

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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**MERIT BRIEF OF  
APPELLANT  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. STANDARD OF REVIEW .....	2
III. STATEMENT OF FACTS .....	3
A. Vectren Requested A New Modified SFV Rate Design In Its Application and Requested Approval of Stage 1 and Stage 2 Rates.....	3
B. The Rate Design And Notice Issues Were Litigated. ....	4
C. The PUCO Approved a Rate Design That Increases The Fixed Monthly Customer Charge To \$18.37 per Month And Eliminates the Volumetric Charges for Gas Distribution Service, beginning in February 2010.....	5
IV. ARGUMENT.....	6
Proposition of Law 1:.....	6
Where A Utility Proposes To Materially Change The Method Of Charging Customers And Includes The Proposal In Its Application For A Rate Increase Before The Commission, It Must Fully Disclose The Proposal In Any Notice Published Under The Requirements Of R.C. 4909.19.....	6
A. R.C. 4909.18 And 4909.19 Require A Public Utility To Provide Actual Notice To Its Customers Of Any Proposed Rate Increase.....	7
B. The Purposes Of R.C. 4909.18 And 4909.19 Are To Provide Any Person, Firm, Corporation, Or Association With An Opportunity To File An Objection To The Increase.....	8
C. This Court Has Determined That The Notice Under R.C. 4909.19 Must Convey The “Essential Nature Or Quality Of The Proposal To Be Disclosed To Those Affected By The Rate Increases.” ( <i>Comm. Against MRT v. Pub. Util. Comm.</i> ) (1977).....	9

D.	Vectren Proposed In Its Application To Materially Change The Method For Charging Customers For Distribution Service By Switching To A Straight Fixed Variable Rate Design. Yet, In Its Notice To The Public, Vectren Failed To Convey The Nature Or Quality Of The Straight Fixed Variable Rate Design Proposal. ....	11
1.	The Application Proposal .....	11
2.	The Notice To Customers .....	13
E.	VEDO’s Notice Failed To Convey The Nature And Quality Of Its SFV Proposal And The Stage 2 Rates, And Thus The Notice Is Legally Inadequate Under The Controlling Precedent Of <i>Committee Against MRT And Ohio Assn. Of Realtors.</i> .....	14
F.	R.C. 4909.18 And R.C. 4909.19 Are Jurisdictional Requirements That Must Be Met In Order To Confer The Commission With Jurisdiction To Consider The Application. <i>Duff v. Pub. Util. Comm.</i> (1978). ....	16
G.	Because The Commission Lacked Jurisdiction To Approve The Straight Fixed Variable Rate Design And Stage 2 Rates Due To The Deficient Notice, This Court Should Vacate The Stage 2 Rates.....	18
	Proposition of Law 2:.....	18
	Where A Utility Fails To Provide Adequate Notice In A Rate Related Proceeding And The Customers’ Property Interests, Established By Statute, Rules, Or Understandings Are Implicated, The Customers’ Due Process Rights Are Violated.....	18
A.	The Due Process Clause Of The Ohio And U.S Constitution Requires Notice And Opportunity To Be Heard When An Interest In Property Is Sought To Be Terminated Or Diminished By The State. ....	19
B.	An Interest In Property Protected By The Due Process Clause Is Created By Existing Rules Or Understandings From An Independent Source Such As State Law. ....	21
C.	R.C. 4905.70 And 4929.02(A)(4), Along With Customer Funding And Customer Participation In Past DSM Programs, Have Created A Property Interest Protected By The Due Process Clause. ....	24

Proposition of Law 3:.....	28
The PUCO Should Respect Its Own Precedents Unless The Need To Change Its Position Is Clear And It Is Demonstrated That The PUCO’s Prior Decisions Are In Error.....	28
Proposition of Law 4:.....	33
The PUCO Violated R.C. 4929.02 And R.C. 4905.70 When It Approved A Rate Design Which Fails To Promote Energy Efficiency And Discourages Conservation. ....	33
A.    The SFV Rate Design Sends The Wrong Price Signal To Consumers.....	36
B.    The SFV Rate Design Removes The Customers’ Incentive To Invest In Energy Efficiency Because The SFV Rate Design Extends The Pay Back Period For Energy Efficiency Investments Made By Consumers. ....	38
Proposition of Law 5:.....	39
The PUCO Violated R.C. 4909.19 When It Implemented Unjust And Unreasonable Rates That Were Against The Manifest Weight Of The Evidence In This Case. ....	39
A.    The Record Shows That The PUCO Ordered A Low-Income Pilot Program That Is Inadequate And Does Not Cure The Flaws Of The Straight Fixed Variable Rate Design .....	44
V.    CONCLUSION.....	47

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Armco, Inc. v. Pub. Util. Comm.</i> (1982), 69 Ohio St.2d 401, 23 O.O.3d 361, 433 N.E.2d 923.....	27
<i>Atchison Topeka &amp; Santa Fe Railway v. Wichita Bd. of Trade</i> (1973), 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed.2d 350.....	29
<i>Bell v. Burson</i> (1971), 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90.....	20,21
<i>Bluefield Water Works &amp; Improvement Co. v. Pub. Serv. Comm. of West Virginia</i> (1923), 262 U.S. 679, 43 S.Ct. 675, 63 L.Ed. 1178.....	37
<i>Board of Regents of State Colleges. v. Roth</i> (1972), 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548.....	20,21
<i>Bronson v. Consolidated Edison Co. of New York, Inc.</i> (S.D.N.Y. 1972), 350 F.Supp. 443 .....	23
<i>Caldwell v. Carthage</i> (1892), 49 Ohio St. 334, 31 N.E. 602.....	20
<i>Canton Storage and Transfer Co. Inc. v. Public Util. Comm.</i> (1995), 72 Ohio St.3d 1, 647 N.E.2d 136.....	33
<i>City of Cleveland v. Pub. Util. Comm.</i> (1965), 3 Ohio St.2d 82, 32 O.O.2d 58, 209 N.E.2d 424 .....	39
<i>City of Cleveland v. Pub. Util. Comm.</i> (1981), 67 Ohio St.2d 446, 21 O.O.3d 279, 424 N.E.2d 561.....	26
<i>City of Cleveland v. Pub. Util. Comm.</i> (1982), 70 Ohio St.2d 290, 293-294, 24 O.O. 3d 370, 436 N.E.2d 1366.....	6
<i>Cleveland Bd. of Edn. v. Loudermill</i> (1985), 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494.....	20
<i>Cleveland Electric Illuminating Co. v. Pub. Util. Comm.</i> (1975), 42 Ohio St.2d. 403, 330 N.E.2d 1, certiorari denied (1975), 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed. 302.....	29
<i>Committee Against MRT v. Pub. Util. Comm.</i> (1977), 52 Ohio St.2d 231, 6 O.O.3d 475, 371 N.E.2d 547 .....	9,14

**TABLE OF AUTHORITIES (Cont.)**

<b><u>Cases</u></b>	<b><u>Page</u></b>
<i>Condosta v. Vermont Electric Cooperative, Inc.</i> (D.Vt. 1975), 400 F.Supp. 358 .....	23
<i>Connell v. Higginbotham</i> (1971), 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418.....	21
<i>Consumers' Counsel v. Pub. Util. Comm.</i> (1979), 58 Ohio St.2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370 .....	3
<i>Consumers' Counsel v. Pub. Util. Comm.</i> (1984), 10 Ohio St.3d 49, 50, 10 OBR. 312, 461 N.E.2d 303.....	29
<i>Craft v. Memphis Light, Gas &amp; Water Div.</i> (C.A.6, 1976), 534 F.2d 684, 21 Fed.R.Serv.2d (Callaghan) 741, affirmed (1978), 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30.....	23
<i>Donnelly v. City of Eureka</i> (D. Kansas 1975), 399 F. Supp. 64 .....	23
<i>Duff v. Pub. Util. Comm.</i> (1978), 56 Ohio St.2d 367, 10 O.O.3d 493, 384 N.E.2d 264 .....	7,16
<i>Elyria Foundry Co. v. Pub. Util. Comm.</i> (2007), 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176 .....	34
<i>FPC v. Hope Natural Gas Co.</i> (1944), 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333.....	22
<i>FPC v. Natural Gas Pipeline Co.</i> (1942), 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037.....	22
<i>Gates Mills Investment Co. v. Parks</i> (1971), 25 Ohio St.2d 16, 54 O.O.2d 157, 266 N.E.2d 552 .....	17
<i>Georgia Power Co. v. Allied Chemical Corp.</i> (Ga.1975), 233 Ga. 558, 212 S.E.2d 628 .....	22
<i>Goldberg v. Kelly</i> (1970), 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287.....	21

**TABLE OF AUTHORITIES (Cont.)**

<b><u>Cases</u></b>	<b><u>Page</u></b>
<i>Grannis v. Ordean</i> (1914), 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363.....	20
<i>Hagar v. Reclamation Dist. No. 108</i> (1884), 111 U.S. 701, 4 S.Ct. 663, 28 L.Ed. 569.....	20
<i>Joint Anti-Fascist Refugee Comm. v. McGrath</i> (1951), 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817.....	19
<i>Limuel v. Southern Union Gas Co.</i> (W.D. Tex. 1974), 378 F.Supp. 964.....	23
<i>MCI Telecommunications Corp. v. Pub. Util. Comm.</i> (1987), 32 Ohio St.3d 306, 513 N.E.2d 337.....	27
<i>MCI Telecommunications Corp. v. Pub. Util. Comm.</i> (1988), 38 Ohio St.3d 266, 527 N.E.2d 777.....	27
<i>Memphis Light, Gas &amp; Water Div. v. Craft</i> (1978), 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30.....	22
<i>Office of Consumers' Counsel v. Pub. Util. Comm.</i> (1984), 10 Ohio St.3d 49, 10 OBR 312, 461 N.E.2d 303.....	29
<i>Ohio Assn. of Pub. School Emps., AFSCME, AFL-CIO v. Lakewood City School Dist. Bd. of Edn.</i> (1994), 68 Ohio St.3d 175, 1994 Ohio 354, 624 N.E.2d 1043.....	20
<i>Ohio Assn. of Realtors v. Pub. Util. Comm.</i> (1979), 60 Ohio St.2d 172, 14 O.O.3d 409, 398 N.E.2d 784. ....	7,9,14,15
<i>Palmer v. Columbia Gas of Ohio, Inc.</i> (C.A.6, 1973), 72 O.O.2d 337, 479 F.2d 153.....	23
<i>State ex rel. Auto Machine Co. v. Brown</i> (1929), 121 Ohio St. 73, 7 Ohio Law Abs. 367, 166 N.E. 903.....	29
<i>State of Ohio v. Western Union Telegraph Co.</i> (1951), 154 Ohio St. 511, 43 O.O. 488, 97 N.E.2d 2.....	17

**TABLE OF AUTHORITIES (Cont.)**

**Page**

**Cases**

*Time Warner AxS v. Pub. Util. Comm.* (1996),  
75 Ohio St.3d 229, 1996 Ohio 224, 661 N.E.2d 1097,  
reconsideration denied (1996), 75 Ohio St.3d 1453, 663 N.E.2d 333.....16

*Western Reserve Transit Authority v. Pub. Util. Comm.* (1974),  
39 Ohio St.2d 16, 68 O.O.2d 9, 313 N.E.2d 811, appeal after remand (1976),  
47 Ohio St.2d 32, 1 O.O.3d. 20, 350 N.E.2d 668.. .....17

*Williams Gas Processing Gulf Coast Co. v. FERC* (C.A.D.C. 2006),  
475 F.3d 319 .....30

**Entries and Orders of the Public Utilities Commission of Ohio**

*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 Service and Related Matters,*  
PUCO Case No. 04-571-GA-AIR,  
Opinion and Order (April 13, 2005) .....24

*In the Matter of the Application of Vectren Energy Delivery 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,*  
PUCO Case No. 05-1444-GA-UNC,  
Supplemental Opinion and Order (June 27, 2007) .....25

*In the Matter of the Application of Vectren Energy Delivery of Ohio for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters,*  
PUCO Case No. 07-1080-GA-AIR,  
Opinion and Order (January 7, 2009) .....25

*In the Matter of the Application of Vectren Energy Delivery of Ohio for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters,*  
PUCO Case No. 07-1080-GA-AIR,  
Entry (January 16, 2008).....4

**TABLE OF AUTHORITIES - cont.**

**Page**

<i>In the Matter of the Application of the Cincinnati Gas &amp; Electric Company for an Increase in Its Rates for Gas Service to All Jurisdictional Customers,</i> PUCO Case No. 95-656-GA-AIR, Opinion and Order (December 12, 1996) .....	31
<i>In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service</i> PUCO Case No. 08-936-EL-SSO, Opinion and Order (November 25, 2008) .....	36
<i>In the Matter of the Application of the East Ohio Gas Company for Authority to Implement Two New Transportation Services, for Approval of a New Pooling Agreement, and for Approval of a Revised Transportation Migration Rider,</i> PUCO Case No. 96-1019-GA-ATA, Finding and Order (June 18, 1989) .....	40,42

**TABLE OF AUTHORITIES - cont.**

	<b><u>Page</u></b>
<b><u>Statutes</u></b>	
R.C. 4903.09 .....	44
R.C. 4903.10 .....	17
R.C. 4903.13 .....	2
R.C. 4903.83 .....	8
R.C. 4905.26 .....	16
R.C. 4905.31 .....	26
R.C. 4905.70 .....	passim
R.C. 4909.15 .....	6
R.C. 4909.18 .....	passim
R.C. 4909.19 .....	passim
R.C. 4909.43 .....	7
R.C. 4928.02 .....	34,35,36
R.C. 4928.66 .....	35
R.C. 4929.02 .....	passim

**Constitutional Provisions**

The Constitution of the State of Ohio, Article I, Section 1, Inalienable Rights (1851).....	19
The Constitution of the State of Ohio, Article I, Section 16, Redress In Courts (1851) .....	19
U.S. Constitution Amendment XIV .....	19

## I. INTRODUCTION

In the past year and a half, the Public Utilities Commission of Ohio (“Commission” or “PUCO”) was faced with rate increase requests from all four of the major natural gas utilities in the state of Ohio, including one by the Vectren Energy Delivery of Ohio, Inc (“Vectren” “VEDO” or “Company”). The case below (“Vectren Rate Case”) represented the third of the four cases that the PUCO decided. In the Vectren Rate Case (and the DEO and Duke Rate cases)<sup>1</sup>, the parties litigated only two issues: rate design and notice.

Both of these issues were recently presented to the Court in the consolidated Duke and DEO appeals.<sup>2</sup> Briefing has concluded and oral arguments were heard. The parties now await the decision of this Court. That decision may in large respect influence the outcome of this appeal, as the issues presented here are not dissimilar. The Court should nonetheless examine the record presented and decide the issues raised in this appeal upon their own merits. This consideration is especially important with respect to the issues of notice, which are fact specific. Additionally, this appeal incorporates a constitutional claim that was not present in either the Duke or DEO appeals.

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<sup>1</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates*, Case No. 07-589-GA-AIR, Pre-Filing Notice (June 18, 2007); *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service*, Case No. 07-829-GA-AIR, Pre-Filing Notice (July 20, 2007).

<sup>2</sup> The Duke Rate Case was appealed on September 16, 2008, and docketed as S.Ct. Case No. 08-1837. The DEO Rate Case was appealed on February 11, 2009 and docketed as S.Ct. Case No. 09-314. Those cases, though separately briefed, were consolidated by the Court on September 2, 2009, and oral arguments were heard on those appeals on September 16, 2009.

The questions presented for this Court are:

- Did Vectren provide adequate legal notice of the straight fixed variable rate design, as required under R.C. 4909.18 (Appx. 000013) and 4909.19 (Appx. 000015)?
- Is there a statutory right to notice created under R.C. 4905.70 and 4929.02(A) that amounts to a property interest protected by the due process clause of the U.S. and Ohio Constitutions?
- When the PUCO changed to a straight fixed variable rate design, departing from past precedent, did it show that the need for change was clear and that its prior decisions on rate design were in error?
- Did the PUCO violate the state policy to promote and encourage conservation as required by R.C. 4929.02(A)(4) (Appx. 000022) and violate state law under R.C. 4905.70 (Appx. 000008) by imposing a straight fixed variable rate design?
- When the PUCO adopted a straight fixed variable rate design was there sufficient evidence to support its decision?

## II. STANDARD OF REVIEW

R.C. 4903.13 governs this Court's review of PUCO Orders. It provides in pertinent part: "A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable\*\*\*." The Court has interpreted this standard as one turning upon whether the issue presents a question of law or a question of fact.

As to questions of fact, the Court has held that it will not reverse the PUCO unless the PUCO's findings are manifestly against the weight of the evidence or are so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.<sup>3</sup> This standard should be applied to OCC's Propositions of Law 3 and 5. In Proposition of Law 3 OCC is

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<sup>3</sup> *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 330 N.E.2d 1, ¶ 8 of the syllabus, certiorari denied (1975), 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed.302.

challenging the PUCO's failure to demonstrate a clear need to change over thirty years of rate design precedent in implementing the straight fixed variable rate design. In Proposition of Law 5 OCC contends that the PUCO adopted a method of collecting rates from customers that was not supported by sufficient evidence.

Questions of law, such as those raised by OCC's Propositions of Law 1, 2, and 4 are held to a different standard of review. This Court has complete, independent power of review on questions of law.<sup>4</sup> Accordingly legal issues are subject to a more intensive examination than are factual questions. OCC's Propositions of Law 1, and 4 focus upon the PUCO's failure to comply with statutes in the Revised Code that pertain to notice and energy efficiency. In addressing these errors the Court will need to interpret and apply the respective provisions of the Revised Code. OCC's Proposition of Law 2 encompasses the PUCO's failure to comply with due process rights established under the Ohio and U.S. Constitutions. The Court will thus have to examine whether a statutory right to due process exists, and if the answer is affirmative, whether that right has been violated by the Commission's actions.

It is in this context that the Court must carry out its review of the Commission's orders. With these rules in mind, the Court must consider and resolve the errors alleged by OCC.

### **III. STATEMENT OF FACTS**

#### **A. Vectren Requested A New Modified SFV Rate Design In Its Application and Requested Approval of Stage 1 and Stage 2 Rates.**

On September 28, 2008, Vectren filed, as part of its pre-filing notice, a proposed public notice of its Application.<sup>5</sup> Vectren's Application proposed, among other things, to collect gas

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

<sup>5</sup> R. 15 at 137 (Schedule S-3)(Supp. 000124).

distribution rates from customers under a new rate design that was based in part, upon a straight fixed variable methodology implemented in stages. In its Application, Vectren sought PUCO approval of its rate design, consisting of an increased fixed customer charge and a decreased volumetric rate for two stages. Stage 1 rates were to be placed in effect on the effective day of the PUCO order approving rates. Stage 2 of the rates was to be instituted on November 1, 2010.<sup>6</sup>

The PUCO on January 16, 2008, approved the proposed notice for publication and ordered Vectren to publish its newspaper notice within thirty days.<sup>7</sup> Vectren complied and published its notice. The content of Vectren's notice and whether the notice met the requirements of R.C. 4909.18 and 4909.19 are issues discussed in detail in OCC's Proposition of Law 1.

**B. The Rate Design And Notice Issues Were Litigated.**

On September 8, 2008, the parties to the case entered into a Stipulation and Recommendation ("Stipulation"). (R. 101). That Stipulation settled all issues except for how the rate increase would be collected from residential customers and the notice issue, first raised by OCC in its objections to the Staff Report. (R.55). Under the Stipulation, the parties agreed that these issues would be fully litigated.<sup>8</sup> Evidentiary hearings commenced on August 19, 2008. Vectren and the PUCO Staff supported the SFV rate design. In the hearing OCC presented

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<sup>6</sup> R. 19 (Testimony of Vectren Witness Ulrey at 6).

<sup>7</sup> 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 and Related Matters. PUCO Case No. 07-1080-GA-AIR, Entry (Jan. 16, 2008). (R. 24).

<sup>8</sup> R. 101 at ¶ 14.

testimony opposing the SFV rate design and portraying the adverse effects that rate design will have on low-income and low-use customers, in particular.<sup>9</sup>

**C. The PUCO Approved a Rate Design That Increases The Fixed Monthly Customer Charge To \$18.37 per Month And Eliminates the Volumetric Charges for Gas Distribution Service, beginning in February 2010.**

The Commission issued its Opinion and Order (“Order”) (R. 114) on January 7, 2009. The Order implemented a modified straight fixed variable rate design in 2009, with a flash cut to complete SFV on February 22, 2010. Complete SFV means customers pay an unavoidable fixed customer charge and no charge for volumes of gas used. The PUCO also found that Vectren had provided adequate notice to its customers of the SFV rate design proposal. OCC filed a timely Application for Rehearing (R. 118) on February 6, 2009. In its Application, OCC asked the Commission to reconsider approving an SFV rate design, which increased the fixed monthly customer charges from \$7.00<sup>10</sup> to as much as \$18.37.<sup>11</sup> OCC also requested the PUCO to reconsider the adequacy of Vectren’s Application notice.

On August 26, 2009, the PUCO issued its Entry on Rehearing (“Entry on Rehearing”) (R. 124) and denied OCC’s Application for Rehearing. Later that day, OCC filed its Notice of Appeal with this Court. (R. 125).

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<sup>9</sup> R. 63 (Testimony of OCC Witness Novak); R. 59 (Testimony of OCC Witness Colton). (Supp. 000042).

<sup>10</sup> Schedule E 3.1, page 1. (R.15).

<sup>11</sup> Stage 2 rates in effect February 22, 2010. (R. 114 at 14-15).

#### IV. ARGUMENT

##### **Proposition of Law 1:**

**Where A Utility Proposes To Materially Change The Method Of Charging Customers And Includes The Proposal In Its Application For A Rate Increase Before The Commission, It Must Fully Disclose The Proposal In Any Notice Published Under The Requirements Of R.C. 4909.19.<sup>12</sup>**

OCC alleges that the Commission unlawfully approved Vectren's rate application notice in violation of R.C. 4909.18 and 4909.19. These statutes were violated when the notice failed to convey the substance and prayer of the straight fixed variable rate design and the resulting Stage 2 rates. In resolving this claim of error, the Court must examine the notice itself, along with the statutes and case law. The Court will need to interpret the statute and determine whether the notice was sufficient under the statute -- i.e. did the notice convey to customers the "substance and prayer" of the application? This is a question of law.

While this Court has recognized that on some issues of law, it will acknowledge and utilize the specialized expertise of the agency in interpreting the law,<sup>13</sup> the notice provisions of R.C. 4909.18 and 4909.19 are not highly technical in nature. Thus, the PUCO's regulatory expertise is not particularly helpful or needed. Rather, this Court is clearly competent to

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<sup>12</sup> See syllabus of *Comm. Against MRT v. Pub. Util. Comm.* (1977), 52 Ohio St.2d 231, 6 O.O.3d 475, 371 N.E.2d 547 -- "Where a utility plans to adopt measured rate service as the method for establishing rates to be charged its subscribers, and includes such plan as a proposal in its general application for a rate increase before the commission, it must specifically mention the proposal in any notice published under the requirements of R.C. 4909.19."

<sup>13</sup> *City of Cleveland v. Pub. Util. Comm.* (1982), 70 Ohio St.2d 290, 293-294, 24 O.O. 3d 370, 436 N.E.2d 1366 (specialized expertise of an administrative agency may be needed where there is disparate competence between the respective tribunals in dealing with highly specialized issues.) There the issue involved the rate setting formula and determining whether offsets against the working capital allowance could be made under R.C. 4909.15(A)(1). Interpreting the notice provisions of R.C. 4909.19 is clearly distinguishable.

independently review these notice statutes, to determine whether notice is sufficient. It has undertaken such a review on numerous occasions in the past.<sup>14</sup>

**A. R.C. 4909.18 And 4909.19 Require A Public Utility To Provide Actual Notice To Its Customers Of Any Proposed Rate Increase.**

Ohio law requires that a public utility's customers be provided actual notice that the utility has filed an application to increase its utility rates. A decision whether or not to enforce the notice requirement is not within the Commission's discretion. Indeed this Court has found that the notice requirements of R.C. 4909.19 must be met in order to confer the PUCO with jurisdiction to hear the case.<sup>15</sup>

The notice requirements for a public utility filing for a rate increase are found primarily under R.C. 4909.18 (Appx. 000013) and 4909.19 (Appx. 000015).<sup>16</sup> R.C. 4909.18 provides that, unless otherwise ordered by the Commission, a public utility must file, along with its application to increase rates, the newspaper notice required by R.C. 4909.19: "(E) [a] proposed notice for newspaper publication *fully disclosing the substance of the application*. The notice shall prominently state that *any person, firm, corporation, or association* may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable."<sup>17</sup> R.C. 4909.19 sets forth the details of the newspaper publication referred to in R.C. 4909.18, providing

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<sup>14</sup> See *Comm. Against MRT*, 52 Ohio St.2d at 233, 371 N.E.2d at 549; *Ohio Assn. of Realtors v. Pub. Util. Comm.* (1979), 60 Ohio St.2d 172, 176, 14 O.O.3d 409, 398 N.E.2d 784.

<sup>15</sup> *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 367, 376, 10 O.O.3d 493, 384 N.E.2d 264.

<sup>16</sup> Other provisions of the Revised Code set out notice requirements to municipal corporations as well. See e.g. R.C. 4909.43. (Appx. 000017).

<sup>17</sup> R.C. 4909.18 (emphasis added).

that the utility must publish “*the substance and prayer of its application*” once a week, for three consecutive weeks in newspapers of general circulation throughout the affected areas.<sup>18</sup>

**B. The Purposes Of R.C. 4909.18 And 4909.19 Are To Provide Any Person, Firm, Corporation, Or Association With An Opportunity To File An Objection To The Increase.**

In construing R.C. 4909.18 and 4909.19, this Court properly recognized that the purpose of publication, as evidenced by the plain language of R.C. 4909.18(E), is to provide any person, firm, corporation, or association, an opportunity to participate in the regulatory process by filing objections to the increase under R.C. 4909.19.<sup>19</sup> Thus, notice must apprise affected subscribers, not utility rate experts, of the utility’s proposal to increase rates. That the statute requires notice be provided by newspaper publication in the utility’s service territory is further evidence that notice is directed to members of the public, not to parties or “interested persons.”

The notice requirement that attaches to an application to increase rates is different than any other notice requirement associated with a utility’s application for a rate increase. It differs from the notice requirements in R.C. 4909.19 that relate to the Staff Report -- where the statute requires a copy of the report to be sent to mayors of municipal corporations affected by the application, and “to such other persons as the commission deems interested.” It differs from the written notice required, under R.C. 4909.19, of the date for the taking of testimony on the applications and objections which may be offered by “interested parties.” It also differs from the notice requirement of R.C. 4903.083 that pertains to notice to the public that public hearings in the communities served by the utility will be held on the rate increase application.

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<sup>18</sup> R.C. 4909.19 (emphasis added) (Appx. 000015).

<sup>19</sup> *Comm. Against MRT*, 52 Ohio St.2d at 233, 371 N.E.2d at 549.

**C. This Court Has Determined That The Notice Under R.C. 4909.19 Must Convey The “Essential Nature Or Quality Of The Proposal To Be Disclosed To Those Affected By The Rate Increases.” (*Commt. Against MRT v. Pub. Util. Comm.*) (1977).**

There is no specific test or formula this Court applies in reviewing the sufficiency of the utility’s notice. This Court has, however, determined that the notice must convey “the essential nature or quality of the proposal” to “those affected by the rate increases.”<sup>20</sup> Notice under R.C. 4909.19 must state “the reasonable substance of the proposal so that consumers can determine whether to inquire further as to the proposal or intervene in the rate case,” this Court has ruled.<sup>21</sup>

There are two seminal cases that should guide this Court in construing the adequacy of notice under R.C. 4909.19. They are *Committee Against MRT v. Pub. Util. Comm.*<sup>22</sup> and *Ohio Assn. of Realtors v. Pub. Util. Comm.*<sup>23</sup> It is in the context of these cases that this Court should view the sufficiency of Vectren’s notice.

In *Committee Against MRT* this Court reviewed the adequacy of notice in a telephone utility case. In the PUCO case that was appealed, the utility had proposed, for certain of its exchanges, to alter the way it charged customers. Instead of a traditional flat, unlimited usage charge, the utility proposed to charge on the basis of usage, measured by minutes. And yet, the utility failed to mention its proposal in the notice, although it had fully explained the measured rate service in its application filed at the Commission.

This Court found that subscribers reading the published notice would not have known of the Company’s “innovative” usage rate plan.<sup>24</sup> Nor would they have had any reason to view the

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<sup>20</sup> *Id.*

<sup>21</sup> *Ohio Assn. of Realtors*, 60 Ohio St.2d at 176, 398 N.E.2d at 786.

<sup>22</sup> *Commt. Against MRT*, 52 Ohio St.2d 231.

<sup>23</sup> *Ohio Assn. of Realtors*, 60 Ohio St.2d 172.

<sup>24</sup> *Commt. Against MRT*, 52 Ohio St.2d at 234, 371 N.E.2d at 549.

application filed at the PUCO, or had any interest in participating at the Commission hearings.<sup>25</sup> Thus, because of the insufficient notice, the subscribers comprising the Committee Against MRT were denied an opportunity to present evidence at the PUCO hearings on which exchanges would be converted to measured rate service.<sup>26</sup> Additionally they were unable to challenge the new rate service itself.<sup>27</sup> Hence, this Court determined that general knowledge that there is a rate increase proposed is not enough to meet the statutory notice obligations of R.C. 4909.19. Rather customers should receive notice of how the increase is to be collected from them, so that they can judge the effect of the proposal upon them, and make an informed decision as to whether to object.

Two years later, another appeal was taken on the sufficiency of notice under R.C. 4909.19 in *Ohio Assn. of Realtors*. There too, a telephone utility had filed an application for an increase in rates that included a request to approve a new mandatory measured rate service to collect revenues from the utility's business subscribers.<sup>28</sup> Even though a portion of the application converted the utility's business customers to a measured rate service, the utility failed to refer to the change in its published notice.<sup>29</sup>

The utility, however, argued that any insufficiency in notice was cured because it mailed information about the proposed measured service in brochures placed in customers' bills.<sup>30</sup> While the Court examined the brochures and determined that they provided a reasonable explanation of the service, it nonetheless found that the utility had violated R.C. 4909.18. The

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<sup>25</sup>Id.

<sup>26</sup>Id.

<sup>27</sup>Id.

<sup>28</sup>*Ohio Assn. of Realtors*, 60 Ohio St.2d at 173, 398 N.E.2d at 784.

<sup>29</sup>Id.

<sup>30</sup>Id. at 175.

subsequent information provided by the utility “cannot stand in the stead of the requirement of a reasonable statement of such rate amendment proposal to be placed in the legal notice.”<sup>31</sup>

Essentially, this Court rejected an after-the-fact remedy to cure the deficient notice to the public.

The notice requirements of R.C. 4909.19 are “not an unreasonable one,” opined this Court.<sup>32</sup> The notice must state the “reasonable substance of the proposal so that consumers can determine whether to inquire further as to the proposal or intervene in the rate case.”<sup>33</sup> Notice was insufficient because it failed to advise customers of the utility’s proposal to change from flat rate service, with unlimited calls, to measured rate service for business customers. Finding that the facts of the case were not materially different than facts in *Committee Against MRT*, the Court reversed the Commission. It also ordered additional hearings after appropriate notices were reissued, the same remedy that OCC is seeking to cure the error in this case.

**D. Vectren Proposed In Its Application To Materially Change The Method For Charging Customers For Distribution Service By Switching To A Straight Fixed Variable Rate Design. Yet, In Its Notice To The Public, Vectren Failed To Convey The Nature Or Quality Of The Straight Fixed Variable Rate Design Proposal.**

**1. The Application Proposal**

In Vectren’s application, it proposed to significantly change how it charged residential customers for gas distribution service.<sup>34</sup> Prior to this rate case filing, Vectren had collected gas

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<sup>31</sup>Id.

<sup>32</sup>Id. at 176.

<sup>33</sup>Id.

<sup>34</sup>Vectren proposed a decoupling in its application to be used in the transition to complete straight fixed variable rate design. Although OCC supported decoupling in lieu of the straight fixed variable rate design, this appeal does not challenge the propriety of choosing one rate design (revenue decoupling) over another (SFV). See R. 106 (OCC Initial Brief).

distribution revenues from residential customers by way of a relatively low fixed customer charge (\$7.00) and a volumetric rate for each unit or Ccf of gas used.

The Company however, in response to customers allegedly using less gas (due to high gas prices and conservation efforts), proposed to implement a wholly different rate design called “straight fixed variable.” Under Vectren’s complete straight fixed variable rate design there is no volumetric rate to collect costs for distribution service, and instead, customers, regardless of usage, pay the same unavoidable fixed customer charge for distribution service.

Vectren proposed in its application to implement straight fixed variable rate design in a staged process. The first stage (Stage 1) was to go into effect on the effective date of rates ordered by the PUCO.<sup>35</sup> Under Stage 1, Vectren proposed seasonal customer charges with a \$10.00 charge during the summer months and a \$16.75 per month charge during the winter months.<sup>36</sup> The proposed volumetric rate was lower than the current volumetric rates for residential distribution service.<sup>37</sup>

The second stage (Stage 2) proposed in the Application was to be implemented November 1, 2010. The customer charge proposed for Stage 2 was \$10.00 in the summer months, with a \$22.00 charge in winter months.<sup>38</sup> Volumetric rates continued to decline in Stage 2 as well.<sup>39</sup> Then in its next rate case, Vectren testified it would propose the same approach

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<sup>35</sup>R. 19 (Testimony of Vectren Witness Ulrey at 5-7). (Supp. 000024).

<sup>36</sup>R. 13 (Schedule E-1B, Sheet No. 10, Rate 310 Residential Sales Service; Sheet 11, Rate 315 Residential Transportation Service, Stage 1 Rates. (Supp. 000139).

<sup>37</sup>Id.

<sup>38</sup>Id.

<sup>39</sup>Id.

again with the entire proposed base revenue increase reflected in increased fixed customer charges. This would again be followed by a Stage 2 rate change one to two years thereafter.<sup>40</sup>

## **2. The Notice To Customers (Supp. 000124)**

The notice alerted customers that they could file an objection to Vectren's Application, pursuant to R.C. 4909.19, and could allege that the Application contains proposals that were unjust and discriminatory or unreasonable. This language however, was not "prominently displayed" as required by R.C. 4909.18(E). Rather it was one sentence in the fourth paragraph of the preamble to the rates, conveyed in the same type and font size as any of the other statements. (R. POP,92608). Also in the preamble to the rate schedules, Vectren summarily stated that "[A]dditionally, VEDO proposes changes to the rate design of Rate 310 (Residential Sales Service) and Rate 315 (Residential Transportation Service) that initiate a gradual transition to a straight fixed variable rate for distribution service." Without further explanation, this statement was unintelligible to customers, and conveyed no information as to what a straight fixed variable rate for distribution service consisted of and the impact this transition would have on their bills.

Then in the rate schedules listed in the notice, the changes in residential sales and transportation customer charges showed proposed charges of \$16.75 per meter (November through April) and \$10.00 per meter (May through October) with associated volumetric charges. Notably these changes were not labeled "Stage 1" -- but were presented to Vectren's customers as the entire proposal.

What is more notable than what was said, was what was not said -- the notice did not include any explanation of what "straight fixed variable rate for distribution service" meant. Nowhere in the notice was the "gradual transition" defined. Indeed, a customer reading the

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<sup>40</sup>R. 19 (Testimony of Vectren Witness Ulrey at 6).

notice would not be able to discern that the rates presented were anything but Vectren's entire rate proposal. However, missing from the notice was the actual "Stage 2 rates" contained in Vectren's application, and the date at which the Stage 2 rates were proposed to go in effect. In fact "Stage 2 rates" were not even mentioned in the Notice, and customers would not have known that the noticed customer charge and volumetric rates were a "Stage 1" proposal, with Stage 2 yet to come.

And yet Vectren's Application sought approval of both Stage 1 and Stage 2 rates. Moreover, the PUCO approved Stage 2 rates for customers, despite the fact that customers never received notice of them. Indeed the PUCO not only implemented Stage 2 rates, but imposed a more aggressive approach to SFV than the Company advocated or proposed, and ordered *a full SFV rate design* starting on February 22, 2010.

**E. VEDO's Notice Failed To Convey The Nature And Quality Of Its SFV Proposal And The Stage 2 Rates, And Thus The Notice Is Legally Inadequate Under The Controlling Precedent Of *Committee Against MRT*<sup>41</sup> And *Ohio Assn. Of Realtors*.<sup>42</sup>**

The facts presented in *Committee Against MRT*<sup>43</sup> and *Ohio Assn. of Realtors*<sup>44</sup> are similar to the facts presented in this case. All three cases focus upon rate application proposals that were intended to significantly change the way the utility collected revenue from customers -- a rate design issue. In *Committee against MRT v. Pub. Util. Comm.*<sup>45</sup> and *Ohio Assn. of Realtors v.*

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<sup>41</sup>*Comm. Against MRT*, 52 Ohio St.2d 231.

<sup>42</sup>*Ohio Assn. of Realtors*, 60 Ohio St.2d 172.

<sup>43</sup>*Comm. Against MRT*, supra.

<sup>44</sup>*Ohio Assn. of Realtors*, supra.

<sup>45</sup>*Comm. Against MRT*, 52 Ohio St.2d 231.

*Pub. Util. Comm.*<sup>46</sup> the proposed change was a radical departure from how the telephone utility charged customers -- switching from a flat rate to a measured rate, and collecting revenues on the basis of usage alone. The Court rightfully characterized these changes as “innovative” and deserving of notice to the public. In this case, where customers have for thirty years paid a relatively low fixed rate and a relatively higher volumetric rate, the change to a complete SFV, accomplished in stages, is also “innovative” -- and not in a good way for consumers. The public deserved notice of such a change.

Instead, the public did not receive adequate notice of the rate design change here, similar to the customers in *Committee Against MRT*<sup>47</sup> and *Ohio Assn. of Realtors*<sup>48</sup> who did not receive any notice of the utilities’ proposals. Although here Vectren did provide a little bit of information in its notice on this subject, unlike the utilities in *Committee against MRT*<sup>49</sup> and *Ohio Assn. of Realtors*.<sup>50</sup> But its notice was so deficient that it was meaningless. Customers were not notified of the stages of the SFV, nor were the concept of SFV or its impact on their bills explained to them. Any reference to “a straight fixed variable rate” and “a transition” to the SFV rate design would not have been understandable to customers. The notice did not explain what straight fixed variable rates were and did not convey to customers what would happen to their bills if Vectren’s proposal was adopted. The notice did not even convey to customers that this proposal was only “Stage 1,” with more increases to the customer charge portion of the bill to come.

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<sup>46</sup>*Ohio Assn. of Realtors*, 60 Ohio St.2d 172.

<sup>47</sup>*Commt. Against MRT*, 52 Ohio St.2d 231.

<sup>48</sup>*Ohio Assn. of Realtors*, 60 Ohio St.2d 172.

<sup>49</sup>*Commt. Against MRT*, 52 Ohio St.2d 231.

<sup>50</sup>*Ohio Assn. of Realtors*, 60 Ohio St.2d 172.

Vectren' notice did not alert customers of the essential nature and quality of Vectren's proposal. Customers of Vectren were not provided notice as to what Vectren's SFV proposal was and how it would affect them. They could not make an informed decision as to whether to object, just like the customers in *Committee Against MRT*<sup>51</sup> and *Ohio Assn. of Realtors*. For these reasons, the notice was legally inadequate under the standards discussed in *Committee Against MRT*<sup>52</sup> and *Ohio Assn. of Realtors*.<sup>53</sup>

**F. R.C. 4909.18 And R.C. 4909.19 Are Jurisdictional Requirements That Must Be Met In Order To Confer The Commission With Jurisdiction To Consider The Application. *Duff v. Pub. Util. Comm.* (1978).<sup>54</sup>**

While arguments may be made claiming that OCC should have objected to the inadequacies of notice sooner than it did,<sup>55</sup> such arguments must fail. This Court has determined that the notice provisions of R.C. 4909.18 and 4909.19 are jurisdictional.<sup>56</sup> That is, there must be compliance with the notice requirements of these statutes in order for the Commission to obtain subject matter jurisdiction to approve the application itself. The Commission's failure to enforce the notice provisions of R.C. 4909.19, as construed in *Committee Against MRT*, created a

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<sup>51</sup>*Comm. Against MRT*, 52 Ohio St.2d 231.

<sup>52</sup>*Id.*

<sup>53</sup>*Ohio Assn. of Realtors*, 60 Ohio St.2d 172.

<sup>54</sup>*Duff*, 56 Ohio St.2d at 376, 384 N.E.2d at 272.

<sup>55</sup>An order was issued by the Attorney Examiner on January 16, 2008, approving the notice for publication. (R. 24). OCC did not take an interlocutory appeal on the Entry, but nonetheless raised the inadequacy of notice in its objections to the Staff Report, filed on July 16, 2008. (R. 55). Additionally, OCC further pursued the issue in cross-examination at the hearing and briefed the issue. OCC applied for rehearing on this as well.

<sup>56</sup>*Duff*, 56 Ohio St.2d at 375-376, 384, N.E. 2d at 271-272.

jurisdictional defect which rendered the rate order void ab initio. Hence, OCC has a right to attack jurisdiction at any time, since subject matter jurisdiction cannot be waived.<sup>57</sup>

Neither should arguments succeed that OCC is engaging in an unlawful collateral attack on the Commission's Order. A PUCO Order can be attacked collaterally through several mechanisms. A PUCO order can be attacked collaterally through the filing of a complaint, under R.C. 4905.26.<sup>58</sup> A PUCO order can also be attacked through the process detailed in R.C. 4903.10 -- where the Commission had no jurisdiction to approve rate design under deficient notice, rendering the PUCO order void, a nullity, and subject to collateral attack.<sup>59</sup>

Indeed, the procedural history of *Ohio Assn. of Realtors* is a testament to the fact that collateral attack is appropriate and should be allowed even though it may occur several years later. In *Ohio Assn. of Realtors*, the utility applied for mandatory measured rate service in 1974.<sup>60</sup> After notice and hearings, the PUCO in 1976 approved the new rates, including the measured rate service for business customers.<sup>61</sup> Two years later the Ohio Association of Realtors filed a complaint case claiming the rate order was unlawful because it did not comply with the

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<sup>57</sup>*Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 233, 1996 Ohio 224, 661 N.E.2d 1097, reconsideration denied (1996), 75 Ohio St.3d 1453, 663 N.E.2d 333, citing to *Gates Mills Investment Co. v. Parks* (1971), 25 Ohio St.2d 16, 20, 54 O.O.2d 157, 266 N.E.2d 552 ("The failure of a litigant to object to subject-matter jurisdiction at the first opportunity is undesirable and procedurally awkward. But it does not give rise to a theory of waiver, which would have the force of investing subject matter jurisdiction in a court that has no jurisdiction." (citations omitted)).

<sup>58</sup>*Western Reserve Transit Authority v. Pub. Util. Comm.* (1974), 39 Ohio St.2d 16, 18, 68 O.O.2d 9, 313 N.E.2d 811, appeal after remand (1976), 47 Ohio St.2d 32, 1 O.O.3d 20, 350 N.E.2d 668.

<sup>59</sup>See *State of Ohio v. Western Union Telegraph Co.* (1951), 154 Ohio St. 511, 520, 43 O.O. 488, 97 N.E.2d 2.

<sup>60</sup>*Ohio Assn. of Realtors*, 60 Ohio St.2d at 172, 398 N.E.2d at 784. Initially appellant filed to reopen the rate case on the basis that the rate order was unlawful due to notice defects. The Commission denied the motion as untimely and opened the complaint docket. *Id.*

<sup>61</sup>*Id.*

notice provisions of R. C. 4909.19. In 1978, the PUCO issued an order in the complaint case finding that the Ohio Association of Realtors had not met its burden of showing that the measured rate tariff approved in 1976 was unlawful due to inadequate notice.<sup>62</sup> An appeal was taken in 1979 three years after the service had been in effect. This Court permitted the appeal and ruled in favor of the appellant finding that the notice was deficient under R.C. 4909.19.<sup>63</sup>

**G. Because The Commission Lacked Jurisdiction To Approve The Straight Fixed Variable Rate Design and Stage Rates Due To The Deficient Notice, This Court Should Vacate the Stage 2 Rates.**

As discussed supra, the Commission lacked jurisdiction to approve Stage 2 rates and the move to a complete straight fixed variable rate design because the notice to customers was inadequate. The Commission's Order in this respect was unlawful and should be reversed. The Commission should be ordered as well to vacate the Stage 2 rates, and return to the Stage 1 rate structure.

**Proposition of Law 2:**

**Where A Utility Fails To Provide Adequate Notice In A Rate Related Proceeding And The Customers' Property Interests, Established By Statute, Rules, Or Understandings Are Implicated, The Customers' Due Process Rights Are Violated.**

OCC alleges that a statutory right to notice exists above and beyond the confines of R.C. 4909.18 and 4909.19. This right is a constitutionally protected due process right. Property interests are created by, among other things, R.C. 4905.70 and 4929.02(A)(4). Because there are property interests involved, customers must be afforded due process, prior to the state (PUCO) taking action to terminate or diminish those property interests. Due process requires notice and

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<sup>62</sup>Id.

<sup>63</sup>Id.

opportunity to be heard. Because the notice was insufficient, customers' due process rights were violated.

In resolving this claim of error, the Court must examine the statutes, and make a determination as to whether these statutes establish a property right that is constitutionally protected. The Court will need to engage in constitutional analysis of "property interests" before resolving this issue. Hence, the Court will need to rule on a constitutional issue. This would be a question of law.

While this Court has recognized that on some issues of law, it will acknowledge and utilize the specialized expertise of the agency, the Commission is not an expert on constitutional issues. This Court is much better suited to address those issues and should engage in an independent review of these issues of law.

**A. The Due Process Clause Of The Ohio And U.S Constitution Requires Notice And Opportunity To Be Heard When An Interest In Property Is Sought To Be Terminated Or Diminished By The State.**

"It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under the law."<sup>64</sup> --*S.Ct. Justice William O. Douglas*

Under the due process clause of the U.S. Constitution, no state shall deprive any person of life, liberty, or property, without due process of law.<sup>65</sup> The Constitution of the State of Ohio,

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<sup>64</sup>*Joint Anti-Fascist Refugee Comm. v. McGrath* (1951), 341 U.S. 123, 179, 71 S.Ct. 624, 95 L.Ed. 817 (Douglas, J. concurring).

<sup>65</sup>Fourteenth Amendment to the United States Constitution (Appx. 000026).

Article I, Section 1, (Appx. 000024) sets forth as an inalienable right, the right to enjoy and defend liberty and to protect property. Section 16 of Article I of the Ohio Constitution provides that “every person, for an injury done him in his land, goods, person, or reputation shall have remedy by due course of law\*\*\*.” (Appx. 000025) In Ohio “due course of law” is the equivalent to “due process of the law” as it appears in the U.S. Constitution, Amendment XIV.<sup>66</sup>

The U.S. Supreme Court has determined that “[t]he most basic requirement of due process is that individuals receive notice and a meaningful opportunity to be heard.”<sup>67</sup> The Ohio Supreme Court is in accord: “The most basic requirement of due process is that individuals receive notice and a meaningful opportunity to be heard.”<sup>68</sup> The requirements of procedural due process come into play when the state or an agency of the state, such as the PUCO, seeks to terminate interests encompassed by the 14<sup>th</sup> amendment’s protection of liberty and *property*.<sup>69</sup> In other words, when the state seeks to terminate a protected interest it must afford “notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective.”<sup>70</sup>

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<sup>66</sup>*In re Pollak* (C.P. 1962), 89 Ohio L. Ab. 112, 182 N.E.2d 69.

<sup>67</sup>*Grannis v. Ordean* (1914), 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363, *Hagar v. Reclamation Dist. No. 108* (1884), 111 U.S. 701, 708, 4 S.Ct. 663, 28 L.Ed. 569.

<sup>68</sup>See e.g., *Caldwell v. Carthage* (1892), 49 Ohio St. 334, 348, 31 N.E. 602; *Ohio Assn. of Pub. School Emps., AFSCME, AFL-CIO v. Lakewood City School Dist. Bd. of Edn.* (1994), 68 Ohio St.3d 175, 176, 1994 Ohio 354, 624 N.E.2d 1043.

<sup>69</sup>*Board of Regents of State Colleges v. Roth* (1972), 408 U.S. 564, 570, 92 S.Ct. 2701, 33 L.Ed.2d 548.

<sup>70</sup>*Bell v. Burson* (1971), 402 U.S. 535, 542, 91 S.Ct. 1586, 29 L.Ed. 2d 90. See also *Cleveland Bd. of Edn. v. Loudermill* (1985), 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (before the state may deprive a person of a property interest, it must provide procedural due process consisting of notice and a meaningful opportunity to be heard.)

**B. An Interest In Property Protected By The Due Process Clause Is Created By Existing Rules Or Understandings From An Independent Source Such As State Law.**

Property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.<sup>71</sup> *Goldberg v. Kelly*<sup>72</sup> represents a transition point for the U.S. Supreme Court where it initiated a change in how due process was construed, extending due process protection to a variety of interests not recognized by the common law. Since then, the U.S. Supreme Court has held that property interests may be varied: “The fourteenth amendment procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests -- property interests -- may take many forms.”<sup>73</sup> Furthermore the U.S. Supreme Court has associated property rights with “entitlement.” “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.”<sup>74</sup>

A property interest or entitlement may be created from different sources. As recognized by the U.S. Supreme Court, property interests are created and their dimensions defined by an independent source such as state law, rules, or understandings. These state laws, rules, or

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<sup>71</sup>See *Connell v. Higginbotham* (1971), 403 U.S. 207, 208, 91 S.Ct. 1772, 29 L.Ed.2d 418; *Bell v. Burson*, 402 U.S. at 539; *Goldberg v. Kelly* (1970), 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287.

<sup>72</sup>*Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (Recipients of New York’s Aid to Families with Dependent Children (AFDC) faced termination of their benefits without any kind of hearing. The AFDC recipients sued and the Court held that such benefits constituted an entitlement for qualified individuals and the plaintiffs were entitled to a hearing before being deprived of their benefits.)

<sup>73</sup>*Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576.

<sup>74</sup>*Id.*

understandings secure certain benefits and support claims of entitlement to those benefits.<sup>75</sup>

Entitlements to benefits in the realm of the public utility field are not unheard of. Indeed federal constitutional cases have recognized confiscation of a utility's property interest where the rate order is unjust and unreasonable in its consequences,<sup>76</sup> when viewed in its entirety.<sup>77</sup>

On occasion as well, courts have found confiscation of a *customer's* property interest related to the provision of public utility service. For instance in *Memphis Light, Gas & Water Div. v. Craft* (1978),<sup>78</sup> the U.S. Supreme Court held that customers asserted a legitimate claim of entitlement to continued utility service within the due process clause of the fourteenth amendment. There several customers sued the utility requesting declaratory and injunctive relief. The customers had duplicate utility meters and in spite of efforts they made to correct the problem, they were consistently double-billed. In time the utility discontinued their service for nonpayment. The U.S. District Court for the Western District of Tennessee ruled that the utility service was not property. The Sixth Circuit Court of Appeals disagreed. The U.S. Supreme Court upheld the Sixth Circuit, emphasizing that existing state law defined constitutionally

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<sup>75</sup>Id.

<sup>76</sup>*FPC v. Hope Natural Gas Co.* (1944), 320 U.S. 591, 602, 64 S.Ct. 281, 88 L.Ed. 333. Indeed some have espoused the counterpart to such a principle, claiming that if unreasonably low rates for utilities are considered "unjust and unreasonable" amounting to a property interest protected by due process, then unreasonably high rates to customers should amount to a property interest protected by due process as well. *Georgia Power Co. v. Allied Chemical Corp.* (Ga 1975), 233 Ga. 558, 572, 212 S.E.2d 628 (Gunter, J. dissenting)(Ingram, J. dissenting). There the dissent argued that if rates are judged to be unreasonably low on basis of constitutional grounds, one ought to be able to decide whether an order is unreasonably high. "To undertake one and decline the other, is to my mind a denial of equal protection of the law. Simple justice demands equality before the law. To rule the court is open to relieve the utility company from an unjust and unreasonable order but not the consumer mocks the constitutional protections which we cherish and herald as available to all who are aggrieved." Id.

<sup>77</sup>*FPC v. Natural Gas Pipeline Co.* (1942), 315 U.S. 575, 586, 62 S.Ct. 736, 86 L.Ed. 1037.

<sup>78</sup>*Memphis Light, Gas & Water Div. v. Craft* (1978), 436 U.S. 1, 9-10, 98 S.Ct 1554, 56 L.Ed. 2d 30.

protected property rights. Because Tennessee law held a public utility liable for damages resulting from wrongfully terminated service where the utility bill was being disputed, the customers had a property interest, requiring due process (notice and hearing).

A number of federal district courts and courts of appeal have held as well that continued utility service is property.<sup>79</sup> In particular the U.S. Sixth Circuit Court of Appeals has concluded that claims to continued utility service constitute “property.”<sup>80</sup> It is within this expanding framework in defining utility customers’ rights that the Court should assess whether customers

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<sup>79</sup>*Condosta v. Vermont Electric Cooperative, Inc.* (D.Vt. 1975), 400 F.Supp. 358, 365-366 (finding that under state law a customer seeking to recover for termination of electricity service had a property interest – “as with the entitlement to routes for airlines, channels for television stations and pension and social security benefits, this plaintiff’s entitlement to electric service is subject to protection as a property right.”(citations omitted);

*Donnelly v. City of Eureka* (D. Kansas 1975), 399 F. Supp. 64, 67-68 (termination of water service requires due process procedures -- “whatever the classification of utility services, be they rights, privileges, or entitlements, such life-sustaining services would seem to fall within the same constitutional protections afforded welfare benefits, wages, drivers’ licenses, reputation in the community, and possession of personal property, all as has been previously decided by the United States Supreme Court”) (citations omitted);

*Limuel v. Southern Union Gas Co.* (W.D. Tex. 1974), 378 F.Supp. 964, 966-67( finding that termination of utility service over billing dispute requires due process -- “The majority of courts considering the question have had no difficulty in considering continued utility service without termination except for cause to be a ‘property’ right within the meaning of the Fourteenth Amendment.”(citations omitted));

*Bronson v. Consolidated Edison Co. of New York, Inc.* (S.D.N.Y. 1972), 350 F.Supp. 443, 447 (holding that electric service termination involved a property right -- “ It is beyond doubt that electric service can become as vital to the existence and livelihood of an individual as a driver’s license or a welfare check; indeed, it has been held on several occasions that when termination of such service is threatened the same constitutional safeguards apply.” (citations omitted);

<sup>80</sup>*Craft v. Memphis Light, Gas and Water Division* (C.A.6, 1976), 534 F.2d 684, 687, 21 Fed.R.Serv.2d (Callaghan) 741, affirmed (1978), 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30; *Palmer v. Columbia Gas of Ohio, Inc.* (C.A.6, 1973), 479 F.2d 153, 160-161, 72 O.O.2d 337, 479 F.2d 153 (“utility service is a specialized type of property which presents distinct problems in our economic system, the taking of which may impose tremendous hardships upon its customers”)(Citations omitted).

of Vectren have a property interest. If the answer is in the affirmative, then customers must be accorded due process, before such interests are terminated or diminished.

**C. R.C. 4905.70 And 4929.02(A)(4), Along With Customer Funding And Customer Participation In Past DSM Programs, Have Created A Property Interest Protected By The Due Process Clause.**

In Ohio, for customers of Vectren, there are rules that secure certain benefits and support claims of entitlement to those benefits. Customers of Vectren have legitimate claims of entitlement or “property” rights to savings in gas that they have committed to make through investment in energy efficiency technologies and participation in demand-side management (“DSM”) programs.

The impetus in part for such programs came from the relatively recent codification of state energy efficiency policies in the Ohio Revised Code. In 2001, R.C. 4905.70 was enacted, requiring the PUCO to initiate programs that promote and encourage conservation of energy and a reduction in the growth rate of energy consumption. Similarly, R.C. 4929.02(A)(4), enacted in 1996, establishes as a policy of the state the encouragement of innovation and market access for cost-effective supply- and demand-side natural gas services and goods.

These statutory policies, in large measure, have spawned the development of demand-side management programs which are paid for, in part, by customer funding. In the Vectren service territory, since 2005, gas distribution rates paid by residential customers have included expenses for annual DSM funding.<sup>81</sup> Beginning in 2007, more funding for DSM was contributed by the Company, as a result of a stipulation reached in the prior Vectren alternative regulation

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<sup>81</sup>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 Service and Related Matters, et al.*, PUCO Case No. 04-571-GA-AIR (April 13, 2005) Opinion and Order (PUCO order approving a stipulation with low-income conservation funding of \$1.1 million per year). (Appx. 000027).

filing.<sup>82</sup> In the PUCO rate case under appeal here, DSM funding continued through PUCO-approved rates that incorporate customer and utility funding amounting to \$4 million of DSM investment annually.<sup>83</sup>

The benefit of such programs is that they provide customers with tools to reduce energy consumption, and thus, lower their gas distribution bills. Vectren, for instance, currently offers its customers demand-side management programs that include programs to incentivize customers to invest in energy efficient equipment.<sup>84</sup> Customers of Vectren have participated in these types of conservation programs, making investment decisions based on the pay-back period -- the time it takes to recover the capital spent on the investment in the energy efficient technology. Past conservation efforts were made, based on the existing rate design of Vectren, featuring a lower fixed customer charge, coupled with a higher volumetric charge.

It is an undeniable fact that a change to the SFV rate design, however, will extend the pay-back period of all energy efficiency investments (past and future) because a greater portion of the bill will be recovered in the fixed charge and a smaller portion in the volumetric portion.<sup>85</sup> Customers who made conservation investment decisions in the past in good faith and in reliance

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<sup>82</sup>*In the Matter of the Application of Vectren Energy Delivery 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*, PUCO Case No. 05-1444-GA-UNC, Supplemental Opinion and Order (June 27, 2007)(PUCO order approving a stipulation with an additional \$2 million per year in Company funded energy efficiency measures). (Appx. 000047).

<sup>83</sup>*In the Matter of the Application of Vectren Energy Delivery of Ohio for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters*, PUCO Case No. 07-1080-GA-AIR Opinion and Order (Jan. 7, 2009) at 12 (Supp. 000222).

<sup>84</sup>See testimony of Vectren Witness Matthew Rose (R.17) at 6-8 (describing VEDO's DSM program portfolio, which includes five residential and three commercial programs.) (Supp. 000001).

<sup>85</sup>See testimony of OCC Witness Novak (R. 63) at 21.

upon the regulatory rate design in place, will find their pay-back period extended and thus, will receive less benefits from their efforts under a complete SFV rate design.

Customers have become entitled to benefits -- by virtue of the energy efficiency legislation, by virtue of customer funding of DSM programs, and by virtue of customer decisions to invest in DSM technologies. Those benefits, however, will be undermined by the SFV rate structure. These are property rights akin to those recognized by the courts as being protected by the due process clause of the U.S. and Ohio Constitutions. These property rights are being diminished by the SFV rate design approved by the PUCO. These property interest rights can only be diminished if customers have been provided notice and opportunity to be heard on the SFV proposal. This opportunity never presented itself because Vectren failed to give adequate legal notice to customers of its move to the straight fixed variable rate design or the specific impact that "Stage 2" rates would have on customers' bills.

Nor does any prior holding of this Court preclude the Court from concluding that a property interest exists for utility customers of Vectren, specifically with respect to the provision of demand-side management programs offered to fulfill the State of Ohio's energy policy initiatives. This Court's prior holdings that a utility ratepayer has no constitutional right to notice and hearing in rate-related matters have all hinged upon the cases where there was *no statutory right asserted*.

This position emanates from dissent of Justice Brown in *Committee Against MRT*. That dissent was adopted by the majority of the Court in *City of Cleveland v. Pub. Util. Comm.* (1981).<sup>86</sup> In that case, the utility filed an application for street lighting service that was not for a rate increase, and was allegedly a new service filing. The PUCO implemented the rates without

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<sup>86</sup>*City of Cleveland v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 446, 453, 21 O.O.3d 279, 424 N.E.2d 561.

conducting a hearing. Cleveland challenged the PUCO on grounds that included constitutional violation of its due process rights under the Ohio and the U.S. Constitutions. Since the PUCO never found that the application “may be unjust and unreasonable” under R.C. 4909.18, a hearing was not required prior to rates being implemented, this Court reasoned. Thus, “the ratepayer had no statutory right to a hearing or notice and thus failure to so provide did not constitute a violation of due process.”<sup>87</sup>

Other Ohio Supreme Court cases where constitutional claims of due process violations have been rejected, have been brought, as well, in cases where there was no statutory right to notice or a hearing. In *Armco, Inc. v. Pub. Util. Comm.* (1982),<sup>88</sup> where this Court found no due process violation, it concluded that there was no statutory right to a hearing -- rather the PUCO had authority to implement flexible pricing under R.C. 4905.31(E). That statute did not require notice and opportunity to be heard. This Court also rejected constitutional claims based on due process in *MCI Telecommunications Corp. v. Pub. Util. Comm.*<sup>89</sup> (1987), after finding that no statutory right to a hearing existed in the context of a Commission-ordered investigation. Additionally, in *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1988),<sup>90</sup> in rejecting due process arguments, the Court relied upon the fact that no statutory right to a hearing existed under a commission-ordered investigation.

Unlike the above cases, here there was a statutory right to a notice and hearing under R.C. 4909.18 and 4909.19. Moreover, additional statutory rights were created, to effectuate the

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<sup>87</sup>Id. at 453.

<sup>88</sup>*Armco, Inc. v. Pub. Util. Comm.* (1982), 69 Ohio St.2d 401, 23 O.O.3d 361.

<sup>89</sup>*MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 306, 513 N.E.2d 337.

<sup>90</sup>*MCI Telecommunications Corp. v. Pub. Util. Comm.* (1988), 38 Ohio St.3d 266, 527 N.E.2d 777.

state's energy efficiency initiatives, via R.C. 4905.70 and 4929.02(A)(4). These statutory rights, coupled with R.C. 4909.18 and 4909.19, create entitlements or benefits to customers that rise to a "property interest" protected by the due process clause of the U.S. and Ohio Constitutions.

These property rights were adversely affected when the Commission approved an abrupt change in rate design, which diminished customers' investment in DSM. This occurred when the rate design was implemented and extended the payback period for such DSM investment. Customers were thus entitled to their constitutional right to notice of such changes. Customers were given inadequate notice, and as a result, were deprived of their procedural due process.

**Proposition of Law 3:**

**The PUCO Should Respect Its Own Precedents Unless The Need To Change Its Position Is Clear And It Is Demonstrated That The PUCO's Prior Decisions Are In Error.**

Case law recognizes the PUCO's authority to change its position; however, such a change cannot be done without appropriate considerations. In *Office of Consumers' Counsel v. Public Utilities Commission*, the Court set forth criteria that the PUCO must adhere to when it changes its position: "\* \* \* Although the Commission should be willing to change its position *when the need therefore is clear and it is shown that prior decisions are in error*, it should also respect its own precedents in its decisions to assure predictability which is essential in all areas of the

law, including administrative law.”<sup>91</sup>

In this case the Commission neither demonstrated clear need to change its position or that its prior decisions were in error. By imposing the SFV rate design on Vectren’s residential customers, the Commission turned its back on thirty years of case precedent supporting a rate design comprised of a low customer charge with a usage-based volumetric charge. The PUCO also turned its back on over thirty years of adhering to the regulatory principle of gradualism. This Court should find that the PUCO’s disregard for prior precedents resulted in rates that were unjust and unreasonable. The PUCO’s Order should be reversed and remanded.

The PUCO has identified gradualism as one of the regulatory principles that it follows in the design of rates.<sup>92</sup> However, for gradualism to have any legitimacy as a regulatory principle, it must be applied with consistency and not haphazardly. Gradualism needs to be applied in a transparent manner so that it is clear that the same principle was applied in an even-handed and predictable manner. For over thirty years gradualism has been used in the design of rates in prior PUCO cases in a manner which has in large respect kept customers’ fixed monthly charge for utility service at a relatively low and stable level.

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<sup>91</sup>*Office of Consumers’ Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 49, 50, 10 OBR. 312, 461 N.E.2d 303, quoting *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d. 431, 71 O.O.2d 393, 330 N.E.2d 1. See also *State ex rel. Auto Machine Co. v. Brown* (1929), 121 Ohio St. 73, 166 N.E. 903. See also *Atchison v. Wichita Bd. of Trade* (1973), 412 US 800, 806, 93 S.Ct. 2367, 37 L.Ed.2d 350 (In 1973 the U.S. Supreme Court set a limit on the power of federal agencies to change prior established policies stating that, while an agency may flatly repudiate its norms, “whatever the ground for the departure [whether it is completely disregarding a policy or simply narrowing its applicability]\*\*\*it must be clearly set forth so that the reviewing court may understand the basis of the agency’s action and so may judge the consistency of that action with the agency’s mandate.”); *Williams Gas Processing Gulf Coast Co.v. FERC* (C.A.D.C. 2006), 475 F.3d 319, 326 (The Court further added that, although not bound by precedent, a demonstration of “reasoned decision-making necessarily requires consideration of relevant precedent.”) (Emphasis added).

<sup>92</sup>Staff Ex. No. 3 (Puican Direct Testimony) at 9 (August 22, 2008). (Supp. 000145).

For example, in a Columbia Gas of Ohio rate case the PUCO rejected implementing a higher customer charge proposed by the utility, even though the customer charge adopted was purportedly lower than the utility's fixed costs. There the Staff recommended, based on principles of gradualism and stability, a fixed customer charge of \$6.00, which was lower than the calculated customer charge of \$7.79.<sup>93</sup> In its decision adopting the Staff-recommended customer charge, the PUCO stated: "While it is true that the customer charge proposed by the Staff *might not recover all customer-related costs*, it is important to consider the customer's expectations, acceptance, and understanding in setting rates and balance these factors accordingly with the determined costs."<sup>94</sup> The PUCO added that, "[t]he Staff's application of the accepted ratemaking principles of gradualism and stability is reasonable."<sup>95</sup>

The PUCO affirmed these principles in another Columbia Gas case where it specifically addressed the recovery of fixed costs through the fixed customer charge. "Staff contends that its proposed customer charge of \$6.25 is reasonable, *since the customer charge is meant to provide a utility only with a partial recovery of its fixed costs* and since the charge it proposes is in keeping with the accepted ratemaking principles of gradualism and stability."<sup>96</sup>

The PUCO also stated in a Cincinnati Gas & Electric rate case "We heard a great deal of testimony at the local hearings regarding the detrimental impact that an increase in the customer

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<sup>93</sup>*In the Matter of the Application of Columbia Gas of Ohio, Inc. to Establish A Uniform Rate for Natural Gas Service Within the Company's Lake Erie Region, Northwest Region, Central Region, Eastern Region, and Southeastern Region*, PUCO Case No. 88-716-GA-AIR (October 17, 1989), Opinion and Order at 87. (Appx. 000098 ).

<sup>94</sup>Id. at 89 (Emphasis added).

<sup>95</sup>Id.

<sup>96</sup>*In the Matter of the Application of Columbia Gas of Ohio, Inc. to Establish a Uniform Rate Within the Company's Northwestern Region, Lake Erie Region, Central Region, Eastern Region, and Southeastern Region*, PUCO Case No. 89-616-GA-AIR (April 5, 1990), Opinion and Order at 80-82. (Appx. 000196)

charge would have on low-income customers. We believe that it is appropriate in this case to keep the customer charge at its current *level in order to minimize rate shock that would otherwise be experienced by residential customers.*<sup>97</sup>

In each of these cases the PUCO set the level of the customer charge by taking into account the principle of gradualism, resulting in small increases to the fixed portion of the customer charge. Gradualism was important to the PUCO because of customer expectations, understandings, and acceptance. Notably, none of these cited cases had an increase in the fixed portions of the customer charge that was even one-third of the size of the increase in this case. Moreover, the PUCO stated that the fixed portion of the customer charge did *not* have to recover all fixed costs.<sup>98</sup> The PUCO has not explained its failure to follow the precedent established in those cases -- why the fixed portion of the customer charge did not have to recover all of the fixed costs in those prior cases, but had to now.

Rather than follow this precedent, in these cases the PUCO Staff claims that almost tripling the fixed monthly customer charge -- from \$7.00 to \$18.37 -- reflects gradualism.<sup>99</sup> The PUCO appears to unreasonably rely on the Company and its Staff's argument that the principle of gradualism has not been ignored by the SFV rate design: "With respect to OCC's arguments concerning gradualism, VEDO notes that the revenue increase in this case for residential customers is only 4.42 percent. The Company contends that because the overall increase rather

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<sup>97</sup>*In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in its Rates for Gas Service to all Jurisdictional Customers*, PUCO Case No. 95-656-GA-AIR (December 12, 1996), Opinion and Order at 46. (Emphasis added) (Appx. 000289)

<sup>98</sup>*In Re Columbia Gas*, PUCO Case No. 88-716-GA-AIR (October 17, 1989), Opinion and Order at 87. (Appx. 000098)

<sup>99</sup>Tr. Vol. VI (Puican) at 36 (August 28, 2008) (Supp. 000212) See also Order at 15. (Supp. 000237).

than a specific component such as the customer charge is less than five percent, the rate design does not violate the principle of gradualism.”<sup>100</sup>

However, in reaching this conclusion, Vectren and the PUCO completely twisted the concept of gradualism similar to forcing a square peg into a round hole. Comparing the distribution component of rates to overall base rates (that include the cost of gas) is misleading, since the distribution rate case had absolutely nothing to do with the commodity price of natural gas. Thus the Commission’s claim that gradualism was recognized in setting the customer charge in this case -- because the increase to customer charges is minimal when compared to the customers’ entire bill -- should be disregarded. Including the commodity of natural gas in this calculation was done for the sole purpose of diluting the magnitude of the increase.

Instead what should be focused on is the magnitude of the increase to the fixed portion of the customer charge -- an increase from \$7.00 to \$18.37 -- clearly more than a five percent increase. Accepting an increase with a magnitude of \$11.37 per customer per month, in a two year period, is done without any resemblance to the principle of gradualism, and demonstrates the PUCO’s failure to be guided by its own regulatory principles in these cases. Such disregard for how the principle of gradualism has been consistently applied in the past harms Vectren’s residential consumers and the public’s confidence in the regulatory process.

Rather than apply gradualism in a manner that keeps the fixed portion of the customer charge at a relatively low and stable level -- consistent with how it has been applied for thirty years -- the PUCO is now claiming that the same gradualism principle justifies an increase of \$11.37. This Court should find that the PUCO abandoned its own past precedent when it

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<sup>100</sup>Order at 10. (Appx. 000237)

implemented SFV. It disregarded the regulatory principle of gradualism in this case without showing there was a need to do so and without showing that the prior precedent was in error. Under the principles espoused in *Office of Consumers' Counsel*, the PUCO's actions in this case must be reversed.

**Proposition of Law 4:**

**The PUCO Violated R.C. 4929.02 And R.C. 4905.70 When It Approved A Rate Design Which Fails To Promote Energy Efficiency And Discourages Conservation.**

The PUCO contravened provisions of R.C. Chapters 4905 and 4929 in adopting the SFV rate design. These Code chapters contain key rate-setting provisions for natural gas distribution service requiring that the PUCO approve rates that promote energy efficiency and encourage conservation in accordance with Ohio law and policy. This Court has repeatedly stated that the PUCO is a creature of statute, and does not have any authority to act beyond what is provided for under Ohio statutes.<sup>101</sup> This Court should find that the Commission has exceeded its authority in this case.

The policy of Ohio is as follows: "It is the policy of this state to, throughout this state: \*\*\* (4) Encourage innovation and market access for cost-effective supply-and demand-side natural gas services and goods;\*\*\*."<sup>102</sup> The PUCO's approval of an SFV rate design is contrary to this Ohio policy because it does not promote customer efforts to engage in conservation of natural gas, and instead encourages increased usage of natural gas. Greater gas use may be evidenced in the Company's own DSM Action Plan: Final Report, which shows weather

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<sup>101</sup>See, e.g., *Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St.3d 1, 1995 Ohio 282, 647 N.E.2d 136.

<sup>102</sup>R.C. 4929.02 (Appx. 000022).

normalized average residential usage for 2008 at 84.6 Mcf<sup>103</sup> compared to the rate case (12 months May 31, 2008)<sup>104</sup> average residential usage of 81.5 Mcf,<sup>105</sup> an increase of 3.1 Mcf or 3.8 percent in a one year period.

It is noteworthy that this increase in average customer usage also contradicts another basis the PUCO relied on in imposing the straight fixed variable rate design. The PUCO relied on eroding sales to justify the SFV rate design.<sup>106</sup> But the Company's own data shows an increase in average customer usage, yet another justification for the SFV rate designs is proven false.

This Court has found that violations of statutes containing state policy warrant a reversing the PUCO's Order and remanding the cause to the PUCO to remedy the statutory violation.<sup>107</sup> For a number of reasons, approval of an SFV rate design by the Commission impedes the development of DSM innovation in Ohio. For example, the SFV rate design sends consumers the wrong price signal by reducing the average cost per unit of gas consumed, thus harming consumers who have invested in energy efficiency by extending the payback period for their investment. The SFV rate design also takes away control that consumers have over their utility bills, by significantly reducing the volumetric portion of their distribution charge under the

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<sup>103</sup>*In re Vectren Energy Delivery of Ohio*, Case No. 07-1080, Vectren Energy Delivery of Ohio DSM Action Plan: Final Report (October 23, 2009) at Table 6, p. 11. See also Motion to Supplement Record on Appeal by the Office of the Ohio Consumers' Counsel, filed on November 4, 2009 in Case No. 09-1547.

<sup>104</sup>Staff Exhibit 1 (Staff Report) at 1 (June 16, 2008). (Supp. 0000243).

<sup>105</sup>VEDO Ex. 9 (Direct Testimony of Jerrold L. Ulrey) at 5 (December 4, 2007) (Supp. 000024)

<sup>106</sup>Order at 11. (Supp. 000222).

<sup>107</sup>*Elyria Foundry Company v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305, 317, 2007 Ohio 4164, 871 N.E.2d 1176. (In the *Elyria Foundry* case a violation of R.C. 4928.02(G), a statute mandating state policy against anticompetitive subsidy relative to competitive retail electric service, was found to have been violated.)

traditional rate design, and by forcing all customers to pay the same customer charge regardless of usage, even if a customer takes no gas at all.

The Commission has a statutory duty to initiate programs that promote conservation. Specifically, R.C. 4905.70 (Appx. 000008) states: “The public utilities commission shall initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs.” The SFV rate design serves the Company’s interests in collecting costs from customers, but fails to promote any customer-initiated conservation efforts for the reasons discussed below. State policy directs the Commission to initiate programs that encourage conservation and reduce energy consumption.

In contrast with its actions in the straight fixed variable gas rate cases, the Commission did uphold statutory requirements pertaining to energy efficiency policy mandates in a recent FirstEnergy case. The PUCO stated: “Likewise, the Commission finds that FirstEnergy’s application for an MRO cannot be approved in the absence of a proposal by the Companies for compliance with the energy efficiency and peak demand reduction requirements of Section 4928.66, Revised Code. The Commission further notes that SB 221 amended the policies of the state, codified in Section 4928.02, Revised Code, to specifically enumerate DSM, time differentiated pricing, and implementation of AMI as policies which should be promoted by the Commission. These provisions were all enacted as part of SB 221, and it is clear that the General Assembly intended for the Commission to consider an electric utility’s plan for

compliance with the energy efficiency and peak demand reduction requirements in conjunction with the consideration of its application for an MRO.”<sup>108</sup>

Although the above case was an electric case, the intent of the legislation and policy mandates for energy efficiency and conservation promotion are similar to the law regarding natural gas utility service.<sup>109</sup> The Commission rejected the FirstEnergy application because of the Company’s failure, *inter alia*, to comply with energy efficiency statutory requirements. The PUCO’s inconsistent treatment of customer-initiated conservation in this case must be reversed.

Moreover, under SB 221 a new provision was added in R.C. 4929.02(A) stating that it is the policy of this State to: “(12) Promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation.” (Appx. 000022). Clearly, the adoption of the straight fixed variable rate design violates this policy, since SFV rate design does not promote such an alignment, but in fact inhibits such objectives. The Commission’s Order should be reversed because it fails to comply with the new law.

**A. The SFV Rate Design Sends The Wrong Price Signal To Consumers.**

The Commission’s Order improperly states that a “levelized rate design sends better price signals to customers.”<sup>110</sup> It was widely argued that high natural gas commodity prices generally send a signal to customers’ that encourages conservation.<sup>111</sup> The SFV rate design contradicts that

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<sup>108</sup>*In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service (“FirstEnergy Case”)* PUCO Case No. 08-936-EL-SSO (November 25, 2008), Opinion and Order at 29 (Appx.. 000355)

<sup>109</sup>R.C. 4928.02 (Appx. 000018).

<sup>110</sup>(Supp. 000222 at 12).

<sup>111</sup>Staff Ex. No. 3 (Puican Prefiled Testimony) at 3-4 (August 22, 2008). . (Supp. 000145)

basic message because it decreases the volumetric rate while significantly increasing the fixed portion of the customer charge. At a time when Vectren's marginal costs for natural gas and energy prices generally are increasing, the SFV rate design sends the wrong price signal to customers<sup>112</sup> because as consumers use more natural gas, the per-unit price decreases under the SFV design. This is absolutely the wrong price signal to send consumers making decisions on the consumption of a precious natural resource.

The straight fixed variable rate design fails to send the proper price signal to encourage conservation. The reasons for the Company's concern with the present rate design (consisting of a lower customer charge and a higher volumetric rate) has nothing to do with conservation, and everything to do with allowing the utility to collect from customers a guaranteed amount of revenue, no matter the weather conditions. In this context, it must be noted that rates are set by the Commission in order to permit the Company an "opportunity" to collect a fair rate of return. Rates are not designed to "guarantee" the utility a rate of return, though Vectren now enjoys the relative guarantee of the SFV rate design for collecting distribution service payments from customers.<sup>113</sup>

The SFV rate design fails to send the proper price signal to encourage conservation. The only conclusion that the Commission should have reached from the weight of the evidence presented in this case is that since the per-unit price decreases as consumption increases, the price signal from the SFV rate design is improper. Therefore, the Court should reverse the PUCO's Order approving the SFV rate design because the resulting rates contravene the law.

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<sup>112</sup>OCC Ex. No. 3 (Direct Testimony of Hal Novak) at 21 (September 26, 2008) (Supp. 000163)

<sup>113</sup>*Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm. of West Virginia* (1923), 262 U.S. 679, 43 S.Ct. 675, 692, 63 L.Ed. 1178 ("A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public \* \* \*; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.").

**B. The SFV Rate Design Removes The Customers' Incentive To Invest In Energy Efficiency Because The SFV Rate Design Extends The Pay Back Period For Energy Efficiency Investments Made By Consumers.**

By imposing the straight fixed variable rate design on customers, the PUCO failed to acknowledge that in order for the energy efficiency programs to work, the Company needs consumers to participate. That means that customers need incentives, too. Extending the payback period for a customer's investment in energy efficiency measures not only fails to provide customers with an incentive, but it constitutes a financial disincentive.

It is uncontroverted in the record that those customers who have invested in additional home insulation and purchased more efficient furnaces and water heaters, as a rational response to increasing gas costs (and in response to Ohio policy), will see their investment returns diminished and payback periods lengthened as a result of an SFV rate design.<sup>114</sup> The SFV rate design approved by the Commission is sufficiently different from the traditional rate design so as to materially alter customer economies when contemplating an energy efficiency investment. Therefore, the SFV rate design discourages new customer conservation, and penalizes those customers who previously made the energy efficiency investment under the prior rate design.

The Commission has the responsibility to approve rates that are just and reasonable. R.C. 4909.18 (Appx. 000013) and R.C. 4909.19 (Appx. 000015). The SFV rate design does not meet the state policy of promoting energy efficiency<sup>115</sup> and violates the legislative mandate to the Commission to initiate programs to promote and encourage conservation.<sup>116</sup> It is important as part of the regulatory compact to make energy efficiency a success, and that the Commission consider not only company incentives and revenues but also customer incentives to participate in

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<sup>114</sup>Tr. Vol. VI (Puican) at 25-26 (August 28, 2008). (Supp. 000145).

<sup>115</sup>R.C. 4929.02(A)(4) (Appx. 000022).

<sup>116</sup>R.C. 4905.70 (Appx. 000008).

programs. If customers invest in energy efficiency only to see their payback periods extended, this may have a chilling effect on continued investments in energy efficiency. Such an outcome is anathema to the intent of the law. Therefore, the SFV rate design results in the implementation of rates that are unjust and unreasonable, and this Court should reverse and remand this case to the Commission.

**Proposition of Law 5:**

**The PUCO Violated R.C. 4909.19 When It Implemented Unjust And Unreasonable Rates That Were Against The Manifest Weight Of The Evidence In This Case.<sup>117</sup>**

Decisions such as *General Motors v. Pub. Util. Comm.*<sup>118</sup> articulate the standard an appellant faces in order to challenge a PUCO Order on a question of fact: “It is well understood that the Supreme Court will not substitute its judgment for that of the Public Utilities Commission on questions of fact unless it appears from the record that the evidence and order are manifestly against the weight of the evidence, or are so clearly unsupported by it as to show misapprehension, mistake or willful disregard of duty.”

As will be explained in detail below, the PUCO’s approval of the straight fixed variable rate design was a push to impose a dramatically different rate design on customers despite the fact that critical and fundamental information (e.g. the SFV rate design impact on low-income customers and impact on customers’ conservation efforts) was not available from the record evidence in this case. R.C. 4909.19 (Appx. 000015) states in part that, “Thereafter, the Commission shall make such order respecting the prayer of such application as seems just and

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<sup>117</sup>*City of Cleveland v. Pub. Util. Comm.* (1965), 3 Ohio St.2d 82, 32 O.O.2d 58, 209 N.E.2d 424.

<sup>118</sup>47 Ohio St.2d 58, 1 O.O.3d 315, 351 N.E.2d 183.

reasonable to it.” The PUCO’s implementation of the SFV rate design was against the manifest weight of the evidence and was unjust and unreasonable.

The PUCO’s push to impose the SFV is a sharp contrast to other more deliberate and openly discussed policy changes. One example is the manner in which residential customers have been afforded the opportunity to switch to a competitive retail natural gas service provider under R.C. Chapter 4929 (“Choice Programs”). The Choice Programs were first implemented as pilot programs. Even now, over 10 years after the first programs were put in place, the Choice Programs are still governed with the understanding that the Commission can make any changes or modifications as needed.<sup>119</sup> The Choice Programs were developed over a period of years with all stakeholders being able to participate in an open process. Moreover, each utility individually addressed Customer Choice, and no one company plan was forced on all others. The Staff and the Commission recognized the magnitude of the changes being proposed in the Choice Programs and dealt with the issues accordingly.

Another example of a deliberate and calculated approach to address significant policy changes is the implementation of a wholesale auction. Despite the fact that virtually all

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<sup>119</sup>*In the Matter of the Commission’s Investigation of the Customer Choice Program of Columbia Gas of Ohio, Inc.*, PUCO Case No. 98-593-GA-COI, *In the Matter of the Commission’s Investigation of the Energy Choice Program of the East Ohio Gas Company*, PUCO Case No. 98-594-GA-COI; *In the Matter of the Commission’s Investigation of the Customer Choice Program of the Cincinnati Gas & Electric Company*, PUCO Case No. 98-595-GA-COI; *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Statewide Expansion of the Columbia Customer Choice Program*, PUCO Case No. 98-549-GA-ATA; *In the Matter of the Application of the East Ohio Gas Company for Authority to Implement Two New Transportation Services, for Approval of a New Pooling Agreement, and for Approval of a Revised Transportation Migration Rider*, PUCO Case No. 96-1019-GA-ATA, Finding and Order (June 18, 1998). (Appx. 000389).

stakeholders have declared the wholesale auction for Dominion East Ohio (“Dominion”) to be a success, the PUCO have been hesitant to impose a similar wholesale auction on other large Ohio LDCs.<sup>120</sup> Vectren has also adopted the wholesale auction process which was considered a significant policy change in how LDCs purchase gas for sales customers. The Vectren wholesale auction process took months and was open to all stakeholders.<sup>121</sup>

In sharp contrast with the current proceeding, the Choice Program and wholesale auction were both the product of long deliberate processes that included participation by all stakeholders *before* any decision was made. This begs the question of why the PUCO would be so concerned with a fair and open process with the Choice Program and wholesale auction -- programs that have resulted in quantifiable benefits for consumers. Yet at the same time, the PUCO has acted so quickly on the SFV rate design -- a change that produces quantifiable benefits only for the utility and higher-use customers but is detrimental to residential, and especially low-use, low-income residential customers. It is noteworthy that in the examples cited, the processes included the full participation of the parties in an open and deliberate process where the implications and

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<sup>120</sup>*In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a Plan to Restructure its Commodity Service Function*, PUCO Case No. 05-474-GA-ATA, (August 29, 2006), Post-Auction Report of Dominion East Ohio Phase 1 Supply Auction, at 4-5 (Appx. 000438).

<sup>121</sup>*In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Approval of a General Exemption of Certain Natural Gas Commodity Sales and Services or Ancillary Services*, Case No. 07-1285-GA-EXM (Opinion and Order) at 12 (April 30, 2008). (Appx. 000448)

ramification of the change were fully discussed before culminating in a consensus.<sup>122</sup> There is no such process, deliberation, or consensus here. In fact, the only support for the Commission's position can be found with its own Staff and the utilities. No consumer representative supports the implementation of the SFV rate design.

The PUCO's decision to implement the SFV rate design was also done without taking the necessary time to study its impacts on Vectren's<sup>123</sup> residential customers. The lack of such a study is further reason to question the "evidence" relied upon by the PUCO. The Commission instead, relied on unsubstantiated theory that low-income customers benefit from the rate design supported by the PUCO's Order.

This is another example of the PUCO's actions being against the manifest weight of the evidence. Lacking any study to show that rate design's impact on customers was fair and would support the SFV rate design, the PUCO relied upon Staff Witness Puican's testimony. PUCO witness Puican testified that PIPP customers were "the best readily available proxy" for all low-income non-PIPP customers.<sup>124</sup> Mr. Puican made this claim, and it was accepted by the PUCO,

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<sup>122</sup>Id. ; See also *In the Matter of the Commission's Investigation of the Customer Choice Program of Columbia Gas of Ohio, Inc.*, PUCO Case No. 98-593-GA-COI; *In the Matter of the Commission's Investigation of the Energy Choice Program of the East Ohio Gas Company*; PUCO Case No. 98-594-GA-COI; *In the Matter of the Commission's Investigation of the Customer Choice Program of the Cincinnati Gas & Electric Company*, PUCO Case No. 98-595-GA-COI; *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Statewide Expansion of the Columbia Customer Choice Program*, PUCO Case No. 98-549-GA-ATA; *In the Matter of the Application of the East Ohio Gas Company for Authority to Implement Two New Transportation Services, for Approval of a New Pooling Agreement, and for Approval of a Revised Transportation Migration Rider*, PUCO Case No. 96-1019-GA-ATA, Finding and Order (June 18, 1998). (Appx. 000389) (All interested parties were allowed to participate in an open and transparent collaborative setting.).

<sup>123</sup>At a minimum the Commission should have evaluated the impact of the imposition of the SFV rate design on the customers of Duke Energy Ohio which was the first gas rate case where the PUCO imposed the SFV rate design, before imposing it on other gas company customers. The Duke case is currently on appeal (S.Ct. Case No. 08-1837).

<sup>124</sup>Staff Ex. 3 (Testimony of Stephen E. Puican) at 7 (August 22, 2008). (Supp. 000145).

despite the fact that Mr. Puican did no analysis to support this contention.<sup>125</sup> This contradictory treatment of the expert testimony demonstrates the PUCO's bias in favor of the straight fixed variable rate design, rather than basing its decision on the record evidence. Then based on this claim, the PUCO went on to conclude that since high-usage PIPP customers benefited from the SFV rate design, non-PIPP low-income customers must also be high-usage customer, who would also benefit.

In contrast to these unsupported claims, OCC presented the testimony of Roger Colton, who conducted a study on the impact of the rate design on low-income customers. Mr. Colton's analysis was based on monthly surveys conducted by the United States Census Bureau. Mr. Colton concluded that, contrary to Mr. Puican's unsupported claims, the PIPP-customer population is not a surrogate for the low-income population as a whole. He concluded this because customers seeking PIPP help would likely not be households with low energy bills --i.e. low use-customers.<sup>126</sup>

Yet, in its Order, the PUCO summarily dismissed Mr. Colton's analysis and supporting data, purportedly because the Census Bureau cautioned that the data might be unreliable.<sup>127</sup> Mr. Colton explained that he was aware of the caution from the Census Bureau.<sup>128</sup> However, the caution was directed to relying upon the customers' actual natural gas expenditures, and not the sample size.<sup>129</sup> Inasmuch as Mr. Colton relied on the Census data to "establish the relationship between -- between incomes to look to see whether the bill for low -- for low income households

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<sup>125</sup>Tr. Vol. VI (Puican) at 35 (August 28, 2008). (Supp. 000212).

<sup>126</sup>OCC Ex. 2 (Direct Testimony of Roger D. Colton) at 27 (July 23, 2008). (Supp. 000042).

<sup>127</sup>Order at 13. (Supp. 000222).

<sup>128</sup>Tr. Vol. V (Colton) at 57-58 (August 27, 2008). (Supp. 000217).

<sup>129</sup>Id.

versus middle income households versus high income households, what those relationships are,” the caution would not affect the legitimacy of his conclusions.<sup>130</sup> Despite this explanation, the PUCO accepted an unsupported position over Mr. Colton’s testimony -- perhaps in no small part because the unsupported Staff testimony justified the end result in favor of the straight fixed variable rate design.

R.C. 4903.09 (Appx. 000001) requires the Commission to provide specific findings of fact and written opinions supported by record evidence. R.C. 4903.09 (Appx. 000001) states: “In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.”

The PUCO’s Order is manifestly against the weight of the evidence and is unreasonable and unlawful. This Court should reverse and remand the PUCO’s Order with instructions for the PUCO to perform an independent study necessary to thoroughly evaluate the SFV rate design’s impacts before permanently implementing this radically different rate design.

**A. The Record Shows That The PUCO Ordered A Low-Income Pilot Program That Is Inadequate And Does Not Cure The Flaws Of The Straight Fixed Variable Rate Design**

The fact that low-use customers will be adversely affected by the SFV rate design in these cases is undeniable. The Commission acknowledged as much in its Order: “we recognize that, with this change to rate design, as with any change, there will be some customers who will be better off and some customers who will be worse off, as compared with the existing rate design. The levelized rate design will impact low-usage customers more, since they have not

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<sup>130</sup>Id. at 59.

been paying the entirety of their fixed costs under the existing rate design. Higher use customers who have been overpaying their fixed costs will actually experience a rate reduction.”<sup>131</sup>

The Commission’s Order alleges that low-usage customers have not been paying the entirety of their fixed costs. This claim is made without citation. It is an unsupported conclusion of the PUCO. Nor is there support for the allegation that high-usage customers were over-paying fixed costs under the previous rate design. In fact, prior to the current proceeding and the recent Duke and Dominion rate cases, the PUCO never raised this issue.

What happens here though is that customers are being forced to accept the financial fallout from these un-substantiated claims -- claims that are transformed into fact and relied upon to rationalize an unreasonable rate proposal. While the record is clear as to the impact that the SFV rate design has on some low-income customers (PIPP customers), the complete actual impact that an SFV rate design will have upon all of Vectren’s low-income customers, especially non-PIPP low-income customers, is not known. Moreover, the record is unclear on the impact of the straight fixed variable rate design on low-use customers -- who might elect to completely discontinue natural gas usage or may disconnect from the system during non-winter heating months in order to avoid the higher fixed customer charge. This was a phenomena recognized by Justice Pfeiffer during the Duke and DEO oral argument.<sup>132</sup>

The SFV rate design approved by the Commission is bad public policy for Vectren’s low-income and low-use residential customers because one known impact of the SFV rate design is that low-use and low-income non-PIPP customers will now be forced to subsidize Vectren’s high-use residential customers. The SFV rate design has the effect of making the distribution

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<sup>131</sup>Order at 14. (Supp. 000222).

<sup>132</sup>See oral argument held on September 16, 2009 in consolidated cases Duke Energy Ohio, Case No. 08-1837 and Dominion East Ohio, Case No. 09-314.

cost per Mcf that a customer faces higher at lower consumption levels than at higher consumption levels. Such a rate design is inherently unfair to low-usage low-income customers, who because of their limited means, likely live in smaller dwellings, such as apartments, and use less natural gas than homeowners with larger homes.<sup>133</sup>

The PUCO states a concern with the impact that the change in rate structure will have on some Vectren customers, and recognizes that some relief is warranted for these customers; however, even without a study the Commission's Order is suspect.

The Commission has ordered the Low income Pilot Program as a small offering to help low-use and low-income customers who will be penalized indefinitely into the future through the SFV rate structure. However, the PUCO failed to offer any explanation that would justify this pilot terminating after one year when the SFV rate design will be in place for many years to come. Under the one year limited pilot a small portion only 5,000 of these low-income customers will receive a \$4.00 per month credit for one year to offset a permanent increase to the fixed portion of the customer charge of \$11.37 per month.

The Order established a rationale for the low-income pilot program, but the Commission has no analysis to support how the approved pilot program will be sufficient to achieve the stated purpose. The Order stated: "In the 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 decision to adopt a levelized rate design in that case. Therefore, the Commission finds that DEO should likewise implement a one-year low-income pilot program aimed at helping

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<sup>133</sup>OCC Ex. 2 (Direct Testimony of Roger G. Colton) at 33 (July 23, 2008). (Supp. 000042).

low-income, low-use customers pay their bills. As in this case, 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 one year to the first 5,000 eligible customers."<sup>134</sup>

The pilot program was approved by the Commission without knowing the extent of the need that the Commission alleges to address. As OCC witness Colton stated, "We found that exactly half (50 percent) of Ohio's low-income natural gas customers had natural gas burdens of below the minimum necessary for those households to gain benefits from participation in the Ohio PIPP."<sup>135</sup> The manifest weight of the evidence, as borne out by the testimony of OCC Witness Colton, demonstrates that low-income customers, who are not on the Percentage of Income Payment Plan program, are harmed by the SFV rate design. Because the Commission's Order relies upon the opposite and unreasonable conclusion to support its Order adopting the SFV rate design, the Order is against the manifest weight of the evidence and thereby unreasonable and unlawful. Therefore, this Court should reverse and remand this case to the Commission.

## V. CONCLUSION

As demonstrated above, the Commission committed several errors in its Opinion and Order. OCC asks that this Court reverse the Commission on the issue of rate design and remand the matter back to the PUCO. On remand, the PUCO should be ordered to conduct further

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<sup>134</sup>Order at 14. (Supp 000222).

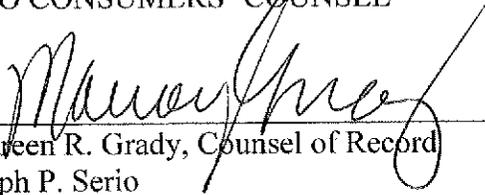
<sup>135</sup>OCC Ex. No. 2 (Direct Testimony of Roger D. Colton) at 28 (July 23, 2008) (Supp. 000042).

hearings in order to establish a lawful and reasonable rate design that, unlike SFV, encourages and does not discourage energy conservation.

Moreover, if the Court does not find the Commission erred in adopting the SFV rate design, it should nonetheless, remand the proceeding back to the PUCO, for purposes of requiring Vectren to reissue appropriate notice of Vectren's proposed rates. Such notice should, consistent with R.C. 4909.18 and 4909.19, include notice of the manner in which Vectren plans to collect its rate increase. Thereafter, the PUCO should conduct further hearings upon the appropriateness of how Vectren will collect increased rates from customers.

Respectfully submitted,

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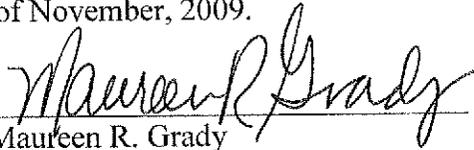
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing *Merit Brief on behalf of the Office of the Ohio Consumers' Counsel* has been served upon the below-named counsel via First Class mail, postage prepaid this 4th day of November, 2009.

  
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