not true - the Commission expressly considered gradualism. While the Commission is not bound by any statutory requirement relating to gradualism, the Commission balanced this factor with others in deciding upon Dominion's rate structure. *In re Dominion* (Entry on Rehearing at 13-14) (December 19, 2008), OCC App. at 18-19; *In re Dominion* (Opinion and Order at 23-24) (October 15, 2008), OCC App. at 45-46. The levelized rate structure the Commission ordered, reflecting gradualism, mitigates the impacts 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 Dominion's fixed costs in the proposed fixed charge." *In re Dominion* (Entry on Rehearing at 13-14) (December 19, 2008), OCC App. at 18-19. The Commission further sought to mitigate negative impacts of the new rates by ordering a low-income pilot program "aimed at helping low-income, low-use customers pay their bills." *Id.* As the Commission described, gradualism impacted the Commission's decision.

The Commission balanced gradualism with other principles. For example, the Commission also balanced the important rate design principle that costs should be

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<sup>4</sup> See the discussion under Proposition of Law No. I.

matched with revenues so that rates reflect the cost of service rendered. *Id.* This Court recognized the importance of this principle when it opined: “[a]lthough different criteria or classifications may be utilized in the establishment of reasonable utility rate structures, the basic underlying consideration is that of cost of service rendered.” *City of Columbus v. Pub. Util. Comm’n*, 62 Ohio St. 3d 430, 438, 584 N.E. 2d 646, 651-652 (1992).

The record established Dominion’s distribution costs are primarily fixed and essentially do not vary from customer to customer, regardless of usage. Fourth Supplemental Direct Test. J. Murphy at 9, Sec. Supp. at 14. By levelizing the monthly amount paid by customers, the new rate provides a better match with the costs Dominion incurs to serve those customers. Accordingly, “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.” *In re Dominion* (Entry on Rehearing at 13-14) (December 19, 2008), OCC App. at 18-19.

Additional benefits flow from the improved matching of costs and revenues. The fixed costs do not vary throughout the year. Accordingly, the levelized rate design “has the added benefit of producing more stable customer bills throughout all seasons because fixed costs will be recovered throughout the year.” *In re Dominion* (Opinion and Order at 24) (October 15, 2008), OCC App. at 46. That means customers will no longer pay a greater portion of their fixed costs during the heating season when their bills are already the highest. *Id.* Additionally, the better matching of costs and revenues results in more

predictable rates because Dominion will not require annual adjustments to make-up for lower-than-expected sales as it would if it used the sales recovery rider. *Id.* In short, more closely matching costs and revenues benefits both Dominion and its customers. The Commission properly balanced this principle in its decision-making.

Contrary to appellants' arguments, the Commission did not violate or ignore gradualism or any other policy or precedent. Appellants' arguments involve only a disagreement over the result of the Commission's balancing. They would apply gradualism differently. That is not a basis to reverse the Commission's decision.

**C. Arguments not raised in either the joint application for rehearing or the notice of appeal fail to meet the jurisdictional requirements of R.C. 4903.10 and should be denied.**

OPAE raises several new arguments that were not included in the application for rehearing or OPAE's notice of appeal. OPAE argues about rate design principles (not legal principles) of fairness, waste, and public acceptance in asking this Court to substitute its discretion for the Commission's. OPAE ignores the rate design principle of cost causation, and the fact the total bill, not any individual component, is the motivating factor behind customers' conservation decisions. OPAE does not cite Commission decisions or decisions of this Court to support its positions. The new arguments do not show the Commission's decision was against the manifest weight of the evidence or that the decision violated Commission precedent or policy.

Moreover, the Commission did not have the opportunity to consider OP&E's new arguments because they were not presented to the Commission; they were not included in the application for rehearing. Joint Application for Rehearing (November 14, 2008), OP&E App. at 75-122. That application contained an assignment of error complaining that: "The Commission Erred By Approving a Rate Design That Unreasonably Violates Prior Commission Precedent and Policy." *Id.* OP&E App. at 75. The associated argument was based on gradualism, nothing more. *Id.* at 35-41, OP&E App. at 115-121. Accordingly, the Commission did not have the opportunity to review the additional issues as required by R.C. 4903.10. This is a jurisdictional requirement. Accordingly, OP&E's failure to properly raise the arguments deprives this Court of jurisdiction to consider them. *Ohio Partners*, 115 Ohio St. 3d at 211, 874 N.E.2d at 768.

Additionally, OP&E did not include these issues in its notice of appeal. Like the application for rehearing, OP&E's notice of appeal contains an assignment of error based on the Commission's alleged failure to follow its policies and precedents. OP&E Notice of Appeal at 3 (February 11, 2009), OP&E App. at 3. But, OP&E's new arguments contain no Commission authority, and, therefore, they are not based on Commission policy or precedent. Failure to raise these issues in the notice of appeal also deprives the Court of jurisdiction. *Ohio Partners*, 115 Ohio St. 3d at 211, 874 N.E. 2d at 768; *Cincinnati Gas & Electric Company v. Pub. Util. Comm'n*, 103 Ohio St. 3d 398, 402, 816 N.E. 2d 238, 243 (2004).

The Commission's adoption of the levelized rate design is based on the record and consideration of established rate design principles. The appellants have failed to show it violates any Commission policy or precedent.

**Proposition of Law No. IV:**

**The substance of Dominion's rate application was lawfully noticed to customers. *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 51 Ohio St. 3d 150, 555 N.E.2d 288 (1990).**

OCC<sup>5</sup> seems to agree that *the substance of Dominion's application is what was required* to be noticed to customers in the company's service territory. OCC Brief at 3, 6. This agreement is shown by the fact that OCC quotes from two of the three statutes it attempts to rely on:

R.C. 4909.18 (Appx. 000069) provides that, unless otherwise ordered by the commission, the public utility must file, along with its application, '[a] proposed notice for newspaper publication fully disclosing *the substance of the application.*' And, irrespective of whether the utility is required to file such notice with the commission, R.C. 4909.19 (Appx. 000072) provides that the utility must publish once a week for three consecutive weeks in newspapers of general circulation throughout the affected areas *the substance and prayer of its application.*

OCC Brief at 5-6 (emphasis added). Further, OCC recognizes that Dominion provided the notice to mayors and municipalities regarding the decoupling rate design proposal contained *in its application* required by R.C. 4909.43. *Id.* at 6. Yet, curiously, OCC

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<sup>5</sup> Neither OPAE nor *amicus curiae* city of Cleveland argues that the required notices were not given.

quarrels with Dominion's statutory notices and the Commission's findings as to their legal sufficiency because the notices do not contain a description of the *Staff's SFV or levelized rate design proposal*. While correctly noting that these statutes require notice of *the contents of the rate application*, OCC at the same time seeks to extend the straight-forward statutory notice requirement to a matter that was *not sought by nor presented as part of Dominion's rate application*. See, e.g., *In re Dominion* (Opinion and Order at 27) (October 15, 2008), OCC App. at 49; *In re Dominion* (Entry on Rehearing at 11) (December 19, 2008), OCC App. at 16. Dominion did not propose the levelized rate design. The Commission's Staff proposed it as part of its *post-application* investigation report.<sup>6</sup> OCC's argument is at odds with the words of the statutes and Court precedent that it cites.

This Court previously addressed the question presented here and determined that where certain information "was not within the 'substance and prayer' of the application ... R.C. 4909.19 did not require GTE [here Dominion] to mention the increase in the notice." *AT&T Communications of Ohio v. Pub. Util. Comm'n*, 51 Ohio St. 3d 150, 555 N.E.2d 288 (1990). In *AT&T*, GTE sought a rate increase and requested local exchange users pay the entire increase. Staff proposed a different method in the GTE Staff Report,

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<sup>6</sup> The notice requirements for a Staff Report are found in R.C. 4909.19, and no party disputes that those requirements were met.

and the Commission ultimately adopted yet another method in its decision. *Id.* at 150, 555 N.E.2d at 288.

In *AT&T*, the Commission assigned the rate increase to most existing rates, including the carrier common line charge, on a uniform percentage basis. *Id.* at 151, 555 N.E.2d at 288. The carrier common line charge was the charge GTE collected from long distance carriers, such as AT&T and MCI, to give them access to GTE's local loop to complete calls. Upon appeal, AT&T and MCI complained in part that the rate plan the Commission approved did not appear in the public notice of GTE's rate application. *Id.* at 152, 153, 555 N.E.2d at 290-292. This Court rejected that argument and distinguished the case OCC relied upon here, *Committee Against MRT, et al. v. Pub. Util. Comm'n*, 52 Ohio St. 2d 231, 371 N.E.2d 547 (1977).<sup>7</sup>

The distinction was that GTE, like Dominion, did not propose the rate plan at issue. Instead, GTE, like Dominion, included the rate plan it proposed in the public notice of its rate increase application in satisfaction of the Revised Code requirements. *AT&T*, 51 Ohio St.3d at 153, 555 N.E.2d at 291-292. The Court found:

In the instant case, GTE did not propose, in its application, to increase the CCLC [carrier common line charge]; the CCLC increase, consequently, was not within the "substance and prayer" of the application. Thus, R.C. 4909.19 did not require GTE to mention the increase in the notice.

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<sup>7</sup> Further instructive for this case was the *Committee Against MRT* Court's observation that the plain language of R.C. 4909.18(E) makes clear that the *purpose* of the notice requirement is to allow affected persons or entities to respond *to the application*. *Committee Against MRT*, 52 Ohio St. 2d at 233, 371 N.E.2d at 549.

*Id.* The Commission's ultimate adoption of a different rate plan was not constrained by that notice, nor does it invalidate that notice. *Id.* at 155, 555 N.E.2d at 292.

In fact, Dominion's ratepayers had notice that proposals different from the application could be made. Dominion's public notice stated that recommendations that differ from the application might be made by Staff or intervening parties and might be adopted by the Commission. Tr. IV at 42, OCC. Supp. at 59-60. In other words, Dominion provided the public with notice at the time of its application that it was possible that different proposals could be made to modify the application.

After the Staff Report introduced the issue, the statutorily required notice for public hearings was published. R.C. 4903.083 requires the Commission to issue public notice of the scheduled hearings and to give a "brief summary of the then known major issues in contention as set forth in the respective parties' and intervenor's objections to the staff report." Ohio Rev. Code Ann. § 4903.083 (West 2009), App at 8. The public hearing notice included the following major issues: "[t]he level of the monthly customer charge that customers will pay" and "[r]ate design, including consideration of decoupling and straight fixed variable mechanisms." *In re Dominion* (Entry at 6) (June 27, 2008), Sec. Supp. at 72. These local hearings were held at locations throughout Dominion's service territory. *In re Dominion* (Entry) (July 31, 2008), Sec. Supp. at 73-78.

Finally, the parties to this case, OCC included, were well aware of Staff's rate design recommendation. OCC, among others, presented evidence, cross-examined

witnesses and presented arguments in the evidentiary hearing. The record demonstrates that customers were well aware of the levelized rate design issue. In one of its briefs before the Commission, OCC noted that an “unprecedented ... number of consumers attend[ed] the local public hearings,” and evidenced a primary concern with the straight-fixed-variable [levelized] rate design proposal. OCC’s Initial Post-Hearing Brief at 1 (September 11, 2008), Sec. Supp. at 96. Even though notice of the application rightfully did not contain notice of the *Staff’s* rate design proposal, the issue of the levelized rate design was included and, the public was obviously aware.

Both the substance and spirit of the notice statutes were met by the company’s notices in this case. The Commission’s adoption of a different rate design did not invalidate Dominion’s public notice, nor did the substance of that notice constrain the Commission’s ratemaking authority. The Court should find that the notices meet the requirements of R.C. 4909.18, R.C. 4909.19, and R.C. 4909.43.

**Proposition of Law No. V:**

**It is premature to rule on either the appropriateness of the process for determining Dominion’s rates for the third year and beyond or the import to be given a cost of service study not yet considered by the Commission. *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm’n*, 103 Ohio St. 3d 398, 400-401, 816 N.E.2d 238, 241(2004); *Ohio Edison Co. v. Pub. Util. Comm’n*, 63 Ohio St. 3d 555, 565-566, 589 N.E.2d 1292, 1300-1301 (1992).**

OCC ignores the Commission’s firm commitment to establish an open and participatory process for determining the appropriate rates for the third year and beyond. After approving the first two years of the transition to the levelized rate design, the

Commission directed Dominion to complete the cost of service study of the feasibility of separating the residential and non-residential GSS/ECTS classes for purposes of cost allocation as agreed in the stipulation and recommendation. *In re Dominion* (Opinion and Order at 25-26) (October 15, 2008), OCC App. at 47-48; Stipulation and Recommendation at 11, OCC. Supp. at 11; *In re Dominion* (Entry on Rehearing at 6-7) (December 19, 2008), OCC App. at 11-12. The Commission's order stated that after reviewing the cost of service study, a process would be established for determining the appropriate rates for the third year and beyond. Upon rehearing, the Commission clarified that the process "for determining the rates in year three and beyond will provide for input from interested stakeholders and will ensure that all parties have the opportunity to participate." *In re Dominion* (Entry on Rehearing at 9-10) (December 19, 2008), OCC App. at 14-15.

OCC and Cleveland claim there is a subsidy flowing from the residential to non-residential customers within the classes under study and imply that is why the Commission ordered the study. OCC Brief at 31-32, Cleveland Brief at 24-27. The Commission's orders state the reason for the cost of service study and make this argument untenable. In fact, the Commission found that "to the extent that there is an intra-class subsidy there is evidence that it may be from nonresidential to residential users." *In re Dominion* (Opinion and Order at 25) (October 15, 2008), OCC App. at 47. The record supports this finding and, further, that if the GSS/ECTS rate class did not

include non-residential customers, residential customers would be allocated additional costs. Tr. I at 235, 237, OCC Supp. at 82C, 82E. The cost of service study was not considered by the Commission in making this decision because the study was not in the record.

In their arguments addressing the procedure to be adopted to hear these issues, both OCC and Cleveland discuss a motion to reopen filed before the Commission on January 29, 2009. OCC Supp. at 316. The motion addresses the cost of service study filed on January 13, 2009 or approximately one month after the Commission issued its entry on rehearing. This motion was filed outside the time provided by statute and rule both for purposes of rehearing and reopening the record. The Commission's procedural rules permit reopening a proceeding only if *good cause* is demonstrated *prior to the issuance of a final order*. Ohio Admin. Code § 4901-1-34(A) (West's 2009), App at 9. Further, when the motion was filed the Commission's order was final and no longer subject to rehearing or reopening on any basis. Thus, the motion could not even be considered an application for rehearing. *See* Ohio Rev. Code Ann. § 4903.10 (West 2009), App. at 5 (requiring "[a]fter any order has been made by the public utilities commission, any party ... may apply for rehearing .... Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.")

It is premature for the Court to accede to OCC's request to impose both a procedure on the Commission for considering the rates in year three and beyond, as well

as the meaning of the cost of service study in that process. OCC has not been harmed or injured by a procedure yet to be had or the Commission's determination of the cost of service study yet to be heard. Absent a decision by the Commission on both matters, no injury can be properly alleged.

In *Ohio Edison v. Pub. Util. Comm'n*, *supra*, the Court found that adoption of a nuclear performance standard *not yet applied* was not a justiciable issue. *Ohio Edison v. Pub. Util. Comm'n* at 565-566, 589 N.E.2d at 1300-1301. Similarly, the Court found in *Craun Transp., Inc. v. Pub. Util. Comm'n*:

\*\*\* [T]here has been no attempt to enforce the rules against the appellants, they have not been affected by the rules in any way, and the validity of the rules can be determined only when that question arises in connection with a matter that is justiciable. Consequently, the appeal is premature.

162 Ohio St. 9, 10, 120 N.E.2d 436, 437 (1954). Because the Commission has yet to consider the third year rates and the import of the study, appellants "have not been affected by \*\*\* [third year rates or the study] in any way, and the validity of the \*\*\* [rates and study] can be determined only when that question arises in connection with a matter that is justiciable." *Id.* The Court should find this matter is not justiciable and is premature.

Further, this Court has followed a two step process in determining whether a controversy is justiciable in character or there is the ripeness requisite for review. *Burger Brewing Co. v. Liquor Control Comm'n*, 34 Ohio St. 2d 93, 97-98, 296 N.E.2d 261, 264-265 (1973), citing *Toilet Goods Assn. v. Gardner*, 387 U.S. 158, 162 (1967). The first

question is “whether the issues tendered are appropriate for judicial resolution, and second to assess the hardship to the parties if judicial relief is denied at that stage.” *Burger*, 34 Ohio St. 2d at 97-98, 296 N.E.2d at 264-265. In *Burger* the Court found the issues were ready for judicial resolution because they had been subject to hearing, and briefs were submitted to the Liquor Control Commission. Here, the Commission has committed to establishing an open process to permit interested stakeholders an opportunity to weigh in on the establishment of rates for the third year and after, as well as to debate the import of the study on the record. The study has yet to be tested in this fashion and is not before this Court. There is insufficient information in the record before both the Commission and the Court for making a decision on these issues. Hence, the requisite adverseness between the parties is absent. *Id.* at 97-98, 296 N.E.2d at 264-265. With regard to the second factor, the impact on the parties if relief is denied at this stage here, absent a decision by the Commission, there is no harm done. Unlike in *Burger*, where the regulations were self-executing, there is a process yet to be followed for determining the rates and the import of the cost of service study in that process. Only after the Commission issues a final decision on these matters will there exist an opportunity to appeal to this Court. The Court should deny this request “to adjudicate rights and obligations in a ‘vacuum’ which was decried by this court in *Fortner v. Thomas*, *supra* (22 Ohio St. 2d 13).” *Burger*, 34 Ohio St. 2d at 97-98, 296 N.E.2d at 264-265.

OCC's theory regarding a relationship between the cost of service study and the adoption of the modified SFV rate design has yet to be heard by the Commission, and, as a result, is not appropriately before the Court. In addition, appellants have not been harmed by a procedure not yet held to determine whether the cost of service study should impact the company's rates for the third year and beyond. OCC's request should be denied.

### **CONCLUSION**

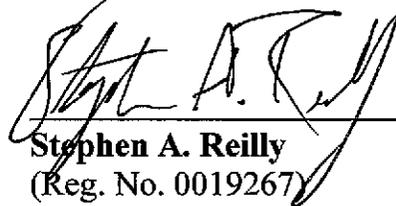
This appeal is about how the Commission exercised discretion responding to changed circumstances. As the Commission's orders reflect, the Commission understood and fully discussed those changes, their effect, and the options for responding to them. The Commission acted on sound rate design principles in adopting a levelized rate design. The Commission lawfully and reasonably applied its expertise and exercised its discretion in making its decisions.

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

Respectfully submitted,

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**PROOF OF SERVICE**

I hereby certify that a true copy of the foregoing Merit Brief, submitted on behalf of appellee, The Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 21st day of May, 2009.

  
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# APPENDIX

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#### **4909.15 Fixation of reasonable rate.**

(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (J) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital, as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (J) of section 4909.05 of the Revised Code.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the

extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate-making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a

computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under section 5727.391 of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(c) of this section, "compliance facility" has the same meaning as in section 5727.391 of the Revised Code.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost of rendering the public utility service for the test period under division (A)(4) of this section.

(C) The test period, unless otherwise ordered by the commission, shall be the twelve-month period beginning six months prior to the date the application is filed and ending six months subsequent to that date. In no event shall the test period end more than nine months subsequent to the date the application is filed. The revenues and expenses of the utility shall be determined during the test period. The date certain shall be not later than the date of filing.

(D) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to

own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (F) and (G) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(E) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

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

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or

until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

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

- (A) A report of its property used and useful in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;
- (B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;
- (C) A statement of the income and expense anticipated under the application filed;
- (D) A statement of financial condition summarizing assets, liabilities, and net worth;
- (E) A proposed notice for newspaper publication fully disclosing the substance of the application. The notice shall prominently state that any person, firm, corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to

such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The notice shall further include the average percentage increase in rate that a representative industrial, commercial, and residential customer will bear should the increase be granted in full;

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

#### **4903.10 Application for rehearing.**

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission.

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.

If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing.

No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

#### **4905.70 Energy conservation programs.**

The public utilities commission shall initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs. Notwithstanding sections 4905.31, 4905.33, 4905.35, and 4909.151 of the Revised Code, the commission shall examine and issue written findings on the declining block rate structure, lifeline rates, long-run incremental pricing, peak load and off-peak pricing, time of day and seasonal pricing, interruptible load pricing, and single rate pricing where rates do not vary because of classification of customers or amount of usage. The commission, by a rule adopted no later than October 1, 1977, and effective and applicable no later than November 1, 1977, shall require each electric light company to offer to such of their residential customers whose residences are primarily heated by electricity the option of their usage being metered by a demand or load meter. Under the rule, a customer who selects such option may be required by the company, where no such meter is already installed, to pay for such meter and its installation. The rule shall require each company to bill such of its customers who select such option for those kilowatt hours in excess of a prescribed number of kilowatt hours per kilowatt of billing demand, at a rate per kilowatt hour that reflects the lower cost of providing service during off-peak periods.

**4929.02 Policy of state as to natural gas services and goods.**

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

- (1) Promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods;
- (2) Promote the availability of unbundled and comparable natural gas services and goods that provide wholesale and retail consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;
- (3) Promote diversity of natural gas supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers;
- (4) Encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods;
- (5) Encourage cost-effective and efficient access to information regarding the operation of the distribution systems of natural gas companies in order to promote effective customer choice of natural gas services and goods;
- (6) Recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment;
- (7) Promote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905. and 4909. of the Revised Code;
- (8) Promote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated natural gas services and goods;
- (9) Ensure that the risks and rewards of a natural gas company's offering of nonjurisdictional and exempt services and goods do not affect the rates, prices, terms, or conditions of nonexempt, regulated services and goods of a natural gas company and do not affect the financial capability of a natural gas company to comply with the policy of this state specified in this section;
- (10) Facilitate the state's competitiveness in the global economy;
- (11) Facilitate additional choices for the supply of natural gas for residential consumers, including aggregation;
- (12) Promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation.

(B) The public utilities commission and the office of the consumers' counsel shall follow the policy specified in this section in exercising their respective authorities relative to sections 4929.03 to 4929.30 of the Revised Code.

(C) Nothing in Chapter 4929. of the Revised Code shall be construed to alter the public utilities commission's construction or application of division (A)(6) of section 4905.03 of the Revised Code.

#### **4903.083 Public hearings on increase in rates.**

For all cases involving applications for an increase in rates pursuant to section 4909.18 of the Revised Code the public utilities commission shall hold public hearings in each municipal corporation in the affected service area having a population in excess of one hundred thousand persons, provided that, at least one public hearing shall be held in each affected service area. At least one such hearing shall be held after 5:00 p.m. Notice of such hearing shall be published by the public utilities commission once each week for two consecutive weeks in a newspaper of general circulation in the service area. Said notice shall state prominently the total amount of the revenue increase requested in the application for the increase and shall list a brief summary of the then known major issues in contention as set forth in the respective parties' and intervenor's objections to the staff report filed pursuant to section 4909.19 of the Revised Code. The public utilities commission shall determine a uniform format for the content of all notices required under this section. Defects in the content of said notice shall not affect the legality of notices published under this section provided the public utilities commission meets the substantial compliance provision of section 4905.09 of the Revised Code.

#### **4901-1-34 Reopening of proceedings.**

(A) The commission, the legal director, the deputy legal director, or an attorney examiner may, upon their own motion or upon motion of any person for good cause shown, reopen a proceeding at any time prior to the issuance of a final order.

(B) A motion to reopen a proceeding shall specifically set forth the purpose of the requested reopening. If the purpose is to permit the presentation of additional evidence, the motion shall specifically describe the nature and purpose of such evidence, and shall set forth facts showing why such evidence could not, with reasonable diligence, have been presented earlier in the proceeding.