

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.)	

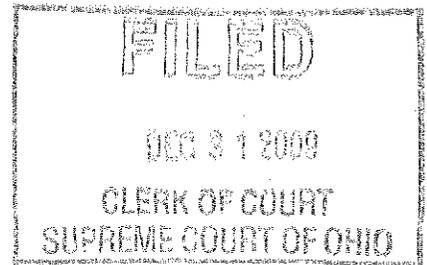
**REPLY BRIEF OF
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I. INTRODUCTION

“It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of laws, not of men***.” -- Supreme Ct. Justice William O. Douglas¹

The Public Utilities Commission of Ohio (“PUCO” or “the Commission”) is a creature of statute -- its authority is derived solely from laws drafted by the General Assembly.² The PUCO lacks the discretion to act in a manner that is contrary to those laws.³

The most important issues before the Court focus on questions of law⁴ which require de novo review. They are: 1) Did Vectren Energy Delivery of Ohio, Inc. (“Vectren” or “the Company”) provide newspaper notice of the Stage 2 rates that complied with R.C. 4909.19, and 2) Did the PUCO in approving a straight fixed variable rate design violate R.C. 4929.02 and 4905.70?

The answer to the first question must be no. Vectren and the PUCO’s arguments that the notice provisions of R.C. 4909.19 were met are mistaken. Subscribers (Vectren’s residential customers) were not given notice of the substance and prayer of Stage 2 rates. The notice did not comply with the law, and because of the jurisdictional nature of R.C. 4909.19, the PUCO could not approve Stage 2 rates. As to the second question, the Court should find that the PUCO did violate R.C. 4929.02 and 4905.70 when it adopted a straight fixed variable rate design. These statutes set forth mandatory state policy intended to encourage the development of energy

¹ *Anti-Fascist Refugee Comm. v. McGrath* (1951), 341 U.S. 123, 177, 71 S.Ct. 624, 95 L.Ed. 817, 857.

² *Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St.3d 1, 647 N.E.2d 136.

³ *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 234, 661 N.E.2d 1097; *Cleveland Electric Illuminating Company v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 529, 668 N.E.2d 889.

⁴ OCC Propositions 1, 2, and 4 present questions of law. OCC Propositions 3 and 5 present questions of fact.

efficiency in Ohio. The straight fixed variable rate design encourages customers to use gas because under an almost flat rate, the per unit price of gas decreases as consumption increases. This contradicts the intent of the statutes and the PUCO had no authority to approve the rate design.

The PUCO and Vectren (“Appellees”) seek to frame these issues as questions of fact, and matters within the PUCO’s discretion.⁵ (Vectren Brief at 14; PUCO Brief at 7). They are not.

II. ARGUMENT

OCC 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 PUCO, It Must Fully Disclose The Proposal In Any Notice Published Under The Requirements Of R.C. 4909.19.

OCC’s Proposition of Law 1 is directed solely at Stage 2 rates. These rates impose the second of two increases to customers’ fixed monthly unavoidable charges. Vectren proposed Stage 2 rates in its application -- with a significantly increased fixed portion of the customer charge and decreased volumetric rates. However, customers were not notified of the amount of

⁵ Vectren also seeks to limit the Court’s review of these important issues by asking the Court to disregard OCC’s Brief for technical defects in the appendix of the brief. Vectren’s request should be denied. It should be noted that the Court’s briefing rules differ from the mandatory, jurisdictional statutes discussed in this brief, such as R.C. 4909.19, 4903.10, and 4903.13. The briefing rules are not jurisdictional—they do not have to be met in order for the Court to have jurisdiction over the issues. Thus, the Court has the ability to overlook technical defects and generally will do so where appellants have substantially complied with the rules, as did OCC here. See e.g. *The State ex rel. Birdsall v. Stephenson* (1994), 68 Ohio St.3d 353, 354, 626 N.E.2d 946; *State ex rel. Carver v. Hull* (1994), 70 Ohio St.3d 570, 573, 639 N.E.2d 1175. Where Appellees are not prejudiced in their ability to file a responsive brief and the Court is not hindered in its ability to decide the case, even missteps in following the Court’s rules will not justify dismissing a party’s brief. Appellee claims no prejudice and this Court should not assume such. Moreover, the Court will not be hindered in its ability to review the case, as OCC has cured its missteps by filing the related material in this Reply Brief. (See Reply Brief Appx. 1-73).

the proposed Stage 2 increase in the fixed portion of the customer charges, nor advised of when the charges would go into effect. Despite these inadequacies, Vectren and the PUCO claim they have complied with the newspaper notice requirements of R.C. 4909.19.

Appellees allege they have complied either completely or substantially with the notice provisions.⁶ (PUCO Brief at 19-20; Vectren Brief at 32). They claim the newspaper notice need only alert subscribers that a proposal exists; customers then might inquire into what the proposal might be. (PUCO Brief at 19; Vectren Brief at 32). Further, Vectren and the PUCO allege there is no harm to subscribers because OCC, their statutory representative, participated fully in the proceeding. (PUCO Brief at 16-19; Vectren Brief at 35).

Appellees' arguments raise the following questions that OCC will address:

- Can the requirements of R.C. 4909.19, to provide newspaper notice to customers, be met through substantial compliance?
- If substantial compliance is allowable for notice, did Vectren substantially comply with the provisions of R.C. 4909.19 for newspaper notice to customers?
- Should there be a presumption of harm to customers when they are not fully informed of the substance and prayer of the application which will have a direct bearing on the rates they pay for utility service?
- Should OCC's participation in the proceeding below preclude the Court from finding harm to residential customers who were not given the independent opportunity to voice their objection?

A. The Requirements Of R.C. 4909.19 For Newspaper Notice To Customers Are Jurisdictional, Mandatory, And Essential To Public Utility Regulation In Ohio, Thus Requiring Strict, Not Substantial, Compliance.

In *Duff v. PUCO*⁷ this Court stated that the newspaper notice provisions of R.C. 4909.19 are how the PUCO obtains jurisdiction over a utility's application. Duff established that these

⁶ OCC's Brief addressed Appellees' arguments that they have completely complied with the newspaper notice provisions. (See OCC Brief at 11-16).

⁷ *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 367, 376, 10 O.O.3d 493, 384 N.E.2d 264.

publication requirements are more than a mere formality.⁸ This principle underlies the Court's decision in *Commt. Against MRT v. Pub. Util. Comm.*⁹ and the *Ohio Assn. of Realtors v. Pub. Util. Comm.*¹⁰ In order for the Commission to obtain jurisdiction to approve rate changes, the requirements for newspaper notice to customers, under R.C. 4909.19, must be met.

Not only are the newspaper notice requirements jurisdictional, but they are also mandatory. The language is unequivocal. R.C. 4909.19 states that the public utility "shall forthwith publish the substance and prayer" of the application in newspapers. The General Assembly's choice of the word "shall" denote that utilities must comply. While substantial compliance may be appropriate for statutes that are directory and not mandatory, substantial compliance is not appropriate for the mandatory jurisdictional requirements of R.C. 4909.19.

Moreover, the newspaper notice provisions underlie the core of Ohio regulation -- utilities may seek rate increases from the PUCO but only if customers are adequately informed and can participate in such proceedings. Participation is afforded through notice -- but the opportunity to be heard is but an empty promise if one is not informed of the issues in contention and can not make a decision as to whether to challenge or object. Notice of the substance of the utility's proposal is the condition precedent to utilities enjoying the right to increase rates.

⁸ Appellees, however, seek to downplay *Duff* by characterizing *Duff* as dicta or a "gratuitous observation." While OCC disputes this characterization, the Court need not resolve this question. For even if the statements in *Duff* are "dicta," they should be followed. Generally, dicta can be relied upon because it is "frequently, and indeed usually correct" and though such passages are not essential to deciding the case, it "is often extremely useful to the profession." Black's Law Dictionary (8th Ed. 2004) 485 (citation omitted.). *Duff* is persuasive and reliable. Its accuracy is not being disputed. The Court's statements have not been challenged or overruled. It should guide the Court here in determining whether the newspaper notice of R.C. 4909.19 can be met by substantial compliance.

⁹ *Commt. Against MRT v. Pub. Util. Comm.* (1977), 52 Ohio St.2d 231, 6 O.O.3d 475, 371 N.E.2d 547.

¹⁰ *Ohio Assn. of Realtors v. Pub. Util. Comm.* (1979), 60 Ohio St.2d 172, 14 O.O.3d 409, 398 N.E.2d 784.

The newspaper notice provisions of R.C. 4909.19 are comparable to the notice requirements under R.C.4903.10 and 4903.13, for appeals from the PUCO to the Court.¹¹ The requirements of those statutes vest jurisdiction like R.C. 4909.19. They are also mandatory, like the notice under R.C. 4909.19. They are based upon the notion of fairness to all parties involved in an appeal.¹² They confer rights by statute. The exercise of those rights is conditioned upon complying with the accompanying mandatory requirements.¹³ Parties must strictly, not substantially, comply with the jurisdictional requirements of notice under R.C. 4903.10 and 4903.13. (PUCO Brief at 29; Vectren Brief at 12). Likewise, because of the similar nature of newspaper notice under R.C. 4909.19, the Court should require strict, not substantial, compliance.

B. Vectren Did Not Substantially Comply With The Mandatory Notice Provisions Of R.C. 4909.19.

If this Court, notwithstanding OCC's arguments, determines that the newspaper notice of R.C. 4909.19 need not be strictly complied with, it should nonetheless find that Vectren has failed to show substantial compliance. As this court has noted, the newspaper notice requirements are not unreasonable.¹⁴ They need not contain minute details. Nonetheless, substantial compliance though must mean more than mentioning that a proposal exists. While

¹¹ Newspaper notice requirements, however, are directed to subscribers of the utility, and the sufficiency of notice must be judged in relation to those individuals. The only notice of Stage 2 rates was the statement made by Vectren that it "proposes changes to the rate design for Rate 310*** and Rate 315 *** that initiate a gradual transition to a straight fixed variable rate for distribution service." (See OCC Supp. at 124-125).

¹² See *City of Cincinnati v. Pub. Util. Comm.* (1949), 151 Ohio St. 353, 376-377, 39 O.O. 188, 86 N.E.2d 10.

¹³ *Id.* at 377.

¹⁴ *Ohio Assn. of Realtors v. Pub. Util. Comm.* (1979), 60 Ohio St.2d at 176, 398 N.E.2d at 786.

such an interpretation was consistent with original language in G.C. 614-20,¹⁵ the language was not retained in subsequent rewrites. Instead, the newspaper notice language changed to its near present form, in 1929, requiring the utility to publish the “substance and prayer” of the application.¹⁶

Vectren and the PUCO ignore the General Assembly’s revisions requiring a utility to convey the “substance and prayer” of the proposal thus rendering the words superfluous. If mention of a proposal were sufficient to comply with R.C. 4909.19, the General Assembly would not have amended the law and enacted words requiring the utility to publish the “substance and prayer of the proposal.” They would have merely left the prior words in place and a utility would only have to convey that a proposal has been made. Vectren and the PUCO would have the Court render the words “substance and prayer of the proposal” meaningless, contrary to Ohio rules of statutory construction that presume the entire statute is intended to be effective.¹⁷

Moreover, because the proposed rate change abruptly discards thirty years of precedent, there is a reasonable and heightened expectation that customers, like those in *Ohio Assn. of Realtors* and *Comm. Against MRT*, would receive adequate notice prior to implementing such a change. Vectren could have easily accomplished such notice, at little cost, by publishing the substance of Stage 2 rates -- the specific proposed customer charge and volumetric rates along with date the rates were to be in effect. It however, did not. Further, what is the point of

¹⁵ G.C. 614-20 required that “Such public notice shall set forth *the fact that such application has been made*, the effective date of the proposed new schedule, the name and location of the agent of the utility in such county or territory where a copy of such new schedule may be inspected by any interested party ***.” G.C. 614-20 (predecessor section to R.C. 4909.19), H.B. 471 (emphasis added). (Reply Brief Appx. 80-83).

¹⁶ G.C. 614-20, Am. S.B. No. 66. (Reply Brief Appx. 75-79).

¹⁷ R.C. 1.47. (Reply Brief Appx. 74).

requiring notice to the public, if not to inform? If that notice does not inform then that notice fails and violates R.C. 4909.19.

When Vectren failed to comply with the newspaper notice of R.C. 4909.19, its actions robbed the Commission of jurisdiction to approve Stage 2 rates. As this Court has aptly noted, the PUCO is a creature of statute and may only exercise that jurisdiction conferred on it by statute.¹⁸ The order was, therefore, void, a nullity, and subject to challenge.¹⁹

Vectren, however, alleges that the mere act of publishing the notice, and not its content, is jurisdictional. (Vectren Brief at 34). Vectren claims that jurisdiction is vested when Vectren published its notice in the form approved by the Commission. Vectren however, does not cite authority for its perspective on this issue. Moreover, such a view was rejected in *Comm. Against MRT*.²⁰ In that case the Commission had approved notice, which the Court later found to be deficient. The Court invalidated subsequent acts by the PUCO which had adopted forms of the utility's proposal. The Court's holding can be read as finding that the Commission lacked jurisdiction to approve rate changes because the utility failed to meet the notice requirements of R.C. 4909.19, despite the Commission approving the notices.

C. Appellant Need Not Show Harm To Seek A Reversal Of The PUCO's Order Approving Stage 2 Rates Based On Vectren's Defective Notice.

The PUCO and Vectren appear to argue that there was no harm to residential subscribers and thus, without harm the Court should not reverse the Commission. (PUCO Brief at 16-19; Vectren Brief at 34-35). Although generally the Court will not reverse an order of the PUCO

¹⁸ *Columbus S. Power Co. v. Pub. Util. Comm.* (1993), 67 Ohio St.3d 535, 537, 620 N.E.2d 835, 838.

¹⁹ See for e.g., *State v. Western Union Telegraph Co.* (1951), 154 Ohio St. 511, 520, 43 O.O. 488, 97 N.E.2d 2.

²⁰ *Comm. Against MRT*, 52 Ohio St.2d 231, 6 O.O.3d 475.

unless there is prejudice, the Court created an exception in *Tongren v. Pub. Util. Comm.*²¹ Where a party is foreclosed from demonstrating prejudice, the matter must be remanded.²²

The *Tongren* exception is met here. The PUCO approved an insufficient notice and approved the Stage 2 rate increases, without requiring Vectren to reissue notice. Vectren and the PUCO would have OCC demonstrate prejudice has occurred based on potential public testimony and objections that might have been filed if customers would have received proper notice of the Stage 2 rates. OCC would then be required to demonstrate such potential testimony could have led the PUCO to different conclusions with regard to the reasonableness of the straight fixed variable rate design. Because the PUCO has stymied OCC's efforts in demonstrating prejudice, like the PUCO stymied OCC's efforts in *Tongren*, the Court should reverse and remand, without a demonstration of prejudice.

D The Court Should Decline To Find That OCC's Representation Of Residential Customers Precludes A Finding Of Harm To Subscribers.

According to Appellees, OCC cannot claim that consumers were denied the opportunity to participate. (Vectren Brief at 35; PUCO Brief at 1.) They argue that with OCC actively participating, there is no harm to customers from Vectren failing to comply with the notice statutes. Likewise, the PUCO argues that because OCC intervened, OCC's awareness of Stage 2

²¹ *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, 706 N.E.2d 1255.

²² *Id.* Vectren makes similar arguments.

rates should be imputed to the 456,000 individual subscribers of Vectren. (PUCO Brief at 19).²³

The corollary to Appellees' argument is that participation by OCC is an effective substitute for the statutorily-required notice to subscribers. The Appellees are wrong. This is contrary to the statutory newspaper notice provisions which underlie R.C. 4909.19. In construing R.C. 4909.18 and 4909.19, the Ohio Supreme Court has 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 file an objection to the increase under R.C. 4909.19.²⁴ Thus, notice should apprise affected subscribers, not a statutory representative of customers, or parties, of the utility's proposal to increase rates.

There is no statutory provision that says if OCC intervenes in a proceeding, then the newspaper notice requirements of R.C. 4909.19 are not needed or need not be met. Yet, this is where Appellees' arguments lead. The Court in *Ohio Assn. of Realtors v. Pub. Util. Comm.* ruled that materials submitted along with the regular customer billings could not "stand in the stead of a requirement of a reasonable statement of such rate proposal to be placed in the legal notice."²⁵ Notwithstanding the Court's holding, the Appellees would have OCC stand in the

²³ In its Brief (at page 35, footnote 102) Vectren cites to a press release issued by OCC. Vectren appears to argue that OCC's press release is evidence that customers were aware of the rate design proposed by Vectren. When OCC issues a press release there is no guarantee that the information will be printed in its entirety and in fact, if it is printed, reporters use only the sections they are interested in to write the story. It is no substitute for legal published notice paid for by Vectren and guaranteed to be printed in its entirety. While OCC's press release intended to alert customers to the rate design proposed, it does not relieve Vectren of its own statutory responsibility to comply with the newspaper notice requirements under R.C. 4909.19. Moreover, the OCC press release is not legal authority nor is it evidence in the record transmitted by the PUCO. It should be ignored. See *Ohio v. Shepherd* (1980), 61 Ohio St.2d 328, 329, 401 N.E.2d 784, 785.

²⁴ *Comm. Against MRT v. Pub. Util. Comm.* (1977), 52 Ohio St.2d at 233, 371 N.E.2d at 549.

²⁵ *Ohio Assn. of Realtors v. Pub. Util. Comm.* (1979), 60 Ohio St.2d at 176, 398 N.E.2d at 786.

stead of a reasonable statement of Stage 2 rates in the legal notice. The Court should reject such arguments because the requirements of R.C. 4909.19 must be met, regardless of whether OCC is participating in the proceeding. To hold otherwise would directly disregard the Ohio General Assembly's mandatory and jurisdictional newspaper notice provisions of R.C. 4909.19.

OCC 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.

A. Statutes, Including R.C. 4905.70 And 4929.02, Are The Sources Of Customers' Property Interests.

Both the PUCO and Vectren argue that the Ohio Supreme Court believes the right to notice must arise under a statute, and does not independently exist in the Ohio or U.S. Constitutions. (PUCO Brief at 22; Vectren Brief at 34). The PUCO alleges that "given the body of the decisions by the Court to the contrary, OCC's argument should be denied." (PUCO Brief at 22).

In this regard, there are a number of decisions by this Court finding that the right to notice arises under a statute. These decisions, however, have been based upon facts presenting little or no statutory authority for notice. In its Brief, OCC presented a number of statutes, including R.C. 4909.18, 4905.70, and 4929.02, that, together with past Commission action, create property rights requiring notice. The Court should not ignore the facts in this case -- just because it has rendered decisions in the past, based on wholly different facts. Rather the Court should examine the distinct facts and statutory arguments to determine whether, given the facts in this case, there is a statutorily created due process right to notice.

B. The Court Should Recognize The Property Rights Of Customers In Energy Conservation Programs And Require The PUCO To Assure Adequate Notice Of Actions That Could Diminish Such Property Rights.

The PUCO alleges there is no legitimate claim of entitlement to conservation assistance, and believes that cases cited by OCC are not on point because they examine customers' property rights to continued utility service. (PUCO Brief at 23-24). Both Vectren and the PUCO note that OCC has not cited any direct authority supporting its theory that customers have a property interest in utility-sponsored conservation programs and the benefits derived under such programs. (PUCO Brief at 24; Vectren Brief at 37).

The cases OCC presented on customer property rights were meant to provide a framework for this Court through which it could examine the unique property interests created under the Ohio statutes. (OCC Brief at 18-28). The cases were discussed for purposes of showing that numerous courts have found that customers can have property rights related to utility service. These cases and the underlying notion of customers acquiring property rights related to utility service were intended to assist the Court in determining the nature of the property interest created under the Ohio statutes.

C. Diminishing Conservation Benefits By Extending The Conservation Payback Period Is Action That Requires Notice To Be Provided.

Appellees allege that Vectren's customers have not been denied the benefits of conservation. (PUCO Brief 25; Vectren Brief at 38). Rather Vectren insists that even if there were a constitutional right to notice, the Order implements additional conservation funding, in the future, which supports, not diminishes, conservation efforts. (Vectren Brief at 38). Vectren, however, ignores the diminished benefits to conservation attributable to implementing the straight fixed variable rate design. The straight fixed variable rate design will extend the payback period on customers' past energy conservation efforts. OCC Witness Novak explained

this²⁶ and it was acknowledged by the Commission in the Duke case, under appeal to this Court as S.Ct. Case No. 08-1837.²⁷ The state, through a PUCO order, should not diminish past conservation benefits without notice and the opportunity to be heard.

OCC 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.

Vectren argued that the PUCO's decision to impose the straight fixed variable rate design did follow PUCO precedent. (Vectren Brief at 27). Vectren defended this claim on two bases. First, Vectren noted that neither the Revised Code nor the Administrative Code require gradualism. (Vectren Brief at 27). This argument misses the point. True, gradualism is not defined as a discrete principle that must be complied with under statutes and rules of the PUCO. However, the PUCO must not only adhere to such authority, but it must also comply with the Ohio Supreme Court's rulings. The Ohio Supreme Court has, through a line of cases, imposed a duty on the PUCO to follow its precedent to ensure predictability.²⁸ The concept of gradualism has been a principle in rate design for over at least thirty years. It is precedent that the Commission must follow, unless it can show the principles of gradualism are erroneous and there is a need to discard them. The PUCO did not make such a demonstration, and thus, the PUCO's order should be reversed and remanded.

²⁶ See (R.63 at 21).

²⁷ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, PUCO Case No. 07-589-GA-AIR, et al., Opinion and Order at 19 (May 28, 2008). (Reply Brief Appx. 84-116).

²⁸ *Office of Consumers Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 49, 50, 10 OBR 312, 461 N.E.2d 303.

Vectren's second argument is that the PUCO did follow its own precedent. Vectren merely cites to the PUCO's own statements that said that it had. (Vectren Brief at 27-28). The PUCO claimed that it followed the principle of gradualism because it ordered a two-stage transition to a full straight fixed variable rate design. (PUCO Brief at 15-16). Vectren also claimed that OCC improperly focused on the fixed portion of the customer charge in making its gradualism argument. (Vectren Brief at 29). Both Vectren and the PUCO are wrong. As was pointed out in the OCC Brief, when the PUCO applied gradualism in the past it focused on the fixed portion of the customer charge in cases where it limited any increase to relatively small amounts (\$1.00-\$2.00) or ordered actual decreases to the fixed portion of the customer charge. (OCC Brief at 30-33).

Moreover, an increase in the fixed portion of the customer charge of \$11.37 over a two year period, with a flash cut to complete straight fixed variable rate -- no volumetric distribution charge -- starting in February 2010, in no way reflects the gradualism practiced by the PUCO for 30 years. Rather it represents a forced interpretation of gradualism in which the two stage increase of \$11.37 is treated no differently than past Commission action limiting increases to the fixed portion of the customer charge by \$3.00, or approximately one-fourth of the increase in this case.

OCC Proposition of Law 4:

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

A. The PUCO Lacks The Discretionary Authority To Contradict Or Ignore Statutes.

Vectren argues that this case is a simple case of the PUCO choosing one rate design over

another -- an area where the PUCO has significant discretion.²⁹ (Vectren Brief at 14). However, that discretion is not unlimited. Rather, this Court has acknowledged that the PUCO is a creature of statute and its discretion and authority are limited by statute.³⁰ Accordingly the PUCO, in determining rate design, must follow Ohio law. Specifically, the PUCO must follow R. C. 4929.02 and 4905.70. R.C. 4929.02 states that “[i]t 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***.”

In this case, the straight fixed variable rate design dramatically increases the fixed portion of the customer charge while decreasing the volume-based portion of the charge. Indeed, in Stage 2, there is only a customer charge, with no volumetric distribution rate. The result of this rate design is that during summer months when natural gas usage is negligible, customers will be forced to pay an unavoidable natural gas distribution bill of at least \$18.37 per month. In contrast to Vectren’s prior fixed portion customer charge of \$7.00 per month, customers will pay an increase of \$11.37 or a 162% increase in the customer charge. That means customers who use no gas during the summer months will be paying much higher bills than their prior summer bills and may not understand that the rate change is intended to encourage conservation efforts. In fact, increasing a customers’ bill when no gas is used will send the opposite message -- that conservation does not matter because you have to pay more in the form of a larger fixed fee, even when you use no gas at all!

²⁹ Vectren cited to and discussed documents and information that were not legal authority or a part of the official record transmitted to the Court. (See Vectren Brief at 4, footnotes 8 and 9). This Court has previously shown that it recognizes and is able to ignore illegitimate materials submitted in briefs. See *Ohio v. Shepherd*, 61 Ohio St.2d at 329, 15 O.O. 3d 396, 401 N.E.2d 934. The Court should disregard these materials here, as well.

³⁰ *Canton Storage and Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 647 N.E.2d 136.

The PUCO defended the straight fixed variable concept, arguing that it sends the proper price signal to customers and encourages conservation because the largest and most volatile component of a customers' bill is the commodity cost of gas. (PUCO Brief at 13). While this might be mathematically correct during the winter months when customers use a lot of gas, it is absolutely not true during the summer months. During the summer, for most residential customers, the customer charge comprises as much as fifty percent or more of their bill.³¹ During these months of little or no usage, the straight fixed variable rate will not send the right price signals or encourage conservation. A probable reaction to these significant increases to the fixed portion of the customer charge is that many customers may choose to drop service during non-winter heating months or switch to a different energy source. Vectren witnesses Overcast and Heid both recognized this when they testified that as the fixed portion of the customer charge increased, customers would have even more incentive to disconnect during the summer months.³² Vectren in fact acknowledged this phenomenon and proposed seasonal rates and an "avoided customer charge" in its application to protect itself from revenues that might be lost through such customer behavior. (R. 2 at Tariff Sheet No. 30).

The PUCO's argument is also meritless because the customer's bill taken as a whole will be higher for customers who conserve than it would otherwise been if traditional rate designs were used. The PUCO focuses on the commodity portion of the bill, but customers are concerned with, and have to pay, the entire bill. As noted earlier, this will discourage conservation by increasing the payback period associated with those measures. The

³¹ For example, for a customer who uses less than 200 Ccf (or 2 Mcf) of gas per month during the summer months, the \$18.37 per month fixed customer charge could total as much as fifty percent or more of the bill, unless the commodity cost is greater than \$1.00 per Ccf (or \$10.00 per Mcf).

³² Vectren Ex. 8(Overcast) at 18 (R.18); Vectren Ex. 7A (Heid) at 6. (R. 18).

Commission's argument is analogous to declaring that it is acceptable to cause harm -- as long as it is not a lot. OCC believes that *primum non nocere* is the more appropriate standard. And when a *primum non nocere* standard has been in place and worked for decades, there is no public policy benefit to changing to a standard that causes actual harm.

The PUCO, however, ignored this concern³³ and instead concluded that customers would be more likely to change how much they consumed.³⁴ Not only did the PUCO provide no source for this conclusion, it also flies in the face of logic. A customer that has engaged in conservation and energy efficiency in the past but is now experiencing an almost 162% increase in their fixed customer charge in summer months when they use no gas, will not react by engaging in more conservation or energy efficiency measures. The customer is more likely to drop gas service temporarily or permanently.

The shift of cost to the fixed portion of the customer charge means that customers will have less control over their gas bill because a larger portion will now be fixed charges that cannot be avoided regardless of energy efficiency efforts. Staff witness Puican acknowledged this.³⁵ Despite Vectren and PUCO arguments to the contrary (Vectren Brief at 17-18; PUCO Brief at 13-14), a rate design that reduces the average cost of gas does not encourage conservation. It encourages more usage. A customer has less incentive to conserve when the unit price is lower; thus the intent of R.C. 4929.02 is contradicted.

In addition, the PUCO defended the straight fixed variable rate design on the grounds that it would be easier for customers to understand fixed charges.³⁶ The PUCO pointed to telephone,

³³ Opinion and Order at 12. (R. 114).

³⁴ *Id.*

³⁵ Tr. Vol. VI (Puican) at 25-27 (Aug. 28, 2009). (R. Sept. 12, 2008 Trans.).

³⁶ Opinion and Order at 12. (R. 114).

trash collection, internet, and cable service as examples of cost recovery through a fixed charge.³⁷ However, in making this comparison, the PUCO ignored a fundamental difference between gas and those other services. Thousands of Vectren's customers use very little or no gas during the summer months. That is not so for the other services, as the demand for the service is steady and not affected by how warm or cold it is. Thus, customers will not understand or accept the higher fixed customer charge, especially when little or no gas is used.

Vectren and the PUCO also argue that the prior rate design that included a smaller fixed customer charge artificially inflated energy efficiency investment and resulted in over-investment in conservation. (Vectren Brief at 18). This claim was made and relied upon even though no witness provided any evidence of over-investment. Relying on this unsupported theory to justify imposing straight fixed variable rates demonstrates the lengths to which the PUCO was willing to go to fundamentally change a rate design that has worked for over thirty years. The risks of over-conservation are unfounded.

OCC Proposition of Law 6:

Whether The Specificity Requirements Of R.C. 4903.10 And 4903.13 Are Met Must Be Determined On A Case By Case Basis Examining Whether The Appellant Has Used A Shotgun Or A Rifle To Approach The Issue.

R.C. 4903.10 requires an appellant to specify the grounds under which the PUCO's order is unjust and unreasonable. R.C. 4903.13 establishes a notice of appeal as the tool to perfect an appeal and requires the appellant to identify the order appealed and the errors complained of.³⁸

³⁷ Id.

³⁸ Notice related to appeal of PUCO orders is made to parties and the Court and thus must be understandable to those individuals. Thus the sufficiency of notice under R.C. 4903.10 and 4903.13 must be judged as to whether it alerted those individuals to the claims in OCC's Merit Brief.

According to this Court, these provisions were enacted by the General Assembly to guard against tactics by appellants where arguments are belatedly raised on appeal.³⁹

This Court has concluded that the “specificity” requirement related to the application for rehearing (and notice of appeal) is jurisdictional. The PUCO and Vectren claim that a number of OCC’s arguments can not be heard, because the Court has no jurisdiction. The Court allegedly lacks jurisdiction to consider the issues because OCC has failed to be specific enough in its application for rehearing and/or notice of appeal.

These claims are primarily directed to instances where OCC has raised the issues but has not, according to Vectren and the PUCO, been specific enough to meet the statutes. When the Court has been faced with whether or not a notice is specific enough, it has conducted a factual, case by case analysis. Generally, it has settled upon the shotgun versus rifle test. If the appellant used a rifle instead of a shotgun to hit the question, then the Court has denied motions to dismiss.

A. OCC Proposition Law 1 Issues:

OCC’s argument in its brief identified the case of *Duff v. Pub. Util. Comm.* (OCC Brief at 16-18). This argument was made anticipating Appellees’ likely arguments in their briefs, and was a tangential, not primary argument. It is an argument that is subsumed under the argument of sufficiency of notice. OCC has met the specificity test. The Court has jurisdiction to hear this issue.

B. OCC Proposition of Law 2 Issues:

In its notice of appeal OCC alleged that “[t]he Commission erred by failing to provide adequate notice of the second stage rate increases to the customers of Vectren, violating customers’ due process rights under the 14th Amendment to the Constitution.” (Reply Brief Appx.

³⁹ *City of Cincinnati v. Pub. Util. Comm.* (1949), 151 Ohio St. 353, 376-377, 39 O.O.188, 86 N.E.2d 10.

02.) OCC's application for rehearing was similar. (Reply Brief Appx. 53-54). In its merit brief, OCC expounded upon these principles and presented an argument explaining how these constitutional rights were implicated. In sub-arguments under Proposition of Law 2, OCC explains how property interests are created, thereby establishing rights to notice under the U.S. Constitution. Although the details of OCC's arguments were presented in its brief, the principle theory -- that customers have constitutional due process rights to notice -- was conveyed to the PUCO in OCC's application for rehearing and its notice of appeal.⁴⁰ OCC complied with statute.⁴¹ The Court has jurisdiction to consider these issues because OCC has complied with the statutes.

C. OCC Proposition of Law 4 Issues:

OCC Proposition 4 addresses the statutory violations of R.C. 4905.70 and 4929.02. This issue is not new. It was raised below in OCC's Application for Rehearing. It was briefed and argued by OCC in the Duke and the DEO appeal.⁴² In fact, on the basis that the same issues were raised here as in the Duke and DEO appeal, Vectren and PUCO moved to stay briefing in this proceeding.⁴³ There they claimed "the grounds for error alleged in the notice of appeal filed in

⁴⁰ *Contra Discount Cellular Inc. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 375, 2007-Ohio-53, 859 N.E.2d 957, where appellants claims were "nothing more than broad, general claims" and appellants failed to set forth the same errors in their notice as they had alleged in their application for rehearing. The application for rehearing bore no resemblance to the Appellant's proposition of law, the Court ruled. *Id.* Here there is a direct correlation between the issues briefed as OCC Proposition of Law 2 and the notice and application for rehearing. *Discount Cellular* thus, is not controlling based on the factual distinctions.

⁴¹ In contrast Vectren has completely failed to comply with the notice requirements of R.C. 4909.19. This is not a case where a question arises as to the sufficiency of what was done. There is no colorable question as to whether Vectren complied. It failed to convey any information that would alert customers, in an understandable manner, to customer charge increases for Stage 2 rates. In doing so its complete non-compliance with a jurisdictional, mandatory statute cannot be overlooked.

⁴² S.Ct. Case Nos. 08-1837, 09-314.

⁴³ See Corrected Joint Motion for Procedural Stay and Memorandum in Support at 1 (Oct. 8, 2009).

this case are the same as those alleged in the notices of appeal filed in the earlier appeals. Thus the parties [PUCO and Vectren] agree that the Court's decision in the earlier cases may be dispositive of the issues in this appeal." Although OCC opposed the motion, OCC generally concurs that, as to the issues of rate design, the Court's decision in the Duke and DEO appeals may be dispositive. It should however, permit OCC the opportunity to present its arguments here as OCC has met the specificity requirements of R.C. 4903.10 and 4903.13.

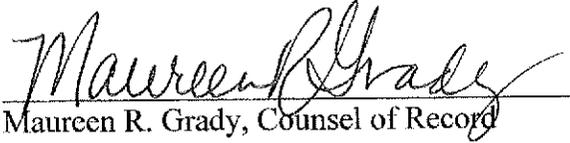
III. CONCLUSION

As discussed in OCC's Brief and this Reply Brief, the Commission's Opinion and Order contained numerous errors. On the basis of those errors OCC requests the Court to remand this case back to the Commission to correct the errors. Should the Court overturn the PUCO's adoption of a straight fixed variable rate design, it should remand the case with a directive to expeditiously implement further proceedings to establish a reasonable and lawful rate design, consistent with the objectives of R.C. 4929.02 and 4905.70 and one that is not based on straight fixed variable concepts.⁴⁴ If the Court upholds the straight fixed variable rate design on substantive grounds, and yet finds that Vectren has failed to properly notice Stage 2 rates, the Court should vacate the Stage 2 rates, and return to Stage 1 rates.

⁴⁴ In this regard OCC proposed an appropriate alternative rate design, not based on straight fixed variable rate concepts, that included a \$10 fixed customer charge and a volumetric rate of \$0.08046/Ccf. See OCC Ex. 3 at 22-23; Schedule WHN-5. (R. 63). This rate design is based on the stipulated revenue increase and could be implemented by the PUCO as it is a reasonable and lawful rate design, consistent with the objectives of R.C. 4929.02 and 4905.70.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
OHIO CONSUMERS' COUNSEL

A handwritten signature in cursive script, reading "Maureen R. Grady", is written over a horizontal line.

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IN THE SUPREME COURT OF OHIO

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

**APPENDIX TO REPLY BRIEF OF
APPELLANT
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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IN THE SUPREME COURT OF OHIO

09-1547

The Office of the Ohio Consumers' Counsel,)
)
 Appellant,)
)
 v.)
)
 The Public Utilities Commission)
 of Ohio,)
)
 Appellee.)

Case No. 09-_____

Appeal from the Public
 Utilities Commission of Ohio
 Case Nos. 07-1080-GA-AIR
 and 07-1081-GA-ALT

FILED
 AUG 26 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

**NOTICE OF APPEAL
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 PUCO

NOTICE OF APPEAL

Appellant, the Office of the Ohio Consumers' Counsel, in accordance with R.C. 4903.11 and 4903.13, and S. Ct. Prac. R. II, Section 3(B), hereby gives notice to the Supreme Court of Ohio and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of its appeal to this Court from Appellee's Opinion and Order entered on its journal on January 7, 2009; and its Entry on Rehearing, entered on its journal on August 26, 2009 in the above-captioned cases.¹

Under R.C. Chapter 4911, Appellant is the statutory representative of the residential customers of Vectren Energy Delivery of Ohio, Inc. ("VEDO" or "the Company"). Appellant was a party of record in the PUCO cases from which this appeal is taken.

On February 6, 2009, Appellant filed a timely Application for Rehearing from the January 7, 2009 Opinion and Order in accordance with R.C. 4903.10. Appellant's Application for Rehearing was denied with respect to the issues raised in this appeal by an Entry on Rehearing entered on Appellee's journal on August 26, 2009.

Appellant files this Notice of Appeal complaining of the errors in Appellee's January 7, 2009 Opinion and Order, and August 26, 2009 Entry on Rehearing and alleging that the Orders are unlawful and unreasonable. In particular the Appellee erred as a matter of law, in the following respects, all of which were raised in Appellant's Application for Rehearing:

- A. The PUCO erred in unlawfully approving the utility's proposed straight fixed variable rate design when the utility failed to provide adequate legal notice of the rate design pursuant to R.C. 4909.18 and 4909.19.
- B. The PUCO's erred in unlawfully approving the utility's proposed straight fixed variable rate design when the utility failed to provide adequate legal notice of the rate design, violating VEDO's residential customers' due process rights under the 14th Amendment to the Constitution.

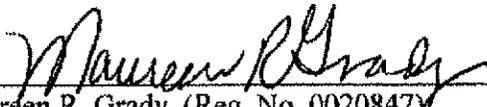
¹ These Orders are attached as Attachment A and Attachment B.

- D. The PUCO erred in failing to respect its own precedent when there was no showing that the need to change its position was clear and no demonstration that its prior decisions were in error.
- E. The PUCO established unjust and unreasonable rates, in violation of R.C. 4909.18 and 4905.22, when it implemented a rate design that was manifestly against the weight of evidence in the proceeding, violating R.C. 4903.09.

WHEREFORE, Appellant respectfully submits that the Appellee's January 7, 2009 Opinion and Order and August 26, 2009 Entry on Rehearing are unreasonable and unlawful, and should be reversed, vacated, or modified. These cases should be remanded to Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
(Reg. No. 0002310)
OHIO CONSUMERS' COUNSEL

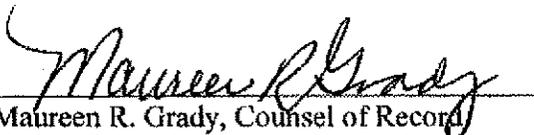
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of the Office of the Ohio Consumers' Counsel was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus and upon all parties of record by hand-delivery or regular U.S. Mail this 26th day of August, 2009.


Maureen R. Grady, Counsel of Record
Counsel for Appellant
The Office of the Ohio Consumers' Counsel

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AND PARTIES OF RECORD**

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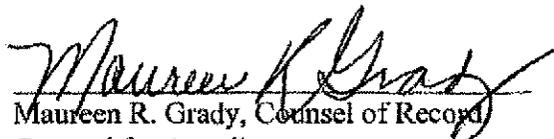
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CERTIFICATE OF FILING

I certify that this Notice of Appeal has been filed with the docketing division of the Public Utilities Commission of Ohio in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.


Maureen R. Grady, Counsel of Record
Counsel for Appellant
The Office of the Ohio Consumers' Counsel

20

BEFORE

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) Case No. 07-1080-GA-AIR
 Rates and Charges for Gas Services and)
 Related Matters.)

In the Matter of the Application of Vectren)
 Energy Delivery of Ohio, Inc., for Approval)
 of an Alternative Rate Plan for a)
 Distribution Replacement Rider to Recover)
 the Costs of a Program for the Accelerated) Case No. 07-1081-GA-ALT
 Replacement of Cast Iron Mains and Bare)
 Steel Mains and Service Lines, a Sales)
 Reconciliation Rider to Collect Differences)
 between Actual and Approved Revenues,)
 and Inclusion in Operating Expenses of the)
 Costs of Certain Reliability Programs.)

In the Matter of the Application of Vectren)
 Energy Delivery of Ohio, Inc., for)
 Continued Accounting Authority to Defer) Case No. 08-632-GA-AAM
 Differences between Actual Base Revenues)
 and Commission-Approved Base Revenues)
 Previously Granted in Case No. 05-1444-)
 GA-UNC and Request to Consolidate with)
 Case No. 07-1080-GA-AIR.)

OPINION AND ORDER

The Commission, considering the above-entitled applications, hereby issues its opinion and order in this matter.

APPEARANCES:

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo, Gretchen J. Hummel, Lisa McAlister, and Joseph M. Clark, 21 East State Street, 17th Floor, Columbus, Ohio 43215-4228, and Lawrence K. Friedeman, Vice President and Deputy General Counsel, P.O. Box 209, Evansville, Indiana 47709-209, on behalf of Vectren Energy Delivery of Ohio, Inc.

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Sheryl Creed Maxfield, First Assistant Attorney General of the state of Ohio, by Duane W. Luckey, Section Chief, and Werner L. Margard III and Anne L. Hammerstein, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Maureen R. Grady Joseph P. Serio, and Michael E. Idzkowski, Assistant Consumers' Counsel, office of the Ohio Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215, on behalf of residential utility consumers of Vectren Energy Delivery of Ohio, Inc.

David C. Rinebolt, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839-1793, on behalf of Ohio Partners for Affordable Energy.

Vorys, Sater, Seymour & Pease, LLP, by W. Jonathan Airey and Gregory D. Russell, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of Honda of America Mfg., Inc.

Chester, Willcox & Saxbe, LLP, by John W. Bentine and Mark S. Yurick, 65 East State Street, Suite 1000, Columbus, Ohio 43215-4213, and Vincent A. Parisi, General Counsel, 5020 Bradenton Avenue, Dublin, Ohio 43017, on behalf of Interstate Gas Supply, Inc.

John M. Dosker, General Counsel, 1077 Celestial Street, Suite 110, Cincinnati, Ohio 45202-1629, on behalf of Stand Energy Corporation.

Trent A. Dougherty, Director of Legal Affairs, 1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212-3449, on behalf of the Ohio Environmental Council.

OPINION:

I. History of the Proceedings

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

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

On May 23, 2008, VEDO filed an application for continued accounting authority to defer differences between actual base revenues and commission approved base revenues, as previously granted by the Commission.

A written report of the Commission staff's (Staff) investigation was filed on June 16, 2008. Objections to the Staff Report were timely filed by VEDO, the Ohio Consumers' Counsel (OCC), Honda of America Manufacturing, Inc. (Honda), Ohio Partners for Affordable Energy (OPAE), and the Ohio Environmental Council (OEC). Motions to intervene were filed by OCC, Honda, OPAE, OEC, Interstate Gas Supply, Inc. (IGS), and Stand Energy Corporation (Stand). Intervention was granted to these parties by the attorney examiner on August 1, 2008.

On July 18, 2008, a prehearing conference was held. The evidentiary hearing was held on August 19, 2008, through August 25, 2008, and on August 27, 2008, August 28, 2008, September 2, 2008, September 9, 2008, and September 15, 2008. Sixteen witnesses testified on behalf of VEDO, five witnesses testified on behalf of OCC, and five witnesses testified on behalf of Staff.

Local public hearings were held on September 3, 2008, in Sidney, Ohio; on September 4, 2008, in Dayton, Ohio; and on September 8, 2008, in Washington Court House, Ohio.

A stipulation (Stipulation) was filed on September 8, 2008, signed by VEDO, OCC, OPAE and Staff (Signatory Parties). Post-hearing briefs were filed by VEDO and Staff. A joint post-hearing brief was filed by OCC and OPAE. Reply briefs were filed by VEDO, Staff, OCC and OPAE.

II. Summary of the Stipulation

The Stipulation was intended by the Signatory Parties to resolve certain issues in this proceeding (Joint Ex. 1). The Stipulation includes, *inter alia*, the following provisions:

- (1) The Signatory Parties agree that VEDO should receive a revenue increase of \$14,779,153 with total annual revenues of \$456,791,425.
- (2) The Signatory Parties agree that the value of all of VEDO's property which is used and useful for the rendition of gas service to customers, as of the date certain of August 31, 2007, is \$234,839,282.
- (3) The Signatory Parties agree that VEDO is entitled to a rate of return of 8.89 percent.

- (4) The proposed tariffs attached to the Stipulation as Stipulation Exhibit 2 should be approved by the Commission and be effective for all services rendered after the date final approved tariffs are filed with the Commission.
- (5) The stipulated revenue requirement includes \$4 million in customer-funded energy efficiency programs, of which \$1.1 million is allocated to low-income weatherization funding. The Signatory Parties further agree to the establishment of an Energy Efficiency Funding Rider (EFFR), initially set at \$0.00, applicable to Rate Schedules 310, 315, 320 and 325. The Signatory Parties also agree that the Vectren Collaborative, originally established in *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Supplemental Opinion and Order (June 28, 2007), will monitor the implementation of the energy efficiency programs approved as proposed in the application in this case and, at least annually, will consider and make recommendations regarding additional program funding, as well as reallocation of funding among programs. The Company will submit, and the Collaborative will support, an application to establish an EFFR charge to provide a minimum of \$1 million to be used to continue funding for the low-income weatherization program for customers whose income is between 200 percent and 300 percent of the poverty level.
- (6) The Signatory Parties agree that the Sales Reconciliation Rider-A proposed by the Company to recover the deferral amount authorized in Case No. 05-1444-GA-UNC should be approved and that the initial rate should be set at the rate contained in Stipulation Exhibit 2 (Joint Ex. 1, Stipulation Ex. 2).
- (7) The Signatory Parties agree that the Commission should provide the Company with accounting authority to continue deferring for future recovery the difference between weather-normalized actual base revenues and Commission-approved base revenues in the same manner as previously authorized in Case No. 05-1444-GA-UNC, as requested in Case No. 08-632-GA-AAM, and that such deferred amounts should be recovered by Sales Reconciliation Rider-A.
- (8) The Company agrees to continue funding the low-income conservation program created pursuant to Case No. 05-1444-

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

- (9) The Signatory Parties agree that the Company should be authorized to establish a Distribution Replacement Rider (DRR) to enable the recovery of and return on investments made by the Company to accelerate implementation of a bare steel and cast iron main replacement program at a pre-tax rate of return of 11.67 percent. The DRR shall be in effect for the lesser of five years from the effective date of rates approved in this proceeding or until new rates become effective as a result of the filing by the Company of an application for an increase in rates under Section 4909.18, Revised Code, or the filing of a proposal to establish rates pursuant to an alternative method of regulation under Section 4929.05, Revised Code.
- (10) The Signatory Parties agree that the revenue distribution shown on Stipulation Exhibit 5 (Joint Ex. 1, Stipulation Exhibit 5) shall be used to develop rates and charges ultimately approved by the Commission in this proceeding.
- (11) The Signatory Parties agree that the rate design issues associated with rate schedules 310 and 315 are not resolved by the Stipulation and will be fully litigated and submitted to the Commission for its consideration and resolution.
- (12) The Stipulation resolves all contested issues raised in Case Nos. 07-1080-GA-AIR, 07-1081-GA-ALT, 05-1444-GA-UNC and 08-632-GA-AAM, except for those issues specifically identified as being reserved for separate resolution by means of litigation or otherwise.

III. Evaluation of the Stipulation

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

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

Dayton Power and Light, Case Nos., 03-2405-EL-CSS et al., Opinion and Order (February 9, 2005); *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR, Order on Remand (April 14, 1994); *Ohio Edison Co.*, Case Nos. 91-698-EL-FOR et al., Opinion and Order (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-179-EL-AIR, Opinion and Order (January 31, 1989). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St. 3d 547 (1997)(quoting *Consumers' Counsel, supra*, at 126). The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

Based upon our three-prong standard of review, we find that the first criterion, that the settlement process involved serious bargaining by knowledgeable, capable parties, is met. Counsel for VEDO, OPAB, OCC and Staff have been involved in many cases before the Commission, including a number of prior cases involving rate issues. Further, a review of the terms of the Stipulation, and the schedules and tariffs filed with the Stipulation, shows that the parties engaged in comprehensive negotiations, resolving all outstanding issues except rate design (Staff Ex. 3a at 3).

The Stipulation also meets the second criterion. As a package, it advances the public interest by resolving a majority of issues raised in this proceeding without incurring the time and expense of further litigation. Moreover, the testimony in the record indicates that the Stipulation establishes a fair and reasonable revenue requirement with an increase in base rates of approximately 3.34 percent (Staff Ex. 3a at 3). At the hearing, Staff witness Puican testified that the stipulated rate of return of 8.89 percent includes a 25 basis point reduction to the return on equity component, in order to take into consideration the reduction in risk to the Company which may result from the Commission's adoption of one of the rate designs proposed by the Company, Staff, or OCC (Tr. IX at 11-12).

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

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

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

IV. Rate of Return and Authorized Rates

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

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

V. Rate Design

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

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

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

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

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

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

the fixed customer charge. OCC and OPAB allege that the SFV rate design would lengthen the payback for energy efficiency investments because a greater portion of the bill will be recovered through the fixed customer charge and a smaller portion of the bill through the volumetric charge. OCC notes that Staff witness Puican testified that charging a volumetric rate to recover fixed costs provides an artificial price signal (Tr. VI at 27-28), but OCC claims that, if the goal is to achieve maximum conservation, then the best price signal is one that includes the largest volumetric charge and the lowest fixed charge.

OCC and OPAB also claim that the adverse impacts of the SFV rate design on low-usage customers are also harmful to low-income customers because it requires them to pay more to subsidize high-volume users. OCC and OPAB cite to the testimony of OCC witness Coulton for the proposition that an SFV rate design has the effect of disproportionately increasing bills to low-income customers (OCC Ex. 2 at 31). OCC and OPAB argue that VEDO and Staff improperly assume the SFV rate design to be beneficial to low-income customers who are not on PIPP. OCC and OPAB rely upon the testimony of OCC witness Coulton, who testified that the average energy use of PIPP customers is higher than the average energy use of PIPP customers plus non-PIPP low-income customers. OCC and OPAB claim that this demonstrates that low-income customers are not high energy users (OCC Ex. 2 at 27).

OCC and OPAB argue that the PIPP population is not an appropriate surrogate for the entire low-income population because of the basic nature of the PIPP program which requires a household to pay a percentage of its income to the utility in order to maintain service. As a result, the PIPP program excludes a substantial number of households that have lower energy bills but are still low-income customers (OCC Ex. 2 at 27). Instead, OCC and OPAB rely upon the testimony of OCC witness Coulton, who claimed that lower income households use less natural gas than higher income households (OCC Ex. 2 at 30).

Further, OCC and OPAB claim that the Company and Staff proposals related to the customer charge violate the doctrine of gradualism. OCC notes that the Staff does not rely upon any formula or overriding principle when applying gradualism (Tr. VI at 36). OCC faults Staff for not providing a more transparent explanation for its support of the SFV rate design. OCC believes that a more gradual introduction of SFV is needed in order to lessen the impact on customers.

Finally, OCC and OPAB claim that the SFV rate design contradicts Ohio law. OCC and OPAB allege that the SFV rate design does not promote customer efforts to engage in the conservation of natural gas and instead encourages the increased usage of natural gas because the SFV rate design reduces costs for high-use customers (OCC Ex. 3 at 21). Thus, OCC and OPAB claim that the SFV rate design violates the state policy codified in Section 4929.02(A)(4), Revised Code.

VEDO responded to three issues raised by OCC: the price signal and its effect on conservation, the impact on low-income customers, and gradualism. With respect to price signals and their impacts on conservation, VEDO contends that conservation will reduce only the customer's commodity cost and that an appropriate and fair rate design will reflect precisely that and will permit a customer to make investment decision on a valid economic analysis. VEDO cites to the testimony of Staff witness Puican, who stated that:

Customers will always achieve the full value of the gas cost savings regardless of the distribution rate. . . . Artificially inflating the volumetric rate beyond its cost basis skews the analysis and will cause over-investment in conservation . . . which exacerbates the under-recovery of fixed costs that the utility must then recover from all other customers.

(Staff Ex. 3 at 3.)

VEDO also alleges that OCC and OPAE incorrectly argue that the interests of low-income customers must prevail in any conflict over rates among residential customers. In addition, VEDO claims that the evidence shows that a fully implemented SFV rate design benefits low-income customers and that the OCC and OPAE position will cause low-income customers to have higher bills (Co. Ex. 8a at 12-16). The Company notes that, although OCC's witness did testify that an SFV rate design would adversely impact low-income customers, the record demonstrates that the witness based his testimony on unreliable data (Co. Ex. 8a at 11). Instead, VEDO argues that it prepared a study demonstrating that PIPP customers, on average, use more gas than the average of all residential customers (Co. Ex. 8a at 17). Further, the Company notes that Staff witness Puican agreed that the usage data of PIPP customers was the best available proxy for all low-income customers (Staff Ex. 3 at 7; Tr. VI at 35). Moreover, the Company presented, on rebuttal, a study that the Company claims directly rebutted OCC's witness and demonstrated that low-income customers in VEDO's service area consume, on average, more natural gas annually than all but the highest income residential customers in its service area (Co. Ex. 8a at 12-14).

With respect to OCC's arguments concerning gradualism, VEDO notes that the stipulated revenue increase in this case for residential customers is only 4.42 percent. The Company contends that, because the Commission has held that gradualism must be considered in reviewing the overall increase rather than a specific component such as the customer charge, an overall increase of less than five percent does not violate the principle of gradualism. *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 04-571-GA-AIR, Entry on Rehearing (June 8, 2005) at 5.

Staff argues that the record in this case demonstrates that the SFV rates are reasonable, understandable, and send the proper price signal to customers. Staff contends

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Tariffs

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

VI. Other Issues

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

VEDO argues that OCC and OP&E have not demonstrated that the PFN lacks substantial compliance with the requirements of Section 4904.43, Revised Code. VEDO further claims that OCC and OP&E lack standing to raise issues regarding the sufficiency of the PFN, which is required by statute to be served upon municipalities in the utility's service area; VEDO believes that only these municipalities would have standing to raise claims regarding the PFN. Finally, VEDO argues that OCC and OP&E have not demonstrated any harm to residential customers resulting from the differences rates in the published notice and VEDO's application and that OCC and OP&E have cited to no authority that these differences warrant a new notice and new hearing.

Staff also claims that OCC and OP&E lack standing to raise claims regarding the adequacy of the notice contained in the PFN. Staff further argues that VEDO substantially complied with the letter and spirit of Section 4909.43, Revised Code, in its PFN; Staff claims that the differences in the volumetric rates in the PFN and the volumetric rates in the VEDO's application amount to \$0.21 per year for a residential customer using 1000 Ccf per year and that these differences are so negligible as to be meaningless from a customer's perspective.

The Commission notes that the Supreme Court has held that the published notice must include the "substance" of the application which the Court defined as "the essential nature or quality" of the proposal. *Committee against MRT v. Pub. Util. Comm.* (1977), 32 Ohio St. 2d 231, 233. The Court later expanded upon its decision in *MRT*, stating that:

The notice requirement of the statute as discussed by this court in *MRT* . . . is not an unreasonable one. It requires only that the notice 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.

Ohio Association of Realtors v. Pub. Util. Comm. (1979), 60 Ohio St. 2d 172, 176.

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

FINDINGS OF FACT:

- (1) On November 20, 2007, VEDO filed applications for an increase in gas distribution rates and for approval of an alternative rate plan.
- (2) A technical conference regarding VEDO's applications was held on February 5, 2008.
- (3) On May 23, 2008, VEDO filed an application for continued accounting authority to defer differences between actual base revenues and commission approved base revenues, as previously granted by the Commission.
- (4) A written report of the staff's investigation was filed on June 16, 2008. Objections to the Staff Report were timely filed by VEDO, OCC, Honda, OPAE, and OEC. Motions to intervene were filed by OCC, Honda, OPAE, OEC, IGS, and Stand.
- (5) Intervention was granted to OCC, Honda, OPAE, OEC, IGS, and Stand by the attorney examiner on August 1, 2008.
- (6) On July 18, 2008, a prehearing conference was held.
- (7) Local public hearings were held on September 3, 2008, in Sidney, Ohio; on September 4, 2008, in Dayton, Ohio; and on September 8, 2008, in Washington Court House, Ohio.
- (8) Notice of the local public hearings was published in accordance with Section 4903.083, Revised Code.
- (9) The evidentiary hearing was commenced on August 19, 2008 and continued on August 20 through August 25, 2008, August 27, 2008, August 28, 2008, September 2, 2008, September 9, 2008, and September 15, 2008.
- (10) On September 8, 2008, a Stipulation was filed on behalf of VEDO, OCC, OPAE, and Staff.
- (11) The Signatory Parties stipulated to a net operating income of \$11,270,763 for the test year ending May 31, 2008.
- (12) Income of \$11,270,763 represents a 4.80 percent rate of return on the stipulated rate base of \$234,839,282.

- (13) The stipulated gross annual revenue to which VEDO is entitled for purposes of this proceeding is \$456,791,425. The Signatory Parties stipulated to a gross revenue increase of \$14,779,153 which should produce a net operating income of \$20,877,212. A net operating income of \$20,877,212 represents a rate of return of 8.89 percent on a rate base of \$234,839,282.
- (14) A rate of return of 8.89 percent is fair and reasonable under the circumstances presented by this case and is sufficient to provide the Company with just and reasonable compensation and return on the value of its property used and useful in furnishing the service described in the application.
- (15) The Stipulation was the product of bargaining among knowledgeable parties, benefits ratepayers and the public interest, and does not violate any important regulatory principles or practices. The Stipulation is reasonable and should be adopted.

CONCLUSIONS OF LAW:

- (1) VEDO's applications were filed pursuant to, and this Commission has jurisdiction over the applications under, the provisions of Sections 4909.17, 4909.18, 4909.19, 4929.05, and 4929.11, Revised Code. The application complies with the requirements of those statutes.
- (2) A staff investigation was conducted and a report duly filed and mailed, and public hearings held herein, the written notice of which complied with the requirements of Sections 4909.19 and 4903.083, Revised Code.
- (3) The ultimate issue for the Commission's consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of the stipulation, the Commission has used the following criteria:

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

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

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

- (4) A rate of return of 4.80 percent does not provide VEDO with reasonable compensation and return on its property used and useful in the rendition of natural gas services.
- (5) It is reasonable and in the public interest to transition, over a phase-in period, to an SFV rate design, as set forth in this opinion and order.

ORDER:

It is, therefore,

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

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

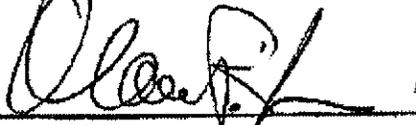
ORDERED, That the application of VEDO for authority to increase its rates and charges for service be granted to the extent provided in this opinion and order. It is, further,

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

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

ORDERED, That a copy of this opinion and order be served on all parties of record.

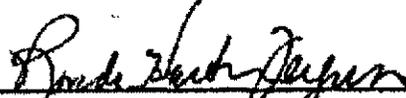
THE PUBLIC UTILITIES COMMISSION OF OHIO



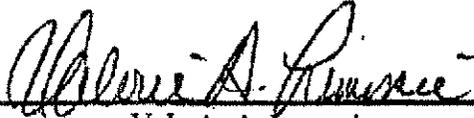
Alan R. Schriber, Chairman



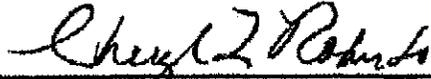
Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie



Cheryl L. Roberto

GAP/vrm

Entered in the Journal

JAN 07 2008



Renee J. Jenkins
Secretary

BEFORE

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) Case No. 07-1080-GA-AIR
 Rates and Charges for Gas Services and)
 Related Matters.)

In the Matter of the Application of Vectren)
 Energy Delivery of Ohio, Inc., for Approval)
 of an Alternative Rate Plan for a)
 Distribution Replacement Rider to Recover)
 the Costs of a Program for the Accelerated)
 Replacement of Cast Iron Mains and Bare) Case No. 07-1081-GA-ALT
 Steel Mains and Service Lines, a Sales)
 Reconciliation Rider to Collect Differences)
 between Actual and Approved Revenues,)
 and Inclusion in Operating Expenses of the)
 Costs of Certain Reliability Programs.)

ENTRY ON REHEARING

The Commission finds:

- (1) Vectren Energy Delivery of Ohio, Inc., (VEDO) is a natural gas company as defined in Section 4905.03(A)(6), Revised Code, and a public utility as defined in Section 4905.02, Revised Code. As such, VEDO is subject to the jurisdiction of the Public Utilities Commission in accordance with Sections 4905.04 and 4905.05, Revised Code.
- (2) On November 20, 2007, VEDO filed applications for an increase in gas distribution rates and for approval of an alternative rate plan.
- (3) On January 7, 2009, the Commission issued its Opinion and Order in this proceeding.
- (4) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

- (5) On February 6, 2009, the Ohio Consumers' Counsel (OCC) filed an application for rehearing, alleging that the Opinion and Order in this case was unreasonable and unlawful on the following grounds.
- (a) The Commission erred by approving a rate design that includes an increase to the monthly residential customer charge without providing consumers adequate notice of the straight fixed variable (SFV or levelized) rate design, pursuant to Sections 4909.18 and 4909.19, Revised Code.
 - (b) The Commission erred by failing to provide adequate notice of the second stage rate increases to the customers of VEDO, violating customers' due process rights under the Fourteenth Amendment of the Constitution.
 - (c) The Commission erred when it failed to comply with the requirements of Section 4903.09, Revised Code, and provide specific findings of fact and written opinions that were supported by record evidence.
 - (d) The Commission erred by approving an SFV rate design that discourages customer conservation efforts in violation of Sections 4929.05 and 4905.70, Revised Code.
 - (e) The Commission erred by approving a rate design that unreasonably violates prior Commission precedent and policy.
 - (f) The Commission erred by imposing the SFV rate design against the manifest weight of the evidence, resulting in unjust and unreasonable rates in violation of Section 4909.18 and 4905.22, Revised Code.
- (6) On February 13, 2009, VEDO filed a memorandum contra OCC's application for rehearing.

- (7) On March 4, 2009, the Commission granted rehearing for the purpose of further considering the matters raised by OCC in its application for rehearing.
- (8) In its first assignment of error, OCC argues that the Commission erred by approving a rate design that includes an increase to the monthly residential customer charge without providing consumers adequate notice of the SFV rates, pursuant to Sections 4909.18 and 4909.19, Revised Code. OCC claims that the notice published by VEDO failed to include any explanation for the term "straight fixed variable" and failed to explain how the transition to a straight fixed variable rate would impact customer charges and volumetric rates. OCC also claims that the notice failed to alert customers that in 2010 the customer charge would increase in the winter months and failed to show the impact of the second stage rates on the customers' bills. Finally, OCC alleges that the notice failed to show VEDO's overall plan to move to a full straight fixed variable rate design.

VEDO argues that, with respect to the sufficiency of the newspaper notice, the Supreme Court has held that the essential nature or quality of the proposal must be disclosed. *Committee against MRT v. Pub. Util. Comm.* (1977), 32 Ohio St.2d 231, 233. Further, according to VEDO, all that is required is "that the notice 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." *Ohio Association of Realtors v. Pub. Util. Comm.* (1979), 60 Ohio St. 2d 172, 176. VEDO notes that, although the Court addressed in these case claims by customer groups whose participation in the Commission proceedings was prevented by the alleged lack of notice, the record shows that both OCC and Ohio Partners for Affordable Energy (OPAE) sought and obtained authority to participate in the proceeding on behalf of VEDO's residential customers. Moreover, given the extensive discovery, objections, and testimony filed by OCC and OPAE in this case, VEDO claims that it cannot be denied that residential customers participated fully in these proceedings.

In the Opinion and Order in this case, the Commission thoroughly addressed the arguments raised by OCC. The

Commission determined that the notices at issue in this proceeding stated the reasonable substance of VEDO's proposal, including sufficient information for consumers to understand that VEDO had proposed a new rate design along with its proposed increase in rates, and that the notice provided sufficient information for consumers to determine whether to inquire further into the proposal or intervene in the case, as required by the Supreme Court in *Ohio Association of Realtors*. OCC has raised no new arguments in its application for rehearing. Accordingly, rehearing on this assignment of error should be denied.

- (9) In its second assignment of error, OCC alleges that the Commission erred by failing to provide adequate notice of the second stage rate increases to VEDO's customers, violating customers' due process rights under the Fourteenth Amendment of the Constitution.

VEDO argues that the Ohio Supreme Court has found that the right to participate in ratemaking proceedings is statutory, not constitutional. *City of Cleveland v. Pub. Util. Comm.* (1981), 67 Ohio St.2d 446, 453. The Commission agrees with VEDO. The Supreme Court clearly stated in *City of Cleveland* that "any legal right which a ratepayer would have to notice of a hearing would have to stem directly from the statutes." *City of Cleveland* at 453. Accordingly, any alleged defect in the notice published by VEDO would not implicate VEDO's customers' due process rights under the Fourteenth Amendment. Rehearing on this assignment of error should be denied.

- (10) OCC claims in its third assignment of error that the Commission erred by approving a low-income pilot program without an adequate record to support that order. OCC asserts that the fact that there is an adverse affect on low-use customers as a result of implementation of the SFV rate design in this case is without question. However, according to OCC, the record in this case does not answer the question of how the SFV impacts non-PIPP, low-income customers. OCC claims that the SFV rate design is bad public policy for VEDO's low-usage and low-income residential customers who, OCC claims, will be forced to subsidize VEDO's high-use customers. OCC notes that the Commission stated a concern regarding the

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

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

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

However, the Commission noted that there will be some customers who will be adversely impacted by the change in rate design. Because some of these low-usage customers may be non-PIPP, low-income customers (despite the fact that there is *no direct correlation* between low-usage customers and low-income customers), the Commission found that a low-income pilot program should be established to ameliorate the impact of the change in rate design upon non-PIPP, low-income customers. This decision was amply supported by record evidence in this case and clearly explained in the Opinion and Order. Accordingly, rehearing on this assignment of error should be denied.

- (11) In its fourth assignment of error, OCC contends that the Commission erred by approving an SFV rate design that discourages customer conservation efforts in violation of Sections 4929.02 and 4905.70, Revised Code. OCC claims that the SFV rate design sends the wrong price signal to customers. OCC also alleges that the SFV rate design removes the customers' incentive to invest in energy efficiency because the SFV rate design extends the payback period for energy efficiency investments made by consumers (Tr. IV at 26).

VEDO claims that the SFV rate design satisfies the requirements of Sections 4929.02 and 4905.70, Revised Code. VEDO notes that it submitted uncontroverted evidence that VEDO is in substantial compliance with and is expected to remain in substantial compliance with the requirements of Section 4929.02, Revised Code (Co. Ex. 9 at 14-15; Co. Ex. 1, Alt Reg. Ex. G). VEDO contends that Section 4905.70, Revised Code, requires that the Commission initiate programs related to conservation and energy efficiency but says nothing about rate design for the recovery of fixed costs. Further, VEDO argues that the evidence in the record demonstrates that the distribution portion of the gas bill is minor compared to the total bill and that recovering fixed costs through volumetric rates actually distorts price signals and causes poor conservation and energy efficiency investment decisions (Staff Ex. 3 at 4-5; Co. Ex. 8a at 23). According to VEDO, OCC's argument that the SFV rate design will prolong the payback for energy efficiency investments ignores the fact that a rate design that recovers fixed costs based on usage levels leads customers

to faulty payback analysis which assumes that fixed costs somehow can be reduced by conservation (Staff Ex. 3 at 4-5; Co. Ex. 9a at 22-23).

The Commission finds that rehearing on this assignment of error should be denied. OCC has raised no new arguments or issues which were not previously considered by the Commission. The levelized rate design adopted in this case does not unduly discourage customer conservation efforts nor does it send the wrong price signal to customers. The record clearly demonstrates that the commodity portion of the gas bill comprises 75 to 80 percent of the total bill (Tr. III at 68). Therefore, gas usage will have the biggest influence on price signals received by customers when making gas consumption decisions, and customers will still receive the full value of the gas cost savings resulting from any conservation efforts (Staff Ex. 3 at 3). Moreover, under the levelized rate design, the variable component of the total bill will reflect the utility's true avoided costs, which are the costs that a utility does not incur with a unit reduction in sales; and customers will not be misled into believing that conservation efforts will reduce recovery of the fixed costs of the distribution system (Staff Ex. 3 at 4-5; Tr. IV at 14, 22-24). Finally, the Commission notes that our decision in this proceeding is consistent with the decisions in three other cases where the Commission has considered use of the levelized rate design. See *In re Duke Energy Ohio, Inc.*, Case No. 07-589-GA-AIR et al., Opinion and Order (May 28, 2008); *In re Dominion East Ohio*, Case No. 07-829-GA-AIR, Opinion and Order (October 15, 2008); *In re Columbia Gas of Ohio, Inc.*, Case No. 08-72-GA-AIR, Opinion and Order (December 3, 2008).

- (12) In its fifth assignment of error, OCC claims that the Commission erred by approving a rate design that unreasonably violates prior Commission precedent and policy. OCC claims that the Commission has identified gradualism as an important regulatory principle and that gradualism has been relied upon in prior cases in such a manner that increases to the fixed portion of the customer charge were limited to \$1.00 to \$2.00 per customer per month. OCC claims that the Opinion and Order imposed increases of \$6.37 and \$11.37 per customer per month over a two-year period without any

resemblance to the principle of gradualism embodied in Commission precedents.

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

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

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

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

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

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

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

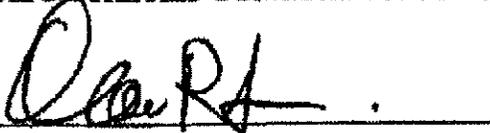
Rehearing on this assignment of error should be denied. In the Opinion and Order, the Commission specifically determined that OCC witness Coulton's testimony regarding whether low-income customers are also low usage customers was of little probative value because Mr. Coulton based his analysis upon monthly surveys conducted by the Census Bureau, using data which the Census Bureau cautioned may be unreliable (Tr. V at 56-63; Co. Ex. 8a at 11). Further, there is no dispute in the record that PIPP customers use more natural gas than the average of all residential customers (Co. Ex. 8a at 17). Moreover, VEDO presented testimony using actual census data for its service area demonstrating that low-income customers in VEDO's service area consume, on average, more natural gas annually than all but the highest income residential customers in its service area (Co. Ex. 8a at 12-14). This evidence is consistent with Staff's conclusion that the use of PIPP customers was the best available proxy for low-income customers (Staff Ex. 3 at 7; Tr. VI at 35).

It is, therefore,

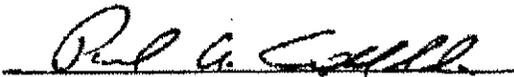
ORDERED, That the application for rehearing filed by the OCC be denied. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie

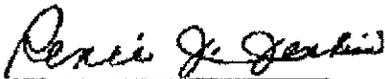


Cheryl L. Roberto

GAP/vrm

Entered in the Journal

AUG 26 2008



Renee J. Jenkins
Secretary

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Recover the Costs of a Program for the) Case No. 07-1081-GA-ALT
Accelerated Replacement of Cast Iron)
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Lines, a Sales Reconciliation Rider to)
Collect Difference Between Actual and)
Approved Revenues, and Inclusion in)
Operating Expense of the Costs of Certain)
Reliability Programs.)

PUCO

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APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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February 6, 2009

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of VEDO)
Energy Delivery of Ohio, Inc., for)
Authority to Amend its Filed Tariffs to) Case No. 07-1080-GA-AIR
Increase the Rates and Charges for Gas)
Services and Related Matters.)

In the Matter of the Application of VEDO)
Energy Delivery of Ohio, Inc., for)
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**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Under R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of approximately 293,000 gas consumers of Vectren Energy Delivery of Ohio, Inc. ("VEDO" "Vectren" or "the Company"), applies for rehearing of the January 7, 2009 Opinion and Order ("Opinion and Order") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in these proceedings. A number of parties, including Vectren, OCC, PUCO Staff, and Ohio Partners for Affordable Energy ("OPAE"), reached a settlement agreement on most issues with the exception of rate design and notice. This settlement agreement was not opposed by the

other parties to the proceeding. The Commission's Order approved the settlement agreement, without modification, and ruled on the remaining issues of rate design and notice, finding that a Straight-Fixed Variable ("SFV") rate design should be implemented and concluding that notice of the SFV substantially complied with the statutes.

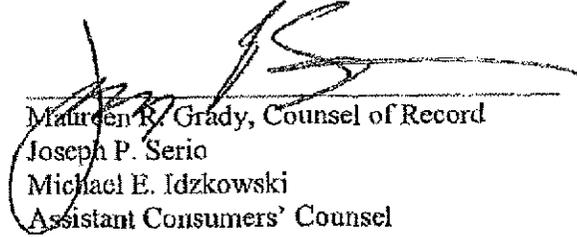
OCC asserts that the Commission's Order is unjust, unreasonable, and unlawful in the following particulars:

1. The Commission erred by approving a rate design that includes an increase to the monthly residential customer charge without providing consumers adequate notice of the SFV rate design pursuant to R.C. 4909.18 and R.C. 4909.19.
2. The Commission erred by failing to provide Adequate Notice of the Second Stage Rate increases to the customers of Vectren, violating customers' due process rights under the 14th Amendment to the Constitution.
3. The Commission erred when it failed to comply with the requirements of R.C. 4903.09, and provide specific findings of fact and written opinions that were supported by record evidence.
4. The Commission erred by approving an SFV rate design that discourages customer conservation efforts in violation of R.C. 4929.05 and R.C. 4905.70.
5. The Commission erred by approving a rate design that unreasonably violates prior Commission precedent and policy.
6. The Commission erred by imposing the SFV rate design against the manifest weight of the evidence resulting in unjust and unreasonable rates in violation of R.C. 4909.18 and R.C. 4905.22.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. PROCEDURAL HISTORY

On September 28, 2007, VEDO filed a Notice of Intent to File an Application for an increase in its gas rates and an Application for approval of Alternative Rate Plan for its Dayton and west central Ohio service area. VEDO subsequently filed its Application on November 20, 2007. The Application for a Rate Increase and an Alternative Rate Plan (together "Application") will affect all of VEDO's residential customers.

On November 5, 2007, the OCC, on behalf of the residential customers of VEDO, moved the Commission to grant OCC's intervention in this case. On November 6, 2007,

OPAE moved to intervene. The OCC and OPAE Motions to Intervene were granted on August 1, 2008.

On June 16, 2008, the PUCO Staff's Report of Investigation ("Staff Report") was filed, as well as the Financial Audit Report submitted by Eagle Energy LLC. OCC filed its Objections to the Staff Report on July 16, 2008. OCC and OPAE filed Intervenor testimony in opposition to the Company's Application on July 23, 2008.

Prior to the hearing in this proceeding, the parties, including OCC and OPAE entered into settlement discussions which resulted in a Stipulation and Recommendation ("Stipulation") that was filed on September 8, 2008. In the Stipulation, the parties agreed, in part, that the Company shall receive a revenue increase of \$14,779.153; receive total annual revenues of \$456,791,425; and have an opportunity to earn an overall rate of return of 8.89%. The Stipulation also included the parties' agreement to a Sales Reconciliation Rider-A ("SRR-A") to allow the Company to collect deferred revenues previously approved by the Commission in Case No. 05-1444-GA-UNC.

However, the Stipulation did not resolve all issues. The Staff and Company proposals at hearing called for the implementation of the SFV rate design, which represented a significant departure from decades of PUCO precedent. OCC and OPAE opposed the SFV. Under the Stipulation, OCC and OPAE reserved their right to litigate the rate design issue¹ and the SFV rate design issue became the central issue in the evidentiary hearing that commenced on August 19, 2008.

In the evidentiary hearing in these cases, OCC presented testimony opposing the Staff's recommended implementation of an SFV rate design, and also testimony

¹ See Stipulation and Recommendation (Sept. 8, 2008), Paragraph 14.

demonstrating the adverse effect the SFV rate design will have on low-income customers, in particular.

Between September 3, 2008 and September 8, 2008, four public hearings were held in Sydney, Dayton, and Washington Court House. At those hearings, various customers of VEDO spoke in opposition to the rate increase proposed and the SFV rate design proposed by the Company and the PUCO Staff.

On September 26, 2008, the OCC and OPAE submitted a Joint Initial Brief on the rate design / SFV issue. VEDO and Staff also submitted Initial Briefs. On October 7, 2008, OCC, OPAE, VEDO and Staff filed Reply Briefs.

The PUCO issued its Opinion and Order on January 7, 2009, which imposed the SFV rate design on customers, similar to the Commission's rulings in the previous Duke² and DEO³ rate cases.⁴

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that within thirty (30) days after an order is issued by the Commission "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."⁵ Furthermore, the

² *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, Opinion and Order (May 28, 2008).

³ *In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-GA-AIR, Opinion and Order (August 28, 2008).

⁴ Opinion and Order at 11.

⁵ R.C. 4309.10

application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”⁶

In considering an application for rehearing, Ohio law provides that the Commission “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.”⁷ If the Commission grants a rehearing and determines that “the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same * * *.”⁸

OCC having been granted intervention on August 1, 2008 thus meets the statutory conditions that apply to an applicant for rehearing under R.C. 4903.10. Accordingly, OCC respectfully requests that the Commission hold a rehearing on the matters specified below.

III. ARGUMENT

Assignment of Error 1: The Commission Erred By Approving A Rate Design That Includes A Substantial Increase To The Monthly Residential Customer Charge, While Reducing The Volumetric Rates Without Providing Consumers Adequate Notice Of The Second Stage SFV Rates, All Of Which Is Required Under R.C. 4909.18 and R.C. 4909.19.

The Commission found in its Opinion and Order that the “notices at issue”⁹ stated the reasonable substance of VEDO’s rate design proposal and “provided sufficient information for consumers to determine whether to inquire further into the proposal or

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ The notices at issue were notices required under R.C. 4909.18 and 4909.19 which pertain to the newspaper notice publication requirements, and the pre-filing notice, required under R.C. 4909.43. OCC’s Application for Rehearing is directed solely to the newspaper notice required under R.C. 4909.18 and 4909.19.

intervene in the case.”¹⁰ In addressing the newspaper notice required under R.C. 4909.18 and 4909.19, the Commission found that the notice had provided “sufficient information to consumers to understand that VEDO had proposed a new rate design along with its proposed increase in rates so that consumers could determine whether to inquire further into the case or to intervene.”¹¹ The Commission’s findings are unreasonable and unlawful and should be reversed by Entry on Rehearing.

A. The Content of the Notice

In a review of this issue, the key question is what did the newspaper notice say that allegedly gave sufficient information to consumers that would enable them to understand that VEDO had proposed a new rate design -- one which drastically departed from thirty years of ratemaking precedent:

VEDO proposes changes to the rate design for 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.¹²

Then VEDO provided, as part of the “description of the proposed changes to the terms and conditions applicable to gas service,”¹³ the proposed rates and the average percentage increase in operating revenue requested by the utility on a rate schedule basis. VEDO, however, **only provided notice of the proposed charges for Stage 1 rates** for Rate 310 and 315. The notice of the charges shows a customer charge of \$16.75 per meter (November-April “winter rates”) and \$10.00 per meter (May-October “summer rates”)

¹⁰ Opinion and Order at 16.

¹¹ *Id.*

¹² See VEDO Legal Notice Of Publication. Emphasis added.

¹³ *Id.*

with volumetric charges of \$0.11937 per Ccf for the first 50 Ccf plus and \$0.10397 per Ccf for all Ccf over 50 Ccf.¹⁴

B. The Inadequacies of the Notice

The Notice did not include any explanation of what “straight fixed variable rate for distribution service” means, despite the Commission’s conclusion that there was “sufficient information for a customer to understand that VEDO had proposed a new rate design.” And “straight fixed variable” is surely not a concept that is widely understood by most customers. Nor does the Company explain what changes there are to initiate the gradual transition to the SFV rate design. Moreover, nowhere in the notice is a “gradual transition” defined. Missing from the notice as well are the actual Stage 2 rates, the average proposed increase to customers under the Stage 2 rates, and the date at which the Stage 2 rates are to go into effect (2010).

In addition, Stage 2 rates for Rate 310 and 315 were not even mentioned in the Notice. Under the Stage 2 rates proposed in Vectren’s Application, the customer charge increases from Stage 1 level summer rates of \$10.00 to \$11.96. Under Stage 2, rates proposed by Vectren winter rates increase from Stage 1 levels of \$16.75 to \$20.04. The increased customer charges for Stage 2 were coupled with decreased volumetric rates for Stage 2 of \$0.8574 per Ccf for the first 50 Ccf, and \$0.7624 per Ccf for all volumes over 50. Without notice of the Stage 2 rates customers could not know or understand a real sense of the “changes” to rate design that were being proposed to implement the SFV rate design. Nonetheless, all that customers saw was the very first year of the proposal. This served to prevent the typical consumer from understanding that increasing the fixed portion of the customer charge and decreasing volumetric rates are what is meant by

¹⁴ *Id.*

moving to the SFV rate design, where eventually there will be no volumetric charges and only a fixed flat rate customer charge.

Thus VEDO's customers were given a notice that 1) failed to explain what a straight fixed variable rate for distribution meant; 2) failed to describe what the gradual transition to this undefined straight fixed variable rate meant to them in terms of their customer charge and volumetric rates; 3) failed to alert customers that in 2010 the customer charge would be increasing again in the winter months to \$20.04 and volumetric rates decreasing; 4) failed to show customers the impact of Stage 2 rates on their bill; and 5) failed to show the Company's overall plan to move to a full SFV -- with no volumetric rates and a high unavoidable fixed customer charge.

Instead, Vectren's customers were left with the impression that their customer charge would increase from \$7.00 year round to \$10.00 in the summer and \$16.75 in the winter, when in reality there was much more of an increase to come to their fixed flat rate unavoidable customer charge. That increase would push the customer charge to \$11.96 in the summer and to a whopping \$20.04.

C. R.C. 4909.18 and R.C. 4909.19 Notice Requirements

The notice requirements contained in R.C. 4909.18 and R.C. 4909.19 are statutory and cannot be waived. R.C. 4909.18 provides that, unless otherwise ordered by the commission, the public utility must file, along with its application to the commission, "[a] proposed notice for newspaper publication fully disclosing the substance of the application."¹⁵ And, irrespective of whether the utility is required to file such notice with the Commission, R.C. 4909.19 provides that the utility must publish once a week for

¹⁵ O.R.C. 4909.18

three consecutive weeks in newspapers of general circulation throughout the affected areas “the substance and prayer of its application”.¹⁶

The Ohio Supreme Court has stated that the purpose of R.C. 4909.18(E) is “to provide any person, firm, corporation, or association, an opportunity to file an objection to the increase under R.C. 4909.19.”¹⁷ The Ohio Supreme Court has established two components that a utility must meet to establish that the newspaper notice complies with R.C. 4909.18(E) and R.C. 4909.19. First, the company must demonstrate that the Notice “fully discloses the essential nature or quality” of the application.¹⁸ Second, the Notice must be understandable and the proposal must be in a format “that consumers can determine whether to inquire further as to the proposal or intervene in the rate case.”¹⁹ Meeting both prongs is essential to providing an opportunity for every person to understand the full context of the proposal and determine whether or not to file an objection.

The Ohio Supreme Court holding in *Committee Against MRT*²⁰ was that the utilities failure to mention the innovative measured rate plan service failed to meet the notice requirements. Because VEDO failed to disclose the “essential nature or quality” of the Stage 2 rates, it failed to meet the first prong of *Committee Against MRT*. As such, the notice is insufficient, thus violating R.C. 4909.18 and 4909.19, and depriving the Commission of jurisdiction with respect to Stage 2 rates.

¹⁶ R.C. 4909.19 (emphasis added).

¹⁷ *Committee Against MRT, et. al. v. Public Util. Comm.* (1977), 52 Ohio St. 2d 231, 234. (Emphasis added.)

¹⁸ *Ohio Assoc. of Realtors v. Pub. Util. Comm.* (1979), 60 Ohio St. 2d 172, 176, 175.

¹⁹ *Id.* at 176.

²⁰ *Committee Against MRT v. Pub. Util. Comm.*, 52 Ohio St.2d 231 (1977).

Because the Notice failed to disclose the nature or quality of VEDO's proposal, it deprived VEDO's customers of their opportunity to be heard. Customers reading the Notice would not have been able to determine whether to inquire further as to the proposal or intervene in the rate case. Had customers understood the drastic nature of the VEDO's proposal, and the dramatic further increases to the customer charge in Stage 2, coupled with decreased volumetric rates, they would have been able to determine whether to inquire further or intervene in this rate case. However, due to the insufficient information in the Notice, the public was denied an opportunity to present evidence at the hearing opposing Vectren's radical rate design and was denied the opportunity to challenge the level of customer charge to be imposed in Stage 2, and the appropriateness of transitioning to the SFV rate design in year 2 and beyond.

Vectren also failed to fulfill the second prong of the Notice test enumerated in *Committee Against MRT*, because the Notice was not understandable to customers to enable them to determine whether they should inquire or take further action. By using the term "straight fixed variable" to describe the proposal, Vectren appears to have deliberately chosen to not disclose the substance of its rate design proposal. Few customers understand -- or have ever even heard of the term "straight fixed variable." Moreover, although the Company did publish notice of the first stage of its proposal, VEDO did not publishing the Stage 2 impacts and its future plans to eliminate volumetric rates completely. Thus, customers could not and would not have understood the vast change in rate design being proposed by Vectren. This change fundamentally alters the way customers have been billed for gas distribution service over the past thirty years.

Thus, under the standards set forth in *Committee Against MRT*, the customers were unable to determine whether to inquire further into the Company's proposal.

Without all the crucial information about Stage 2 rates, the "essential nature or quality" of the proposal to increase Stage 2 rates to customers was not disclosed to VEDO's customers. Although customers may have been made aware that the Company was proposing changes to the rate design, the Notice gave no clue as to the magnitude of the proposed changes other than for the first year. Nor did it present Vectren's long-term plan beyond Stage 2 to eventually eliminate volumetric rates altogether and replace them with a single flat unavoidable customer charge.²¹ Moreover, customers would not have been able to discern the true nature of the Company's proposal -- to eventually do away with volumetric rates and have one very high unavoidable flat rate customer charge -- a charge that is incurred no matter how little or how much gas is used.

Assignment of Error 2: The Commission Erred By Failing To Provide Adequate Notice of the Second Stage Rate Increases To The Customers Of Vectren, Violating Customers' Due Process Rights Under The 14th Amendment To The Constitution.

"The fundamental requisite of due process of law is the opportunity to be heard."²² Due process for individuals is a constitutional right protected by the Fourteenth Amendment. The opportunity to be heard can have no meaning however, if one is not informed of the

²¹ Indeed this is what the Commission in its Opinion and Order determined to do. The Commission ordered the customer charge to be increased to \$18.37 per month, with no volumetric rate after the first year. See Opinion and Order at 15.

²² *Grannis v. Ordean*, 234 U.S. 385, 394, 43 S. Ct. 779, 784 (1914), citing *Louisville & N.R. Co. v. Schmidt*, 177 U.S. 230, 236 (1900); *Simon v. Craft*, 182 U.S. 427, 436 (1901).

issues in contention and consequently can not make a decision as to whether to challenge or object to the matter.²³

Since VEDO's notice did not sufficiently inform its customers of the issues in contention, VEDO's customers were unable to make a decision as to whether to challenge or object to the matter. Customers' opportunity to be heard could not be assured or assured under such circumstances. Consequently, customers' rights to due process in the form of an opportunity to be heard were violated.

Assignment of Error 3: The Commission Erred By Approving a Low-Income Pilot Program Without an Adequate Record to Support the Order.

The fact that there is an adverse affect on low-use customers as a result of implementation of the SFV rate design in these cases is without question. The Commission in its Opinion and Order acknowledged:

Nonetheless, as we noted in Duke and DEO, we recognize that, with this change to rate design, as with any change, there will be some customers who will be better off and some customers who will be worse off, as compared with the existing rate design. **The levelized rate design will impact low-usage customers more,** since they have not been paying the entirety of their fixed costs under the existing rate design. Higher use customers who have been overpaying their fixed costs will actually experience a rate reduction.²⁴

The Commission's Opinion and Order attempts to mitigate this adverse effect by claiming that low-usage customers have not been paying the entirety of their fixed costs. This statement is made without citation, and without any prior Commission proceeding or precedent that found that high-usage customers were over-paying fixed costs under the

²³ See for example *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652 (1950), where the Court noted that "[t]he right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

²⁴ Opinion and Order at 14. Emphasis added.

previous rate design. In fact, the PUCO has never made such a finding of fact. Instead, this statement is made after-the-fact and in the face of over 30 years of precedent²⁵ using a rate design with a lower fixed customer charge and a higher volumetric rate. As a result, customers are being forced to accept the financial fallout from this unsubstantiated claim being transformed into fact. This statement by the Commission is a self-fulfilling conclusion to support an otherwise unsupportable decision. The record is clear as to the impact that the SFV rate design has on low-use customers; however, the actual impact that an SFV rate design will have upon VEDO's low-income customers, especially non-PIPP low-use and low-income customers, is debatable.

The record in this case does not answer the question of how the SFV rate design impacts the non-PIPP low-income customer. It would seem axiomatic that such a fundamental question would be fully explored and analyzed **prior to approving such a dramatic change in policy, and not after-the-fact.** The Commission has approved the SFV rate design in this case and in the Duke and DEO rate cases, without a full and complete understanding of the harm that it may cause. Using another governmental regulation analogy, this would be the equivalent to the FDA granting approval for a new

²⁵ See Tr. Vol. I at 204, where Mr. Puican referenced a 1978 case. *In the Matter of the Application of Columbia Gas of Ohio, Inc., for an increase in the rates to be charged and collected for gas service in the village of Mt. Sterling, Ohio*, Case No. 77-1309-GA-AIR, *In the Matter of the Application of Columbia Gas of Ohio, Inc., for an increase in the rates to be charged and collected for gas service in the City of Martins Ferry, Ohio*, Case No. 77-1428-GA-AIR, Opinion and Order at 12-13 (May 24, 1979). Where the Commission noted that "In these proceedings, applicant proposes to replace this rate with a rate structure incorporating a fixed monthly customer charge reflecting costs which do not vary with usage and a uniform rate per Mcf for gas consumed." at 12. The Commission further concluded that, "*The Commission has approved this type of rate schedule in the belief that it is cost-justified and with the interests of conservation firmly in view*" (emphasis added) at 13. Thus the Commission recognized a customer charge comprised of a low customer charge and a volumetric rate better served conservation.

drug before knowing the full extent of any potential harmful effects of that new drug.²⁶ It is the responsibility of the drug manufacturer -- as a proponent -- to demonstrate that the product is not dangerous.²⁷ Similarly it is the responsibility of VEDO and Staff -- as the proponents of the SFV rate design -- to demonstrate that the SFV rate design will not harm non-PIPP low-income customers. It is not an intervening parties' responsibility to prove that the SFV rate design is not just and reasonable, but instead it is the Company's burden to prove that the change to an SFV rate design is just and reasonable.²⁸

The SFV rate design approved by the Commission is bad public policy for VEDO's low usage and low-income residential customers who will now be forced to subsidize VEDO's larger and high-use customers. The SFV rate design has the effect of making the distribution cost per Mcf that a customer faces higher at lower consumption levels than at higher consumption levels.²⁹ 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 large homes. The SFV rate design is not only unfair to these customers with small incomes, it is extremely insensitive in its timing; coming on the heels of several years of belt-tightening by America's working poor, amidst a nationwide mortgage foreclosure crisis

²⁶ *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSo, Prefiled Testimony of Richard Cabaan at 17-18 (October 6, 2008).

²⁷ *Id.*

²⁸ In a rate case, there is no dispute that the Company has the burden of proving that its Application is just and reasonable. R.C. 4909.18 states that, "[A]t such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility." Emphasis added. R.C. 4909.19 also states, "[A]t any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility." Emphasis added.

²⁹ Staff Ex. No. 3 (Puican Direct Testimony) at 6 (August 22, 2008).

and with the country in a looming recession and possibly facing a depression, a fact uncontested in the record.³⁰

The Commission stated a concern with the impact that the change in rate structure would have on some VEDO customers, and recognized that some relief was warranted for those customers. Such a finding resulted in an Opinion and Order that is internally inconsistent. On one hand the PUCO declared that the SFV rate design to be a superior option to a revenue decoupling mechanism with a lower fixed customer charge.³¹ Yet, on the other hand, the PUCO acknowledged the negative impact that the SFV rate design would have on non-PIPP low-income customers.³²

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 VEDO should likewise implement a one-year low-income pilot program **aimed at helping low-income, low-use customers pay their bills**.

As in the prior cases, the customers in the low-income pilot program shall be non-PIPP low-usage customers, verified at or below 175 percent of the poverty level. DEO'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.³³

Thus for the first year of the SFV rate design, the eligible non-PIPP low income customers will only experience an increase from \$7.00 per customer per month to \$9.37

³⁰ Opinion and Order at 15

³¹ *Id.* at 11-13.

³² *Id.* at 14.

³³ *Id.*, *Emphasis added.*

per customer per month.³⁴ However in year two -- when the pilot program expires -- the same non-PIPP low income customer will experience an even greater increase -- from \$9.37 per customer per month to \$18.37 per customer per month. Thus any "penalty" that may have been avoided in year one is more than doubled in year two and beyond.

To the extent that the Commission ordered this small offering to help low-use low-income customers who will be penalized through the implementation of SFV, it remains entirely unclear why this benefit evaporates after one year when the SFV will be in place for a longer period of time. Moreover, the Commission failed to explain why such an important program for VEDO should be only one-half the size of Duke's, especially with no evidence in the record that VEDO has half the non-PIPP low income customers that Duke has. If the low-income pilot is to have any significance and benefit for non-PIPP low-income customers, then it must be available to a comparable number of customers -- which for VEDO would be approximately 10,000 customers, and it should extend beyond year 1.

The Commission's Opinion and Order established a rationale for the low-income pilot program, but the Commission provided no analysis to support how the approved pilot program would be sufficient to achieve the stated purpose, for either year one or beyond. The Opinion and 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.³⁵

³⁴ The increase will be limited to \$2.37 because of the \$5.00 pilot program credit.

³⁵ Opinion and Order at 14.

The pilot program was approved by the Commission without the benefit of sufficient understanding of the extent of the need that the Commission allegedly addressed. As OCC witness Colton stated:

We found that exactly half (50%) 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.³⁶

Thus, it is not unreasonable to conclude that there are thousands of non-PIPP low-income customers in VEDO's service territory. In such a case, the Commission's pilot program for 5,000 customers for only one year is woefully inadequate and will not come close to meeting the need caused by the SFV rate design, or achieving the Commission stated goals.

Assignment of Error 4: The Commission Erred By Approving An SFV Rate Design That Discourages Customer Conservation Efforts In Violation Of R.C. 4929.05 And R.C. 4905.70.

The SFV rate design approved by the Commission does not promote customer efforts to engage in conservation of natural gas, and instead would encourage increased usage of natural gas. Such a rate design is contrary to the State policy:

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

* * *

(4) Encourage innovation and market access for cost-effective supply-and demand-side natural gas services and goods;³⁷

The SFV rate design approved by the Commission impedes the development of Demand Side Mangement ("DSM") innovation in Ohio for a number of reasons. The SFV rate design sends consumers the wrong price signal; it will harm consumers who

³⁶ OCC Ex. No. 2 (Colton Direct Testimony) at 28 (July 23, 2008).

³⁷ R.C. 4929.02.

have invested in energy efficiency by extending the payback period; and it will take away control that consumers have over their utility bills.

Instead of impeding DSM programs, the Commission has a statutory duty to initiate programs that promote conservation. R.C. 4905.70 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 limited cost recovery interests, but fails to promote conservation for the reasons discussed below. State policy and statutory mandates direct the Commission to act in such a manner so that the rate design it imposes on customers has a positive effect on energy conservation.

The Commission has the responsibility to approve rates that are just and reasonable.³⁸ An SFV rate design does not meet the State policy of promoting energy efficiency³⁹ and violates the legislative mandate to the Commission to initiate programs to promote and encourage conservation.⁴⁰ It is important as part of the regulatory compact to make energy efficiency a success, that the Commission consider not only company incentives and revenues but also customer incentives to participate in 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 the Commission should reverse its Opinion and Order on rehearing.

³⁸ R.C. 4909.18 and R.C. 4909.19.

³⁹ R.C. 4929.02(A)(4).

⁴⁰ R.C. 4905.70.

A. The SFV rate design sends the wrong price signal to consumers.

The Commission's Opinion and Order improperly stated that a "levelized rate design sends better price signals to customers."⁴¹ This contradicts the fundamental tenet that high natural gas commodity prices generally send a signal to consumers that encourages conservation. The SFV rate design contradicts that basic message because it decreases the volumetric rate while significantly increasing the fixed portion. At a time when VEDO's marginal costs for natural gas and energy prices generally are increasing, the SFV rate design sends the wrong price signal to customers, 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 SFV rate design fails to send the proper price signal to encourage conservation. To the extent that the Company and/or Staff are concerned that the present rate design (consisting of a lower customer charge and a higher volumetric rate) does not enable the Company the ability to collect sufficient revenues, it should not be ignored that the regulatory principles have long been in place that a Company is not **guaranteed cost recovery**. Rather 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 anything.⁴² The opportunity to develop a more stable revenue stream can be

⁴¹ Opinion and Order at 12.

⁴² *Bluefield Water Works & Improvement Company v. Pub. Serv. Comm. of West Virginia*, 43S, Cl. 675, 692 (June 11, 1923) ("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.")
Emphasis added.

addressed by the implementation of a decoupling mechanism with appropriate safeguards, in a manner that does not discourage customer conservation efforts.

The only conclusion that the Commission should have reached in these cases is that the price signal from the SFV rate design is improper. Therefore, the Commission should reverse its Opinion and Order approving the SFV rate design on rehearing because the resulting rates are unjust and unreasonable.

B. 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.

The Commission noted that a "critical"⁴³ component of its decision on the SFV rate design was the provision for energy efficiency projects. The Opinion and Order lauded the establishment of the programs because they were "consistent with Ohio's economic and energy policies."⁴⁴ However, the Opinion and Order was selective with what parts of the decision are consistent with the state economic policy and which parts are not. For example, the Opinion and Order imposed the SFV rate design despite the fact that it will lengthen the payback period for energy efficiency investments. Customers who have invested in energy efficiency measures such as additional home insulation, more efficient furnaces and water heaters -- as a rational response to increasing gas costs, and in response to the very same state economic and energy policies that the PUCO touted -- will see their investment returns diminished and payback periods

⁴³ Opinion and Order at 12.

⁴⁴ *Id.*

lengthened as a result of the change to an SFV rate design.⁴⁵ This is another reason that the SFV rate design discourages conservation.

This issue becomes even more important in light of the fact that many of the conservation efforts that customers have undertaken in the recent past were also based on the current rate design which provided customers greater incentive to conserve. This is because the current rate design consists of a lower fixed customer charge and a higher volumetric charge. Prior to the imposition of the SFV rate design, customers could see a direct reduction in bills as a result of less usage due to conservation efforts. Customers made those conservation investment decisions in good faith and in reliance on the regulatory rate design in place consistent with the very same policies that tout energy efficiency efforts. It is patently unfair to now change the rules that customers relied on.

A change to the SFV rate design will extend the payback period of energy efficiency investments because a greater portion of the bill will be recovered in the fixed charge and a smaller portion in the volumetric portion.⁴⁶ Mr. Puican dismissed this difference claiming that it was an artificial price signal.⁴⁷ But the fact remains that if the goal is to achieve maximum conservation, then the best price signal is one that includes the largest volumetric charge and the lowest fixed charge. This is consistent with the fact that the actual commodity of gas which comprises the largest portion of a customer's total bill is based on volume.

Mr. Puican attempted to defend his position by indicating that the artificial inflation of the volumetric charge beyond cost would lead to an over-investment in

⁴⁵ OCC Ex. No. 3 (Novak Direct Testimony) at 21.

⁴⁶ Tr. Vol. VI (Puican) at 26 (Aug. 28, 2008).

⁴⁷ *Id.*

conservation.⁴⁸ However, despite this dubious claim, there is absolutely no evidence in the record of any instances of over-investment in conservation as a result of the current rate design.

Because the SFV rate design lengthens the pay back period for conservation investments, the SFV rate design has the effect of reducing the customer's incentives to invest in energy efficiency. The cost per unit under the SFV rate design declines as consumption grows which sends the wrong price signal, and the customers who invest in energy efficiency investments face longer payback periods.⁴⁹ The Commission was faced with a decision to implement a rate design that has a negative impact on a customer's payback analysis, or a rate design that positively impacts the payback analysis. In order to adhere to the state policy in R.C. 4929.02 and R.C. 4905.70, the Commission must implement the latter rate design. In these cases, that would be the rate design that includes a smaller customer charge (\$7.00), a higher volumetric rate, and a decoupling mechanism with appropriate safeguards.

Making a radical rate design shift to a SFV rate design is especially unfair for customers who have invested to become more energy efficient as a response to actions urged by State and Federal energy efficiency policies. In this sense, an SFV rate design reduces some of the control customers have over their utility bills, because more of their bill is uncontrollable or fixed and less is controllable or dependent on their volumetric usage.

The reduction that would be made to the volumetric rate resulting from an increase to the customer charge under an SFV rate design could affect consumers'

⁴⁸ Id. at 27 (Aug. 28, 2008).

⁴⁹ OCC Ex. No. 3 (Novak Direct Testimony) at 21.

conservation investment decisions. Although the commodity costs do represent the largest portion of a residential customer's bill, the reality is that consumers have made conservation decisions based on the current level of volumetric billing. Based on this evidence, it is a given that the SFV rate design will reduce the benefits and will extend the payback period of energy efficiency investments. Therefore it should not be approved by the Commission.

In reality, each consumer is different in how they approach energy efficiency investment decision-making. The Commission's role is to put in place a rate design that will be most effective at removing barriers or most effective at promoting consumers' investment in energy efficiency. The only conclusion that the Commission can reach is that the SFV rate design, and the rates proposed there under, extend the payback period, and are therefore unjust and unreasonable and should not be approved by the Commission in these cases.

Assignment of Error 5: The Commission Erred By Approving A Rate Design That Unreasonably Violates Prior Commission Precedent And Policy.

The PUCO has identified gradualism as one of the regulatory principles that it has incorporated as part of its decision-making process.⁵⁰ However, for gradualism to have any legitimacy as a regulatory principle, it must be applied with a certain level of consistency and transparency and not haphazardly or in a manner designed to merely justify the end results. Gradualism had been relied upon in prior cases in such a manner that increases to the fixed portion of the customer charge were limited to \$1.00 to \$2.00 per customer per month.⁵¹ However, in this case, the PUCO Staff claimed that almost

⁵⁰ Staff Ex. No. 3 (Paican Direct Testimony) at 9.

⁵¹ See footnotes 56-64.

doubling or tripling the customer charge -- increases of \$6.37 and \$11.37 -- reflect gradualism.⁵² The PUCO unreasonably relied on the Company and Staff argument that the principle of gradualism has not been ignored by the implementation of the SFV rate design, despite a claim that, "the Commission is sensitive to the impact of any rate increase on customers, especially during these tough economic times"⁵³ the Opinion and Order nonetheless imposed increases of \$6.37 and \$11.37 per customer per month over a two-year period, without any resemblance to the principle of gradualism that the PUCO adhered to for over thirty years. Thus, after two years, customers will see their customer charge nearly triple. Given that the current customer charge is \$7.00 per customer per month, these increases are not gradual increases. Rather these increases to the fixed portion of the customer charge represent enormous increases in the customer charge and they violate the principle of gradualism. This demonstrates the PUCO's failure to be guided by its own regulatory principles in these cases. Such disregard for the principle of gradualism harms VEDO's residential consumers and the regulatory process.

The Opinion and Order ignored numerous prior cases where gradualism was applied in a much more reasoned and measured manner. In a Columbia Gas case, , the Commission noted that the Staff recommended a Customer Charge of \$6.00, which was lower than the calculated charge of \$7.79, based on principles of gradualism and stability.⁵⁴ As part of its decision, the Commission concluded:

⁵² Tr. Vol. IV (Pucan) at 113-114 (August 25, 2008).

⁵³ Opinion & Order at 15.

⁵⁴ *In the Matter of the Applications 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*, Case No. 88-716-GA-AIR et. al, ("1988 Columbia Gas"), Opinion and Order at 87 (October 17, 1989).

While it is true that the customer charge proposed by the staff might not recover all customer-related costs, **it is important to note that costs, while very important, are not the only factor to consider in establishing the charge. The Commission must also consider the customers' expectations, acceptance, and understanding in setting rates and balance these factors accordingly with the determined costs.**⁵⁵

In accepting the Staff position in the 1988 Columbia Gas case, the Commission noted that "[t]he Staff's application of the accepted ratemaking principles of gradualism and stability is reasonable."⁵⁶

Both the Staff Report and the Opinion and Order in another Columbia Gas case,⁵⁷ echoed the same belief in and reliance on gradualism. The Commission noted that:

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.⁵⁸

The Commission further elaborated on these principles, when it ruled that:

We heard a great deal of testimony at the local hearings regarding the detrimental impact that an increase in the customer charge would have on low-income customers (See, Cincinnati Tr. 29-30, 54, 61, 93). **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.**⁵⁹

⁵⁵ *Id.* at 89. Emphasis added.

⁵⁶ *Id.*

⁵⁷ *In the Matter of the Applications of Columbia Gas of Ohio, Inc., to Establish a Uniform Rate for Natural Gas Service Within the Company's Northwestern Region, Lake Erie Region, Central Region, Eastern Region, and Southeastern Region*, Case No. 89-616-GA-AIR et. al. ("1989 Columbia Gas"), Opinion and Order at 80-82 (April 5, 1990).

⁵⁸ *1989 Columbia Gas* at 80.

⁵⁹ *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*, Case No. 95-656-GA-AIR, Opinion and Order at 46 (December 12, 1996). Emphasis added.

The Staff view of gradualism, as noted throughout the many Staff Reports, has been in the context of Company-proposed customer charge increases of only \$2.00 to \$4.00. In most cases, the Staff Report notes that in making its recommendation, the Staff recognized and prescribed to ratemaking principles of gradualism within the revenue distributions.⁶⁰ This same language also appeared in Northeast Ohio casewhere the Staff Report stated, “[i]n recommending customer charges, Staff recognizes and prescribes to the established ratemaking principle of gradualism within the revenue distribution.”⁶¹

The same or similar statement appears in the Cincinnati Gas & Electric, Case No. 01-1228-GA-AIR, Staff Report,⁶² in the Cincinnati Gas & Electric, Case No. 92-1463-GA-AIR Staff Report,⁶³ Columbia Gas of Ohio, Case No. 91-195-GA-AIR Staff Report,⁶⁴ Dayton Power & Light Company, Case No. 91-415-GA-AIR Staff Report,⁶⁵ and the River Gas Company, Case No. 90-395-GA-AIR Staff Report.⁶⁶

The Commission in its Opinion and Order contemplated the potential harmful effects of rate shock from the SFV rate design, but never acted upon its query:

⁶⁰ *In the Matter of the Complaint and Appeal of Oxford Natural Gas Company from Ordinance No. 2896, Passed by the Council of the City of Oxford on February 7, 2006*, Case No. 06-350-GA-CMR, Staff Report at 26 (September 19, 2007).

⁶¹ *In the Matter of the Application of Northeast Ohio Natural Gas Corp. for an Increase in its Rates and Charges for Natural Gas Service*, Case No. 03-2170-GA-AIR, Staff Report at 44 (August 29, 2004).

⁶² *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in its Gas Rates in its Service Territory*, Case No. 01-1228-GA-AIR, Staff Report at 57 (January 1, 2002).

⁶³ *In the Matter of the Application of the Cincinnati Gas & Electric Company to File an Application for an Increase in Gas Rates in its Service Area*, Case No. 92-1463-GA-AIR, Staff Report at 29 (March 17, 1993).

⁶⁴ *In the Matter of the Application of Columbia Gas of Ohio, Inc., to Increase Gas Sales and Certain Transportation Rates Within its Service Area*, Case No. 91-195-GA-AIR, Staff Report at 58 (August 25, 1991).

⁶⁵ *In the Matter of the Application of the Dayton Power and Light Company for Authority to Amend its Filed Tariffs to Increase the Rates and precedents Charges for Gas Service*, Case No. 91-415-GA-AIR, Staff Report at 45 (November 13, 1991).

⁶⁶ *In the Matter of the River Gas Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Service*, Case No. 90-395-GA-AIR, Staff Report at 31 (October 29, 1990).

Before strictly applying cost causation we must consider and balance other important public policy outcomes of rate design. * *
* Can it be implemented without rate shock - that is, with sensitivity to gradualism?⁶⁷

Historically, the principle of gradualism has been accepted in the form of mitigating a customer charge "increase" from \$6.77 to \$6.00⁶⁸ or from \$5.23 to \$5.00⁶⁹ or even keeping it at \$5.70.⁷⁰ During that period when the gradualism principle was adhered to the commodity prices were generally more stable. However, there is no evidence to support an argument for adherence to the principle of gradualism only at a time when commodity prices are at a lower level. The Commission should adhere to the principle of gradualism when considering a \$7.00 customer charge may increase to \$13.37 or \$18.37 per customer per month, especially when the commodity prices are over \$8.00/Mcf.⁷¹ The need for gradualism grows as consumers face greater costs; the need does not decline.

The problem with the Commission's Opinion and Order is that it is not a long-term move to the SFV rate design. Should such a shift occur, it should be gradual with small incremental increases in the fixed customer charge and with the opportunity to evaluate its impact on customer conservation and affordability.

⁶⁷ Order at 25.

⁶⁸ *In the Matter of the Application of the Cincinnati Gas & Electric Company to File an Application for an Increase in Gas Rates in its Service Area*, Case No. 92-1463-GA-AIR, Staff Report at 29 (March 17, 1993).

⁶⁹ *In the Matter of the Application of the Dayton Power and Light Company for Authority to Amend its Filed Tariffs to Increase the Rates and precedents Charges for Gas Service*, Case No. 91-415-GA-AIR, Staff Report at 45 (November 13, 1991).

⁷⁰ *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*, Case No. 95-656-GA-AIR, Opinion and Order at 45-46 (December 12, 1996).

⁷¹ Staff Ex. No. 3 (Puican Prefiled Testimony) at 3-4 (August 22, 2008).

Assignment of Error 6: The Commission Erred By Imposing The SFV Rate Design Against The Manifest Weight Of The Evidence Resulting In Unjust And Unreasonable Rates In Violation Of R.C. 4909.18 And R.C. 4905.22.

One of the keys to the PUCO's decision to impose the SFV rate design was the use of PIPP customers as a surrogate for all low-income customers.⁷² In making this decision, the Commission completely accepted and relied on the testimony of the Staff witness on this issue.⁷³ It is noteworthy that other than making this statement, the Staff provided no objective evidence or statistical data to support this position. Instead, only a subjective conclusion was provided -- one that justified the end conclusion in favor of the SFV rate design. Inasmuch as Staff provided no objective data or statistical information in support of the statement, the OCC and other intervenors were denied an opportunity to explore the credibility of such information.

In contrast, the OCC presented the testimony of Roger Colton which relied on statistical analysis of data provided by the Energy Information Administration⁷⁴ and United States Census data.⁷⁵ Despite the fact that Mr. Colton based his observations and conclusions on objective data and statistical analysis, the Opinion and Order completely discounted his testimony.⁷⁶ In doing so the Commission held Mr. Colton's testimony to a significantly higher standard than the testimony provided by Staff. This double standard was unfair and had the impact of shifting the burden from Staff -- who relied on PIPP customers as a surrogate for all low-income customers -- to the OCC.

⁷² Opinion and Order at 13.

⁷³ *Id.*

⁷⁴ OCC Ex. No. 2 (Colton Direct Testimony) at 7 (July 23, 2008).

⁷⁵ *Id.* at 7-10.

⁷⁶ Opinion and Order at 13.

The Opinion and Order stated that the data relied on by Mr. Colton “may be unreliable.”⁷⁷ However, this conclusion ignored Mr. Colton’s explanation:

The caution about census -- the use of census information on expenditures doesn’t go to the sample size. The caution goes to using the American Community Survey to establish the -- the answer is yes I am aware of this caution. The caution goes to using the census data to establish the -- the actual dollar figure for a -- for a natural gas bill, and it doesn’t apply simply to the American Community Survey. It applies to Department of labor’s Consumer Expenditure Surveys and any other survey because people tend to overstate their -- their natural gas bills and I don’t -- I didn’t believe when I use this data, I use it because I don’t believe that caution is applicable to -- to what I used it for in that I don’t use the American Community Survey to say that the natural gas bill in Montgomery county or the natural gas bill in Ohio is \$21.03. What I used it for was to establish the relationship between -- between incomes to look to see whether the bill for low income households versus middle income households versus high income households, what those relationships are.

The Opinion and Order nonetheless concluded that, “We find that the record demonstrates that low-income customers, **on average**, would actually enjoy lower bills under the levelized rate design.”⁷⁸ The record may indicate that PIPP customers -- who are higher use customers -- may benefit from the SFV rate design, but the record does not indicate that non-PIPP low income customers will fare as well. In fact, by relying on an **average** of PIPP and non-PIPP customers to reach that conclusion, the PUCO actually confirmed Mr. Colton’s testimony. This flaw underlies one of the key premises to the decision to impose the SFV rate design on customers. As such, both the premise and conclusion are flawed and the Commission should correct this flaw by reversing its decision on the SFV rate design.

⁷⁷ *Id.*

⁷⁸ Opinion and Order at 13, Emphasis added.

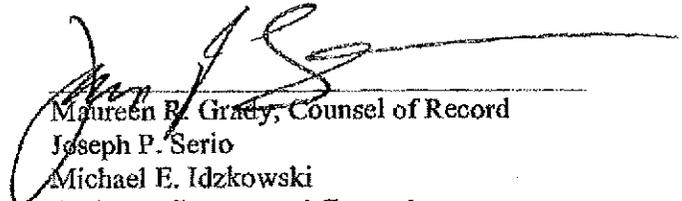
Without the acceptance of Staff's unsupported statement regarding PIPP customers as a surrogate for non-PIPP low-income customers, it is uncontroverted that the SFV rate design has a negative impact on low-income customers. Thus the resulting rates are unjust and unreasonable.

IV. CONCLUSION

For the reasons set forth herein, the Commission should issue an Entry on Rehearing that reverses the Finding and Order approving the straight fixed variable rate design. Additionally, the Commission should reverse its finding that the notice provided for Stage 2 rates was sufficient, and should order the Company to reissue a corrected Stage 2 notice and conduct proceedings focusing on the appropriateness of the Stage 2 rates.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

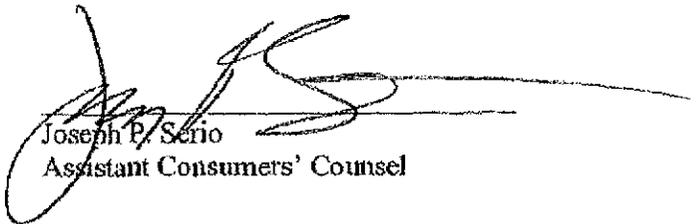


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Application for Rehearing has been served upon the below-named persons via electronic transmission and by regular U.S. Mail Service, postage prepaid, this 6th day of February, 2009.


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1.47 Presumptions in enactment of statutes.

In enacting a statute, it is presumed that:

- (A) Compliance with the constitutions of the state and of the United States is intended;
- (B) The entire statute is intended to be effective;
- (C) A just and reasonable result is intended;
- (D) A result feasible of execution is intended.

Effective Date: 01-03-1972

THE STATE OF OHIO
LEGISLATIVE ACTS

PASSED
(EXCEPTING APPROPRIATION ACTS)

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

EIGHTY-EIGHTH GENERAL ASSEMBLY OF OHIO

At Its Regular Session

BEGUN AND HELD IN THE CITY OF COLUMBUS,
JANUARY 7, 1929 to APRIL 16, 1929
(both inclusive)

Also the Times for Holding the Courts of Appeals,
and Courts of Common Pleas in Ohio,
A. D. 1929

VOLUME CXIII



COLUMBUS, OHIO.
THE V. J. HEER PRINTING CO.,
1929

Bound at the State Bindery

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wise appropriated, the sum of ten thousand dollars for the uses and purposes of this act.

ARTHUR HAMILTON,
Speaker pro tem. of the House of Representatives.

JOHN T. BROWN,
President of the Senate.

Passed March 7, 1929.

Approved March 20, 1929.

MYERS Y. COOPER,
Governor.

The sectional numbers on the margin hereof are designated as provided by law.

GILBERT BITTMAN,
Attorney General.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 20th day of March, A. D. 1929.

CLARENCE J. BROWN,
Secretary of State.

File No. 12.

(Amended Senate Bill No. 66)

AN ACT

To create, within the public utilities commission, a division of investigation; to revise the laws relating to rates of public utilities, hearings thereon and determination thereof and to repeal sections 406 and 614-20 of the General Code.

Be it enacted by the General Assembly of the State of Ohio:

Sec. 496. Division of investigation. Appointment of superintendent of investigation; duties; salary, term of office. Appointment of attorney examiners, experts, engineers and accountants.

SECTION 1. There is hereby created within the public utilities commission a division of investigation. The commission, with the approval of the governor, shall appoint a superintendent of the division of investigation who shall hold office during the pleasure of the commission and shall receive an annual salary of five thousand dollars payable in the same manner as the salaries of other state officers are paid.

The commission shall have power to appoint attorney examiners, experts, engineers, and accountants deemed necessary to carry out the provisions of this act, who shall be in the unclassified division of the civil service and shall serve during the pleasure of the commission at such salaries and compensation as the commission may fix, provided that nothing in this act shall be construed to take out of the classified service any employes now in the classified service.

The commission shall designate from time to time one of the attor-

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Sec. 614-20. Filing

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ARTHUR HAMILTON,
House of Representatives.

JOHN T. BROWN,
President of the Senate.

MYERS Y. COOPER,
Governor.

signed as provided by law.

GILBERT BETTMAN,
Attorney General.

at Columbus, Ohio, on

LARENCE J. BROWN,
Secretary of State.

3)

a division of invest-
ments of public utilities,
and to repeal
the

State of Ohio:

**ment of superintendent
office. Appointment of
and accountants.**

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mission, with the approval
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attorney examiners, ex-
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ney examiners as an assistant superintendent who shall, in the absence, sickness or disability of the superintendent, possess the powers and perform the duties of the superintendent.

It shall be the duty of the superintendent to perform the duties of the executive secretary of the commission, which office is hereby abolished, and to keep a full and complete record of all proceedings of the commission; to issue all necessary process, writs, warrants and notices; to keep all books, maps, documents and papers ordered filed by the commission, and all orders made by the commission or a commissioner, or approved and confirmed by it and ordered filed; he shall be responsible to the commission for the custody and safe preservation of all documents in its office. Under the direction of the commission, the superintendent shall have charge of its office, superintend and perform its clerical business, and perform such other duties as the commission may prescribe. The superintendent and any attorney examiner shall have power to administer oaths in all parts of the state so far as the exercise of such power is properly incidental to the performance of their duties or that of the commission.

Sec. 614-20. Filing of application for change of rate; contents.

SECTION 2. No rate, joint rate, toll, classification, charge or rental or any change in any rate, joint rate, toll, classification, charge or rental or any regulation or practice affecting any rate, joint rate, toll, classification, charge or rental of a public utility shall become effective until the commission, by order, shall determine the same to be just and reasonable, except as hereinafter provided, providing however that this section shall not apply to any rate, joint rate, toll, classification, charge or rental or any regulation or practice affecting the same of railroads, street and electric railroads, motor transportation companies and pipe line companies.

Any such public utility desiring to establish any rate, joint rate, toll, classification, charge or rental or to modify, amend, change, increase or reduce any existing rate, joint rate, toll, classification, charge or rental or any regulation or practice affecting the same shall file a written application with the commission. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant and shall contain a schedule of the existing rate, joint rate, toll, classification, charge or rental, or regulation or practice affecting the same, if any, together with a schedule of the modification, amendment, change, increase or reduction sought to be established, and also a statement of the facts and grounds upon which such application is based. If such application is not an application for an increase in any rate, joint rate, toll, classification, charge or rental, the commission shall permit the filing of the schedule proposed in the application and fix the time when the same shall take effect.

Must file certain exhibits.

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

1. G. L.

property used and useful
ication.

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increase the public utility
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after for the final hear-
to all parties interested,
forth in said application
eof as to it seems just

within thirty days after
investigation, the appli-
of testimony before the
mission to the superin-
n an attorney examiner,
stimony with respect to
ferred by any interested
e and place to take tes-
all parties. The taking
in said notice and the
pleted; providing, how-
ood cause shown, grant
cluding Saturdays, Sun-

days and holidays, and provided further that the commission may grant continuances for a longer period than three days upon its order and for good cause shown.

When the taking of testimony is completed, a full and complete record thereof noting therein all objections made and exceptions taken by any party or counsel, shall be made up and signed by the attorney examiner and superintendent, and filed with the commission. Whereupon the commission shall promptly fix a date for final hearing, giving notice thereof to all interested parties, and at such hearing all interested parties shall be entitled to be heard in person or by counsel and thereafter make such order respecting the prayer thereof as to it seems just and reasonable.

Testimony shall be under oath; record of same.

In all proceedings before the commission, as herein or otherwise by law provided, wherein the taking of testimony is required, except when heard by the commission, an attorney examiner or examiners shall be assigned by the commission to take such testimony and fix the time and place therefor, and such testimony shall be taken in the manner prescribed herein. All testimony shall be under oath or affirmation and taken down and transcribed by a reporter and made a part of the record in the case. The commission, in its discretion, shall have power to hear the testimony or any part thereof in any case without having the same referred to an attorney examiner and shall also have power in the hearing of any case to take additional testimony or to direct the superintendent to cause additional testimony to be taken. Testimony shall be taken and a record made in accordance with such general rules and regulations as the commission may prescribe, and subject to such special instructions in any proceeding as it, by order, may direct.

If rate is found unreasonable and excessive; repayments.

Provided, however, that in all actions or proceedings pending before the commission upon the effective date of this act, in which a rate, joint rate, toll, classification, charge or rental shall be in effect, or shall become effective, and a bond, undertaking or other security shall have been filed, or may be filed by the utility, it shall be the duty of the commission to proceed to determine whether any portion of such rate, joint rate, toll, classification, charge or rental is unreasonable and excessive, and the utility shall repay to the consumers such portions of such rate, joint rate, toll, classification, charge, or rental collected as the commission, upon final hearing, shall determine to have been unreasonable and excessive, together with interest thereon at the rate of six per centum per annum from the date of payment by the consumers to the date of repayment by the utility. Such repayments shall be made at such times and in such amounts as the commission shall order, and shall be paid promptly by such utility to the consumers entitled thereto, and in such manner as the commission may prescribe, and if any such money ordered repaid shall not have been claimed by the consumers entitled thereto within one year from the time the same shall become due and payable in accordance with the order of the commission, all such unclaimed moneys shall be paid

THE STATE OF OHIO
LEGISLATIVE ACTS

PASSED

AND

JOINT RESOLUTIONS

Adopted

BY THE

EIGHTY-THIRD GENERAL ASSEMBLY

At Its Regular Session

WHICH BEGAN JANUARY 7, 1919.

VOLUME CVIII
Part II



Springfield, Ohio:
The Springfield Publishing Company,
State Printers.
1919.
Bound at the State Bindery.

000080

[House Bill No. 471.]

AN ACT

To amend section 614-20 of the General Code of Ohio, relating to the public utility commission.

Be it enacted by the General Assembly of the State of Ohio: SECTION 1. That section 614-20 of the General Code of Ohio be amended to read as follows:

Thirty days' written notice required before change of rate, toll, etc., unless ordered by commission.

Sec. 614-20. Unless otherwise ordered by the commission, no change shall be made in any rate, joint rate, toll, classification, charge or rental, in force at the time this act takes effect, or as shown upon the schedules which shall have been filed by a public utility in compliance with the requirements of this act, or by order of the commission, except after thirty days' notice, in writing, to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force, and the time when the change, rate, charge, toll, classification, or rental shall go into effect; and all proposed changes shall be plainly indicated upon existing schedules, or by filing new schedules thirty days prior to the time when they are to take effect, but the commission may prescribe a less time when they may take effect, provided, however, that if the proposed change shall effect an increase in the rate, joint rate, toll, classification, charge or rental, notice, in form approved by the commission, published once each week for three consecutive weeks before the effective date thereof, unless the commission shall authorize a less time, shall be given by publication in a newspaper published at the county seat of each county in which such change applies, and of general circulation therein, or in one newspaper published in, and of general circulation throughout the territory in which such utility operates. Such published notice shall set forth the fact that such application has been made, the effective date of the proposed new schedule, the name and location of the agent of the utility in such county or territory where a copy of such proposed new schedule may be inspected by any interested party; and provided, further, however, that such utility shall at the time of the filing of the schedule with the commission, place on file with such agent of such utility a copy of the proposed new schedule and keep the same on file for the inspection of any interested party pending the hearing before such commission.

New schedules filed on changes indicated; when publication in newspaper required; contents of publication.

Powers of commission to enter upon hearing without pleadings filed; notice of suspension of schedule pending hearing; extension of time suspending schedule.

Whenever there shall be filed with the commission any schedule effecting an increase in any rate, joint rate, toll, classification, charge or rental, or stating any new regulation or practice affecting any existing rate, joint rate, toll, classification, charge or rental in force at the time this act takes effect, the commission shall have, and it is hereby given authority, either upon complaint or upon its own initiative without complaint at once, and if it so orders without answer or other form of pleading by the interested public

utility, but concerning classification, change such hearing filing with affected the such suspension and postpaid toll, classification not for a when such regulation after a full rate, joint tion or pre such order fication, ch proper in toll, classification become effective be concluded stated, the time of su provided, l increased rental, sha the commis satisfaction the repayment increased rental, col final hearing excessive, and in su bond, und commission however, t dition to t by the util of such in ing over a the utility (1/2) of su At an be increas the burden proposed i the public ing and d questions l as possible

471.]

General Code of Ohio, relating to
commission.

Act of the State of Ohio:
-20 of the General Code
provides:

Whenever ordered by the commission any rate, joint rate, toll, force at the time this act takes effect, the schedules which shall have compliance with the requirements of the commission, excepting, to the commission, the changes proposed to be made, and the time when the rate, joint rate, toll, or rental shall go into effect, shall be plainly indicated by filing new schedules when they are to take effect, or a less time when they are to take effect, or, that if the proposed rate, joint rate, toll, or rental, in form approved by the commission, shall be given by publication in the county seat of each county, and of general circulation, published in, and of general circulation, in which such notice shall set forth the name and location of the person or territory where a copy of the schedule may be inspected by any interested party pending the

with the commission any rate, joint rate, toll, or rental, stating any new regulation, joint rate, toll, classification, and it is hereby given that the commission or upon its own initiative if it so orders without any objection by the interested public

utility, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, joint rate, toll, classification, charge, rental, regulation or practice; and pending such hearing and the decision thereon, the commission upon filing with such schedule and delivering to the public utility affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and postpone the use and operation of such rate, joint rate, toll, classification, charge, rental, regulation or practice, but not for a longer period than thirty days beyond the time when such rate, joint rate, toll, classification, charge, rental, regulation or practice would otherwise go into effect; and after a full hearing, whether completed before or after the rate, joint rate, toll, classification, charge, rental, regulation or practice goes into effect, the commission may make such order in reference to such rate, joint rate, toll, classification, charge, rental, regulation or practice as would be proper in a proceeding initiated after the rate, joint rate, toll, classification, charge, rental, regulation or practice had become effective; provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a period not exceeding thirty days; provided, however, that such suspension of payment of such increased rate, joint rate, toll, classification, charge or rental, shall not go into effect if the utility shall file with the commission a bond, undertaking or other security, to the satisfaction of the commission, securing and guaranteeing the repayment to all the consumers of such portion of such increased rate, joint rate, toll, classification, charge or rental, collected by such utility as the commission, upon final hearing, may determine to have been unreasonable or excessive, which repayments shall be made at such times and in such amounts as the commission shall order, such bond, undertaking or security to be in such amount as the commission may from time to time determine; provided, however, that the amount fixed at any time shall not in addition to the amount of such increase or other charge made by the utility already accrued exceed the estimated amount of such increase or other charge made by the utility extending over a period of one year, based upon the business of the utility for the previous year, or be less than one-half ($\frac{1}{2}$) of such estimated amount.

At any hearing involving a rate increased or sought to be increased after this section shall have become effective, the burden of proof to show that the increased rate or the proposed increased rate is just and reasonable shall be upon the public utility and the commission shall give to the hearing and decision of such question, preference over other questions pending before it, and decide the same as speedily as possible.

Burden of proof
on public utility
to show increase
rate reasonable;
preference over
other questions.

SECTION 2. That said original section 614-20 of the General Code of Ohio be, and the same is hereby repealed.

The sectional number in this act is in conformity to the General Code.
JOHN G. PATON,
Attorney General.

CARL R. KIMBALL,
Speaker of the House of Representatives.
CLARENCE J. BROWN,
President of the Senate.

Passed December 19, 1919.
Approved January 16, 1920.

JAMES M. COX,
Governor.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 16th day of January, A. D. 1920.
251 G.

[Senate Bill No. 215.]

AN ACT

To make an appropriation for the payment of salaries of the employes of the senate, and maintenance.

Be it enacted by the General Assembly of the State of Ohio:
SECTION 1. That sums set forth in this act are hereby appropriated out of any moneys in the state treasury not otherwise appropriated.

Appropriation.

SENATE.

Personal Service—	
A1 Salaries	\$3,000 00
A2 Wages	10,000 00
Maintenance—	
C4	\$1,000 00
C6	200 00
E1	500 00
F7	500 00
F9 Other	500 00

CLARENCE J. BROWN,
President of the Senate.
CARL R. KIMBALL,

Speaker of the House of Representatives.

Passed January 14, 1920.
Approved January 5, 1920.

JAMES M. COX,
Governor.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 15th day of January, A. D. 1920.
252 G.

To amend section supplement ment of sec and 2976-1 annexation levying of police pow.

Be it enacted

SECTION
General Code tion 2976-10e 2976-10d, 297 10i as follows

Sec. 297: vide for conv that purpose nral resource merged and herein provic part only of ary lines the isting townsh

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Sec. 297: any territory district, whe which such park district park commia tion, containi posed to be : plat of such the electors

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OPINION AND ORDER

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

APPEARANCES:

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

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

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

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

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

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

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
 Technician D Date Processed 5/28/08 000084

Vorys, Sater, Seymour and Pease LLP, by M. Howard Petricoff and Stephen M. Howard, 52 Gay State Street, P.O. Box 1008, Columbus, Ohio 43215, on behalf of Direct Energy Services, LLC and Integrys Energy Services, Inc.

Christensen, Christensen, Donchatz, Kettlewell & Owens, LLC, by Mary W. Christensen and Jason Wells, 100 East Campus View Blvd., Suite 360, Columbus, Ohio 43235, on behalf of People Working Cooperatively, Inc.

John M. Dosker, 1077 Celestial Street, Suite 110, Cincinnati, Ohio 45202-1629, on behalf of Stand Energy Corporation.

Thomas R. Winters, First Assistant Attorney General, by Duane W. Luckey, Section Chief, and William L. Wright and Thomas Lindgren, Assistant Attorneys General, Public Utilities Section, 180 East Broad Street, 9th Floor, Columbus, Ohio 43215, on behalf of the Staff of the Public Utilities Commission of Ohio.

OPINION:

I. PROCEDURAL BACKGROUND

Duke Energy Ohio, Inc. (Duke, company) is a public utility, engaged in the distribution and sale of natural gas to approximately 424,000 customers in Adams, Brown, Butler, Clermont, Clinton, Hamilton, Highland, Montgomery, and Warren counties, Ohio. As a public utility and a natural gas company within the definition of Sections 4905.02 and 4905.03(A)(6), Revised Code, Duke is subject to the jurisdiction of this Commission in accordance with Sections 4905.04, 4905.05 and 4905.06, Revised Code.

On June 18, 2007, Duke filed notice of its intent to file an application to increase its rates. The Commission issued an entry on July 11, 2007, establishing a test period of January 1, 2007 through December 31, 2007 for the proposed rate increase and a date certain of March 31, 2007, as well as granting certain waivers requested by Duke.

Duke filed the application in Case No. 07-589-GA-AIR, seeking to increase its gas rates on July 18, 2007. Duke also filed separate applications for approval of an alternative rate plan (Case No. 07-590-GA-ALT) and for approval to change accounting methods (Case No. 07-591-GA-AAM). As originally filed, Duke's rate increase application sought approval for a 5.71 percent annual rate increase, an additional \$34 million, over current total adjusted operating revenues. As part of the alternative rate plan application, Duke proposes to: (a) extend the term of the Accelerated Main Replacement Program (AMRP) and the associated rider (Rider AMRP) through the year 2019, (b) establish a process to recover its future investment in Duke's Utility of the Future initiative through a new rider

(Rider AU), and (c) create a new sales decoupling rider (Rider SD) to remove any disincentive for energy conservation initiatives. In the accounting application, Duke seeks approval to defer certain costs to be recovered later as a part of the AMRP expenditures and to capitalize the cost incurred for certain property relocations and replacements.

By entry issued September 5, 2007, the Commission found that Duke's application in Case No. 07-589-GA-AIR complied with the requirements of Section 4909.18, Revised Code, and Rule 4901:1-19-05, Ohio Administrative Code (O.A.C.) and accepted the application for filing as of July 18, 2007. The entry also granted Duke's waiver requests as to certain standard filing requirements and directed Duke to publish notice of the application in newspapers of general circulation in the company's service territory. Duke filed proof of such publication on February 25, 2007. To provide interested parties with an opportunity to make inquiries about the Duke applications, a technical conference was hosted by the Commission's staff on August 20, 2007.

Motions to intervene in these cases were granted to the Ohio Energy Group (OEG), the Kroger Company (Kroger), Interstate Gas Supply, Inc. (Interstate), the city of Cincinnati, the office of the Ohio Consumers' Counsel (OCC), People Working Cooperatively, Inc. (PWC), Integrys Energy Services, Inc. (Integrys), Direct Energy Services, LLC (Direct), Stand Energy Corporation (Stand), and the Ohio Partners for Affordable Energy (OPAE).

Investigations of Duke's applications were conducted and reports filed by the Commission staff and Blue Ridge Consulting Services, Inc. (Blue Ridge), an independent auditing firm. Both the report filed by staff (Staff Report, Staff Ex. 1) and financial audit report filed by Blue Ridge (financial audit report, Staff Ex. 4) were filed on December 20, 2007. Objections to the Staff Report and/or financial audit report were filed by PWC, OEG, Duke, OPAB, OCC, and, jointly, by Integrys and Direct. Motions to strike certain objections were filed by Duke and OCC. Memoranda contra the motions to strike objections were filed by Duke, Interstate, OPAB, and, jointly, by Integrys and Direct.

On January 25, 2008, a prehearing conference was held, as required by Section 4909.19, Revised Code. In accordance with Section 4903.083, Revised Code, local public hearings were held on February 25, 2008, in Cincinnati, Ohio, and on March 11, 2008, in Mason, Ohio.

A total of 27 witnesses testified at the two local hearings in Cincinnati, while four people took the stand at the Mason hearing. Two witnesses testified in favor of the rate increase, particularly as to the accelerated main replacement (AMRP) and riser replacement programs. Another witness testified that, although he was not opposed to the rate increase if Duke required additional money to maintain the gas lines, he was opposed to the extent that the increase is incorporated into the monthly customer charge as

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

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

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

A. Duke's Motion for Protective Order

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

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

v. Cleveland (1992), 64 Ohio St.3d 544, 549. However, one of the exceptions is for trade secrets. Section 1333.61(D), Revised Code, defines trade secret as:

[I]nformation, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The Commission finds that Attachment MGS-1 is financial information that derives independent economic value from not being generally known to or readily ascertainable by proper means by others who can obtain economic value from its use and that it is subject to reasonable efforts to maintain its secrecy. Therefore, we find that it contains trade secret information, as defined under Section 1333.61(D), Revised Code, and, therefore, that it should be granted protective treatment. In accordance with Rule 4901-1-24, O.A.C., Duke's request for a protective order is granted and the information filed under seal, as Attachment MGS-1, shall be afforded protective treatment for 18 months from the date this order is issued. Any request to extend protective treatment shall be made in accordance with Rule 4901-1-24(F), O.A.C.

B. Duke's Motion for Waiver and Leave to File Depositions

On February 25, 2008, Duke filed a motion for waiver of a Commission filing requirement and leave to file depositions *instantier*. Duke states that depositions were conducted on February 21, 2008. On Friday, February 22, 2008, Duke filed notice that it would be filing the deposition transcripts of five witnesses and commenced electronic transmission of the depositions. However, Duke states that it subsequently learned that only one of the five depositions was received by the Commission's Docketing Division before the end of the business day on February 22, 2008. Accordingly, the remaining four depositions were electronically transmitted on Monday, February 25, 2008. Duke requests that the Commission waive the requirement of Rule 4901-1-21(N), O.A.C., that depositions be filed with the Commission at least three days prior to the commencement of the

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

II. SUMMARY OF THE EVIDENCE

A. Summary of the Proposed Stipulation

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

- (1) Duke will receive a revenue increase of \$18,217,566, which represents a percentage increase of 3.05 percent and is based on a 8.15 percent rate of return. Duke will not be required to file the 60-day update filing of actual financial data for the test year (Jt. Ex. 1, at 5 and Stipulation Ex. 1).
- (2) Duke's revenue distribution, billing determinants, and rates to be adopted are shown on Exhibit 2 of the Stipulation, and assume the adoption of the new residential rate design. The rates also reflect the shift of \$6,000,000 to the residential class, phased-in over two years, based upon the agreed revenue requirement and Duke's updated cost of service study (*Id.* at 5; Stipulation Ex. 2).¹
- (3) Duke will amortize deferred rate case expenses requested for recovery in its filing in these cases as recommended in the Staff Report (*Id.* at 6).
- (4) Duke will implement new depreciation rates that reflect the mid-point between Duke's proposed depreciation rates and the rates proposed in the Staff Report, as shown on Stipulation Exhibit 5 (*Id.*).
- (5) The allocation of common plant related to the provision of gas distribution service will be based on an updated allocation

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

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

- (6) Duke will file actual data to support a Rider AMRP adjustment for the last nine months of 2007. The Rider AMRP revenue requirement will be modified to include deferred curb-to-meter expense and riser expense, net of maintenance savings, for calendar year 2007. Such net deferred expense shall be capitalized with carrying charges at an annual rate of 5.87 percent, representing the company's long-term debt rate, and recovered through Rider AMRP, beginning in this filing. Duke may elect to recover this expense in any annual Rider AMRP filings, provided that the recovery does not exceed the Rider AMRP cumulative residential rate caps. If this deferred expense causes Duke to exceed the Rider AMRP cumulative rate cap in any year, Duke may recover that portion of the deferred expense that exceeds the rate cap in a subsequent year as long as the recovery does not exceed the cumulative rate cap. The new Rider AMRP residential rates are limited on a cumulative basis as shown on Stipulation Exhibit 4, at 3, and recoverable pursuant to the Rider AMRP revenue allocation described in paragraph 9 of the Stipulation. Duke may implement these rates, effective with the beginning of the first billing cycle following issuance of the Commission's order, adjusted as necessary to permit the company full recovery of the revenue increase through May 1, 2009, subject to refund, upon Commission approval (*Id.* at 6-7).
- (7) Following the implementation of new Rider AMRP rates, Duke will file a pre-filing notice and application annually to implement subsequent adjustments to Rider AMRP, beginning in November 2008.² The annual filing will support the adjustment to Duke's revenue requirement for any increase to Rider AMRP. Duke shall continue to make its Rider AMRP annual filing until the effective date of the Commission's order in Duke's next base rate case (*Id.* at 8-9).

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

- (8) Duke's revenue requirement calculation and Rider AMRP application filed with the Commission shall include the post-March 31, 2007 (date certain) original cost and accumulated reserve for depreciation of property associated with the AMRP program that is used and useful on December 31 of the prior year in the rendition of service as such property is associated with the AMRP and riser replacement programs, including capital expenditures for new plant (including but not limited to new mains, services and risers), adjustments for the retirement of existing assets, calculated Post-In-Service Carrying Charges ("PISCC") on net plant additions and related deferred taxes until included in rates for collection in Rider AMRP, a proper annual depreciation expense, and any sums of money or property that Duke may receive to defray the cost of property associated with the AMRP capital expenditures. The return assigned to the recovery of all such net capital expenditures shall be at a pre-tax weighted average cost of capital of 11.7 percent (*Id.* at 9-11).³
- (9) Duke will substantially complete the AMRP by the end of 2019 and will complete the riser replacement program by the end of 2012. Duke will file an application with the Commission for approval to extend the AMRP program if not substantially completed by the end of 2019 (*Id.* at 12).
- (10) Duke shall maintain its alternative regulation commitments until the effective date of the Commission's order in the company's next base rate case, except that the incremental \$1,000,000 in funding for weatherization shall be funded through base rates.⁴ If, for any reason, Duke does not expend the \$3,000,000 gas weatherization funding amount in any year, the amount not expended will be carried over to the following year and added to the annual \$3,000,000 funding to be available for distribution to weatherization projects during that year. If a weatherization service provider does not meet its contract requirements, including its failure to meet deadlines, following consultation with the Duke Energy Community Partnership (Collaborative), Duke will reprogram the remaining funding to

³ This rate of return is based on a 10.4 percent return on equity.

⁴ OCC agrees with Duke's incremental \$1 million weatherization funding; however, OCC does not agree that this out-of-test period expenditure should be collected through base rates, and asserts that this amount should instead be collected through a rider.

a different project and/or assign it to another weatherization service provider so that the funding dollars can be spent expeditiously and productively (*Id.* at 12-14).⁵

- (11) The residential rate caps on Stipulation Exhibit 4 apply to Rider AMRP. Duke may establish deferrals for the expenses of the riser replacement program if these expenses cause Duke to exceed the cumulative rate cap, including a carrying cost of 5.87 percent. The rate caps shall be cumulative rather than annual caps such that if the rate increase is below the annual cap in a given year, the unused portion of the cap may be carried forward to future years but can never exceed the cumulative cap. If the deferred curb-to-meter expense or the deferred riser replacement program expense causes Duke to exceed the cumulative rate cap in any year, then Duke may recover that portion of the deferred expense that exceeds the cumulative rate cap in a subsequent year as long as the recovery does not exceed the cumulative rate cap (*Id.* at 17).
- (12) The parties agree that Duke shall take over ownership of the curb-to-meter service, including the riser, whenever a new service line or riser is installed or whenever an existing curb-to-meter service or riser is replaced. Duke shall file its tariffs in these cases such that Duke will be responsible for the cost of initial installation, repair, replacement and maintenance of all curb-to-meter services, including risers, except that consumers shall pay the initial installation costs related to the portion of service lines in excess of 250 feet. In 2008, Duke will begin capitalizing rather than expensing the costs currently described as "Customer Owned Service Line Expense." For this purpose, Duke will submit proposed tariff changes to Staff for review and approval, with a copy to parties, prior to filing the revised sheets with the Commission. Such capitalized costs shall be recoverable through Rider AMRP (*Id.* at 12-14).⁶
- (13) Duke will file, within 60 days of the Commission's final order in this proceeding, a deployment plan for the company's Utility of the Future Program for 2008-2009 (*Id.* at 15-16).

⁵ The members of the Collaborative include Duke personnel and representatives of the OCC, Staff, the Hamilton County Cincinnati Community Action Agency, City of Cincinnati, and FWC.

⁶ Neither Direct, Interstate, nor Integrys endorse this provision of the stipulation.

- (14) Duke's base rates do not include any amount for gas storage carrying costs. On a going forward basis, Duke will recover its actual gas storage carrying costs through its gas cost recovery rider (Rider GCR), without reduction to rate base, as shown on Stipulation Exhibit 1. Carrying charges associated with the actual monthly balances of Current Gas in Storage shall be accrued at a 10 percent annual rate as shown on Stipulation Exhibit 3. Further, the parties agree that the Commission should: (a) approve the methodology for the calculation of the storage carrying costs for inclusion in the GCR rate, as demonstrated in Stipulation Exhibit 3; (b) find that such an adjustment to Duke's rates is not an increase in base rates; and (c) approve recovery of such costs in Duke's next GCR filing following the Commission's order in this proceeding (*Id.* at 16-17).
- (15) Duke shall conduct an internal audit of its method and process for allocating service company charges to Duke by no later than 2009, and shall provide the audit report to Staff and the OCC (*Id.* at 18).
- (16) Duke shall continue to use the "Participants Test" as one of the methods for evaluating its Demand Side Management/Energy Efficiency programs as appropriate; however, Duke shall continue to use other cost/benefit tests as the Collaborative deems appropriate (*Id.* at 19).
- (17) Duke will implement a pilot program available to the first 5,000 eligible customers. The intent of the pilot program will be 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 the Percentage of Income Payment Plan (PIPP). Eligible customers shall be non-PIPP low usage customers verified at or below 175 percent of the poverty level. Duke will design a tariff that adjusts the fixed monthly charge for eligible customers as shown on Stipulation Exhibit 2. These rates may be adjusted if the Commission does not approve the fixed customer charge as shown in Stipulation Exhibit 2. Duke will develop the details for this program in consultation with Staff and the parties. Duke shall evaluate the program after the first winter heating season to determine, following consultation with staff and the parties, whether the program should be

continued to all eligible low-income customers, including considerations of program demand and cost (*Id.* at 20).

- (18) Duke will convene a working group or collaborative process, open to interested stakeholders, within 60 days after approval of the Stipulation, to explore implementing an auction to supply the standard service offer. Duke will report to the Commission within one year after approval of this Stipulation, the findings of the working group or collaborative including the facts and arguments which support and or oppose implementation of an auction process. The working group or collaborative process shall also review whether the present allocation of 80 percent of the net revenues from Duke's asset management agreement should continue to flow to GCR customers only, or should be changed to flow to GCR customers and choice customers (*Id.* at 21-22).
- (19) Duke shall revise its GCR tariff to implement a sharing mechanism for sharing of net revenues from off-system transactions.⁷ Such sharing mechanism shall be effective if Duke does not have an asset management agreement transferring management responsibility for its gas commodity, storage and transportation contracts to a third party, and shall provide for sharing of the net revenues from off-system transactions to be allocated 80 percent to GCR and choice customers and 20 percent to Duke shareholders. The revenue sharing percentage proposed by implementation of the sharing mechanism in this Stipulation is expressly limited to gas-related sales transactions, and shall not have precedential value in establishing the sharing percentages for similar electric sales transactions by Duke. This sharing mechanism, but not the 80 percent/20 percent revenue allocation, shall be subject to review in future GCR cases (*Id.* at 21-22).⁸
- (20) Duke shall meet with Staff and other interested parties to discuss eliminating customer deposits for PIPP customers and shall eliminate such deposits if Staff agrees (*Id.* at 18).

⁷ Off-system transactions are defined to include but are not limited to Off-System Sales Transactions, Capacity Release Transactions, Park Transactions, Loan Transactions, Exchange Transactions, and any other similar, but yet unnamed transactions.

⁸ This paragraph does not change the allocation contained in the current sharing mechanism for revenues received under Duke's asset management agreement.

- (21) Duke shall review and fully consider the merits of adopting any new payment plans submitted by any party and, if Duke elects not to implement such new payment plan, Duke shall respond to the stakeholder in writing to state the reason for its decision (*Id.* at 18).
- (22) Duke shall review its use of payday lenders as authorized payment stations and will use its best efforts to eliminate the use of payday lenders as authorized payment stations if other suitable locations for the payment stations are available in the same geographic area. Duke shall provide a list of all payday lenders utilized as authorized payment stations to Staff and other interested parties annually. The annual payday lenders list is to be provided initially on May 1, 2008, and on May 1, each year thereafter (*Id.* at 18-19).
- (23) Duke shall communicate with its customers to educate them about the difference between authorized and non-authorized payment stations. Duke shall work with members of the Collaborative to develop the educational materials and communication strategy (*Id.* at 19).

B. Summary of the Residential Rate Design Issue

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

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

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

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

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

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

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

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

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

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

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

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

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

III. DISCUSSION AND CONCLUSION

A. Consideration of the Stipulation

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

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

- (a) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (b) Does the settlement, as a package, benefit ratepayers and the public interest?
- (c) Does the settlement package violate any important regulatory principle or practice?

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

place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission (*Id.*).

The Commission finds that the Stipulation filed in these cases appears to be the product of serious bargaining among capable, knowledgeable parties. The signatory parties represent a wide diversity of interests including the utility, residential consumers, low-income residential consumers, commercial and industrial consumers, and Staff. Further, we note that the signatory parties routinely participate in complex Commission proceedings and that counsel for the signatory parties have extensive experience practicing before the Commission in utility matters.

The Stipulation also meets the second criterion. As a package, the Stipulation advances the public interest by resolving all issues raised, except as to residential revenue design, thereby avoiding extensive litigation. While the Stipulation includes a general rate increase of approximately three percent across all customer classes, that increase will allow the company an opportunity to recover its expenses. As for the new AMRP, which now includes riser replacement and company ownership of certain customer service lines, the Stipulation continues the mechanism established for the parties and the Commission to evaluate the reasonableness of the expenses incurred on a consistent, regular basis during the program until another base rate application is filed by Duke. We conclude that the continuance of the main replacement program, the initiation of the riser replacement program and Duke's ownership of customer service lines advances the public interest and safety. As with the previous program, the new AMRP and riser replacement program does not sanction cost recovery of any or all yet-to-be-incurred costs and does institute caps on future recovery. The Stipulation also continues the process under which each year's AMRP and riser replacement expenses can be evaluated for the next AMRP rider, while also addressing questions related to over-recovery and treatment of cost savings. We note that the accounting provisions adopted to facilitate the new AMRP program and the riser replacement program cease at the completion of each program. The Commission further notes that the Stipulation provides for the continuation of the weatherization program and a pilot program for low income customers.

Regarding company ownership of certain customer service lines, Duke should, upon the request of the customer, work with the customer as to location, relocation, and manner of installation of the service line, to the extent feasible under the gas pipeline safety regulations, Duke's tariff, and Duke's procedures.

Finally, the Stipulation meets the third criterion because it does not violate any important regulatory principle or practice. Indeed, the Stipulation provides a resolution for Duke to economically continue the AMRP and to initiate the riser replacement program facilitating gas system safety and reliability improvements.

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

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

B. Consideration of the Residential Rate Design

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Rate Determinants:

1. Rate Base

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

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

2. Operating Income:

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

3. Rate of Return and Authorized Increase:

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

4. Rates and Tariffs:

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

FINDINGS OF FACT:

- (1) On June 18, 2007, Duke filed notice of its intent to file an application to increase its rates. In that notice, the company also requested a test year beginning January 1, 2007, and ending December 31, 2007, with a date certain of March 31, 2007.
- (2) By entry issued July 11, 2007, the Commission approved Duke's request to establish the test period of January 1, 2007, through December 31, 2007, for the rate increase proposal and a date certain of March 31, 2007.
- (3) Duke filed its rate increase application on July 18, 2007. On July 18, 2007, Duke also separately filed requests for approval

of an alternative rate plan, docketed at Case No. 07-590-GA-ALT, and for approval of changes in accounting methods, docketed at Case No. 07-591-GA-AAM.

- (4) By entry dated September 5, 2007, the Commission found that Duke's rate increase and alternative rate plan applications complied with the requirements of Section 4909.18, Revised Code, and Rule 4901:1-19-05, O.A.C.
- (5) The Commission accepted Duke's rate increase application for filing as of July 18, 2007.
- (6) OEG, Kroger, Interstate, the city of Cincinnati, OCC, PWC, Integrys, Direct, Stand and OPAE each requested, and was granted, intervention in these proceedings.
- (7) Objections to the staff report were filed by Duke, PWC, OEG, OPAE, OCC, and, jointly, by Integrys and Direct.
- (8) Duke published notice of its applications and the hearings and filed the required proofs of publication on February 11, February 25, and March 12, 2008.
- (9) The staff of the Commission and the financial auditor filed their respective reports of investigation on December 20, 2007.
- (10) On January 25, 2008 a prehearing conference was held, as required by Section 4909.19, Revised Code.
- (11) Two local public hearings were held in Cincinnati, Ohio, on February 25, 2008, and another local public hearing was held in Mason, Ohio, on March 11, 2008, in accordance with Section 4903.083, Revised Code. At the Cincinnati hearings a total of 27 witnesses gave testimony and four witnesses gave testimony at the Mason hearing.
- (12) On February 28, 2008, a Stipulation was filed by all the parties to this proceeding resolving all the issues presented in these matters, except rate design.
- (13) The evidentiary hearing commenced as scheduled on February 26, 2008, was continued until February 28, 2008, and reconvened on March 5, 2008. At the evidentiary hearing, Duke and staff each presented one witness in support of the

Stipulation. In regard to the one litigated issue, rate design, Duke presented four witnesses, OCC presented two witnesses and staff presented one witness.

- (14) The Stipulation is the product of serious bargaining between knowledgeable parties, benefits ratepayers, advances the public interest, and does not violate any important regulatory principles or practices.
- (15) The value of all of the company's jurisdictional property used and useful for the rendition of natural gas service to customers affected by this application, determined in accordance with Section 4909.15, Revised Code, is not less than \$649,964,874.
- (16) Under its existing rates, Duke's net operating revenue is \$43,274,872, under its existing rates. This net annual revenue of \$43,274,872, when applied to a rate base of \$649,964,874, results in a rate of return of 6.66 percent.
- (17) A rate of return of 6.66 percent is insufficient to provide Duke reasonable compensation for the service it provides.
- (18) A rate of return of 8.45 percent is fair and reasonable, under the circumstances presented in these cases, and is sufficient to provide the company just compensation and return on the value of its property used and useful in furnishing natural gas service to its customers.
- (19) A rate of return of 8.45 percent applied to the rate base of \$649,964,874 will result in allowable net operating income of \$54,922,032.
- (20) The allowable gross annual revenue to which the company is entitled for purposes of this proceeding is \$615,791,371.

CONCLUSIONS OF LAW:

- (1) Duke's application for a rate increase was filed pursuant to, and this Commission has jurisdiction of the application pursuant to, the provisions of Sections 4909.17, 4909.18, and 4909.19, Revised Code. The application complies with the requirements of these statutes.

- (2) Staff and Blue Ridge conducted investigations of the application, filed their respective reports, and served copies of the Staff Report on interested persons in accordance with the requirements of Section 4909.19, Revised Code.
- (3) The hearings, and notice thereof, complied with the requirements of Sections 4909.19 and 4903.083, Revised Code.
- (4) The Stipulation is the product of serious bargaining between knowledgeable parties, benefits ratepayers, advances the public interest, and does not violate any important regulatory principles or practices. The Stipulation submitted by the parties is reasonable and shall be adopted in its entirety.
- (5) Duke's existing rates and charges for gas service are insufficient to provide Duke with adequate net annual compensation and return on its property used and useful in the provision of natural gas service.
- (6) A rate of return of 8.45 percent is fair and reasonable under the circumstances of this case and is sufficient to provide Duke just compensation and return on its property used and useful in the provision of gas service to its customers.
- (7) Duke should be authorized to cancel and withdraw its present tariffs governing service to customers affected by these applications and to file tariffs consistent in all respects with the discussion and findings set forth herein.
- (8) The levelized rate design, as modified herein, is a reasonable resolution to address Duke's declining sales volumes per customer, allow Duke the opportunity to collect the revenue requirement established in this rate case proceeding and encourage Duke's participation in customer energy conservation programs.

ORDER:

It is, therefore,

ORDERED, That Duke's request for a protective order in regards to Attachment MGS-1 is granted for 18 months from the date this order is issued. It is, further,

ORDERED, That Duke's request for leave to file depositions less than three days prior to the commencement of the evidentiary hearing is granted. It is, further,

ORDERED, That the Stipulation filed on February 28, 2008 is approved in its entirety. It is, further,

ORDERED, That Duke's request for a waiver of the requirement to file an updated income statement, pursuant to Rule 4901-7-01, Appendix A, Chapter II(A)(5)(d), O.A.C., is granted. It is, further,

ORDERED, That Duke implement the levelized rate design for its residential customers as discussed in this order. It is, further,

ORDERED, That Duke's applications to increase its rates and charges for gas service, to implement an alternative rate plan and to modify accounting methods are granted to the extent provided in this opinion and order. It is, further,

ORDERED, That Duke is authorized to cancel and withdraw its present tariffs governing gas service to customers affected by these applications and to file new tariffs consistent with the discussion and findings as set forth in this order. Upon receipt of four complete copies of tariffs conforming to this opinion and order, the Commission will review and consider approval of the proposed tariffs by entry. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber - CONCURRING
08/17/08
Alan R. Schriber, Chairman

Paul A. Centolella - CONCURRING
and DISSENTING
Paul A. Centolella

Ronda Hartman Bergus
Ronda Hartman Bergus

Valerie A. Lemmie
Valerie A. Lemmie

Cheryl L. Roberto
Cheryl L. Roberto

RMB/GNS/vrm

Entered in the Journal
MAY 28 2008

Renee J. Jenkins

Renee J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio, Inc. for an Increase in Rates.) Case No. 07-589-GA-AIR

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of an) Case No. 07-590-GA-ALT
Alternative Rate Plan for Gas Distribution)
Service.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval to Change) Case No. 07-591-GA-AAM
Accounting Methods.)

CONCURRING OPINION OF
CHAIRMAN ALAN R. SCHRIBER

The straight fixed variable (SFV) option proposed by the PUCO Staff and adopted here today appropriately speaks to two significant issues. One is the potential impact on low income customers and the other is the desired effect that the Order shall have upon conservation.

The latter consideration is paramount. As we acknowledge that there are serious energy issues, we strive to promote and adopt advanced and renewable energy sources. While these are necessary and important pursuits, I believe that conservation is the most important measure of all. Nothing is less costly or more effective than simply reducing consumption. As time goes by, I trust that we will expend many resources adopting conservation measures on "both sides of the meter".

What we are attempting to do today is to provide appropriate incentives, through a rational pricing scheme, to encourage a reduction in the consumption of natural gas. By "rational", I mean a balanced approach that penalizes neither those whom have already squeezed the last cubic foot of natural gas from their budget, nor those whom might be inclined to "over-conserve".

The proposed SFV option achieves the optimum balance because it segregates fixed costs from those costs that are within the control of the consumer. In contrast, the current pricing scheme assigns all costs- fixed and variable - to the level of usage. The inherent danger with the current system is that consumers might be led to believe that the more they cut back, the more they save. This is true to a point. The point happens to be that of diminishing returns; over conservation takes place when the fixed costs of providing the

service are no longer covered with revenue. This inevitably leads to a rate case and higher rates. In other words, if usage-sensitive rates are assigned to fixed costs, and if usage falls below a certain point, then fixed costs do not get covered. It is then time for a rate case: what has the consumer saved?

If the solution is appropriate price signals, then prices must be associated with the volume of gas alone. In contrast, under the current pricing scheme, the gas company has no incentive to encourage conservation because those same usage sensitive rates might flow through to fixed costs as consumption grows, much to the utility's advantage. Under the SFV, the fixed costs are covered and the company makes no money on the gas commodity. Therefore, the company might actually promote conservation more aggressively.

One alternative to the old conventional method is a decoupling rider mechanism. In this case, Homeowner A who has already squeezed the last cubic foot of un-needed gas from his home via conservation oriented expenditures is discriminated against. This results from the make-whole provision that accrues to the utility when Homeowner B begins to pare down consumption. In other words, as B's meter begins to spin slower, so too do the company's revenues. Homeowner A will be compelled to make up some share of the shortfall, notwithstanding the fact that Homeowner A can cut back consumption no further.

Finally, those who argue that inadequate price signals are the biggest issue need only look at the impact of budget billing. What signal is being sent when the bill each month is the same regardless of consumption? Yet, is anyone recommending the elimination of budget billing?

The other issue in play is that of the income effect of the SFV methodology. One can conclude that consumers of greater amounts of gas will see their bills fall while those at the low end will see theirs rise. This does not mean that the burden will fall disproportionately on low-income consumers. There is record testimony that suggests that low-income consumers, i.e., PIPP customers consume more on average per year than others. Clearly, PIPP customers are protected. Furthermore, while one can play freely with percentages, the nominal dollar increases due to the rate restructuring is quite small. As a precaution, however, the Commission is modifying the stipulation to provide a four dollar credit to ten thousand non-PIPP customers as opposed to five thousand provided for in the stipulation.

All told, it is important that we arrive at a decision as expeditiously as possible. I believe that over the years the lesson to be learned is that we can never know with one hundred percent certainty all of the facts and all of the possible outcomes. This is precisely why the law has provided this Commission with the ability to react to adverse outcomes should they arise. This is the ultimate consumer protection.



Alan R. Schriber, Chairman

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
Energy Ohio, Inc. for an Increase in Rates.) Case No. 07-589-GA-AIR

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of an) Case No. 07-590-GA-ALT
Alternative Rate Plan for Gas Distribution)
Service.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval to Change) Case No. 07-591-GA-AAM
Accounting Methods.)

OPINION OF COMMISSIONER PAUL A. CENTOLELLA
CONCURRING IN PART AND DISSENTING IN PART

The majority concludes that the current residential rate design has a negative impact on the ability of Duke Energy Ohio (hereafter "Duke", "the Company", or "the utility") to maintain financial stability, attract new capital, and on its incentive to encourage energy efficiency and conservation. And, the majority determines that it is necessary to decouple the utility's recovery of fixed costs from its volumetric sales. I concur with the majority in these conclusions and on issues other than residential rate design. I dissent from the majority regarding how to transition toward a residential rate design which decouples the recovery of fixed costs from volumetric rates.

Having determined that a new decoupling rate design is appropriate, the Commission must decide two questions. First, we must decide the better choice between two decoupling methods: a straight fixed variable (SFV) rate design, which recovers fixed costs in a flat monthly customer charge, or a decoupling adjustment, which allows the company to recover the same fixed cost revenue requirement with a lower customer charge by adjusting subsequent year rates to true up revenues received from volumetric charges. Second, in the event the Commission finds the SFV rate design preferable, the Commission should consider how to transition to a rate design which is significantly different from the rate structures that have formed the basis of consumer expectations.

Over the long-term, moving in the direction of a SFV rate design is preferable to keeping a modest customer charge and relying entirely on a decoupling adjustment. Both methods will address revenue and earnings stability issues in that the fixed costs of delivering gas to the home will be recovered irrespective of consumption. When fully implemented, each will remove any disincentive by the Company to promote conservation

and energy efficiency. And, both methods can be implemented in a straight forward manner and, if appropriately designed, easily explained to consumers as a deliberate or more gradual transition toward recovering fixed costs through a customer charge. However, as the ultimate objective, significant movement toward a fixed variable rate design is consistent with developing a more efficient rate structure. Efficient rate design seeks to align price elastic rate elements more closely to marginal costs, while recovering a larger portion of any residual revenue requirements through comparatively price inelastic charges. Experience shows that there is a significant price response to increases in volumetric charges, as evidenced by the recent steep reductions in average per customer consumption as gas costs increased. Given that customer charges are paid to provide access to gas service, it is reasonable to expect comparatively less price response with respect to increases in the customer charge. Over the long-term, this supports significant movement toward a SFV rate design in which a larger portion of the company's fixed cost revenue requirements is recovered through the customer charge.

Additionally, the SFV rate design will reduce the month-to-month variation in customer bills as fixed costs will be recovered evenly throughout the year, making it easier for customers to deal with high winter heating bills. While decoupling adjustments are not difficult to implement, a SFV rate design, when fully implemented, will remove the need for any additional administrative proceedings to review decoupling adjustments.

Consumers have made investment decisions based on expectations regarding natural gas pricing and fairness compels us to move at a measured pace when making fundamental changes in rate design. For this reason, the Commission should carefully consider the appropriate transition path.

On the question of how to transition to a fixed charge rate design, Duke and the Staff have proposed a modified SFV rate design in which the customer charge would be set at \$20.25 per bill in year one and \$25.33 per bill in year two. Fully implementing a SFV rate design would require a customer charge in excess of \$30 per residential consumer bill. Duke and the Staff also proposed and the Commission has expanded a "Pilot Low Income Program" that would provide some low income consumers a discount to cushion the impact of the change in rate design.

In my view, the pace of the transition in this case is more rapid than should be selected given the consumer expectations created by long-standing rate design practices and the recovery of fixed costs should be fully decoupled from sales volumes during the transition.

The pace of the transition proposed in the stipulation could send the wrong message to consumers with respect to energy conservation. Consumers who have made efficiency investments and reduced their consumption could see a significant increase in

the regulated portion of their bills, while their neighbors who have implemented no energy efficiency measures and are high use customers will see the regulated portion of their gas bills decline by similar amounts. Given rising gas commodity costs, increasing dependence on foreign sources of gas supply, and the likely adoption of limits on greenhouse gas emissions from the burning of fossil fuels, encouraging the adoption of cost effective energy efficiency measures should be among our highest priorities. A more gradual transition to a SFV rate design would minimize near term bill increases for low use consumers recognizing the investments that many of these consumers have made to reduce their gas usage, allow consumers to capture a greater portion of the expected benefits of such investments, and avoid the appearance that the Commission is rewarding high use by lowering the gas bills of high use customers.

Second, during the period covered by this Order, the modified SFV approach will not fully decouple recovery of the Company's fixed costs from sales volumes. A modest three percent reduction in sales during the first year would represent a loss to Duke of the opportunity to recover more than a million dollars of its fixed costs.

To address these concerns, I would reach the following result.

First, the recommendation of the Staff and Company should be modified to reduce the year one customer charge for all residential consumers to \$16.25 per residential bill and establish the base level of the year two customer charge for all residential consumers at \$21.33.

Second, consistent with the majority opinion, the Company should review and further enhance its weatherization and conservation program offerings. As one part of this review, Duke should adopt the objective of making cost-effective weatherization and conservation programs available to all low income consumers and to ramp up programs to facilitate implementation of all such measures as rapidly as reasonably practicable. Low income consumers often face difficult choices between paying their energy bills and meeting other essential needs, yet may be among the last to be able to take advantage of cost-effective energy efficiency investments. Consumers who struggle to make ends meet often find it difficult to pay for the initial cost of efficiency measures. And, many low income consumers live in rental housing with landlords who have little incentive to install efficiency measures that would reduce their tenants' utility bills.

Third, in conjunction with filing a proposal for approval of significantly expanded energy efficiency programs and recovery of the costs of such programs, I would invite the Company to propose an interim decoupling adjustment. This adjustment should be structured to adjust the second and subsequent year base customer charge of \$21.33 for the difference, on a per customer bill basis, between the portion of the Company's fixed cost

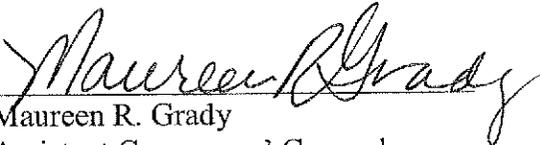
residential revenue requirement that is allocated to volumetric rates and the revenues recovered for such fixed costs through volumetric rates at weather normalized sales levels.

To meet the energy challenges of the 21st Century, Ohio will need to greatly improve the efficiency with which we use all forms of energy including natural gas. Efficient price signals will be an important, but not sufficient, element in this transformation. Our increasing knowledge of behavioral economics and experience with utility energy efficiency programs has shown that utility efficiency programs can produce significant net economic benefits. The Commission needs to encourage the cost-effective expansion of such programs. And, we should not wait through the completion of a multi-year transition to a SFV rate design before doing so in full measure.


Paul A. Centolella, Commissioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply Brief and Appendix on Behalf of Appellant, the Office of the Ohio Consumers' Counsel* has been served upon the below-named counsel via First Class mail, postage prepaid this 31st day of December, 2009.


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