ORIGINAL

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel.	)	Case No. 09-0314
Appellant,	)	
v.	)	Appeal from the Public Utilities Commission of Ohio Case Nos. 07-829-GA-AIR, 07-830-GA-ALT, 07-831-GA-AAM, 08-169-GA-ALT, and 06-1453-GA-UNC
The Public Utilities Commission of Ohio,	)	
Appellee.	)	

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I. STATEMENT OF FACTS AND CASE

A. Introduction

It is unrefuted that the Company bears the burden of proof to demonstrate that its Application was just and reasonable. To the extent East Ohio Gas Company d/b/a Dominion East Ohio Gas Company ("DEO" or "the Company") adopted the PUCO Staff position on the straight fixed variable ("SFV") rate design, then the Company bears the burden to prove the SFV rate design is just and reasonable.[1] The Office of the Ohio Consumers' Counsel's ("OCC") appeal of the process that resulted in the implementation of the SFV rate design is based upon the fact that the Public Utilities Commission of Ohio ("PUCO" or "Commission") approved this rate design based solely on speculation and conjecture without actual evidence of the impact of the SFV rate design on customer bills. The Commission's Staff ("Staff") who initially proposed the SFV rate design did not perform any studies or analysis to support the Commission's approval of the SFV rate design. When DEO abandoned the rate design originally proposed in its rate increase application ("Application"), which included a decoupling mechanism ("Rider SRR"), in favor of the SFV rate design, it was similarly done without any supporting study or analysis. The Company could not, and did not meet its statutory burden.

The harm to DEO's approximately 1.1 million residential customers from the SFV rate design is genuine and measurable. However, the Commission dismissed OCC's arguments about the harm from the SFV rate design without the benefit of record evidence to support its decision. The Commission did not attempt to satisfy the law's requirement for actual evidence by ordering in a timely manner the necessary studies of the SFV rate design that would provide analysis of the impacts to DEO's residential customers following the SFV rate design implementation. A

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[1] R.C. 4909.18 and R.C. 4909.19 (Appx. 000069-000073).

manifest weight of the evidence argument is appropriate and necessary where the Commission's decision is void of evidence and without provisions to obtain the evidence by timely subsequent review of the decision.[2] Regulation, no matter how much perceived discretion the regulator may have, cannot be permitted to withstand judicial review under these circumstances.

In addition to the lack of evidence supporting the Commission's decision to implement the SFV rate design, it is also noteworthy that the Commission did not have the benefit of an emerging national trend on its side. At the time the PUCO was contemplating implementation of the SFV rate design only two other states had approved an SFV rate design whereas six other states contemplating the SFV rate design had rejected it.[3] Instead, a much more discernable national trend involved eleven states which had approved a decoupling mechanism and eleven other states that were considering a rate design incorporating a decoupling mechanism.[4]

While both SFV and a rate design incorporating a decoupling mechanism will address what the utility considers to be a problem -- the identified problem facing the utility -- revenue erosion caused by declining average use per customer -- each of these two rate designs impacts customers quite differently. The Commission decided to address this problem with the imposition of the SFV rate design, which will cause harm to DEO's residential customers. However, a decoupling mechanism would have provided a remedy for the Company's identified problem, but would have done so in a more transparent and balanced manner without the unjust and unreasonable impacts to DEO's residential customers. A decoupling mechanism would have

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[2] *Cleveland Electric Illuminating Company v. Pub. Util. Comm.*, (1984), 12 Ohio St.2d 320.

[3] OCC v. PUCO, S. Ct. Case No. 08-1837, OCC Exhibit No. 5 (Gonzalez Direct Testimony) at 21 (OCC Supp. 000164) (December 15, 2008), See also Amicus Brief of the National Resources Defense Council in Support of the Appellant Ohio Consumers' Counsel at 14-15 (December 15, 2008).

[4] Id.

also allowed the Commission the opportunity to move towards the SFV rate design in a more gradual manner consistent with its own precedents and policies while affording the Company time to analyze and conduct necessary studies regarding the impacts of the SFV rate design prior to its implementation.

Finally, the Court should not permit DEO to avoid the statutory notice requirements set forth in R.C. 4909.18. The adoption of the SFV rate design represents the most dramatic change to natural gas rate design in over 30 years. Yet customers did not receive notice of this change as part of the Company's Notice filings.[5] Without the required statutory notice, the Company's Application was fatally flawed and should have been rejected by the Commission.

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

B. Statement of Facts

The OCC incorporates the facts as stated in its Merit Brief filed on April 17, 2009. On May 21, 2009 and May 22, 2009, the Appellee, Public Utilities Commission of Ohio, and Intervening Appellee, DEO, respectively filed their Merit Briefs that OCC responds to herein.

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[5] PUCO Merit Brief at 32; See also DEO Merit Brief at 15.

II. ARGUMENT

OCC Propositions of Law II and IV

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

A. The PUCO's decision to adopt the Straight Fixed Variable rate design is not supported by record evidence.

The Commission unreasonably argues that the SFV rate design is beneficial to DEO's residential customers including lower-income residential customers. PUCO Merit Brief at 9. The Commission's argument is also not persuasive when considering the parties who supported the SFV rate design -- not surprisingly -- do not have to pay the higher fixed customer charge that results from the SFV rate design. Merit Brief at 9. Instead, only the parties who represent the customers that actually have to pay the higher rates opposed the SFV rate design. A close review of the rationale the Commission relies upon to adopt the SFV rate design demonstrates the significant extent to which it is skewed in favor of the Company.

Examples of the rationale that the PUCO relies upon are as follows: "steadily-declining sales per customer consumption have caused *DEO* to experience significant revenue erosion." PUCO Merit Brief at 10 (Emphasis added). "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." PUCO Merit Brief at 10. (Emphasis added). "The financial instability caused by persistent revenue erosion threatens *the utility's* ability to continually provide adequate and reliable service to all customers." PUCO Merit Brief at 10 (Emphasis added). These statements demonstrate an overarching concern, by the Commission, for DEO's circumstances. By implementing the SFV rate design, the

Commission addressed DEO's concerns, but failed to balance this action with the residential customers' interests and needs.

Historically, the Commission has approved customer charge increases by adhering to a measured and gradual policy. The Commission justifies its blatant disregard for precedent and policy by rationalizing its actions in light of where it potentially could have taken the customer charge instead of looking from where the customer charge came. The Commission stated: "While the Staff Report supported a fixed charge as high as $17.50/month, the Commission adopted a fixed charge of $12.50/month in year one and 15.40/month in year two." PUCO Merit Brief at 11.

Contrary to the Commission's argument that monthly increases to the customer charge of as much as $8.12[6] in year one and monthly increases of as much as $11.02[7] in year two are "cautious and gradual" implementation, these increases are neither cautious nor gradual. PUCO Merit Brief at 11. Nor are these increases "consistent with the principle of gradualism despite DEO's argument to the contrary." DEO Merit Brief at 24-27. Rather these increases to the fixed portion of the customer charge represent enormous and unprecedented increases in the customer charge that violate the principle of gradualism. The PUCO's argument would be akin to justifying a rate increase not on the record or precedent but on the fact that it could have been worse. This is an unjust and unreasonable result. Therefore, this Court should reverse and remand the PUCO's Order in this case.

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[6] $12.50 - $4.38 = $8.12 (for DEO's West Division or $12.50 - 5.70 = $6.80 for DEO's East Division).

[7] $15.40 - $4.38 = $11.02 (for DEO's West Division, or $15.40 - $5.70 = 9.70 for DEO's East Division).

The PUCO considered its actions to be justified because it stated the SFV rate design "sends more accurate price signals and provides consumers with better information regarding how to manage their gas." PUCO Merit Brief at 12, See also DEO Merit Brief at 30-31. These justifications are without merit. A price signal is a message sent to consumers and producers in the form of a price charged for a commodity; this is seen as indicating a signal for producers to increase or decrease supplies and/or consumers to increase or reduce demand.[8]

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

Furthermore, the PUCO incorrectly perceives that a benefit exists for consumers due to the levelizing effect of the customer charge via the SFV rate design. The Commission stated: "the levelized rate design spreads recovery of fixed costs more evenly throughout the year * * *." PUCO Merit Brief at 12 and 19. However, this claim flies in the face of the fact that currently the majority of DEO's natural gas residential customers have voluntarily chosen not to participate in DEO's budget billing program. OCC Ex. No. 5 (Radigan Direct Testimony) at 8 (Supp. 000169). The evidence was uncontroverted and suggests that DEO's customers do not initiate budget billing because of the natural leveling effect of their total energy bills -- gas and electric -- which itself forms a natural budget billing plan.

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[8] Paul A. Samuelson, Economics, Ninth Edition, McGraw-Hill, 1973 at 163.

Moreover, budget billing is a voluntary option that customers can choose. The SFV rate design as approved by the Commission is not a choice. The Commission should not force customers who have largely already rejected the budget billing option to accept it in the form of a SFV rate design and then be told that this form of a levelized billing is a benefit, contrary to their own preferences. It is further evidence that the Commission is more interested in establishing a rate design that favors the Company instead of finding a balanced rate design that does not harm DEO's residential customers.

The Commission's disregard for the lack of consumer support for the SFV rate design and the lack of record evidence to support the Commission's decision adopting a dramatic change in rate design was an abuse of discretion that should be remedied by this Court.

B. The Commission's Order Adopting the SFV Rate Design is against the manifest weight of the evidence.

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

The Commission approved the SFV rate design for DEO's GSS and Energy Choice Transportation Service ("ECTS") classes despite acknowledging that there was insufficient record evidence to support its decision, as is evidenced by its ordering future studies intended to establish findings on a prospective basis to validate its current decision. The areas of inquiry that the Commission has ordered be reviewed are as follows: 1) DEO is to perform a review of the

cost allocation methodologies for the GSS/ECTS classes (Order at 25 (Appx. 000047)); 2) following the end of the first year of the low-income 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" (Order at 27 (Appx. 000049)); and 3) the DSM collaborative was ordered, as part of its review, "to develop energy efficiency program design alternatives and should consider those alternatives in a manner that strikes a balance between cost savings and any negative ratepayer impacts." Order at 23 (Appx. 000045).

Thus, the Commission recognized that its decision will cause harm to some customers and it attempted to show a mitigation of that harm through a series of after-the-fact band-aids and studies. Nonetheless, the fact remains that customers simply would be better off without the SFV rate design, and would benefit from approval of the rate design originally proposed by DEO and reflected in the notice to the public.

In light of this lack of record support, the statement in the PUCO's Brief that "in a *thorough and thoughtful* exercise of discretion * * * the Commission *carefully* reviewed and evaluated the evidence and arguments in adopting levelized rate design is overstated. PUCO Brief at 9 (Emphasis added). The PUCO cited to absolutely no quantitative analysis of customer impacts. In fact, the Commission challenged OCC's argument that the Commission abused its discretion by implementing the levelized rate design without sufficient evaluation of customer impacts. The Commission cited a Supreme Court case that decided the Commission has considerable discretion in rate design matters. PUCO Merit Brief at 8 citing *Citywide Coalition for Utility Reform v. Pub. Util. Comm.* (1993), 67 Ohio St. 3d 531. The *Citywide* case involved Cincinnati Gas and Electric's ("CG&E") declining block rate structure which was challenged as not being cost-justified. However, in the *Citywide* decision, the Court noted that "the Commission

also ordered CG&E to *conduct further analysis on this issue for presentation and consideration in its next rate case."* This is factually distinguishable from the present case wherein the Commission has implemented the SFV rate design without the benefit of requiring future studies of the impacts of the SFV rate design on consumers.[9]

The Commission did not study customer impacts before the SFV rate design implementation or order a study be performed after the SFV rate design implementation. Instead the Commission is willing to rely only on a conclusion stating "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" as support for its decision. PUCO Merit Brief at 13-14.

Yet at the same time the Commission acknowledges that "the SFV rate design will leave some [residential] customers better off and some [residential] customers worse off as compared with the existing rate design. PUCO Merit Brief at 15. The Commission's Order is void of any objective analysis to support its conclusion that the impacts to those residential customers who are worse off is "minimal." It is incomprehensible that the Commission would rely solely on unstated or non-quantified *minimal impacts* when abandoning 30 years of Commission precedent. The PUCO was quick in pulling the plug on long-lived precedent to benefit DEO. It is an obvious abuse of discretion. Arguably, if the benefits DEO was to derive from the SFV rate design were unstated or non-quantified, it is unlikely the Commission would have approved such a rate design under such speculative circumstances.

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[9] The type of underlying study in the *Citywide* case that the Court relied on is fundamentally different than the General Sales Service study that the PUCO did order, after-the-fact in this case. The General Sales Service study is a very limited cost of service study that merely impacts how the SFV rate design might be implemented at some point in the future. (See OCC Merit Brief at Proposition of Law V, pages 43-49).

The Commission's failure to perform an exhaustive analysis, contrary to its arguments on brief, of the customer impacts resulting from a dramatic change in rate design before or after implementation to support its decision to move forward with the SFV rate design was an abuse of discretion and is against the manifest weight of the evidence. The Court should find accordingly.

OCC Proposition of Law III

> **There is no evidence to support the PUCO's finding that the Straight Fixed Variable rate design encourages conservation efforts.** ***(Responsive to PUCO Proposition of Law II; DEO Proposition of Law III).***

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

> (A) It is the policy of this state to, throughout this state:
>
> * * *
>
> (4) Encourage innovation and market access for cost-effective supply-and demand-side natural gas services and goods; R.C. 4929.02 (Appx. 000054).

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

> [t]he record and the Commission's decision demonstrates that the levelized rate design *will not discourage* customers from pursuing conservation and energy efficiency investments. * * * The largest component of the total bill is the cost of natural gas and that is also undisputed. Dominion's customers will always achieve the full value of gas cost savings from conservation measures regardless of the distribution rate. PUCO Merit Brief at 17 (Emphasis Added); See also DEO Merit Brief at 25.

The Commission cannot use the commodity cost of natural gas as evidence to support its conclusion that the SFV rate design encourages conservation. DEO's recovery of the commodity

cost is not changing as a result of the implementation of the SFV rate design which provides recovery of the costs of gas distribution service (pipes and etc.). Instead there must be a review of the SFV rate design in isolation to evaluate what impact the SFV rate design has on consumers' consumption decisions. Absent an analysis of the impacts of the SFV rate design on conservation efforts it is impossible for the Commission to sustain an argument that the SFV rate design will not discourage, let alone will encourage, conservation.

The Commission unreasonably argues that "customers who invest in better insulation materials or more efficient appliances will continue to save money as they use gas more efficiently." PUCO Merit Brief at 20. Again, the Commission focuses only on the savings that materialize through the commodity cost recovery mechanism, which is unrelated to the distribution costs which are recovered through the SFV rate design which is the subject of this appeal. It is unrefuted in the record that those customers who have invested in additional home insulation and purchased more efficient furnaces and water heaters as a rational response to increasing gas costs (and in response to Ohio policy) will see their investment returns diminished and payback periods lengthened as a result of the SFV rate design. OCC Ex. No. 5 (Radigan Direct Testimony) at 13-15 (Supp. 000174-000176). In this manner, the SFV rate design discourages customer conservation.

The Commission also unreasonably argued that the SFV rate design removes the Company's disincentive to promote conservation. PUCO Merit Brief at 18. It is disingenuous for the Commission to suggest that it approved the levelized rate design as part of a balanced overall rate package because it also included DEO's annual multi-million dollar commitment to fund energy efficiency. PUCO Merit Brief at 20. The PUCO's explanation ignores the fact that the same multi-million dollar commitment was open for consideration by DEO under its

Application which included a decoupling mechanism. The Court should not lose sight of the fact that a key factor underlying DEO's agreement to such a large commitment to energy efficiency is predominantly based upon the fact that DEO enjoys full and complete cost recovery of its DSM commitments and not because of the SFV rate design. Opinion and Order at 21 (Appx. 000043), See also Stipulation and Recommendation at 4 (Supp. 000004).[10]

If under the SFV rate design the price signal encourages consumption and/or if customers invest in energy efficiency only to see their payback periods extended, this can have a chilling effect on continued investments in energy efficiency. Such an outcome is anathema to the intent of the law and state policy. Therefore, the residential rate design as approved by the Commission was unlawful and in violation of Ohio policy due to its failure to promote energy efficiency and encourage conservation and should, therefore, be reversed and remanded by this Court. This Court should find that the SFV rate design approved by the Commission will materially alter customer economies when contemplating an energy efficiency investment, and therefore is unlawful because it violates R.C. 4929.02.

The Commission unreasonably found that the levelized rate design is far more beneficial than the use of the DEO proposed decoupling mechanism. (PUCO Merit Brief at 19). The decoupled rate design proposed by DEO in its Application was intended to addresses revenue stability and declining customer usage in a way that is more gradual in its application and with protection for customers of a reconciliation of any over-recovery or under-recovery. Decoupling continues the volumetric rate design so that those who use the most natural gas pay the most. Under decoupling, the company is essentially guaranteed the level of revenues approved by the Commission after certain appropriate adjustments. This occurs because at the end of the year,

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[10] The $9.5 million in DSM projects are recovered by DEO as follows: $5.5 million in base rates and $4.0 million through the DSM Rider.

the Company's revenues received are compared with the revenues authorized resulting in a reconciliation adjustment that is either credited or debited to customers through a rider. The transparent and balanced reconciliation mechanism of the decoupling rate design is absent in the levelized SFV rate design approved by the Commission which makes no year-end adjustment to the revenues over/under collected by DEO.

The Commission made other non-compelling arguments. The Commission stated "the levelized rate design does nothing to chill or dampen customer enthusiasm to save money." PUCO Merit Brief at 21. However, that is not the standard in 4929.02. In the law, it is not enough for the Commission to merely get out of the way of energy conservation, but rather it is the Commission's obligation to *encourage innovation and market access for cost-effective supply-and demand-side natural gas services and goods*.[11] Moreover, not to be discounted is the fact that the PUCO's conclusion is completely contradicted by the testimony of actual customers at the Local Public hearings.[12] The Commission should be leading the energy efficiency initiative through affirmative and proactive means. While the Commission does not believe the SFV rate design does anything to "chill or dampen" a consumer's desire to conserve. The SFV rate design does not do anything to "encourage" that desire either. The Court should find the Commission's attitude, on this issue, to be unlawful.

The Commission's argument that: "the fundamental reason that the Commission adopted the SFV residential rate design was to foster conservation, not discourage it" rings hollow. PUCO Brief at 22 (Emphasis omitted). A rate design that sends a price signal to consumers that encourages consumption (not conservation), extends the payback period, and fails to encourage

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[11] R.C. 4929.02(B) "The Public Utilities Commission shall follow the policy specified in this section in carrying out sections 4929.03 to 4929.10 of the revised code."

[12] Joint Application for Rehearing at 36 (November 14, 2008) (Appx. 000124).

energy conservation is unjust and unreasonable because it violates R.C. 4929.02(A)(4), and this Court should reverse and remand the Commission's decision.

The PUCO argues that R.C. 4905.70 applies only to electricity conservation programs. PUCO Merit Brief at 21. While there is no doubt that the statute refers to electric conservation programs, the statute is not so limited. In fact, the statute refers to "energy conservation programs," where the word "energy" would include both natural gas and electricity. Pursuant to the statute, the PUCO is to initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiency and take into account long-run incremental costs. If the statute were intended only to apply to electricity conservation programs, it would have said so. The plain reading of the statute, with its explicit reference to "energy" conservation, is broad enough to include electricity and natural gas.

OCC Proposition of Law I.

The PUCO's Order Should Be Reversed Because Customers Did Not Receive Notice of the Straight Fixed Variable Rate Design As Approved by the PUCO (*Responsive to PUCO Proposition of Law IV; DEO Proposition of Law I*).

DEO sent notice to its customers regarding the substance of its Application. However, when DEO endorsed and the PUCO approved the SFV rate design in its Opinion and Order (October 15, 2008) DEO's notice became deficient because the rate design in DEO's Application was fundamentally different from the rate design proposed by the PUCO Staff that DEO then endorsed. PUCO Merit Brief at 29. The notice requirements for a public utility's application to begin a traditional rate case and for an alternative rate case are found under R.C. 4909.18 (Appx. 000069), 4909.19 (Appx. 000072) and 4909.43 (Appx. 000074). In this case, the Commission denied consumers adequate notice with sufficient detail of the residential rate design that was

eventually supported by DEO and that was approved by the Commission, which differed significantly from DEO's Application.

DEO's notice provided customers with information that the percentage increase for customers would be 5 percent from current rates for a total bill comprised of delivery charges and commodity charges. Pre-Filing Notice at Tab 5 (OCC Supp. at 000000298-000000302). However, under the SFV rate design, for the lowest use residential customers (usage between 0 and 80 Mcf per year), in year two those customers will see increases of between 136 percent and 12.4 percent depending on annual usage levels. Staff Ex. No. 3B (Second Supplemental Testimony of Stephen E. Puican) at Exhibit SEP-1B (August 25, 2008) (Supp. 000268). DEO's proposed phase in of the SFV rate design for the highest usage residential customers will see a 1.32 percent to 28.34 percent decrease in their total bills from their current bills. Id. The DEO notice of the 5 percent increase would only be applicable to 112,000 (or less than 10 percent) of DEO's 1.1 million customers who used between 80 and 90 Mcf in year one. Id. at SEP 1A (Supp 000267).

Had DEO's required notice provided its low-use customers with accurate information and sufficient detail regarding the extent of the impact of the rate design that it ultimately endorsed and that thereafter was approved, DEO's customers may have responded differently to the rate increase proposal, in order to protect their interests, because they would have been provided with timely notice of the substance of the proposed changes. The PUCO Staff relies on arguments regarding the number of consumers who attended the local public hearings in DEO's service territory as evidence that the issue of the SFV rate design was one the public was aware of. PUCO Brief at 32. The PUCO Staff's reliance on the level of participation in local public hearings is misplaced. First, this reliance ignores the statutory notice requirements for the sum

and substance of the Application. Second, there is no connection between the level of attendance at local public hearings and any actions taken by the Company for that public notice because the Company's notice was not for the SFV rate design. Instead it was the action of OCC and other consumer advocates who brought this issue to the forefront of consumers' attention that resulted in the outpouring of consumer opposition to the SFV rate design. We cannot measure what would have been the greater outpouring of consumer opposition to the imposition of the SFV rate design, because consumers never received the timely and statutory notice apprising them of their ability and right to do so. The statutory system that has been put in place to provide customers notice was broken, in this case, because the Company was essentially permitted to change its Application in a material manner without the substance of such change being communicated to its consumers by the Company.

The Commission argued that R.C. 4909.19 requires copies of the PUCO Staff Report to be served upon municipalities affected by the rate application as well as "such other persons" as the Commission deems interested, and those notice requirements were met. PUCO Merit Brief at 29, See also DEO Merit Brief at 16. While the service list for the Staff Report may be substantially identical to the distribution of DEO's Notice regarding its Application for the rate increase, it is unreasonable to believe that a lawful substitute for a notice of the "substance of the Application" could be the 179-page Staff Report filed on May 23, 2008, because the Commission made post-Application changes that were thus excluded from DEO's notice.

The Company cannot be permitted to hide behind post-Application changes, approved by the Commission, as lawful justification for providing consumers a deficient notice. The Commission argues that "The Commission's adoption of a different rate design did not invalidate [DEO's] public notice, nor did the substance of that notice limit or constrain the

Commission's ratemaking authority." PUCO Merit Brief at 32. However, the Commission's authority to design and establish customer rates should not supersede consumers' right under the law to have notice of the rate increase that the utility is ultimately asking them to pay.

DEO's notice provided customers information about the rate design included in its Application. DEO's notice did not provide customers with any information about the rate design that the Company later adopted and the then PUCO imposed. Moreover, no subsequent timely notice was provided to customers regarding the Company's conversion to the SFV rate design. Therefore, the practical result of this case is that DEO's customers were never provided the statutory notice that would allow affected persons or entities to respond to the application in a timely manner.

The PUCO's Order approving DEO's insufficient notice to its consumers, which excluded the post-application SFV rate design, results in an unreasonable and unlawful Order that should be reversed and remanded by this Court.

OCC Proposition of Law V

> **It is not premature for the Court to rule on either the appropriateness of the process for determining DEO'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. (Responsive to PUCO Proposition of Law V, and DEO Proposition of Law IV (A)(1)).**

DEO provides service to its general sales service ("GSS") customer class. The GSS class is comprised of residential customers and nonresidential customers who use 3,000 Mcf/year or less. An issue was raised in the case below as to whether there was an intra-class subsidy within the GSS class, affecting residential and non-residential consumers. In the Order, the Commission unreasonably relied upon DEO's argument that within the GSS class, to the extent there is an intra-class subsidy, there is evidence that it may be from non-residential users to residential users. PUCO Merit Brief at 33.

But, based on OCC's concern, the Commission did require DEO to perform a cost of service study after the Order. DEO's results show that OCC's concerns were genuine, and that the intra-class subsidy that exists is from residential customers to non-residential customers. The Commission has unreasonably argued that it has committed to establish an open and participatory process for determining the appropriate rates for the third year. PUCO Merit Brief at 32. The fallacy with this argument is that beginning with the implementation of year one rates DEO's residential customers are harmed. Waiting for three years to remedy this harm is unjust and unreasonable.

DEO has attempted to minimize the OCC's argument regarding the intra-class subsidy in the GSS customer class in these cases by comparing the subsidy caused under the SFV rate design to an alleged subsidy under the Percentage of Income Payment Plan ("PIPP"). DEO Merit Brief at 39-40. The Company's after-the-fact attempt to compare the known and measurable subsidy from the SFV rate design to the intra-class subsidy for the PIPP program is misplaced in light of the Supreme Court of Ohio's 1986 decision upon a challenge of the PIPP program:

> Pursuant to its emergency powers under R.C. 4909.16, the PUCO created the PIP plan as a response to growing concern 'about the number of residential gas * * * [and] electric customers unable to obtain service as a result of disconnection for nonpayment of bills because of the economic recession, increases in the cost of gas and electric service, and a decrease in the level of governmental assistance * * *.' PUCO No. 83-303-GE-COI, *supra,* at 1. The PUCO's exercise of this emergency authority was appealed to this court in a number of cases. [ ] These appeals were summarily dismissed upon motion of the PUCO which asserted that the quasi-legislative nature of its decisions was not properly subject to judicial review. In addition, it is the opinion of this court that it is clearly within the PUCO's emergency powers under R.C. 4909.16 to fashion such relief as that provided by the PIP plan and we find the plan of the commission to be manifestly fair and reasonable as a solution to the crisis.[13]

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[13] *Montgomery County Board of Commissioners v. Pub. Util. Comm.* (1986), 28 Ohio St.3d 171.

Because the Court upheld the exercise of emergency powers to address the crisis through the PIPP program, the Company's comparison of PIPP to this case, where a subsidy is derived from the implementation of a novel new rate design that was imposed without the benefit of all information regarding the impacts of that new rate design is without merit.

Furthermore, there has been an unsuccessful challenge by non-residential consumers to the PIPP program. In a 1993 Finding and Order, the Commission stated:

> IEC [Industrial Energy Consumers] challenges the arrearage crediting component of the stipulation as unreasonable and unlawful. IEC characterizes the program as an illegal debt forgiveness program. IEC is clearly mistaken. The arrearage crediting program is nothing more than a rate incentive program similar to other such programs implemented by the Commission. The purpose of the program is to provide PIPP customers with an incentive to get off and stay off of PIPP. *Such a result clearly benefits all rate payers* * * *.[14]

The Commission also went on to justify its approval of the PIPP program recovery mechanism because the existence of similarly designed programs that benefited the non-residential customers. The Commission stated:

> The Commission currently operates similar programs for industrial and commercial customers pursuant to Section 4905.31, Revised Code. To encourage the expansion of business in a particular service area, the Commission allows the use of economic development rates (EDR). * * * *EDR rates allow the customer to pay a lower rate and the utility to recover half of the lost revenues from all other ratepayers through base rates*. The arrearage crediting program accomplishes the same purpose by allowing the former PIPP customer to pay a reduced rate while the utility recovers half of the arrearage through the PIPP Rider. The arrearage crediting program is an EDR for residential ratepayers or EDR is PIPP for the industrial and or commercial ratepayers.[15]

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[14] *In the Matter of the review of the Interim Emergency and Temporary PIP Plan Riders Contained in the Approved Rate Schedules of Electric and Gas Companies,* Case Nos. 88-1115-GE-PIP, et al. Finding and Order at 18 (December 2, 1993) (Emphasis added) (Second App. 000018).

[15] Id. at 18-19 (Emphasis added) (Second App. 000018-000019).

This demonstrates the PIPP program has been completely evaluated and reviewed, whereas the SFV rate design is untried and its implications not completely known. Therefore, the Commission should disregard DEO's argument that the subsidy arising under the SFV rate design should be mitigated based upon an alleged subsidy under the PIPP program that until now had not been raised by DEO in the rate case or in the updated COSS.

The harm originates for residential consumers in year one, and there is no justification for waiting to remedy the hardship created by the intra-class subsidy until the third year.
The Commission's decision to disregard the obvious harm to DEO's residential consumers, demonstrated by DEO's updated cost of service study, until the third year under this rate design is unjust and unreasonable.

III. CONCLUSION

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

Respectfully submitted,

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IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel.	)	Case No. 09-0314
	)	
Appellant,	)	
	)	Appeal from the Public Utilities Commission of Ohio Case Nos. 07-829-GA-AIR, 07-830-GA-ALT, 07-831-GA-AAM, 08-169-GA-ALT, and 06-1453-GA-UNC
v.	)	
The Public Utilities Commission of Ohio,	)	
Appellee.	)	

SECOND APPENDIX OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of the Interim Emergency and Temporary PIP Plan Riders Contained in the Approved Rate Schedules of Electric and Gas Companies.	Case No. 88-1115-GE-PIP
In the Matter of the Commission Review of the PIPP Program and Its Operations.	Case No. 90-705-GE-PIP
In the Matter of the Commission Investigation Into the Rules, Regulations, and Practices Governing the the Disconnection of Natural Gas, Gas, or Electric Service to Residential Customers.	Case No. 90-879-GE-ORD

FINDING AND ORDER

The Commission finds:

1) On September 24, 1993, most, but not all, of the parties to these proceedings filed a Stipulation and Recommendation (stipulation). Included as part of the stipulation are two separate side agreements (one entered into by The Dayton Power and Light Company [DP&L]), the other the Centerior companies). Those supporting the stipulation and those who have specifically indicated that they do not oppose the stipulation include Commission staff; all the residential consumer groups who are parties, except the City-wide Coalition for Utility Reform (CCUR), represented by Cincinnati Legal Aid; all the gas companies; all the electric companies except for Ohio Edison Company (Ohio Edison); and both combination companies, DP&L and Cincinnati Gas & Electric Company (CG&E). City-wide Coalition for Utility Reform, a residential consumer group in the Cincinnati area, opposes the stipulation, as does the Industrial Energy Consumers (IEC), a group of large industrial companies located throughout Ohio. Ohio Edison opposes that provision of the stipulation, as the stipulation may be applied to it, that pertains to

the reduction of the percentage of income payment plan (PIPP) amount for electricity by qualifying PIPP customers during the heating season from five percent of income to three percent of income, the so-called two-tiered payment structure.

2) The primary provisions of the stipulation include:

A. A provision that the Commission recognize that, where provisions of the stipulation or the side agreements differ from the current rules and orders of the Commission, the provisions of the stipulation and of the side agreements will supersede those rules and orders.

B. An arrearage crediting program pursuant to which:

1. An electric customer who ceases or has ceased to be income-eligible for PIPP would continue making the monthly payment the customer was required to make during his last PIPP-eligible winter month during the PIPP winter period which occurs within the 12-month period following the loss of eligibility. During the PIPP non-winter period the now income ineligible former PIPP customer with an income above 50 percent of the poverty level would be required to pay his actual bill or the amount specified by Commission rule; the now income ineligible former PIPP customer with an income below 50 percent of the poverty level would be required to pay the actual bill or that amount required by paragraph (C) (2)

of the stipulation whichever is greater during the same period. To avail themselves of the arrearage crediting program, gas customers ceasing to be income eligible for PIPP would be required to make monthly payments on a year round basis as permitted by section (C)(1) of the stipulation during the full 12-month period following the loss of eligibility.

2. To pay the actual monthly bill beginning no later than the 13th month following the loss of PIPP eligibility.

3. To pay the actual monthly bill plus an "arrearage component" beginning no later than the 25th month following the loss of PIPP eligibility. The "arrearage component" consists of the sum of the customer's arrearage balance existing at the end of the last month of PIPP eligibility, plus any arrearage balance accumulated thereafter, divided by the number of months the customer was enrolled in PIPP plus 24, but in no event shall the arrearage component be required to exceed $20.00/month per utility service, i.e., $40.00/month total. Beginning the 25th month, and no less than once every six months thereafter, the customer's arrearage balance will be reduced by an

amount equal to the arrearage component dollars actually paid during the applicable period. As long as the customer has paid the amounts due under the actual monthly bill during the applicable period, failure to make an arrearage component payment in any month shall not affect the arrearage credit provided herein. This provision does not alter any legal rights of a utility, including the right to disconnect service in compliance with Chapter 4901:1-18, O.A.C., upon the failure of the customer to pay, including the payment provisions set forth in the stipulation.

4. To pay any amount in excess of that required under the stipulation. This excess shall be considered a payment toward that month's actual bill or the arrearage component, whichever is applicable.

C. In addition to the above, the arrearage crediting program also contains:

1. A provision requiring the utilities to make a good faith attempt to assist each former PIPP customer to comply with this plan.

2. A provision requiring that government or other non-utility assistance based upon arrearages referenced in this stipulation, to the extent that such aid becomes available, shall be

accepted as arrearage component payments and receive the appropriate matching credit.

3. A provision that implementation of the arrearage crediting program established by this stipulation shall be subject to the continued recovery through the PIPP riders of all Commission-approved arrearage balances, regardless of the crediting of individual customer account balances.

4. A provision that a utility which has an arrearage crediting plan arrived at through a base rate case or other proceedings, which has been approved by the PUCO, is excluded from the arrearage crediting program established by this stipulation (i.e., DP&L and the Centerior companies).

D. Pursuant to the stipulation:

1. The Ohio gas companies agree that Rule 4901:1-18-05(C), O.A.C., notwithstanding, PIPP customers may make the payments required by Rule 4901:1-18-04(B)(2) during each month of the entire year to satisfy their PIPP payment obligations.

2. Unless specified in a separate agreement previously referenced, the Ohio electric companies agree that Rule 4901:1-18-05(C), O.A.C., notwithstanding, PIPP customers at or below 50 percent of the federal

poverty level who utilize electricity as their secondary heat source may make payments of three percent of monthly household income notwithstanding Rule 4901:1-18-04(B)(2), O.A.C. For purposes of this payment, the PIPP period shall remain as defined in Rule 4901:1-18-05(C), O.A.C.

E. PIPP Balanced Budget Payment Plan:

1. Unless specified in a side agreement previously referenced, the Ohio electric companies and the combination companies agree to offer, at each PIPP electric customer's option, an electric PIPP balanced budget payment plan.

2. If a customer receives an extraordinarily large bill during the true-up month, the utility will negotiate payment in good faith.

3. PIPP customers who choose to participate in this PIPP budget payment plan will retain their PIPP status.

4. An arrearage that accumulates over the 12-month period of the plan shall be a PIPP arrearage.

5. If a customer fails to make the PIPP budget payment plan payments, he or she may avoid disconnect by informing the utility of his or her PIPP status and making the PIPP payments required by Rule 4901:1-1-18-04(B), O.A.C., or Section II(C) of this stipulation.

F. Additional Utility Commitments:

1. The Ohio gas companies, the Ohio electric companies and the combination companies agree to continue to produce and distribute educational information concerning the PIPP program, and to explain upon inquiry the qualification criteria, enrollment procedures and administrative provisions of the PIPP program, and to make available to eligible customers information about the availability of the PIPP program.

2. The Ohio gas companies, the Ohio electric companies and the combination companies agree to consider all opportunities to make additional governmental or other non-utility assistance available to PIPP customers, and to cooperate with and take advantage of such programs, to the extent doing so will not in any way, directly or indirectly, encourage or result in additional energy consumption by PIPP customers, discourage payments of accounts by PIPP customers on their own behalf, or result in an increase in deferred PIPP arrearage balances or the PIPP rider rates.

G. Ohio gas companies, the Ohio electric companies, and the combination companies may, upon written notice to the Commission referencing the stipulation, make some or all of the following changes in their current PIPP-related accounting procedures:

1. Eliminate the distinction between "Pre-PIPP" balances and arrearages incurred by customers while enrolled in the PIPP program, and include such Pre-PIPP balances in the amounts eligible for PIPP rider recovery and for the arrearage credit provided for herein.

2. Include the recovery of "Post-PIPP" arrearages incurred by customers no longer income eligible for the PIPP program, but participating in the 24-month PIPP grace period.

3. Eliminate the 12-month aging period for arrearages before they become eligible for inclusion in the calculation of the PIPP rider, and substitute any lesser aging period which is at least of two-months duration.

4. Initiate, not more than once annually, Commission proceedings to adjust their PIPP rider to "true-up" the applicable surcharge rate so that, as nearly as possible, the PIPP rider rate recovers, over the course of a year, an amount equal to the PIPP arrearages (including both Pre-PIPP and Post-PIPP designated amounts) accumulated over that year plus the appropriate carrying charges and amortization amounts previously included from prior years, plus or minus any

deficiency or excess recovery recovered by the rider during the prior year.

H. The signatories further agree, among other things, that:

1. The elimination of the Pre-PIPP distinction and the reduction of the aging period before PIPP arrearages qualify for recovery may, if adopted by a signatory utility, have working capital implications. The PIPP rider rate calculation will be net of any working capital component relating to Pre-PIPP or PIPP if now included in the current base rate, and any other working capital implications shall be addressed in each such signatory utility's next base rate case.

2. The signatory utilities' respective ability to implement the provisions of the stipulation may be subject to computer-related constraints, but shall be exercised in as prompt and efficient manner as circumstances permit.

3. The signatories shall not propose any further changes to the PIPP program of the signatory utilities, other than adjustment to the PIPP rider (other than by agreement of the utility and all directly affected parties), for a period of four years from the date of the Commission order adopting and approving this stipulation. The Commission may, on its

own initiative, recognize an emergency relating to weather or customer conditions and under those circumstances, order changes in the PIPP program.

4. Small utilities that do not have a PIPP rider will be exempt from the new requirements brought on by this stipulation and the other previously referenced settlement agreements until such time as they propose to institute a rider.

5. The utilities and staff agree to continue their commitment to weatherization and energy efficiency programs.

3) As noted above, the parties to the stipulation include, as part of the stipulation, the side-agreement entered into by the Centerior companies, i.e., The Toledo Edison Company and The Cleveland Electric Illuminating Company, and the side-agreement entered into by The Dayton Power and Light Company. These side agreements specifically describe/limit the applicability of certain provisions of the stipulation in each of those utilities' service areas. For example, DP&L as a result of the opinions and orders in Case Nos. 91-414-EL-AIR and 91-415-GA-AIR, dated January 22, 1992 and February 20, 1992, currently has in its tariffs an arrearage crediting program, a program whose terms are not compatible with the arrearage crediting program set forth in the main stipulation. The side agreement involving DP&L protects the arrearage crediting program already in force in the DP&L service area. Similarly, the separate stipulation entered into by the Centerior companies describe how the arrearage crediting program will operate in the service areas of The Toledo Edison Company and The Cleveland Electric Illuminating Company, as well as specifically not requiring these companies to provide

either the PIPP balanced budget payment plan or the so-called two-tiered payments for PIPP customers at or below 50 percent of the federal poverty level. The separate agreement of the Centerior companies also sets forth the applicability of the late payment service charge as these charges are assessed against The Toledo Edison Company's PIPP customers.

4) By Entry dated September 24, 1993, this matter was scheduled for hearing to begin at 10:00 a.m. on October 7, 1993. The purpose of the hearing was limited to a review of the incremental changes to the PIP plan proposed in the stipulation and the side agreements.

5) The ultimate question we must answer in conducting our review of the stipulation in this case is whether the stipulation, in light of the record, is reasonable. In considering the reasonableness of a settlement, the Commission has previously recognized a need to analyze 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?

See In the Matter of the Restatement of the Accounts and Records of The Cincinnati Gas & Electric Company, The Dayton Power and Light Company and Columbus & Southern Ohio Electric Company, Case No. 83-1187-EL-UNC (November 26, 1985), and Cleveland Electric Illuminating Company, Case No. 88-170-EL-AIR (January 31, 1989). Further, the Ohio Supreme Court has endorsed the Commission's effort using these criteria to resolve cases in a method economical to ratepayers and public utilities. Consumers' Counsel v. Pub. Util. Comm., 64 Ohio St. 3d 123, 126 (1992). Moreover, the court

stated that the Commission may place subs
tial weight on the terms of a stipulatio
even though the stipulation does not bin
Commission. Id.

Ohio Edison, CCUR, and IEC oppose the stipulation in part or in whole. CCUR and IEC argue implicitly or explicitly that the stipulation does not meet the criteria established by the Commission. However, none of these parties attacks the reasonableness of the stipulation as a whole; rather, these parties argue that the stipulation is unreasonable or unlawful with respect to certain provisions contained in the stipulation. At the outset, the Commission points out that we intend to review the stipulation as a package, based on the evidence, to determine whether it is just and reasonable. Accordingly, we will examine the objections to the stipulation of the parties to determine whether they are sufficient to warrant rejection of the entire package. The great majority of the parties to these proceedings representing a wide variety of interests are proposing the stipulation before us. If these parties, representing all the gas utilities, all but one of the electric utilities, staff, OCC, and various groups representing low-income consumers believe the changes they recommend are necessary, it is appropriate in a broad stipulation such as the one before the Commission to extend great weight to their collective judgment. It is not necessary to require the same degree of proof in the case of a widely supported stipulation as that required in a fully contested case, so long as the Commission conducts the review set forth above. If the same degree of proof were necessary there would be no reason to have stipulations because no time or effort would be saved. If the elements in a stipulation had to be proved to the same extent as proposals in a fully contested case, no stipulating party would be able to reserve its position on the merits of the matters resolved and limit such concurrence only for the purposes of the stipulation because the tribunal would have to make ultimate findings in any event. It is not sound public policy nor efficient trial practice to

require the same degree of proof. It is appropriate for the Commission to rely on the collective judgment of the parties where support for the stipulation is broadly based, as is clearly evident here.

6) Lisa M. Kirk, Chief of the Public Interest Center in the Commission's Consumer Services Department, and Douglas R. Maag, Division Chief, Energy and Water Division in the Commission's Utilities Department, testified in support of the stipulation including the two side agreements. The staff witnesses stated that they did not review each individual component of the stipulation or the side agreements on a stand-alone basis but reviewed the stipulation and the side agreements in their entirety. Each testifies that the stipulation and the side agreements are reasonable since they present additional opportunities to customers to maintain utility services during the heating season as well as presenting these customers additional opportunities for satisfying payment obligations both at rate levels reasonable for all customers. Thus, the staff witnesses conclude that the stipulation is in the public interest. Finally, the staff witnesses noted that the stipulation is a product of lengthy and serious bargaining among capable, knowledgeable parties representing a diverse group of interests (Staff Exs. 1 and 2).

7) Ohio Edison is alone among Ohio utilities in opposing the stipulation. Ohio Edison Company opposes, as applied to it, that portion of the stipulation generally referred to in these proceedings as the two-tiered payment option. Pursuant to that provision, as noted above, PIPP customers at or below 50 percent of the federal poverty level who utilize electricity as their secondary heat source may make payments of three percent of monthly household income notwithstanding Rule 4901:1-18-04(B)-(2), O.A.C.; for purposes of this payment the PIPP period is that defined in Rule 4901:1-18-05(C), O.A.C. In his testimony, Douglas S. Elliot, Manager of the Customer Accounts Department for Ohio Edison Company, states that his company would voluntarily implement the

remaining portions of the stipulation but that the costs the company will incur because of the imposition of the two-tiered structure, estimated at $900,000 annually, are unwarranted in light of the lack of expressed dissatisfaction with the status quo on the part of the company's customers and in the presence of a downward trend of winter period disconnections of electric service in the company's service area (Ohio Edison Ex. 1, at 4; Tr. I, 114).

8) As noted at Finding 5, above, the Commission must look at the stipulation and side agreements as one proposal. We recognize that each provision was bargained for by at least one of the parties, and that that party in turn gave up something it wished in the agreement or accepted something in the agreement it otherwise would not have accepted. Thus, for the Commission to approve the stipulation, it is important that the Commission find the agreement reasonable in its totality.

Ohio Edison rejects, as applied to it, the so-called two-tiered payment plan for PIPP customers who use electricity as a secondary heat source and whose income is less than 50 percent of the federal poverty level. Ohio Edison does not reject the data reporting requirements of Commission staff, data the Commission could require Ohio Edison to provide regardless of the stipulation. More importantly, Ohio Edison has volunteered to reduce the amount of time PIPP arrearages are aged, thus shortening the amount of time that Ohio Edison must wait to recover these revenues. Even assuming that Ohio Edison's cost estimate of $900,000 for the "two-tiered payment plan" is accurate, the amount quoted is de minimus given the company's customer base and sales. The $900,000 cost figure calculated by Ohio Edison does not recognize any sums accruing to Ohio Edison because of the almost total elimination of the aging of PIPP arrearages. Ohio Edison's rejection of the two-tiered payment plan, a plan which provides economic relief to Ohio Edison customers earning less than 50 percent of the federal poverty level, combined with Ohio Edison's acceptance of revenues it

would not otherwise be due except for other provisions in the stipulation is, to say the least, curious. It is particularly curious given the fact that none of the other electric utilities regulated by the Commission have opposed this stipulation. Ohio Edison may feel that this single provision of the stipulation is not in its interest as a corporate entity; however, that is not, as noted above, the test we must use to review the entire proposed stipulation. Thus, the Commission rejects the objections of Ohio Edison Company.

9) CCUR objects to the adequacy of notice and opportunity for hearing. CCUR also objects that the proposed side agreements are discriminatory and unlawful; that the arrearages crediting provisions are discriminatory and unsupported by the record; that the modifications to the payment plan are insufficient to address the emergency; that the even-billing provisions of the stipulations are unreasonable and discriminatory; that the moratorium provision is unreasonable and improper; and, that the three-year phase-in of the 88-column report is unreasonable and unsupported by the record.

10) While the hearing in this case was held on an expedited schedule, the schedule itself did not prejudice the due process needs of any of the parties. No party, not even CCUR, filed an interlocutory appeal regarding this issue. Contrary to the arguments of CCUR, the proposed side agreements are not discriminatory. While these side agreements may contain different provisions from those contained in the main stipulation or from each other, each customer similarly situated in the service territory of a regulated gas, electric, or combination company is treated the same. The same is true for the arrearages crediting provisions. While the provisions of the stipulation do not resolve all the problems of the low-income consumer to the satisfaction of CCUR, the terms of the stipulation and the side agreements provide for more benefits for these customers than the terms of the current PIPP. The scope of the review in this case

goes to the reasonableness of the stipulation before us. The fact that other proposals might in some eyes be more desirable is not controlling to a decision in this case. The question here is whether the stipulation, including side agreements, is reasonable.

CCUR's arguments related to the modifications to the payment plan, the even-billing provision, the moratorium on raising the issue of amending PIPP, and the three-year phase in of the 88-column report are not supported by the record.

11) IEC, representing a number of large industrial gas and electric users, objects to the stipulation and the side agreements incorporated therein on five grounds:

A. This proceeding is unlawful as a rulemaking proceeding because the outcome will render a system that is non-uniform in application.

B. The proposed PIPP changes have no proximate relationship to disconnections during the winter months occasioned by an inability to pay and, therefore, no need for these changes exists.

C. Adoption of these PIPP program extensions and expansions without a clear demonstrated emergency or need therefor, and without regard to their cost and cost burden, is both unreasonable and arbitrary.

D. The change in the structured recovery of PIPP costs and the additional costs imposed upon energy intensive industrial customers is arbitrary and unreasonable.

E. The stipulation does not reflect a diversity of interests and should not be hastily adopted.

12) The Commission is not persuaded by IEC's arguments. It is not significant in the case before us whether this proceeding is legislative or adjudicatory in nature. The tests of reasonableness are met regardless. Contrary to IEC's arguments, the provisions of the stipulation and side agreements presented to the Commission in these cases will be applied on a uniform basis within the service areas of each of the companies involved. IEC is also incorrect in its assertion that the elements of the stipulation have not been subjected to the appropriate tests of reasonableness. Staff witnesses Maag and Kirk examined the stipulation as a whole and determined that it is the result of serious bargaining among knowledgeable parties; is reasonable as a package; represents reasonable PIPP rate administration; and is consistent with current regulatory decisions relating to PIPP (Staff Exs. 1 and 2). This is the appropriate standard to apply to a stipulation presented to this Commission to which one or more parties have objected. Office of Consumers' Counsel v. Pub. Util. Comm., 64 Ohio St. 3d 123 (1992).

It is clear that the Commission has jurisdiction to make changes with regard to the PIPP. With regard to the PIPP, itself, the Supreme Court of Ohio in Montgomery County Board of Commissioners v. Pub. Util. Comm., 28 Ohio St. 3d 171, 174 (1986), found that:

> ... [I]t is clearly within the PUCO's emergency powers under R.C. 4909.16 to fashion such relief as that provided by the PIP plan and we find the plan of the commission to be manifestly fair and reasonable as a solution to the crisis.

Thus, it is within the jurisdiction of this Commission to modify the PIPP pursuant to its emergency powers as long as the emergency exists. As found by the Commission, the emergency situation related to the inability of Ohio's low-income citizens to pay for heating utility service in full and in a timely manner

still exists. See In the Matter of the Investigation into Long-Term Solutions Concerning Disconnection of Gas and Electric Service in Winter Emergencies, Case No. 83-303-GE-COI (Phase I), Entry dated October 21, 1993.

Also contrary to IEC's argument, it does not require a change in the extent of the emergency for the Commission to alter its response to the emergency. In the case before us it is clear that PIPP arrearages have become an impediment to some low-income consumers from taking employment. Part of the response contained in the stipulation, the arrearage crediting program, addresses this issue.

IEC challenges the arrearage crediting component of the stipulation as unreasonable and unlawful (IEC Brief at 16-20). IEC characterizes the program as an illegal debt forgiveness program (Id. at 18). IEC is clearly mistaken. The arrearage crediting program is nothing more than a rate incentive program similar to other such programs implemented by the Commission (Tr. I, 46, 87). The purpose of the program is to provide PIPP customers with an incentive to get off and stay off of PIPP (Id. at 87). Such a result clearly benefits all rate payers because henceforth a PIPP customer will pay his or her entire bill not just the PIPP amount of the bill.

The Commission currently operates similar programs for industrial and commercial customers pursuant to Section 4905.31, Revised Code. To encourage the expansion of business in a particular service area, the Commission allows the use of economic development rates (EDR). See Cincinnati Gas & Electric Company, Case No. 91-410-EL-AIR (May 12, 1982), at 48. EDR rates allow the customer to pay a lower rate and the utility to recover half of the lost revenues from all other ratepayers through base rates (Id. at 49). The arrearage crediting program accomplishes the same purpose by allowing the former PIPP customer to pay a reduced rate while the utility recovers half of the arrearage (the half that is credited)

through the PIPP rider. The arrearage crediting program is an EDR for residential ratepayers or EDR is PIPP for the industrial and or commercial ratepayers.

It is equally clear that the Commission has the authority to implement the arrearage crediting program. The Commission has broad authority to increase rates under its emergency powers contained in Section 4909.16, Revised Code. It states that "The commission ... may temporarily alter, amend ... any existing rate." The Supreme Court of Ohio has consistently recognized the Commission's authority to increase rates pursuant to Section 4909.16, Revised Code, City of Amherst v. PUCO, 46 Ohio St. 2d 256, 257, 348 N.E. 2d 330, 331 (1976). Further, the court has extended the authority to increase rates pursuant to Section 4909.16, Revised Code, to the PIPP program, Montgomery County Board of Commissioners v. PUCO, 28 Ohio St. 3d 171, 174, 503 N.E. 2d 167, 170 (1986). The arrearage crediting program is simply part of the PIPP program properly implemented under Section 4909.16, Revised Code. The same is true of the remaining components of the stipulation.

The Commission staff has determined that it requires additional data regarding the operation of the PIPP program. The implementation of the 88-column report is a response to that need. It is not our purpose here to review each of the provisions contained in the stipulation and in the side agreements on a standalone basis to determine if it is reasonable. We have used the examples of the arrearage crediting program and the 88-column report to indicate that our review has attempted to determine whether the changes are reasonable. We find that they are.

Our review of the stipulation and the side agreements indicate that the cost of the PIPP program, over time, is unlikely to increase any great amount because of the stipulation and the side agreements, themselves. It is true, however, that the accelerated recovery of some of these costs will make it appear, in the short-term, that the costs of the program

have increased. Staff witness Maag testified that the cost of the components of the stipulation will be minimal (Tr. II, 129). The only evidence of record is that the cost will not exceed $3.5 million statewide (CCUR Ex. 6). In light of that evidence, it is clear that the impact of the stipulation on industrial customers is de minimus. Industrial customers will pay less than half the costs associated with the stipulation. Additionally, no element of the stipulation changes the method of cost recovery used in the PIPP program. Cost recovery on a per kWh basis is not disturbed nor is it at issue in these proceedings. Neither IEC nor any other party proposed or presented evidence concerning such a change. In light of the de minimus effect of the proposed stipulation on industrial energy consumers and the failure of IEC to present any evidence concerning the alleged burden on industrial customers, IEC's objection concerning the per kWh recovery of costs is denied.

Finally, contrary to the statement of IEC, the stipulation and the side agreements incorporated therein do enjoy the support of a wide group of interests.

13) Rule 4901-1-30, O.A.C., permits stipulations of the type presented here. While this Commission is never bound by a stipulation, we believe such agreements between parties to be entitled to careful consideration. See, e.g., The Cincinnati Gas and Electric Company, Case No. 76-302-EL-AIR, (May 4, 1977). It is clear to this Commission after a careful review of the stipulation including the side agreements, the testimony of the witnesses in this case, and other evidence of record, that the terms of the stipulation meet the criteria set forth in Finding 5, above, and represent a reasonable resolution of the issues in this case. We are particularly impressed with the breadth of the coverage of the stipulation. Low-income residential customers benefit from additional payment plans which reduce the likelihood of winter disconnections. All residential customers benefit from the stipulation's requirement that the utilities produce and

distribute educational information about P that utilities continue weatherization and energy efficiency programs; and by the cha to the PIPP program. All classes of custo benefit from the four-year moratorium on changes to the PIPP program and by the additional data reporting requirements. The stipulation contains the above-cited benefits; yet, creates no undue burden on any customer class. Nor do the stipulation and side bars violate any important regulatory principles or practices. We find the stipulation, including the side agreements to be a reasonable response to the continuing emergency. Therefore, we adopt the stipulation in its entirety. In so finding, however, we must note that we do agree with the assessment of The Dayton Power and Light Company in regard to the stipulation including the side agreement to which it is a party:

> It [the settlement] is ... an attempt to provide immediate, real life answers to immediate, real life issues. While the Settlement attacks the symptoms, it is certainly not a complete cure for the problems of low-income customers. That cure can not and will not come from the public utility industry or the Commission. For now, the Settlements provide reasonable changes which will help address PIP program issues....

(DP&L Brief at 10-11).

It is, therefore,

ORDERED, That the Stipulation and Recommendation filed in this case on September 24, 1993, including the side-agreement entered into by the Centerior companies and the side-agreement entered into by The Dayton Power and Light Company, be adopted. The terms of the stipulation are applicable to each gas, electric, and combination company with a PIPP tariff rider on file with this Commission. It is, further,

ORDERED, That each of the above-captioned cases be closed as a matter of record. It is, further,

ORDERED, That a copy of this Finding and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Craig A. Glazer, Chairman

J. Michael Biddison

Jolynn Barry Butler

Richard M. Fanelly

David W. Johnson

SJD;geb

Entered in the Journal
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A True Copy

Gary E. Vigorito
Secretary

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply Brief and Second Appendix on behalf of the Office of the Ohio Consumers' Counsel has been served upon the below-named counsel via First Class mail, postage prepaid this 26th day of June, 2009.

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