

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Aligning Electric)	
Distribution Utility Rate Structure with)	Case No. 10-3126-EL-UNC
Ohio's Public Policies to Promote)	
Competition, Energy Efficiency, and)	
Distributed Generation.)	

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
OHIO PARTNERS FOR AFFORDABLE ENERGY
AND
OHIO POVERTY LAW CENTER**

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September 20, 2013

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The Public Utilities Commission of Ohio (“PUCO” or “Commission”) issued an Order that “encouraged” electric utilities to charge customers by using a straight fixed variable (“SFV”) rate design when the utilities file their next base rate cases.¹ For electric utilities that do not propose a SFV rate design in their next base rate cases, the PUCO directed the PUCO Staff “to include in its Staff Report an alternative rate design that includes SFV principles.”²

Under a SFV rate design, a customer pays a single fixed charge for delivery of electricity to cover the utility’s fixed distribution costs, while generation energy is billed at a volumetric rate. With a SFV rate design, the PUCO essentially will be replacing the traditional opportunity for utilities to profit with a new financial guarantee for Ohio’s electric utilities. To protect consumers from this rate design, the Office of the Ohio

¹ Finding and Order (August 21, 2013) (“Order”) at 20.

² Id.

Consumers' Counsel ("OCC"), Ohio Partners for Affordable Energy ("OPAE") and Ohio Poverty Law Center ("OPLC") seek rehearing of the PUCO's Order.³

The PUCO's Order was unjust, unreasonable and unlawful in the following respects:

1. The PUCO's decision is contrary to R.C. 4903.09 and court precedent because it failed to adequately explain why the PUCO required that a SFV rate design must either be included by an electric utility in its next base rate case or be a component of the PUCO Staff's report in electric utilities' next base rate cases.
2. The PUCO's decision lacks support in the record, violating R.C. 4903.09.
3. By ordering that a SFV rate design be included in an electric utility's next base rate case – either by the utility or in the PUCO Staff's Report – the PUCO de facto modified its standard filing requirements without proper administrative procedure.

The PUCO should abrogate its Order.

The grounds for this Application for Rehearing are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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³ This Application for Rehearing is filed pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On December 29, 2010, the PUCO opened this proceeding to review “whether modifications to Ohio’s electric distribution utilities’ rate structures would better align utility performance with Ohio’s desired public policy outcomes; and if so, what modifications should be adopted.”⁴ To facilitate the review, the PUCO established “a process to gather additional facts, solicit presentations from diverse viewpoints, and encourage public comment on questions of policy.”⁵

In the December 29 Entry, the PUCO set forth several “discussion questions” and asked for comments on the questions “to aid the Commission in initially framing the issues that should be considered.”⁶ The PUCO asked only for comments on the “discussion questions”; it did not allow for reply comments.⁷ The PUCO indicated that the comments were the first step in its review process:

This **first** round of comments is **solely** for the purpose of having parties aid the Commission in determining the appropriate questions and data necessary to be considered in this review. The

⁴ Entry (December 29, 2010) at 1.

⁵ Id.

⁶ Id. at 5.

⁷ Id.

Commission, **at a later date, will consider and specify additional opportunities for input** into this review.⁸

Eleven interested parties filed motions to intervene after the December 29 Entry was issued,⁹ and on February 11, 2011, initial comments were filed in this proceeding.¹⁰ After that, the PUCO provided no additional opportunities for input into its review. On August 21, 2013 – thirty months after initial comments were filed – the PUCO issued its Finding and Order in this case.

In the Order, the PUCO reviewed the positions of the various interested parties who filed comments in response to the “discussion questions.” The first question was whether there are fundamental operational distinctions between natural gas and electric utilities that must be considered in determining whether and how to eliminate or mitigate the throughput incentive in electric distribution rates. The PUCO noted that OCEA, FirstEnergy and Duke discussed many fundamental operational differences between electric and natural gas systems, while AEP Ohio opined that the systems are

⁸ Id. (emphasis added).

⁹ Ohio Energy Group (January 5, 2011); Ohio Environmental Council (“OEC”) (January 12, 2011); The Kroger Company (“Kroger”) (January 21, 2011); Sierra Club (February 2, 2011); OCC (February 4, 2011); The Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, United Clevelanders Against Poverty, and The Consumers for Fair Utility Rates (collectively, “Citizens Coalition”) (February 7, 2011); Industrial Energy Users-Ohio (February 9, 2011); The Natural Resources Defense Council (“NRDC”) (February 9, 2011); Nucor Steel Marion, Inc. (“Nucor”) (February 11, 2011); Wal-Mart Stores East L.P. and Sam’s Club, Inc. (“Wal-Mart”) (February 11, 2011); and Ohio Manufacturers’ Association (February 11, 2011).

¹⁰ Comments were filed by Ohio Consumer and Environmental Advocates (“OCEA”), which includes OCC, Sierra Club, OEC, NRDC, Citizens Coalition, Ohio Poverty Law Center, Citizen Power and Greater Cincinnati Energy Alliance; Citizens Coalition, in addition to its participation in OCEA’s comments; Ohio Partners for Affordable Energy (“OPAE”); Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, “FirstEnergy”); Duke Energy Ohio, Inc.; Dayton Power and Light Company (“DP&L”); Columbus Southern Power Company and Ohio Power Company (“AEP Ohio”); Wal-Mart; and Kroger.

fundamentally similar and OPAE argued that the differences do not affect the nature of the distribution systems.¹¹

The second question was whether there are factual or policy considerations that suggest electric distribution rate design should be constructed differently from natural gas. The PUCO noted that OCEA listed six such considerations, FirstEnergy discussed five, OPAE named three and Duke and DP&L each described two.¹² The PUCO also stated that AEP Ohio said there were “few” such considerations.¹³

The third question asked which rate design the PUCO should use if it adopts a decoupling rate design: SFV, decoupling adjustment, lost revenue recovery adjustment, or some combination of these. The PUCO noted that Nucor recommended “that the Commission should not use this proceeding to adopt a one-size-fits-all cost recovery mechanism that would be applied to all electric utilities on a uniform basis.”¹⁴ Also, OCEA, FirstEnergy and OPAE flatly opposed the SFV.¹⁵ Although AEP Ohio supported SFV, the PUCO noted AEP Ohio’s view that full implementation of the SFV “would be difficult due to the potential bill impacts.”¹⁶ The PUCO noted some support for SFV by Duke and Kroger.¹⁷

Despite the opposition to, and less than enthusiastic support for, a SFV rate design, the PUCO determined that SFV would “best accomplish” the policy goals of

¹¹ Order at 2-3.

¹² Id. at 4-5.

¹³ Id. at 5.

¹⁴ Id. at 8.

¹⁵ Id. at 6-7, 9.

¹⁶ Id. at 8.

¹⁷ Id. at 8-9.

competition, increased energy efficiency and encouraging distributed generation.¹⁸ The PUCO based its decision on “the comments filed in this proceeding, as well as recent experience by the natural gas companies....”¹⁹ The PUCO “encouraged” electric utilities to use a SFV rate design when they file their next base rate cases.²⁰ For those electric utilities that do not include a SFV rate design in their next base rate cases, the PUCO directed the PUCO Staff “to include in its Staff Report an alternative rate design that includes SFV principles.”²¹ The PUCO’s decision was in error.

As discussed herein, the PUCO’s decision lacks adequate explanation, is unsupported by the record in this proceeding and violates principles of administrative law. The PUCO should abrogate its decision.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order, “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.” OCC and OPAE filed motions to intervene in this proceeding. In addition, OCC and OPLC filed comments in this proceeding as part of OCEA, and OPAE filed its own comments.²²

R.C. 4903.10 requires that an application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the

¹⁸ Id. at 19.

¹⁹ Id.

²⁰ Id. at 20.

²¹ Id.

²² See OCEA Comments at 2, n. 1.

order to be unreasonable or unlawful.” In addition, Ohio Adm. Code 4901-1-35(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.”

In considering an application for rehearing, R.C. 4903.10 provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.” As shown herein, the statutory standard to abrogate the Order is met here.

III. ARGUMENT

A. The PUCO’s Decision Is Contrary To R.C. 4903.09 And Court Precedent Because It Failed To Adequately Explain Why The PUCO Required That A Straight Fixed Variable Rate Design Must Either Be Included By An Electric Utility In Its Next Base Rate Case Or Be A Component Of The PUCO Staff’s Report In Electric Utilities’ Next Base Rate Cases.

Administrative agencies must adequately explain their decisions. The United States Supreme Court has repeatedly stated:

It is an axiom of administrative law that an agency’s explanation of the basis for its decision must include “a ‘rational connection between the facts found and the choice made.’”²³

The PUCO is required by law to base its decisions on its findings. R.C. 4903.09 requires that “[i]n all contested cases heard by the public utilities commission, a

²³ *Bowen v. American Hospital Assn.*, 476 U.S. 610, 625, 90 L. Ed. 2d 584 (1986), citing *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.”

The Supreme Court of Ohio has recognized the need for agencies to adequately explain their decisions, even in the absence of a specific statutory requirement: “The purpose of an explanation requirement is ‘to inform the parties and potentially a reviewing court of the basis for the commission’s decision.’”²⁴

In this proceeding, the PUCO’s explanation of its preference of SFV for electric utilities does not provide a basis for the PUCO’s decision. The PUCO states that its decision is based on the comments in this proceeding and its experience with SFV in the natural gas industry.²⁵ But, as discussed in the next section, the comments were overwhelmingly opposed to SFV for electric utilities. And the comments were especially negative regarding SFV as not promoting state policy and its adverse effect on customers. Nevertheless, the PUCO did not explain why the negative aspects of SFV for electric distribution service are overcome by the PUCO’s experience with SFV in the natural gas industry.

The commenters also pointed out numerous ways in which electric and natural gas operations are different. Yet the PUCO does not explain how these differences are inconsequential to implementation of SFV for electric utilities.

²⁴ *State ex rel. Ochs v. Industrial Comm’n*, 85 Ohio St. 3d 674, 675; 1999 Ohio 294; 710 N.E.2d 1126; 1999 Ohio LEXIS 1751, quoting *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.* (1994), 71 Ohio St. 3d 139, 145, 642 N.E.2d 378.

²⁵ Order at 19.

The PUCO states that in the natural gas cases, “the Commission found that the SFV rate design would produce more stable bills for customers, that bills would be easier to understand and would produce a more accurate price signal, and that the SFV rate design would assure a more equitable allocation of distribution system costs to cost-causers.”²⁶ And the PUCO adds that “[t]he Commission believes that these same characteristics *could* be applicable to an SFV rate design for electric utilities.”²⁷ But the PUCO does not elaborate as to why this may be so. The PUCO points to nothing in the record that led to its conclusion.

The PUCO’s Order lacks adequate explanation of the basis for its decision. The Order is unjust, unreasonable and unlawful, and should be abrogated.

B. The PUCO’s Decision Lacks Support In The Record, Violating R.C. 4903.09.

The Ohio Supreme Court has held that a PUCO ruling on an issue without record support is an abuse of discretion and reversible error.²⁸ In this proceeding, there is no basis in the record to support the PUCO’s Order.

The PUCO claims that SFV for electric utilities will “best accomplish” the policy goals of competition, increased energy efficiency and encouraging distributed generation.²⁹ But nearly every commenter discussed numerous differences between the natural gas and electric industries and how SFV would adversely affect electric utilities, consumers and energy efficiency efforts. And Nucor Steel opposed the adoption of any

²⁶ Id. at 20.

²⁷ Id. (emphasis added).

²⁸ *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 519; 2011 Ohio 1788; 947 N.E.2d 655; 2011 Ohio LEXIS 957, citing *Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008 Ohio 990, 885 N.E.2d 195, ¶ 30.

²⁹ Order at 19.

single decoupling mechanism in this proceeding, stating that it would “unnecessarily bind the Commission’s hands.”³⁰ Nucor recommended that the PUCO use this proceeding as an opportunity to generate and develop ideas on rate design from interested stakeholders that the PUCO can later apply in actual rate cases.³¹ Nucor also urged the PUCO to make clear that it will continue to evaluate rate design issues on a case-by-case basis.³²

FirstEnergy identified some “unique attributes” of electric distribution businesses that influence distribution rate design. Among them were:

- a. The electric distribution system is designed to accommodate individual customer and class peak demands that are driven by instantaneous loads. The utility has to install and maintain sufficient distribution capacity to meet customers’ peak demands even as these load centers shift and migrate with customers.
- b. To the extent that customers’ individual demands continue to grow, additional plant capacity is needed regardless of the changes, if any, in the number of customers on the system
- c. Unlike natural gas, consumption of electricity and the number of electric utility customers continue to grow driving the need for investment in the distribution system. For the period 2002-2009 average residential electric consumption grew 1%. This growth has occurred even during a period of recession. During this same time period, average residential natural gas consumption fell by 12%. Decoupling may make sense in a declining sales industry, like natural gas, but it is wholly inappropriate in the electric industry where sales and costs are increasing.
- d. Although kWh usage or throughput may not directly cause the costs that drive capital investment in the distribution system for the residential class, a correlation between kW demand and kWh usage has been exhibited. Simply put, customers who use more electricity have higher demand for

³⁰ Nucor Comments (February 11, 2011) at 2.

³¹ Id. at 3.

³² Id.

electricity and require more distribution infrastructure to serve.

- e. Increasing mandates and policy support for distributed generation, net metering, new reliability standards, smart grid, and renewable resources create new operational challenges on the distribution system that must be addressed and will likely give rise to the need for additional distribution investment. These requirements are unrelated to the costs of the existing distribution system, the volume of kWh sales or the number of customers on the system. But these new requirements must be recognized in any distribution rate design going forward.³³

FirstEnergy opposed moving to a SFV design for several reasons. First, FirstEnergy pointed out that SFV would diminish customer incentives needed to spur distribution efficiency and demand reductions from a customer perspective. Second, FirstEnergy stated that SFV would shift costs from higher-usage customers to lower-usage customers, without assuring that costs are more properly assigned to cost causers. Third, FirstEnergy argued that the SFV rate design makes adjustments only to revenue levels while ignoring an electric utility's ability to recover its prudently incurred costs and an opportunity to earn a reasonable return on investment.³⁴

OCEA noted that electricity consumption levels cause a much greater portion of electric system costs than is the case with natural gas, and that natural gas uses are largely non-discretionary while some electric customers are able to make choices about what electronic devices they use and how and when they use them.³⁵ OCEA argued against a SFV rate design for electric companies because:

³³ FirstEnergy Comments (February 11, 2011) at 10.

³⁴ Id. at 11.

³⁵ OCEA Comments (February 11, 2011) at 6-7.

- Electric customers will see a much larger absolute increase in the fixed portion of their bills than experienced by gas customers when SFV was implemented by Ohio's natural gas utilities. The implementation of an SFV rate design for Ohio's electric utilities would require a radical increase in fixed per-customer charges and would have negative effects on those customers who use little electricity or have already made investments to become more efficient or use less grid-provided electricity. Low to medium income customers among Ohio's electric customers would be immediately and negatively affected to a greater degree by the increase in the customer charge that would accompany an SFV rate design than Ohio's natural gas customers.
- An SFV rate design would undermine existing investments in energy efficiency and renewable energy and reduce the rewards of further investment. One of Ohio's important policies relevant to this topic is the encouragement of distributed generation. Investments in small distributed generation equipment are often larger than investments in gas efficiency measures. A significantly reduced variable charge and correspondingly increased customer charge would drastically increase the payback period for these investments. Implementing a SFV mechanism would discourage investment in distributed generation by the customer classes assigned to this type of rate design and could potentially create backlash from those customers who have already invested in distributed generation in Ohio.³⁶
- The bundled price of natural gas service has experienced sharp price volatility over the past two decades, making customers more aware of their level of natural gas consumption. In comparison, bundled electricity prices have been comparatively stable in Ohio over the same time frame. Higher fixed charges would make any customer inattention problem worse.
- SFV essentially averages costs compared to current recovery. For residential natural gas customers, an individual customer's consumption makes little difference to the average cost per customer. By contrast, a group of residential electric customers who use a lot of power can

³⁶ Further, it is unclear how a SFV rate design encourages distributed generation. Residential and commercial customers who have invested in Solar Photovoltaic or wind energy systems in support of State energy policy would see their investment payback time increased significantly from a SFV rate design, and such a design would most likely discourage customers contemplating distributed generation systems.

impose large costs on other customers who use less by creating new capacity needs and requiring distribution grid upgrades.

- Adopting a SFV rate design would present considerable challenges from a customer education standpoint. The Commission Entry initiates a formal discussion on policies which promote the efficient use of energy and demand response programs. However, implementation of SFV sends a mixed price signal contrary to these goals.³⁷

Further, OCEA noted that use of a SFV rate design for electric utilities goes against Ohio policies and national trends:

The states currently leading the nation in efficiency investment – and Ohio will soon be among these leaders – overwhelmingly use decoupling over Lost Revenue Adjustment Mechanisms or SFV rate designs to support this investment. Of the 10 U.S. states or regions that had the highest per-capita investment in energy efficiency in 2009, decoupling is used in 9, while Lost Revenue Adjustment Mechanisms are used in 2. A Commission decision to adopt an SFV rate design for the electric industry would be at odds with Ohio’s policies as discussed above and nearly unprecedented nationally.³⁸

Although Duke stated that both electric and natural gas systems are similar regarding revenue requirements and in accommodating the respective classes’ maximum local loads, Duke also pointed out three differences between the systems. Specifically, Duke mentioned that there are some differences in the costs and nature of the equipment; that load growth is more likely to drive a need for investment to expand the electric distribution system than the gas distribution system; and that gas load volatility is higher than that for electric loads due to the weather.³⁹ According to Duke, these can lead to operational differences between the gas and electric distribution systems.

³⁷ OCEA Comments at 8-10.

³⁸ Id. at 16-17 (footnote omitted).

³⁹ Duke Comments (February 11, 2011) at 2.

Duke gave only qualified support for a SFV rate design. Duke started with a caveat that, absent a detailed description of the mechanism and how precisely the mechanism will work, it is extremely difficult to recommend any form of a decoupling rate design.⁴⁰ And while Duke voiced support for the SFV rate design approved in its gas case,⁴¹ it also stated that “[a]ny rate design changes (i.e., structural to the rates and charges) should be supported by competent studies and analysis that seek to fully understand cost causality.”⁴²

Although OPAE saw no real differences between gas and electric systems,⁴³ it was vehemently opposed to using the same rate design for electric companies that is used for gas companies. OPAE pointed out that 80% of the natural gas used by residential and many small commercial customers is consumed in four months of the year for heat, and that virtually all small-use customers consume natural gas for the same three purposes: heating, hot water and cooking.⁴⁴ But, as OPAE stated, electric has a wide range of uses that vary significantly among households.⁴⁵

OPAE identified several drawbacks of the SFV rate design. First, under SFV a portion of the revenue collection remains subject to the weather or the economy.⁴⁶ Second, SFV is a disincentive to energy efficiency and conservation, since larger users

⁴⁰ Id.

⁴¹ Id.

⁴² Id. at 3. Indeed, the PUCO itself understood the need for more data before making any decision, as it attached Appendix B, a list of data questions to the utilities, entitled “NECESSARY DATA”. December 29 Entry at 9. None of that data has been provided, much less used to support the PUCO’s decision here.

⁴³ OPAE Comments (February 11, 2011) at 4-5.

⁴⁴ Id. at 6.

⁴⁵ Id.

⁴⁶ Id. at 8.

have an incentive to use more power because the SFV rate lowers the cost per unit as consumption increases.⁴⁷ Third, SFV shifts costs from large users to small users.⁴⁸ Fourth, SFV significantly discounts the savings of small users, extending the paybacks of even modest investments such as lighting, while promoting consumption by reducing the cost per kilowatt as usage increases.⁴⁹

AEP Ohio voiced the most support for a SFV rate design.⁵⁰ But even AEP Ohio prefaced its comments with the following caveat:

AEP Ohio offers these observations in the abstract for this generic docket and states that its views or concerns could change depending on the facts and circumstances in the future. AEP Ohio offers these comments as a resource for the Commission in an attempt to provide the Commission some general input on the issues requested.⁵¹

Despite this qualified support, AEP Ohio also pointed out numerous pitfalls regarding SFV. First, AEP Ohio stated that “pragmatically the full implementation is difficult due to the potential bill impacts for particular customers.”⁵² AEP Ohio urged the PUCO to “mov[e] incrementally toward a greater share of fixed distribution costs recovered through customer and/or demand charges.”⁵³ Second, AEP Ohio stated that under SFV there would remain a portion of fixed distribution charges that would not be collected from customers that implement utility-sponsored energy efficiency programs.⁵⁴

⁴⁷ Id. at 8-9.

⁴⁸ Id. at 9.

⁴⁹ Id.

⁵⁰ See AEP Ohio Comments (February 11, 2011) at 2-6.

⁵¹ Id. at 2.

⁵² Id. at 6.

⁵³ Id.

⁵⁴ Id. at 7.

AEP Ohio stated that SFV would need to be coupled with the continued use of a lost distribution revenue collection mechanism.⁵⁵

Kroger stated that decoupling is an example of single-issue ratemaking, which focuses on a change in a single cost or revenue item but ignores the multitude of other factors that otherwise influence rates.⁵⁶ With decoupling, Kroger said, “if customers respond to utility rate hikes by reducing their electricity consumption, fixed charges are increased to compensate the utility for any resultant reduction in per-customer usage.”⁵⁷ Kroger noted that such an increase reflects an undue reduction of utility risk, unless the utility’s allowed return on equity is correspondingly reduced.⁵⁸

Kroger prefers a SFV rate design, but with two “important distinctions.”⁵⁹ First, a proper determination of customer charges requires that identification of customer-related costs be accurately ascertained in the first instance.⁶⁰ For electric service, Kroger stated, this requires a distribution cost-of-service study that takes into account the fact that a significant portion of the investment required to provide distribution facilities is directly related to the number of customers and their geographic dispersion on the utility’s system.⁶¹ Second, Kroger opposes adoption of an “extreme variant of SFV rate design in

⁵⁵ Id.

⁵⁶ Kroger Comments (February 11, 2011) at 2.

⁵⁷ Id. at 3.

⁵⁸ Id. As the U.S. Supreme Court has stated: “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 equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding, risks and uncertainties, but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.” *Bluefield Water Works v. Public Service Comm’n*, 262 U.S. 679, 692-93 (1923).

⁵⁹ Kroger Comments at 5.

⁶⁰ Id.

⁶¹ Id. at 5-6.

which demand-related (or size-related) costs are shifted into the customer charge for demand-billed classes.”⁶² This seems to be at odds with AEP Ohio’s proposal.

Still, the PUCO ignored all the opposition and qualified support, and determined that SFV should be implemented. The PUCO’s Order points to nothing specific that supports its determination to implement SFV.

In addition, the PUCO relied on its experience with SFV in the gas industry but ignored the experiences of the electric utility revenue decoupling pilot programs offered by Duke and AEP Ohio. The PUCO merely acknowledged the existence of the programs but did not examine them,⁶³ even though each pilot has been in existence for more than a year.⁶⁴

The PUCO’s decision lacks support in the record, and is thus unlawful. The Order should be abrogated.

C. By Ordering That A Straight Fixed Variable Rate Design Be Included In An Electric Utility’s Next Base Rate Case – Either By The Utility Or In The PUCO Staff’s Report – The PUCO De Facto Modified Its Standard Filing Requirements Without Proper Administrative Procedure.

The Order did not mandate that electric utilities file a SFV rate design with their next base rate cases. However, the Order did “encourage” electric utilities to do so, and directed the PUCO Staff to include a SFV rate design in its Report for any electric utility filing a base rate case without a SFV rate design. This means that a SFV rate design *will*

⁶² Id. at 6.

⁶³ Order at 18-19.

⁶⁴ See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if Their Proposed Merger is Approved, as a Merged Company (collectively, AEP Ohio) for an Increase in Electric Distribution Rates*, Case No. 11-351-EL-AIR, Opinion and Order (December 14, 2011) at 9-10; *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of a Distribution Decoupling Rider*, Case No. 11-5905-EL-RDR, Finding and Order (May 30, 2012) at 3-4.

be included in electric utilities' next base rate cases. This amounts to a change in the PUCO's Standard Filing Requirements without proper administrative procedure.

The December 29 Entry that initiated this proceeding did not provide notice to interested parties that the comments that were filed would be the only opportunity for input regarding the inclusion of a SFV rate design in electric utility rate cases. Instead, the Entry stated that the purpose of the proceeding was to review “whether modifications to Ohio’s electric distribution utilities’ rate structures would better align utility performance with Ohio’s desired public policy outcomes; and if so, what modifications should be adopted.”⁶⁵ To facilitate the review, the PUCO established “a process to gather additional facts, solicit presentations from diverse viewpoints, and encourage public comment on questions of policy.”⁶⁶

In the Entry, the PUCO set forth several “discussion questions” and asked for comments on the questions “to aid the Commission in **initially framing the issues that should be considered.**”⁶⁷ The PUCO asked only for comments on the “discussion questions”; the Entry did not allow for reply comments.⁶⁸

The PUCO also indicated that the comments were merely the first step in its review process:

This **first** round of comments is **solely** for the purpose of having parties aid the Commission in determining the appropriate questions and data necessary to be considered in this review. The

⁶⁵ Entry (December 29, 2010) at 1.

⁶⁶ Id.

⁶⁷ Id. at 5.

⁶⁸ Id. (emphasis added).

Commission, **at a later date, will consider and specify additional opportunities for input** into this review.⁶⁹

But through the Order, the PUCO determined that SFV is the “best” means to accomplish the state’s policy goals enumerated in this proceeding. The notice provided in the December 29 Entry thus was inadequate to properly inform parties about the nature of this proceeding. Parties were misled into believing there would be further opportunities for input into the process. FirstEnergy, for example, stated that it understood “that this proceeding is just the first step in the process and that further proceedings and opportunities for input will be provided before the PUCO makes any specific decision to move forward with decoupling.”⁷⁰ AEP Ohio also noted that “[t]he Entry stresses that the comments are intended solely for the purpose of having parties aid the Commission in determining the appropriate questions and data necessary to be considered in this review, and that it will consider additional opportunities for input later.”⁷¹

The PUCO provided no additional opportunities for input during the thirty months that elapsed between the filing of comments and the issuance of the Order. There were no workshops; there were no evidentiary hearings; there were no further proceedings whatsoever. The PUCO has not even gathered data that would help it determine whether to require decoupling and if so, which form of decoupling to use.⁷²

⁶⁹ Id. (emphasis added).

⁷⁰ FirstEnergy Comments at 1.

⁷¹ AEP Ohio Comments at 2.

⁷² In the December 29 Entry (at 5), the PUCO stated: “While the Commission is not, at this time, seeking the actual data contained in Appendix B, the Commission is requesting feedback as to the type of data that should be considered in its review of the various decoupling rate designs.”

The PUCO's unannounced change that it would require the consideration of a SFV rate design (proposed by either the utility or the PUCO Staff) in future electric base rate cases has taken away opportunities for interested parties to have meaningful substantive participation in this proceeding. For example, Wal-Mart was planning to offer substantive comments at a later stage of the proceeding promised in the Entry:

The Commission initially requested comment on the identification of the appropriate questions and data necessary for a complete investigation into the subject matter. After reviewing Appendices A & B attached to the initial Entry, Walmart [sic] looks forward to the opportunity to substantively comment, after having reviewed the data to be submitted.⁷³

The Order has eliminated opportunities for additional input into the types of decoupling mechanisms that should be used by electric distribution companies in Ohio.

The PUCO did not follow proper administrative procedure in determining that SFV is the preferred means for decoupling. The Order is unlawful and should be abrogated.

IV. CONCLUSION

The PUCO violated Ohio law by not adequately explaining its Order, by issuing an Order that lacks support in the record and by adopting the Order without proper administrative procedure. As a result, the Order is unjust, unreasonable and unlawful, and residential electric consumers may be harmed through the adoption of an improper rate design that the Order de facto mandates. To protect consumers, the PUCO should abrogate its Order.

⁷³ Wal-Mart Stores East and Sam Club East Comments (February 11, 2011) at 2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served by electronic mail to the persons listed below, on this 20th day of September 2013.

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