ORIGINAL

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,	:	Case No. 09-1547
Appellant,	:	Appeal from the Public Utilities Commission of Ohio
v.	:	
The Public Utilities Commission of Ohio,	:	Public Utilities Commission of Ohio Case Nos. 07-1080-GA-AIR
Appellee.	:	and 07-1081-GA-ALT

VECTREN ENERGY DELIVERY OF OHIO, INC.'S MEMORANDUM CONTRA TO THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S MOTION FOR A STAY OF EXECUTION

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FILED
OCT 19 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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MEMORANDUM CONTRA

I. INTRODUCTION

The Motion for a Stay of Execution ("Motion") filed by the Office of the Ohio Consumers' Counsel ("OCC") on October 8, 2009 in this proceeding is just the most recent attempt in a years' long crusade by the Appellant to impose its preferred rate design on residential customers over that advocated by other parties and approved by the Public Utilities Commission of Ohio ("Commission"). As set out below, the policy discussions underlying the Commission's decision in these cases began nearly four years ago, followed thereafter by expanded discussion in the state and federal legislative arenas. The decision of the Commission in these cases is consistent with its decisions in three other rate cases of the three largest Ohio natural gas companies, only two of which OCC has appealed[1]. As it has brought these issues to the Court, OCC has ignored the rich regulatory and legislative underpinnings of the outcome it seeks to defeat and has, instead, suggested that the Commission's decision has been rendered without fully weighing and addressing the matters before it. Nothing could be further from the truth.

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[1] See *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates,* Case No. 07-589-GA-AIR, et al., Opinion and Order (May 28, 2008) ("Duke Rate Case"); *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase its Rate for Gas Distribution Service,* Case No. 07-829-GA-AIR, et al., Opinion and Order (May 28, 2008) ("Dominion Rate Case"); and *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case No. 08-72-GA-AIR, et al., Opinion and Order (December 3, 2008) ("Columbia Rate Case").

The cases below[2] were primarily for the purposes of establishing a reasonable revenue requirement for Vectren Energy Delivery of Ohio, Inc. ("VEDO") for providing distribution service and an appropriate design for the rates to be charged to recover that revenue requirement. As discussed below, the parties to these cases stipulated all issues, except for the design of the rates. All parties who made rate design proposals agreed that rate design accommodations recognizing a trend of declining customer usage and providing incentives for utilities to encourage conservation should be made. OCC advocated a distribution rate which contained a combination of the traditional rate design comprised of a modest customer charge component and a volumetric component, accompanied by a decoupling rider which recovers, on a volumetric basis, the difference between the revenue requirement approved and the collection of revenues actually achieved. VEDO and the Staff of the Commission proposed a straight fixed variable ("SFV") rate design which recovers those costs which are fixed through a fixed charge and those costs that vary with usage through a charge which varies with usage. In its Opinion and Order ("Order") in these cases, the Commission decided that, because the costs of distribution service are fixed (do not vary with usage or from customer-to-customer), the most equitable rate design for distribution service is the SFV rate design which establishes a fixed or levelized monthly charge. It is important to note that all parties stipulated to a rate of return that included a downward adjustment to reflect the reduced risk to revenue collection resulting from a change to the traditional rate design, regardless of the rate design proposal ultimately approved.

In order to provide for a transition from the traditional rate design to the SFV rate design, the Commission ordered new rates to be effective in two stages. Stage 1, to be effective for one

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[2] See *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters*, Case No. 07-1080-GA-AIR, et al., Opinion and Order (January 7, 2009).

year (through February 21, 2010), is a modified traditional rate design comprised of an increased customer charge and a volumetric component with **no** decoupling rider. Stage 2, to be in effect thereafter, is an SFV rate or a fixed monthly charge to become effective February 22, 2010. OCC's instant Motion asks the Court to stay the implementation of Stage 2 rates.[3] OCC's Motion ignores the credible evidence and applicable law upon which the Commission's decision is based as explained in VEDO's response below.

II. BACKGROUND

On November 20, 2007, VEDO filed applications in these cases for authority to increase its rates for distribution service and to implement the first two stages of a transition that would ultimately result in an SFV rate design. On September 8, 2008, the parties to these cases, including the OCC, filed for Commission approval, a Stipulation and Recommendation ("Stipulation") which resolved all but one of the issues, including an overall revenue requirement, rate of return (adjusted downward for the rate design change as noted above), and the revenue requirement to be allocated to residential customers.

The rate design issue, which was fully litigated, involved no dispute relative to the policy considerations supporting elimination of traditional the rate design in favor of a rate design approach that "decouples" the utility's ability to recover its fixed costs from customer consumption. All of the parties (and Staff) who presented a rate design proposal in these proceedings offered some kind of design or mechanism that addresses this policy objective. The differences in the proposals related solely to the appropriate rate design or mechanism employed to achieve the policy objective. VEDO proposed a staged transition to an SFV, or levelized, rate

[3] OCC has filed similar motions for a stay with the Court in its appeals from the Duke Rate Case (Supreme Court Case No. 08-1837) and the Dominion Rate Case (Supreme Court Case No. 09-314), which were denied by Entries dated June 1, 2009 and August 26, 2009, respectively.

design and a companion interim decoupling rider for the duration of the transition. Order at 7-8, App. 3-4. The Staff proposed a two-stage transition toward an SFV rate design with no decoupling rider. Staff Ex. 1, at 30-31, App. 15-16. OCC proposed continuation of a two component distribution rate comprised of a small customer charge and a volumetric component accompanied by a decoupling rider. Order at 8, App. 4. In sum, then, VEDO, OCC, and the Staff all agreed to the annual revenue amount assigned to residential customers (*Id.* at 5, App. 2), but simply proposed different alternatives to collect that amount.

The Commission had previously embraced the policy objectives underlying the rate design proposals in VEDO's cases. Prior to the submission of these cases on the record, the Commission had occasion to address these policy considerations. In its May 28, 2008, Opinion and Order in the recent Duke Rate Case, the Commission reiterated the policy it first established in VEDO Case No. 05-1444-GA-UNC[4] as follows:

> ...[T]he time has come to re-think traditional natural gas rate design. Conditions in the natural gas industry have changed markedly in the past several years. The natural gas market is now characterized by volatile and sustained price increases, causing customers to increase their efforts to conserve gas. The evidence of record clearly documents the declining sales trend over the decades.
>
> * * *
>
> Under traditional rate design, the ability of a company to recover its fixed costs of providing service hinges in large part on its actual sales, even though the company's costs remain fairly constant regardless of how much gas is sold. Thus, a negative trend in sales has a corresponding negative effect on the utility's ongoing financial stability, its ability to attract new capital to

[4] See *In the Matter of the Application of Vectren Energy Delivery Company of Ohio, Inc., for Approval, Pursuant to Revised Code Section 4929.11, of a Tariff to Recover Conservation Expenses and Decoupling Revenues Pursuant to Automatic Adjustment Mechanisms and for Such Accounting Authority as May Be Required to Defer Such Expenses and Revenues for Future Recovery Through Such Adjustment Mechanisms*, Case No. 05-1444-GA-UNC, Supplemental Opinion and Order (June 27, 2007) ("Conservation Case").

> invest in its network, and its incentive to encourage energy efficiency and conservation.
>
> The Commission, therefore, concludes that a rate design which separates or "decouples" a gas company's recovery of its cost of delivering the gas from the amount of gas customers actually consume is necessary to align the new market realities with important regulatory objectives.
>
> * * *
>
> We further believe that there is a societal benefit to removing from rate design the current built-in incentive to increase gas sales. A rate design that prevents a company from embracing energy conservation efforts is not in the public interest.

Duke Rate Case Order at 17-18.

On January 7, 2009, the Commission issued its Order in the above cases, in which it approved the Stipulation and decided the litigated rate design. In weighing the various rate design proposals, the Commission found:

> In three recent cases, the Commission has addressed the question of whether to adopt a levelized rate design (i.e., SFV), which recovers most fixed costs through a flat monthly charge, or a decoupling rider or sales reconciliation rider (SRR), which maintains a lower customer charge and allows the utility to offset lower sales through an adjustable rider. *See In re Duke Energy Ohio, Inc.*, Case No. 07-589-GA-AIR et al., Opinion and Order (May 28, 2008); *In re The East Ohio Gas Company, dba Dominion East Ohio*, Case No. 07-829-GA-AIR, et al., Opinion and Order (October 15, 2008); *In re Columbia Gas of Ohio, Inc.*, Case No. 08-72-GA-AIR, Opinion and Order (December 3, 2008). Consistent with our previous decisions, and recognizing that the stipulated rate of return includes a reduction to the return on equity to account for risk reduction associated with rate design change, the Commission finds, on balance, that a levelized rate design is preferable to a decoupling rider.

Order at 11, App. 5. For VEDO, the Commission ordered a transition to a full SFV rate design, Stage 1 of which contains a volumetric component with no companion decoupling rider and Stage 2 of which constitutes a full SFV rate. *Id.* at 14-15, App. 8-9.

On February 6, 2009, OCC filed an Application for Rehearing, which was granted by Entry dated March 4, 2009, to give the Commission additional time to consider the issues raised therein. OCC's Application for Rehearing was ultimately denied in an Entry on Rehearing on August 26, 2009 ("August Rehearing Entry"). On the same day, OCC filed an appeal at the Ohio Supreme Court, and on September 25, 2009, the Commission timely transferred the record to the Court.

On September 30, 2009, OCC filed a Motion to Stay implementation of the Stage 2 Rates in the docket of the cases below at the Commission. On October 8, 2009, OCC filed its instant Motion with the Court seeking a stay in this appeal.

In support of its Motion, OCC erroneously asserts that "[b]oth stages of the rate design were proposed by Vectren and modified and approved by the PUCO, to provide Vectren with the opportunity to collect the revenues authorized by the PUCO in its Order." Motion at 7. OCC also inaccurately claims that "...a stay of the February 2010 (Stage 2) rate design will not impede Vectren's opportunity to implement and collect its approved revenues...." Motion at 6. OCC fails to mention that: (i) the rate design proposed by VEDO included an interim decoupling rider so long as a volumetric component remains in effect to offset the risk of declining sales; (ii) OCC itself proposed a decoupling rider for the same reason; and (iii) the rate of return was already adjusted downward to reflect the elimination of that risk. By seeking a stay at Stage 1, OCC seeks to have it both ways. Because Stage 1 rates do not include any mechanism to address declining sales and the rate of return has been reduced in anticipation of the elimination of that risk, a stay at Stage 1 would leave VEDO exposed to the effects of declining customer usage (without any commensurate rate of return recognition), correspondingly reducing the opportunity VEDO has to collect the revenues agreed to by the parties. What OCC's Motion

actually seeks is to continue to deprive VEDO of the opportunity to collect the revenue amounts to which OCC agreed.

III. STANDARD OF REVIEW

OCC has unsuccessfully attempted to shoe-horn its retreaded anti-SFV arguments into support for the standards for the review of stay requests originally articulated by Ohio Supreme Court Justice Douglas in a dissenting opinion that follows:

> These standards should include consideration of whether the seeker of the stay has made a strong showing of the likelihood of prevailing on the merits; whether the party seeking the stay has shown that without a stay irreparable harm will be suffered; whether or not, if the stay is issued, substantial harm to other parties would result; and, above all in these types of cases, where lies the interest of the public.[5]

In its attempt to meet these standards, as in the primary cases below, OCC merely presents a preview of its arguments on the merits which have been previously addressed and rejected by the Commission and are already on appeal in two other cases before the Court. VEDO will respond to the OCC's discussion of these standards below.

A. OCC has made no showing that it is likely to prevail on the merits.

In its Motion, OCC asserts that it is likely to prevail on the merits because it provided support and documentation for its positions. Yet, OCC simply repeats arguments advanced and rejected multiple times in this and three other natural gas rate cases mentioned above. OCC claims it will prevail because the requirements of R.C. 4929.02(A)(4) and R.C. 4905.70 have not

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[5] *MCI Telecommunications Corp. v. Public Utilities Commission* (1987), 31 Ohio St.3d 604, 606, 510 N.E.2d 806; and *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Entry at 3 (March 30, 2009).

been met; that the Commission's Order improperly deviates from precedent; and that public notice requirements were not met. OCC says, "[t]he gravity of the errors presented, when fully weighed and addressed, make it likely that the OCC will prevail on the merits in an appeal on the merits." Motion at 10. OCC's implication is that the Commission has not fully weighed and addressed the matters advanced by OCC in support of its opposition of the SFV rate design. Yet, the record clearly reflects that the Commission has fully weighed and considered the arguments made by OCC in this and three other fully-litigated rate design records and has rejected OCC's position each and every time.

In the balance, OCC completely ignores the fact that the rate design issues in these proceedings are rooted in a dialogue that began as a result of the application that VEDO filed almost four years ago in Case No. 05-1444-GA-UNC. The rate design proposal which VEDO submitted in these proceedings was submitted in compliance with the Commission's order in Case No. 05-1444-GA-UNC. Conservation Case Order at 6. Case No. 05-1444-GA-UNC included a technical conference for the parties and a technical presentation for the Commissioners (Conservation Case, February 7, 2006 Entry at 1) and an extensive exchange of views regarding the amount of conservation funding, the role of decoupling, and alternative means of accomplishing the alignment-of-interests objective that underlies decoupling. During this extended examination, the General Assembly and Congress have spoken in support of the alignment-of-interests objective, and the General Assembly has acted to make it clearer that the Commission has the authority to adopt a "decoupling mechanism". R.C. 4929.01(A) and (O) and R.C. 4929.051 and Security Act of 2007; Title V, Subtitle D, Section 532(b)(6). There are few, if any, rate design issues that have received more attention from the Commission or the

General Assembly than the rate design issues before the Commission in these proceedings. OCC's suggestion that these matters have not been fully weighed and addressed is not credible.

Specifically, the Commission's attention to the matters raised by OCC has been as follows:

1. The Commission's Order meets the requirement of R.C. 4929.02(A)(4) and R.C. 4905.70.

OCC asserts (as it did in three prior cases) that the SFV rate design discourages conservation and, therefore, violates R.C. 4929.02(A)(4) and R.C. 4905.70 by sending improper price signals and extending the payback for conservation measures. Motion at 12-13. VEDO, Staff, and OCC witnesses testified that the distribution portion of the gas bill is minor as compared to the total bill. Company Ex. 8a at 23, App. 17; Staff Ex. 3 at 4-5, App. 19-20; and OCC Ex. 3 at 19, App. 21. Mr. Puican and Mr. Overcast agree that recovering fixed costs through volumetric rates actually distorts price signals and causes poor conservation and efficiency investment decisions. Staff Ex. 3 at 4-5, App. 19-20; Company Ex. 8a at 23, App. 17. Commodity costs comprise 75 to 80 percent of the total bill. Tr. Vol. III at 68, App. 22. Mr. Puican states clearly that "[c]ustomers will always achieve the full value of the gas cost savings regardless of the distribution rate," and "[a]rtificially inflating the volumetric rate beyond its cost basis skews the [efficiency investment] analysis and will cause over-investment in conservation ... which exacerbates the under-recovery of fixed costs that the utility must then recover from all other customers." Staff Ex. 3 at 3, App. 18. Furthermore, the Commission had already found in the Duke Rate Case that:

> The Commission also believes that a levelized rate design sends better price signals to consumers. The rate for delivering the gas to the home is only about 20 to 25 percent of the total bill. The largest portion of the bill, the other 75 to 80 percent, is for the gas that the customer uses. This commodity portion, the cost of the

> actual gas used, is the biggest driver of the amount of a customer's bill. Therefore, gas usage will still have the biggest influence on the price signals received by the customer when making gas consumption decisions, and customers will still receive the benefits of any conservation efforts in which they engage. While we acknowledge that there will be a modest increase in the payback period for customer-initiated energy conservation measures with a levelized rate design, this result is counter-balanced by the fact that the difference in the payback period is a direct result of inequities within the existing rate design that cause higher use customers to pay more of their fair share of the fixed costs than low-use customers.

Duke Rate Case, Opinion and Order at 19. After fully weighing this argument in these cases, the Commission fully addressed it and found, based on the evidence, that:

> Customers will not be misled into believing that reductions in consumption will allow them to avoid the fixed costs of the distribution system, as feared by Staff. However, the commodity portion of a customer's bill, the actual cost of gas the gas used, will remain the biggest driver of the bill. In fact, commodity costs comprise 75 to 80 percent of the total bill (Tr. III at 68). Therefore, we believe that the gas usage will still have the biggest influence on the price signals received by customers when making gas consumption decisions and that customers will still receive the appropriate benefits of any conservation efforts.

Order at 12, App. 6.

The Commission found, based on the evidence of record, that the SFV rate design sends proper price signals and provides appropriate payback periods for conservation measures, thereby rejecting the bases OCC advances for violations of R.C. 4929.02(A)(4) and R.C. 4905.70. OCC fails to mention that the SFV rate design, by removing VEDO's incentive to encourage conservation, paved the way for the $4.1 million demand-side management program established in these cases, consistent with the policy requirement of R.C. 4929.02(A)(4) that the Commission "[e]ncourage innovation and market access for cost-effective supply-and demand-

side natural gas services and goods" and the requirement of R.C. 4905.70 that the Commission initiate programs related to conservation and energy efficiency. Order at 12-13, App. 6-7.

2. The Commission's Order demonstrates a need for a change to the traditional rate design.

OCC uses surprisingly strong language in support of its claim that a change of rate design for natural gas distribution service is unlawful and unreasonable. OCC says, for example, that the Commission showed "flagrant disregard for prior precedents" and that Commission "abandons" it policy of gradualism in approving the SFV rate design.

Yet, as explained above, there was no dispute among the parties to these cases about the policy reasons that required a change to the traditional rate design to "decouple" the utility's ability to collect its authorized revenues from customer consumption and to align the interests of the utility and its customers in favor of conservation. Applying OCC's standard of judgment, OCC itself showed "flagrant disregard for prior precedents" by proposing a decoupling rider as a companion to the traditional rate design to accomplish those goals, while VEDO and the Commission Staff proposed the alternative SFV rate design. OCC's proposed decoupling rider is no less a departure from thirty years precedent than the SFV rate design adopted by the Commission.

In terms of OCC's claim that the Commission violated the principle of gradualism, it must be noted that there is no mention of gradualism in either the Ohio Revised Code or the Ohio Administrative Code. The Commission has historically applied the principle of gradualism to avoid significant shifts of cost responsibility among customer classes, in favor of gradual movement to achieve customer-class cost of service goals over more than one rate case. In rejecting the OCC's assertion that the Commission abandoned its policy of gradualism, the Commission said, in its August Rehearing Entry:

> The Commission finds that the Opinion and Order applied the principle of gradualism in a manner which is consistent with our precedents. As VEDO points out, we rejected a similar argument in *In re Dominion East Ohio*, Case No. 07-829-GA-AIR, when we held that:
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> > [W]e note that the Customer Groups continue to compare the new flat monthly fee with the customer charge under the previous distribution rate structure. Such comparisons can be misleading and distort the impact on customers, since any analysis of the impact of the new levelized rate structure should consider the total customer charges. We note that, in association with the adoption of the SFV rate design, the volumetric charge reflected in the bills of residential customers will be reduced as the customer charge is phased-in to reflect the elimination of the majority of the company's fixed costs from the volumetric charge.
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> *In re Dominion East Ohio*, Case No. 07-829-GA-AIR, Entry on Rehearing (December 19, 2008) at 14.
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> In its application for rehearing, OCC does not address the fact that, in this proceeding, the distribution volumetric rate for residential customers will be *eliminated entirely* in the second year with the completion of the phase-in of the levelized customer charge. Moreover, OCC ignores our previous findings that gradualism must be considered in reviewing the overall increase rather than a specific component such as the customer charge and that an overall increase of less than five percent does not violate the principle of gradualism. *In re Vectren Energy Delivery of Ohio*, Case No. 04-571-GA-AIR, at 5.

August Rehearing Entry at 8-9, App. 12-13. As the Commission acknowledged, the overall increase to the revenue responsibility of residential sales customers in these cases is 4.42 percent. *Id.* at 8, App. 12.

OCC has not demonstrated that the Commission's adoption of the SFV rate design improperly, unreasonably, or unlawfully violates precedent or, even if it were grounds for reversal, the principle of gradualism.

3. All statutory public notice requirements were met; the right to participate in rate cases is statutory, not constitutional.

OCC continues to assert constitutional due process as a basis for customers' right to participate in utility rate cases. Motion at 15-16. As counsel for Staff and the Commission has pointed out many times in multiple cases, the Ohio Supreme Court has found that the right to participate in rate-making proceedings is statutory, **not** constitutional. *City of Cleveland v. Public Utilities Commission of Ohio*, 67 Ohio St.2d 446, 453 (1981).

Additionally, OCC argues that the newspaper notice VEDO published required by R.C. 4909.18 and R.C. 4909.19 was legally inadequate. OCC fails to acknowledge that the Commission reviewed and approved VEDO's proposed newspaper notice by Entry dated January 16, 2008, in which the Commission explicitly found that the notice was in compliance with the requirements of R.C. 4909.18(E). OCC did not apply for rehearing from this finding of the Commission. The newspaper notice was subsequently published consistent with the requirements of R.C. 4909.19. In response to OCC's untimely challenges to the adequacy of VEDO's public notice, the Commission ultimately said:

> The notices at issue in this proceeding stated the reasonable substance of VEDO's proposal and provided sufficient information for consumers to determine whether to inquire further into the proposal or intervene in the case. As the Staff points out, the differences in the PFN and the application are negligible. Further, the published notice provided sufficient information to consumers to understand that VEDO had proposed a new rate design along with its proposed increase in rates so that consumers could determine whether to inquire further into the case or to intervene. Accordingly, the Commission finds that the notices at issue substantially comply with the applicable statutes.

Order at 16.

Finally, it is more than a little disingenuous for OCC to suggest that residential customers were, for lack of adequate notice, denied the opportunity to inquire further about VEDO's

proposal or intervene in these proceedings. The record shows that OCC and Ohio Partners for Affordable Energy ("OPAE") both sought and obtained authority to participate in these cases on behalf of VEDO's residential customers. The actual inquiry of residential consumers into VEDO's proposals included 570 Interrogatories (not including sub-parts), 186 Requests for Production of Documents (not including sub-parts), numerous informal information requests, and nine depositions. OCC/OPAE together filed two sets of objections to the Staff Report and five sets of expert testimony on behalf of residential customers in these proceedings. It cannot be denied that residential consumers participated fully in these proceedings.[6]

Consequently, OCC's claim that it is likely to prevail on the issues does not constitute a "strong showing," but remains grounded in its apparent belief that its previously rejected arguments will assume meaningful substance and prevail if repeated enough times. Given the historical repeated considerations of these issues raised by OCC and repeated rejections by the Commission based on the facts and the law it is, rather, unlikely that OCC will prevail on appeal.

B. OCC has not shown that, without a stay, residential customers suffer irreparable harm.

OCC argues that implementation of Stage 2 rates will cause irreparable harm because the SFV rate discourages conservation, may force low-use customers off the system, public notice

[6] In addition to the lawful notices perfected in these cases, OCC issued press releases related to the rate design issue. See, for example, the release posted on OCC's website on August 6, 2008 advocating against VEDO's proposal at http://www.pickocc.org/nes/2008/pressrelease.php?date=08062008. Also, as mentioned above, this issue has been the subject of significant public and governmental debate and legislation on both a state and federal level. There may not be another public utility issue that has received as much public notice and extensive examination by both the Commission and the General Assembly.

requirements were not met, and monetary restitutions would be impossible.[7] As discussed above, all public notice requirements were met, and residential customers clearly exercised their statutory right to participate in these cases.

1. Customers will not lose opportunities to conserve.

As discussed above, after consideration of the considerable amount of evidence in these cases, the Commission has determined that the SFV rate design does not deprive customers of conservation opportunities. Order at 12, App. 6. As OCC well knows, the Stage 2 rates it addresses in its Motion have nothing to do with customers' bills for gas; these rate schedules address distribution service only, the costs of which are fixed and do not vary with the amount of gas a customer uses. OCC complains that, "...the fixed monthly customer charge must be paid regardless of whether the customer reduces usage." Motion at 9. That, of course, is reasonable because the fixed costs that the fixed monthly charge is designed to collect will not go down no matter how little gas a customer uses. The Commission's Order clearly reflects its careful consideration of OCC's arguments that consumers' conservation decisions will be adversely

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[7] Twice in its Motion, OCC asserts, without explanation, that low-income customers will be negatively impacted or irreparably harmed absent the stay it requests. Motion at 4 and 16. In response to OCC's continuing argument that low-income customers are harmed by the SFV rate design, the Commission said:

> The Commission agrees with VEDO that OCC continues to improperly conflate the impact of the SFV, or levelized, rate design on low-usage customers with the impact of the rate design upon low-income customers. In the Opinion and Order, the Commission specifically determined that the evidence in the record did not support the conclusion that low-income customers necessarily are low-usage customers (Co. Ex. 8a at 12-14, 17; Staff Ex. 3 at 7; Tr. VI at 35). Further, the Commission determined, based upon the record in this proceeding, that the levelized rate design better reflects cost causation principles by fairly apportioning the fixed costs of service among all customers (Staff Ex. 3 at 8, 9-10; Tr. V at 13-14; Co. Ex. 9b at 5). August Rehearing Entry at 5, App. 12.

affected by the implementation of the SFV rate design and, on the basis of the facts in the record, has decided that consumers' conservation decisions are not adversely affected by the SFV rate design. Order at 12, App. 6.

2. The potential loss of low-use customers will not harm the remaining customers.

OCC claims that the potential loss of low-use customers will increase costs to VEDO's remaining customers. While none of OCC's Motion has merit, this argument is especially specious and frivolous. The revenue responsibility assigned to the residential class was agreed to by stipulation signed by OCC. Order at 3, App. 2. That means that, no matter how many customers leave or join the system, the revenue responsibility to the residential class will not change unless and until VEDO files a new rate case and obtains Commission approval to change the residential revenue requirement. There will be absolutely no effect on the revenue amount allocated to the residential class agreed to by OCC or Stage 2 rates as a result of any changes in customer counts.

3. The SFV imposes no economic harm on customers.

OCC argues that, when it ultimately prevails in this appeal, it will be impossible to compensate customers for the economic harm they have experienced in the interim. Motion at 22-24. Yet, OCC cannot demonstrate that it will ultimately prevail and has not explained why the simple fact that customers will pay a fixed charge for fixed costs will result in economic harm.

OCC's argument here is limited to a statement that, "[t]he incremental increases in the customer charge that will be imposed in February cannot be recovered once they are paid." Motion at 24. Then, pitting one subset of its clients against another, OCC claims that low-use customers will have suffered irreparable harm when OCC prevails in this appeal. *Id.* Again,

OCC ignores the fact that, rather than creating subsidies, the SFV rate design eliminates subsidies. The Commission has been clear that this is an important factor in its selection of the SFV rate design over the decoupling rider option advocated by OCC:[8]

> [t]hat the levelized rate design promotes the regulatory principles of providing a more equitable cost allocation among customers, regardless of usage" and that "[i]t fairly apportions the fixed costs of service among all customers so that everyone pays their fair share. Customers who use more energy for reasons beyond their control, such as abnormal weather, a large number of persons sharing a household, or older housing stock, will no longer have to pay their own fair share plus part of someone else's fair share of the costs.

Order at 13-14, App. 7-8. OCC offered no evidence in the cases below or any explanation in its Motion why any residential customers should not pay their fair share for the fixed costs of the distribution service VEDO provides them or why one subset of its clients should continue to subsidize service provided to another. In fact, through the application of the SFV rate design, each residential customer will receive full value for a fair rate. It is apparent that the stay OCC requests would create, rather than eliminate, a real economic harm for some of its clients.

C. Substantial harm to other parties would result if the requested stay is granted.

OCC claims to have met this standard by asserting that its requested stay will not cause substantial harm to VEDO because VEDO did not propose a full SFV rate design and because VEDO will continue to collect revenues during the stay. What OCC again fails to mention is that VEDO proposed a decoupling rider to be in effect during its proposed transition to a full SFV rate design to offset declining sales during the period in which the rate design contained

[8] It bears repeating that the stay sought by OCC would leave VEDO without either the SFV rate design or a decoupling rider in the face of an authorized rate of return set to accommodate the effect of one or the other.

some volumetric component. Order at 7-8, App. 3-4. Additionally, OCC ignores that it also proposed a decoupling rider to accompany the traditional rate design to offset the effect of declining sales. *Id.* at 8, App. 4.

In its Order, the Commission acknowledged the SFV rate design and OCC's proposed decoupling rider as alternative approaches for remedying the inequities of the traditional rate design and ordered a transition to a full SFV rate design with the Stage 1 rate containing a volumetric component with no companion decoupling rider and a Stage 2 rate with a full SFV rate design. *Id.* at 11, 15; App. 5, 9. Clearly then, VEDO remains exposed to the risk of declining sales during the time Stage 1 rates remain in effect. As explained above, if the stay sought by OCC was granted, VEDO would be exposed to the continuing impacts of declining sales (and insufficient revenues) without the decoupling rider that even OCC found necessary and advocated. If that was the case, an argument could be made that the downward adjustment to the rate of return should be reversed to reflect the continuation of the risk of declining sales.

Additionally, and also as pointed out above, OCC fails to mention the continuing harm to high use customers who subsidize the provision of distribution service to remaining customers. Furthermore, the Commission found that the record demonstrates that low-income customers, on average, would actually enjoy lower bills under the levelized rate design. *Id.* at 13, App. 7. Consequently, the stay sought by OCC, who represented all of VEDO's residential consumers in these cases (*Id.* at 2, App. 1), would actually support subsidies flowing from one subset of its clients to another and delay a reduction to the bills of low-income customers that would result from the levelized rate provided by the SFV rate design.

Therefore, not only would VEDO incur continuing irreparable harm from the OCC's requested stay, high use and low-income customers would be denied the reduction in their bills that will occur with the implementation of Stage 2 rates.

D. Implementation of the SFV rate design is in the public interest.

In support of its request for stay, OCC asserts that the public interest lies in encouraging energy conservation, which it says the SFV does not do. Of course, as addressed above, the Commission has already found to the contrary. In fact, the Commission specifically said that the SFV rate design (unlike the rate design favored by OCC) will not deceive customers into believing that conservation measures can reduce their bills for distribution service and that the biggest influence on customers' conservation decisions is the commodity cost itself. *Id.* at 12, App. 6.

The public interest is served by establishing utility rates that provide the utility a reasonable opportunity to recover its costs of providing service in a manner equitable to the customers being served. OCC makes the misleading statement that the SFV rate design, "...raises issues of fairness, as noted by Justice Pfeifer in the DEO and Duke appeals oral argument, by shifting costs between low-use and high-use customers within a customer class." Motion at 10. As established repeatedly in all four natural gas company rate cases in which OCC purported to represent all residential customers, the SFV rate design does nothing to shift costs from one subset of the residential customer class to another. What the SFV rate design does is shift the responsibility for paying for the fixed costs of distribution to a fixed charge which properly assigns to each residential customer his fair share of the fixed costs of providing distribution service. Accordingly, the Commission explicitly found, as a conclusion of law, that

"...[i]t is reasonable and in the public interest to transition, over a phase-in period, to an SFV rate design, as set forth in this opinion and order." Order at 19, App. 10.

IV. THE UNDERTAKING REQUIREMENT OF R.C. 4903.16

R.C. 4903.16 provides:

> A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

OCC argues, for various reasons, that it is excused from the requirement that it execute an undertaking to insure the damages caused by the delay it seeks and to repay any moneys paid in excess of the charges established by the order it seeks to stay. The Court has already addressed the applicability of the undertaking requirement to governmental movants in a case involving OCC and has upheld the requirement and found, moreover, that OCC's failure to post a bond would have been fatal to its requested stay.[9]

The undertaking required in this case is critical since the record evidence clearly shows that the traditional rate design OCC seeks to perpetuate results in high-use residential customers paying more than their fair share to subsidize distribution service to low-use residential customers. Also, the lack of either OCC's decoupling rider or the Stage 2 SFV rate along with

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

the authorized rate of return, which was reduced in anticipation of either of these options, leaves VEDO exposed to the very real threat that it will not be able to collect enough revenues to satisfy the residential revenue requirement which the Stage 2 rates are designed to collect. Both the overpayment by high-use residential customers and the under-collection by VEDO which would result from a stay of the implementation of Stage 2 rates can be calculated with certainty, making the posting of an undertaking of real consequence. Additionally, R.C. 4903.16, which constitutes the only statutory authority for Supreme Court stays of Commission orders, permits stay only of the Commission's "final order." In its Motion, OCC seeks a stay of only one, very narrow facet of the Commission's order in the cases below, for which no statutory authority exists.

In addition to OCC's failure to meet the standards of review of requested stays of Commission orders, OCC's flawed request and its failure to execute the undertaking required by R.C. 4903.16 are fatal to its Motion.

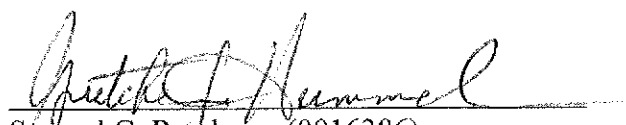
V. CONCLUSION

OCC has failed to meet the customary standards of review of requests to stay and has, instead, simply asserted its ultimate success in this appeal by reiterating the unsuccessful arguments it has previously made on the record and intends to make in its merit brief in this appeal. The stay requested by OCC, if granted, would leave VEDO with neither the SFV nor the decoupling rider, and therefore, subject VEDO to increased risk to its ability to collect the revenues which OCC has agreed are reasonable. This increased risk, on top of the adjustment made to VEDO's authorized rate of return to reflect the reduction of the risk caused by declining customer usage, would certainly cause irreparable harm to VEDO. Additionally, the retention of a volumetric component in the distribution charge would continue the subsidy provided by high

usage (including low-income) customers to low usage customers causing irreparable harm to this subset of residential customers, as well. OCC has failed to execute the undertaking required by law to protect VEDO and certain residential customers against the negative consequences of its requested stay.

WHEREFORE, VEDO respectfully requests that the Court deny OCC's Motion for a Stay of Execution.

Respectfully submitted,



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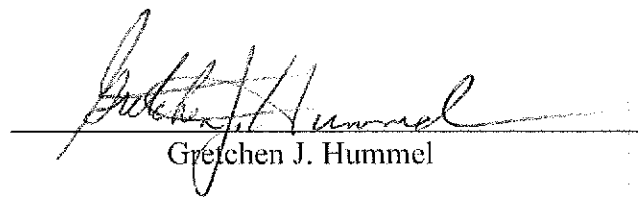
CERTIFICATE OF SERVICE

I hereby certify that copies of this *Vectren Energy Delivery of Ohio, Inc.'s Memorandum Contra to the Office of the Ohio Consumers' Counsel's Motion for a Stay of Execution* has been served by first class mail, postage prepaid, or hand-delivered to the following parties of record, this 19th day of October, 2009.



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APPENDIX

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OPINION:

I. History of the Proceedings

Vectren Energy Delivery of Ohio, Inc., (VEDO or the Company) is a natural gas company as defined in Section 4905.03(A)(6), Revised Code, and a public utility as defined in Section 4905.02, Revised Code. As such, VEDO is subject to the jurisdiction of the Public Utilities Commission in accordance with Sections 4905.04 and 4905.05, Revised Code.

On November 20, 2007, VEDO filed applications for an increase in gas distribution rates and for approval of an alternative rate plan. A technical conference regarding VEDO's applications was held on February 5, 2008.

GA-UNC, from October 1, 2008, until the effective date of rates approved in this proceeding.

(9) The Signatory Parties agree that the Company should be authorized to establish a Distribution Replacement Rider (DRR) to enable the recovery of and return on investments made by the Company to accelerate implementation of a bare steel and cast iron main replacement program at a pre-tax rate of return of 11.67 percent. The DRR shall be in effect for the lesser of five years from the effective date of rates approved in this proceeding or until new rates become effective as a result of the filing by the Company of an application for an increase in rates under Section 4909.18, Revised Code, or the filing of a proposal to establish rates pursuant to an alternative method of regulation under Section 4929.05, Revised Code.

(10) The Signatory Parties agree that the revenue distribution shown on Stipulation Exhibit 5 (Joint Ex. 1, Stipulation Exhibit 5) shall be used to develop rates and charges ultimately approved by the Commission in this proceeding.

(11) The Signatory Parties agree that the rate design issues associated with rate schedules 310 and 315 are not resolved by the Stipulation and will be fully litigated and submitted to the Commission for its consideration and resolution.

(12) The Stipulation resolves all contested issues raised in Case Nos. 07-1080-GA-AIR, 07-1081-GA-ALT, 05-1444-GA-UNC and 08-632-GA-AAM, except for those issues specifically identified as being reserved for separate resolution by means of litigation or otherwise.

III. Evaluation of the Stipulation

Rule 4901-1-30, Ohio Administrative Code, authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such agreements are accorded substantial weight. *See Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123, 125 (1992), *citing Akron v. Pub. Util. Comm.*, 55 Ohio St. 2d 155 (1978). This concept is particularly valid where the stipulation is supported or unopposed by the vast majority of parties in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., Dominion Retail v.*

Further, the Stipulation extends shareholder funding of VEDO's low-income conservation program and provides for a significant expansion of funding for energy efficiency programs. The Stipulation provides for $4 million in funding for energy efficiency programs, including $1.1 million in funding for low-income weatherization programs. The Commission notes that the energy efficiency programs will be monitored on an ongoing basis by the Vectren Collaborative, which was first established under Case No. 05-1444-GA-UNC. The Stipulation also establishes a distribution system replacement program to accelerate the replacement of VEDO's aging distribution systems and provides for oversight of this program. Finally, the Stipulation establishes a program to address the safety concerns of prone-to-fail risers with a schedule to replace such risers and adopts a proposal for VEDO to assume ownership and repair responsibility for customer service lines (Staff Ex. 3a at 3-4).

Finally, the Stipulation meets the third criterion because it does not violate any important regulatory principle or practice (Staff Ex. 3a at 4).

Our review of the Stipulation indicates that it is in the public interest and represents a reasonable resolution of the issues in this case. The Commission finds the stipulated rate of return of 8.89 percent, requiring an increase of $14,779,153 in revenues, to be fair, reasonable, and supported by the record and will adopt the stipulated revenue increase and rate of return for purposes of this proceeding. We will, therefore, adopt the Stipulation in its entirety.

IV. Rate of Return and Authorized Rates

The Signatory Parties stipulated to a net operating income of $11,270,763 for the test year ending May 31, 2008. Application of this dollar return to the stipulated rate base of $234,839,282 results in a rate of return of 4.80 percent. Such a return is insufficient to provide VEDO with reasonable compensation for the natural gas service it renders to its customers.

The parties have agreed to a recommended rate of return of 8.89 percent on a stipulated rate base of $234,839,282, requiring a net operating income of $20,877,212. Adding the stipulated revenue increase of $14,779,153 to the stipulated test year revenues of $442,012,272 produces a new revenue requirement of $456,791,425, an increase of 3.34 percent (Joint Ex. 1, Stipulation Exhibit 1, Schedule A-1).

V. Rate Design

The Stipulation left the issue of rate design unresolved. VEDO has proposed a residential rate design that reflects gradual movement toward a straight fixed variable (SFV) rate design over a period of two rate case cycles. Because this two-step approach

would include a volumetric component in rates, the Company also proposes a transitional decoupling rider (SRR-B) which would recover the difference between the actual revenues collected under the proposed rates and the stipulated revenue requirement in this case (Co. Ex. 9b at 3-5).

According to VEDO, the evidence demonstrates that a rate design that recovers the fixed costs of providing distribution service through the customer charge is warranted, based on the goal of setting rates based upon the cost of providing service (Co. Ex. 9b at 5; Staff Ex. 3 at 8-9). VEDO notes that OCC's witness Coulton agreed that a basic principle of ratemaking is that rates should reflect costs and that one set of customers should not be charged for costs that a different set of customers caused a utility to incur (OCC Ex. 2 at 21-22). VEDO also contends that the record shows that a rate design that collects fixed costs through a volumetric charge provides customers with a misleading price signal about costs that can be avoided by reducing consumption (Co. Ex. 9b at 5, 8; Staff Ex. 3 at 4-5).

VEDO argues that, based on these traditional ratemaking principles, its proposal to establish a residential rate design based on implementation of full SFV has compelling advantages over any other proposal. VEDO notes that, if the Commission were to adopt a two-stage transition to a full SFV without the proposed decoupling rider, the rates at the stipulated revenue level would be an average year-round customer charge of $16.04, with a volumetric charge that would produce the remainder of the residential revenue requirement in the first year, and an average year-round full SFV rate of $18.37, with no volumetric charge, in the second year (Co. Ex. 9b at 11-13; Tr. VIII at 11).

OCC and OPAE argue that a decoupling mechanism with a low customer charge accomplishes the same goal and is superior to the SFV rate design because it sends appropriate price signals and allows customers to have better control over their gas bills. OCC and OPAE claim that a decoupling mechanism would retain the current lower fixed monthly charge of $7.00; in contrast, OCC and OPAE claim that customers would not understand a structure based upon two seasonal charges, as proposed by the Company. OCC and OPAE believe that a decoupling mechanism such as the mechanism approved by the Commission in Case No. 05-1444-GA-UNC would protect VEDO from any decline in average use that was not weather-related. Moreover, OCC and OPAE contend that a traditional decoupling mechanism is superior to SFV because it is symmetrical and provides equal protection from changing sales volumes to both customers and the Company.

OCC and OPAE also claim that the SFV rate design sends the wrong price signal to consumers by telling customers that it does not matter how much they consume; their gas distribution bill will be relatively the same. OCC and OPAE claim that the SFV design does not encourage conservation because it reduces the volumetric rate while increasing

that the SFV rates follow cost-causation principles and reduce a subsidy that exists under current rates. Staff claims that the current rate design, which recovers most of the Company's fixed distribution costs through a rate that varies with usage, distributes more of the fixed costs to higher users of natural gas. Staff claims that SFV rates more evenly distribute fixed costs by increasing the portion of those costs recovered through a fixed rate component, thereby matching fixed and variable cost recovery with the costs actually incurred (Staff Ex. 3 at 4-5).

Staff further argues that the SFV rate design does not disproportionately impact low-income customers because the rate effects of the SFV rate design are not impacted by the income of individual ratepayers. Further, Staff believes that the record shows that many low-income customers would benefit from an SFV rate design. Staff contends that, based upon the higher usage levels of PIPP customers, many of these customers will benefit from the SFV approach (Staff Ex. 3 at 6-7).

Finally, Staff argues that the SFV rate design sends the appropriate price signal to customers. Staff claims that including fixed costs in a variable rate distorts price signals. Staff argues that, since SFV rate design aligns fixed costs with fixed rate components and variable costs with variable rate components, it provides better price signals for customers' investment decisions (Staff Ex. 3 at 4). Thus, Staff argues that, because the SFV rate design provides better information and results in more informed consumer decisions, it is a benefit, rather than a detriment, to consumers and conservation.

In three recent cases, the Commission has addressed the question of whether to adopt a levelized rate design (i.e., SFV), which recovers most fixed costs through a flat monthly charge, or a decoupling rider or sales reconciliation rider (SRR), which maintains a lower customer charge and allows the utility to offset lower sales through an adjustable rider. *See In re Duke Energy Ohio, Inc.*, Case No. 07-589-GA-AIR et al., Opinion and Order (May 28, 2008); *In re The East Ohio Gas Company, dba Dominion East Ohio*, Case No. 07-829-GA-AIR, et al., Opinion and Order (October 15, 2008); *In re Columbia Gas of Ohio, Inc.*, Case No. 08-72-GA-AIR, Opinion and Order (December 3, 2008). Consistent with our previous decisions, and recognizing that the stipulated rate of return includes a reduction to the return on equity to account for risk reduction associated with rate design change, the Commission finds, on balance, that a levelized rate design is preferable to a decoupling rider. Both methods address revenue and earnings stability issues in that the fixed costs of delivering gas to consumers will be recovered, regardless of whether consumption is reduced. Accordingly, both methods remove any disincentive to the utility to promote conservation and energy efficiency. However, a levelized rate design has the added benefit of producing more stable customer bills throughout the year because fixed costs will be recovered evenly throughout the year. In contrast, with the SRR proposed by OCC and OPAE, consumers would pay a higher portion of their fixed costs during the heating season when overall natural gas bills are already at their highest, and rates would be less

predictable because they are subject to annual adjustments to recover lower-than-expected sales.

Moreover, the levelized rate design has the advantage of being easier for customers to understand. Customers will see most of the costs that do not vary with usage recovered through a flat monthly charge. As we noted in *Duke* and in *DEO*, customers are accustomed to fixed monthly bills for numerous other services, such as telephone, trash collection, internet, and cable services. An SRR, on the other hand, is much more complicated and difficult to explain to customers. It would be difficult for customers to understand why they would have to pay more through a decoupling rider if they have worked hard to reduce their consumption; it may appear to customers that the utility is penalizing customers for their conservation efforts.

Moreover, as we noted in *DEO*, the Commission believes that a levelized rate design sends better price signals to consumers. The possible response of consumers to an increase in the customer charge, i.e. dropping gas service entirely and switching to a different fuel, is much less likely to occur than consumers changing their level of gas usage in response to a change in the volumetric rate. When a utility is entitled to recover costs in excess of its costs for providing the next increment of gas service, a more economically efficient rate design is one that recovers these additional costs largely through a change that has little impact on consumer behavior.

Customers will not be misled into believing that reductions in consumption will allow them to avoid the fixed costs of the distribution system, as feared by Staff. However, the commodity portion of a customer's bill, the actual cost of gas the gas used, will remain the biggest driver of the bill. In fact, commodity costs comprise 75 to 80 percent of the total bill (Tr. III at 68). Therefore, we believe that the gas usage will still have the biggest influence on the price signals received by customers when making gas consumption decisions and that customers will still receive the appropriate benefits of any conservation efforts.

Additionally, the provision of $4 million in base rates for energy efficiency projects under the stipulation and its commitment for an additional $1 million through a subsequent filing are critical to our decision in this case. The Commission has long recognized that conservation and efficiency should be an integral part of natural gas policy. To that end, the Commission has recognized that energy efficiency program designs that are cost-effective, produce demonstrable benefits, and produce a reasonable balance between reducing total costs and minimizing impacts on non-participants are consistent with Ohio's economic and energy policy objectives. In the Stipulation, the parties have agreed to fund energy efficiency programs for low-income customers as well as to convene a collaborative to monitor the implementation of energy efficiency programs approved as proposed in the application and to consider and make recommendations

regarding additional program funding or possible reallocation of funding among programs. We laud the parties for this agreement and we encourage VEDO to make cost-effective weatherization and conservation programs available to all low-income consumers and to ramp up such programs as rapidly as reasonably practicable. Furthermore, we encourage the collaborative to address additional opportunities to achieve energy efficiency improvements and to consider programs which are not limited to low-income residential consumers. As part of its review, the collaborative should 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. The energy efficiency programs should also consider how best to achieve net total resource cost and societal benefits; how to minimize unnecessary and undue ratepayer impacts; how process and impact evaluation will be conducted to ensure that programs are implemented efficiently; how to capture what otherwise become lost opportunities to achieve efficiency improvements in new buildings; how to minimize "free ridership" and the perceived inequity resulting from the payment of incentives to those who might adopt efficiency measures without such incentives; and how to integrate gas energy efficiency programs with other initiatives. The Commission directs that the collaborative shall file a report within nine months of this order, identifying the economic and achievable potential for energy efficient improvements and program designs to implement further reasonable and prudent improvements in energy efficiency.

Moreover, the Commission notes that the evidence in the record of this case does not support the conclusion that low-income customers are low-usage customers. VEDO presented testimony using actual census data for its service area, demonstrating that low-income customers in VEDO's service area consume, on average, more natural gas annually than all but the highest income residential customers in its service area (Co. Ex. 8a at 12-14). Further, it is undisputed that PIPP customers use more natural gas than the average of all residential customers (Co. Ex. 8a at 17). Staff witness Puican recommended the use of PIPP customers as the best available proxy for low-income customers (Staff Ex. 3 at 7; Tr. VI at 35). Although OCC's witness Coulton testified that his analysis indicated that low-income customers were also low-usage customers, Mr. Coulton based his analysis upon monthly surveys conducted by the Census Bureau, using data which the Census Bureau cautioned may be unreliable (Tr. V at 56-63; Co. Ex. 8a at 11); thus, Mr. Coulton's testimony regarding whether low-income customers are also low-usage customers is of little probative value in this proceeding. We find that the record demonstrates that low-income customers, on average, would actually enjoy lower bills under the levelized rate design.

We also find that the levelized rate design promotes the regulatory principles of providing a more equitable cost allocation among customers, regardless of usage. It fairly apportions the fixed costs of service among all customers so that everyone pays their fair share. Customers who use more energy for reasons beyond their control, such as

abnormal weather, a large number of persons sharing a household, or older housing stock, will no longer have to pay their own fair share plus part of someone else's fair share of the costs.

Nonetheless, as we noted in *Duke* and *DEO*, we recognize that, with this change in rate design, as with any change, there will be some customers who will be better off and some customers who will be worse off, in comparison to the existing rate design. The levelized rate design will impact low-usage customers more than high-usage customers, since they have not been paying the entirety of their fixed costs under the existing rate design. High-usage customers, who have been paying more than their share of the fixed costs, will actually experience a reduction in their gas bills.

The Commission is concerned, however, with the impact that the change in rate structure will have on some VEDO customers who are low-income, low-usage customers. The Commission believes that some relief is warranted for this class of customers. In previous cases, we approved a pilot program available to a specified number of eligible customers, in order to provide incentives for low-income customers to conserve and to avoid penalizing low-income customers who wish to stay off of programs such as PIPP. We have emphasized that the implementation of the pilot program was important to our decisions to adopt a levelized rate design in that case. Therefore, the Commission finds that VEDO should likewise implement a one-year, low-income, pilot program aimed at helping low-income, low-usage customers pay their bills.

As in the prior cases, the customers in the low-income, pilot program shall be non-PIPP, low-usage customers, verified at or below 175 percent of the poverty level. VEDO's program should provide a four-dollar, monthly discount to cushion much of the impact on qualifying customers. This pilot program should be made available for one year to the first 5,000 eligible customers. VEDO, in consultation with staff and the parties, shall establish eligibility qualifications for this program by first determining and setting the maximum low-usage volume projected to result in the inclusion of 5,000 low-income customers who are determined to be at or below 175 percent of the poverty level. The Commission expects that VEDO will promote this program such that, to the fullest extent practicable, the program is fully enrolled with 5,000 customers. Following the end of the pilot program, the Commission will evaluate the program for its effectiveness in addressing our concerns relative to the impact on low-usage, low-income customers.

Having decided that the Commission will approve a levelized rate design rather than an SRR, we will address whether to adopt a partial SFV, which includes a volumetric component, or to move directly to a full levelized rate design. According to the evidence in the record, a residential customer charge of $18.37 would produce the full residential revenue requirement stipulated to by the Signatory Parties (Tr. VIII at 11-12). The fixed rate of $18.37 would allow the Commission to completely eliminate the volumetric charge

for distribution service, which would eliminate the collection of any fixed distribution costs through the volumetric rate. However, as we have noted in other recent decisions, the Commission is sensitive to the impact of any rate increase on customers, especially during these tough economic times. We note that we have previously approved a sales decoupling mechanism for VEDO in Case No. 05-1444-GA-UNC, which represented an initial step in transitioning VEDO away from traditional rate design and included efforts toward conservation. We believe that a gradual move to the SFV rate design will continue our effort to help to correct the traditional design inequities while mitigating the impact of the new rates on customers by maintaining a volumetric component to the rates for the first year.

We recognize that VEDO proposed that the residential customer charge be set at $10.00 per month during the summer months of the first year and at $16.75 per month during the winter months of the first year. (Tr. III at 11.) We do not believe that a seasonal difference is appropriate, especially in light of the increased rates that such an approach would cause during the time of year when bills are otherwise the highest. However, we are willing to use the average of those two figures as the customer charge during the first year following this issuance of this opinion and order. Therefore, the customer charge during the first year will be set at $13.37 per month, with a volumetric rate to allow VEDO to collect the authorized revenue requirement. After the first year, the customer charge will adjust to the full $18.37 per month, with no volumetric rate.

V. Tariffs

As part of its investigation in this matter, Staff reviewed the various rates, charges, and provisions governing terms and conditions of service set out in VEDO's proposed tariffs. Further, revised tariffs which comply with the Stipulation were submitted by the Signatory Parties (Joint Ex. 1, Stipulation Exhibit 2). Upon review, the Commission finds VEDO's proposed tariffs reasonable, except for the phase-in of the SFV rate design that is required by this opinion and order. Therefore, VEDO shall file proposed tariff pages in compliance with this opinion and order, for Commission approval, reflecting rates that will result in collection of the authorized revenue requirement.

VI. Other Issues

OCC and OPAE argue that VEDO failed to provide adequate notice to customers of the proposed second-stage SFV rates, as required by Sections 4909.18(E), 4909.19, and 4909.43(B), Revised Code. Specifically, OCC and OPAE allege that VEDO's notice of intent (PFN) filed under Section 4909.43, Revised Code, is inadequate because VEDO's second stage rates for certain customers do not match the rates in VEDO's application. OCC and OPAE also claim that VEDO's published notice is defective because it did not include the second-stage rates for certain residential customers.

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

(4) A rate of return of 4.80 percent does not provide VEDO with reasonable compensation and return on its property used and useful in the rendition of natural gas services.

(5) It is reasonable and in the public interest to transition, over a phase-in period, to an SFV rate design, as set forth in this opinion and order.

ORDER:

It is, therefore,

ORDERED, That the Stipulation filed on September 8, 2008, be approved. It is, further,

ORDERED, That VEDO comply with all of the requirements and obligations stated in the Stipulation. It is, further,

ORDERED, That the application of VEDO for authority to increase its rates and charges for service be granted to the extent provided in this opinion and order. It is, further,

ORDERED, that VEDO implement a one-year, low-income, pilot program consistent with this opinion and order. It is, further,

ORDERED, That VEDO shall file, for Commission approval, proposed tariffs consistent with this opinion and order. It is, further,

impact of the change in rate design on some VEDO customers and that the Commission recognized that some relief was warranted for those customers, in the form of the low-income pilot program. However, OCC contends that, although the Opinion and Order established a rationale for the low-income pilot program, it provided no analysis to support how the approved pilot program would be sufficient to achieve its stated purpose.

VEDO responds that the low-income pilot program approved by the Commission is a reasonable complement to the transition to the SFV rate design. VEDO notes that OCC's argument is based on OCC's continuing insistence, in spite of evidence to the contrary, that low-income customers will be adversely affected by an SFV rate design. VEDO claims that the Commission determined in the Opinion and Order that the SFV rate design removes the subsidization of users at different consumption levels for responsibility for fixed costs. Further, VEDO notes that the Commission's reasoning in approving the pilot program in this case was consistent with the Commission's reasoning in approving a low-income pilot program in *In re The East Ohio Gas Company, d.b.a. Dominion East Ohio*, Case No. 07-829-GA-AIR et al., Entry on Rehearing (December 19, 2008) at 8. Finally, VEDO notes that OCC can show no harm resulting from this program. VEDO states that any erosion in revenue recovery resulting from this program will be borne by VEDO and will act as a reduction to the agreed-upon revenue responsibility of the residential customer class.

The Commission agrees with VEDO that OCC continues to improperly conflate the impact of the SFV, or levelized, rate design on low-usage customers with the impact of the rate design upon low-income customers. In the Opinion and Order, the Commission specifically determined that the evidence in the record did *not* support the conclusion that low-income customers necessarily are low-usage customers (Co. Ex. 8a at 12-14, 17; Staff Ex. 3 at 7; Tr. VI at 35). Further, the Commission determined, based upon the record in this proceeding, that the levelized rate design better reflects cost causation principles by fairly apportioning the fixed costs of service among all customers (Staff Ex. 3 at 8, 9-10; Tr. V at 13-14; Co. Ex. 9b at 5).

resemblance to the principle of gradualism embodied in Commission precedents.

VEDO notes that the Commission has previously rejected a claim that a change to the customer charge component of the distribution charge violated the principle of gradualism where the overall increase in the revenue responsibility of the residential customer class amounted to an increase of less than five percent. *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 04-571-GA-AIR, Entry on Rehearing (June 5, 2005) at 5. VEDO claims that the overall increase in this proceeding to the revenue responsibility of residential sales customers is 4.42 percent. Finally, VEDO notes that the Commission recently rejected this same argument by OCC in *In re Dominion East Ohio*, Case No. 07-829-GA-AIR, Entry on Rehearing (December 19, 2008) at 14.

The Commission finds that the Opinion and Order applied the principle of gradualism in a manner which is consistent with our precedents. As VEDO points out, we rejected a similar argument in *In re Dominion East Ohio*, Case No. 07-829-GA-AIR, when we held that:

> [W]e note that the Customer Groups continue to compare the new flat monthly fee with the customer charge under the previous distribution rate structure. Such comparisons can be misleading and distort the impact on customers, since any analysis of the impact of the new levelized rate structure should consider the total customer charges. We note that, in association with the adoption of the SFV rate design, the volumetric charge reflected in the bills of residential customers will be reduced as the customer charge is phased-in to reflect the elimination of the majority of the company's fixed costs from the volumetric charge.

In re Dominion East Ohio, Case No. 07-829-GA-AIR, Entry on Rehearing (December 19, 2008) at 14.

In its application for rehearing, OCC does not address the fact that, in this proceeding, the distribution volumetric rate for residential customers will be *eliminated entirely* in the second year with the completion of the phase-in of the levelized customer charge. Moreover, OCC ignores our previous findings that gradualism must be considered in reviewing the overall increase rather than a specific component such as the customer charge and that an overall increase of less than five percent does not violate the principle of gradualism. *In re Vectren Energy Delivery of Ohio*, Case No. 04-571-GA-AIR, at 5. Accordingly, the Commission finds that the Opinion and Order was consistent with our most recent precedents and that rehearing on this assignment of error should be denied.

(13) OCC argues, in its sixth assignment of error, that the Commission erred in imposing the SFV rate design against the manifest weight of the evidence, resulting in unjust and unreasonable rates in violation of Sections 4909.18 and 4905.22, Revised Code. OCC claims that, by relying on PIPP customer data as a proxy for low-income customer data, the Opinion and Oder imposed rates that are unjust, unreasonable, and against the manifest weight of the evidence. In support of its assignment of error, OCC contends that the Commission relied upon the testimony of a Staff witness, which was not based upon objective data or statistical information, and that the Commission ignored the testimony of OCC witness Coulton.

In response, VEDO argues that the testimony of OCC witness Coulton was based upon data that carried a warning that it was not reliable for the use to which it was put by Mr. Coulton (Co. Ex. 9a at 11). Further, VEDO claims that the opinion of OCC witness Coulton was based upon a defective analytical approach which was disconnected from the facts and circumstances specific to VEDO's service area (Co. Ex. 81 at 10-11; Tr. IV at 14, 22-24). Moreover, VEDO notes that OCC ignores the evidence presented by VEDO which confirmed the opinion of a Staff witness. VEDO claims that this evidence demonstrated that low-income customers in VEDO's service territory consume on average more natural gas than all but the highest income residential customers (Co. Ex. 8a at 12-14).

tried to hide the motion for a waiver is simply specious. VEDO notes that the cover sheet to both volumes of its application specifically state in the heading that the application included the motion for a waiver.

(8) The Commission agrees that OCC lacks standing to raise objections to the request for a waiver of the SFRs. *Ohio Bell Tel. Co.*, Case No. 93-487-TP-ALT at 2. We have consistently held that the purpose of the SFRs is to enable the Staff to fulfill its statutory obligation to investigate the application and file a report to the Commission and that intervenors cannot properly raise issues regarding the granting or denial of a request for a waiver. *See In re Seneca Utilities, Inc.*, Case No. 85-27-WW-AIR, Entry at 2 (April 16, 1985). Further, the Commission finds that VEDO has stated good cause for the waiver. According to VEDO, the information is not readily available in a form that would allow VEDO to comply with the SFRs and compiling the information in such a form would require substantial time and expense. The Commission believes that the other information submitted with the application, together with the ability of the Staff to obtain additional information from VEDO if necessary, is sufficient for the Staff to investigate and evaluate the application. Accordingly, the Commission finds that VEDO's motion for a waiver should be granted.

(9) With the filing of its notice of intent to file an application seeking Commission authority to increase its gas rates, VEDO moved that its test period begin June 1, 2007, and end May 31, 2008, and that the date certain be August 31, 2007. VEDO's proposed test period and date certain comply with Section 4909.15(C), Revised Code, and were, therefore, approved by Commission entry dated October 24, 2007.

(10) The application meets the requirement of Section 4909.18, Revised Code, which enumerates the statutory requirements for an application to increase rates and this Commission's Standard Filing Requirements. As such, the Staff recommends the application be accepted for filing as of November 20, 2007.

(11) VEDO's proposed notice for publication, set forth in Schedule S-3 of its application, complies with the requirements of Section 4909.18(E), Revised Code, and should be approved. VEDO shall

Rate Design

Staff has traditionally recommended and supported a rate design for the natural gas distribution component consisting of a minimal customer charge and a volumetric rate or blocks of rates. That structure, while not truly cost-reflective, sufficed to allow the utility the opportunity to recover the recommended revenue requirement as long as gas consumption remained level or increased. In recent years, due primarily to the volatile and relatively high cost of gas (to be recovered through the Gas Cost Recovery mechanism), the trend of gradually increasing gas consumption per customer, has been reversed. Therefore, Vectren and other gas utilities have seen the recovery of distribution costs deteriorate as the volume of gas used decreased.

In this case, Staff recommends a rather significant change in its rate structure policy. Rather than recovery via a minimal customer charge and relatively high volumetric rates, Staff recommends that the Commission approve a rate structure primarily based on a fixed distribution service charge. In reality, most distribution-related costs are fixed. The distribution facilities required to serve a small residence are most likely the same as those required to serve a larger residence. The distribution facilities required to serve a minimum number of gas appliances in a residential unit are most likely the same as those required to serve a residence with multiple gas appliances. The distribution costs to the utility vary only slightly, if at all, by the volume of gas used.

In addition, to better reflect cost causation, the primary fixed-charge-base-rate structure accomplishes other rate objectives. It levelizes the distribution component of a customers' bill, providing rate certainty. It reduces the revenue deterioration of a utility in a time of reduced consumption, thus, reducing the need for frequent rate cases. It alleviates the need for a decoupling mechanism which requires frequent potentially controversial reconciliations and weather adjustments. From the companies' point of view, it eliminates its natural disincentive to promote energy conservation which, when rates are volume-based, causes revenue erosion.

Staff is aware, however, of the pitfalls of this significant change in the design of rates. The biggest negative impact being that the change from a primarily volume-based rate to a primarily fixed charge rate often results in larger price increases to low use customers (or, if the fixed charge is "blocked", to the lower use customers in the block). A secondary disadvantage is that the fixed charge structure reduces the incentive on the part of the customer to reduce its usage. Staff, however, finds that this argument is much less relative in the case of distribution rates. The distribution portion of a customer's bill is relatively small compared to the total bill. The cost of gas to be recovered through the Gas Cost Recovery mechanism will continue to serve as the incentive to a customer to keep its usage to a minimum. Finally, the current rate schedules are designed as "residential" or "general service" in nature. General Service customers are much less homogenous than residential customers and a simple fixed charge may not be the appropriate cost recovery mechanism.

In this proceeding, an initial set of Residential rates are proposed (Stage 1) as well as a second set of rates (Stage 2). Stage 2 rates are revenue neutral in that they utilize the same revenue allocation to Residential rate classes as reflected in the Stage 1 rates. However, in the Stage 2 Residential rates the volumetric charges have been reduced by a approximately 35% and those dollars are then recovered in higher Customer Charges.

Staff proposes and recommends a change in rate design that phases in the change from a primarily volumetric rate to a primarily fixed charge rate. The following table illustrates this concept.

Monthly Billing Determinates

			Applicant	Staff	Stage 2	Stage 2
Residential Service:		Current	Proposed	Proposed	Applicant Proposed	Staff Proposed
Customer Charge		$7.00	$10.00 - Summer	$10.00 - Summer	$11.96 - Summer	$11.96
			$16.75 - Winter	$16.75 - Winter	$20.04 - Winter	$20.04
Fixed Distribution Service Charge						
0-50 Ccf		0.1199	0.11937	0.09042	0.08754	0.08073
51 and > Ccf		0.1044	0.10397	0.08049	0.07624	0.05276
General Service:						
Customer Charge:	Group 1	$10.00	$20.00	$20.00		
	Group 2	$25.00	$40.00	$40.00		
	Group 3		$80.00	$80.00		
Fixed Distribution Service Charge						
0-50 Ccf		0.1288	0.12002	0.14639		
51 and > Ccf		0.105	0.10284	0.12759		

Staff Discussion of Recommendation

It is apparent that there are a significant number of residential and general service accounts that use such small volumes of gas that it is likely that the usage is for something other than space or water heating. While Staff's proposal attempts to mitigate the rate increase to these customers to alleviate drastic changes, from a cost causation viewpoint, these customers are no different than other customers. Staff recommends that the Applicant work with these customers to notify them that, in the future, they may see significant increases simply by taking limited service.

Finally, it is likely that the traditional "residential/general service" schedules may not be the appropriate mechanisms to reflect cost causation through rates. A more appropriate mechanism for rate differentials may be a more "facilities-based" approach. Staff recommends

gas delivery increases as gas consumption increases. This is not correct. The marginal distribution-related cost of an additional Ccf of gas throughput is zero. The fixed costs of distribution service do not change with changes in Ccf throughput or consumption. Importantly, the proposed rate is a distribution rate. In fact, fixed costs do not enter into the calculation of marginal costs at all. Mr. Novak erred in assuming that volumetric rates for delivery service represent a marginal cost. A rate design that recovers fixed costs volumetrically will signal customers to make inaccurate and inefficient investment decisions because the volumetric rate design incorrectly signals a customer that a portion of the fixed costs of providing distribution service can be avoided as a result of reducing annual usage. An SFV rate design or a rate design that more completely recovers the fixed costs of distribution service from residential customers through a monthly customer charge will better signal customers to make an investment in the optimum level of conservation. Customers also avoid the discouragement that comes from a volumetric rate design that comes when the volumetric rates are subsequently increased because the volumetric rate design results in a mismatch between the fixed costs of providing service and the revenue available to the utility to cover such fixed costs.

Q. Based on the VEDO service area specific data for residential customers, what rate design do you believe is most appropriate for VEDO's residential customers?

responsible for directing Staff investigations into electric utilities' Demand-Side Management ("DSM") programs and have submitted testimony in numerous proceedings relating to evaluation of DSM programs.

4. Q. What is the purpose of your testimony in this proceeding?

A. I am testifying in response to several objections to the Vectren Energy Delivery of Ohio (Vectren) rate case Staff Report raised by various parties to this proceeding.

5. Q. The Office of the Ohio Consumers' Counsel (OCC) objection 52, Ohio Partners for Affordable Energy (OPAE) objection VI, and the Ohio Environmental Council (OEC) all object to the Staff's proposed Straight Fixed Variable (SFV) rate design on the grounds that it fails to encourage conservation and adversely affects the Company's energy efficiency efforts. Do you agree with these objections?

A. I do not agree. When evaluating customer incentives to conserve, one needs to look at the total variable rate a customer faces and not just the distribution rate. Vectren used a gas cost rate of $9.686 per Mcf in its application and regardless of which rate design is ultimately approved in this proceeding, the variable component of base rates will be relatively small in comparison to the cost of the gas itself. Customers will always achieve the full value of the gas cost savings regardless of the distribution rate. I believe most customers make conservation decisions based on their total bill rather than by an explicit cost/benefit analysis based solely on the variable portion of rates,

1 particularly given the volatility of the gas cost component.

2

3 The following table shows the monthly changes to the Vectren GCR since January

4 2008:

	GCR Rate	Change
Jan-08	$ 9.0321	
Feb-08	$ 9.3528	$0.3207
Mar-08	$ 9.6352	$0.2824
Apr-08	$11.4243	$1.7891
May-08	$12.0829	$0.6586
Jun-08	$13.2304	$1.1475
Jul-08	$14.0774	$0.8470
Aug-08	$13.7565	($0.3209)

5

6 The volatility includes a one month increase of $1.79 per Mcf from March to April of

7 this year and an overall increase of $4.7244 per Mcf since January. Given these types

8 of extreme fluctuations, I believe customers recognize the imprecision of any payback

9 analysis and will incorporate that uncertainty into their energy efficiency investment

10 decisions.

11

12 Even assuming customers conduct this type of payback analysis, including fixed costs

13 in a variable rate distorts the price signals customers face. The variable component of

14 rates should reflect a utility's true avoided costs, *i.e.* the costs that a utility does not

15 incur with a unit reduction in sales. The SFV rate design satisfies this condition by

16 more closely matching fixed and variable cost recovery to those actual costs incurred.

17 Artificially inflating the volumetric rate beyond its cost basis skews the analysis and

18 will cause an over-investment in conservation. This exacerbates the under-recovery of

fixed costs that the utility must then recover from all other customers.

Customer incentives to conserve must also be considered within the context of the change in incentives the SFV rate design provides the Company. OCC and OPAE and OEC all support a rate design that ties a Company's recovery of its fixed costs to sales volumes. To artificially require the Company to recover its fixed costs through the volumetric rate creates a disincentive for the Company to promote energy efficiency. Staff is proposing a rate design that eliminates this disincentive. The relatively small potential disincentive for customers to conserve due to the reduction in the volumetric rate is more that offset by the removal of the Company's disincentive to actively promote and fund energy-efficiency.

6. Q. OCC objections 53 and 55 and the OEC object to the Staff's rejection of a proposed Sales Reconciliation Rider (SRR) in favor of the SFV rate design. OCC objection 55 also claims the Staff's proposal is contrary to the State policy of conservation as noted in R.C. 4929.02 and R.C. 4905.70. Do you agree with these objections?

A. No I do not. I believe the SFV rate design achieves a better result than the proposed reconciliation rider would. The SFV rate design is a straightforward solution that removes the inherent disincentives under traditional rate design so that LDCs can promote energy-efficiency. It is an economically logical concept that eliminates the need for the annual true-ups required by the SRR approach. The SFV provides a

1 *A24.* No. As pointed out in Section I of my testimony, the Staff's analysis of declining
2 weather normalized use per customer for the residential customer class is in error.
3 While actual sales per customer have declined, the average weather normalized
4 residential usage per customer has held steady between 7 to 8 Mcf per bill for the
5 last six years. It is important to distinguish between actual and weather
6 normalized usage since rates are set on weather normalized sales volumes. There
7 is simply no corroborating evidence in the record for this rate case supporting a
8 decline in residential weather normalized use per customer. In fact, as shown on
9 Schedule WHN-2, just the opposite has occurred; weather normalized residential
10 average use per customer has actually increased during the test period from the
11 preceding year.
12
13 In addition, the Staff's point that a flat monthly distribution charge for residential
14 customers will somehow provide customers with price certainty is also faulty.
15 The distribution charge is relatively minor in comparison to a customer's total bill
16 that includes gas costs which fluctuate monthly and other surcharges. I doubt if
17 any residential customers would perceive an added benefit to price certainty from
18 a fixed monthly distribution charge.
19
20 ***Q25. ARE THERE OTHER REASONS THAT YOU OPPOSE THE MOVE TO A***
21 ***FIXED MONTHLY CUSTOMER CHARGE?***

1 If you ask them what they pay for telephone, for
2 internet, for cable, for those other service, they
3 can tell you because it's a fixed charge per month.
4 So what I envision us doing is over time helping
5 customers understand that we are moving to something
6 that will help them actually realize what they are
7 paying for gas distribution service separate from
8 what they are paying for gas supply.
9 ATTORNEY EXAMINER: Mr. Ulrey, can you
10 tell me what the -- at today's prices what the split
11 is on a customer's bill between distribution and
12 supply? What's the percentage?
13 THE WITNESS: There's variation based on
14 the current cost of gas supply, but a 75 percent gas
15 cost, 25 percent distribution cost so 80/20 is right
16 in the ballpark.
17 ATTORNEY EXAMINER: In that range?
18 THE WITNESS: Yes.
19 ATTORNEY EXAMINER: Thank you.
20 Q. So that I can understand your answer to
21 the Examiner, you are saying currently today 25
22 percent of the bill is the customer charge and
23 approximately 75 percent is cost of gas, and that
24 with the move to straight fixed variable it becomes