

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas 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 its 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
)	

**REPLY BRIEF
OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

On March 17, 2008, the Office of the Ohio Consumers' Counsel ("OCC") filed its Initial Brief ("OCC Brief") in the above-captioned matter, to protect approximately 380,000 residential consumers from unprecedented proposals to all but end the billing of gas distribution service by cubic foot of gas purchased and instead charge customers a fixed fee of up to \$25.33 per month regardless of whether the customer uses any gas at all. The proposals to impose this fixed fee on customers are in the Initial Briefs of Duke Energy Ohio, Inc. ("Duke" or "Company") ("Duke Brief") and the Staff ("Staff") of the Public Utilities Commission of Ohio ("PUCO" or "Commission") ("Staff Brief"). The Ohio Partners for Affordable Energy ("OPAE") also filed an Initial Brief ("OPAE Brief")

to protect customers from the high fixed charges proposed by the PUCO Staff and Duke. In addition to these Initial Briefs, letters were also filed by Stand Energy Corporation (“Stand”) and the City of Cincinnati which clarified their position on the Stipulation and on the straight fixed variable (“SFV”) rate design that would result in the fixed fee charges described above. The Ohio Energy Group (“OEG”) and Direct Energy Services, LLC (“Direct”) and Integrys Energy Services, Inc. (“Integrys”) filed Reply Briefs for the purpose of clarifying their positions on the SFV issue. The OCC replies herein to the Initial Briefs of the other parties.

The history of the case is incorporated herein as presented in OCC’s Initial Brief.

II. ARGUMENT

A. The PUCO Staff and Duke Have Violated the Stipulation By Wrongly Claiming that the Stipulation Resolves the Residential Rate Design Issue.¹

The PUCO Staff and Duke both claim that the Stipulation and Recommendation (“Stipulation”)² is a settlement of the residential rate design issues. They are sorely mistaken. These issues are the most contested and controversial issues in the cases and among the most controversial issues presented to the Commission in any case -- which is reflected in the fact that the issues were not settled. The PUCO Staff and Duke seek the advantage of having the Commission decide this case according to the settlement criteria that favor adoption of a settlement over litigated positions -- an advantage for which they did not bargain and which the Commission should reject in the most direct way to ensure

¹ OCC reserves every right under the Stipulation, law and rule to make any and all arguments going forward with regard to this violation of the Stipulation.

² Joint Ex. No. 1 (February 28, 2008).

the transparency and fairness of the legal process at the Public Utilities Commission of Ohio that is threatened by their arguments.

The Stipulation and its recommendations are part of the record that the Commission will consider in these cases.³ All twelve parties entered into the Stipulation that was only intended to resolve issues other than the design of residential rates.

Specifically, the Parties to the Stipulation stated:

The Parties expressly agree that the issue of fixed vs. volumetric rate design and/or a sales decoupling rider is not intended to be resolved through this Stipulation and will be decided by the Commission following the hearing, as noted in footnote 7.⁴

In an abundance of caution, this provision is repeated, in duplicate, in footnote 15 of the Stipulation. In footnote 7 of the Stipulation, it is further stated, making it in triplicate, that the SFV and related issues are “not resolved through this Stipulation....”

Two of the other Parties to the Stipulation, Stand Energy (“Stand Letter”) and the City of Cincinnati (“City Letter”), filed letters regarding their signing of the Stipulation.⁵ In addition, OEG filed a reply brief stating: “OEG must remind the Staff and Duke Energy that it also took no position on the SFV rate design, therefore must not be considered a proponent.”⁶ Finally, a Reply Brief filed by Direct and Integrys stated:

³ Joint Ex. No. 1 (Stipulation).

⁴ Joint Ex. No. 1 at 1, footnote 1.

⁵ Stand Letter (March 20, 2008) (“This letter is being placed in the record to make it clear that Stand Energy Corporation did not oppose the SFV rate design, but also did not take a position in support thereof. Therefore, the fairest characterization of Stand Energy’s position would be that Stand Energy was “neutral” on the issue of the SFV rate design.”) (Original emphasis); City Letter (March 24, 2008) (“By this letter, the City of Cincinnati, seeks to clarify the record * * * to reflect that the City of Cincinnati takes no position with respect to the rate design issue that was the subject of litigation in this matter.”).

⁶ OEG Reply Brief at 2 (March 21, 2008).

“Direct and Integrys neither support nor oppose the Staff report’s recommendation relating to an [SFV] rate design.”⁷

It is disingenuous for Duke and the Staff to suggest that the Stipulation is a settlement proposal by a vast majority of the parties to impose a SFV rate design on residential customers. The rate design issue was not stipulated and it was not supported by a vast majority of the parties. Instead only the Staff and Company supported the SFV rate design. Moreover, the rate design issue was litigated without a settlement during evidentiary hearings that were conducted on March 5-6, 2008, and the Commission’s decision should be based upon the evidence presented, with the Company bearing the burden of proof that the SFV rate design proposed by Staff and embraced by Duke is just and reasonable.⁸

Testimony filed in support of the Stipulation, by the very parties now claiming that they settled the issues for residential consumers, shows support for the fact that the rate design issue was clearly not intended to be settled by the Stipulation. The PUCO Staff’s witness, Mr. Hess, testified:

Q: Do you believe the Stipulation filed in this case is the product of serious bargaining among knowledgeable parties?

A: Yes. This agreement is the product of an open process in which all parties were represented by able counsel and several were represented by technical experts. Extensive negotiations occurred. The Stipulation represents a comprehensive compromise of issues raised by parties with diverse interests. All parties have signed the Stipulation and adopted it as *a reasonable resolution of all issues except the single rate design issue that has been reserved for litigation*. I believe that the Stipulation that the parties are

⁷ Direct and Integrys Reply Brief at 2 (March 24, 2008).

⁸ See OCC Brief at 7-19, R.C. 4909.18, R.C. 4909.19, R.C. 4929.04(C), and R.C. 4929.05.

recommending for Commission adoption presents a very fair and reasonable result.⁹

Mr. Hess's testimony discussed the benefits that he believed were achieved through the settlement, and nowhere was the SFV rate design touted as a benefit:

Q: In your opinion, does the Settlement benefit rate payers and promote the public interest?

A: Yes.

- The stipulation establishes a fair and reasonable revenue requirement with a minimal increase in the base rates of approximately 3[percent].
- It recommends fair compromise of the tariff subsidy issue.
- It establishes a pilot rate structure for low income/low usage customers.
- It continues the Accelerated Main Replacement Program.
- It establishes a program to address the safety concerns and replace risers within a reasonable period of time.
- It adopts the Applicant's proposal to replace customer service lines as yet another safety measure.
- It removes the regulated utility's subsidization of a competitive gas supply cost thus furthering the development of a competitive gas market.
- It sets up a process to discuss the applicant's exit from the merchant function, again, furthering the development of a competitive gas market.
- It extends the Applicant's commitment to weatherization and energy efficiency.
- It commits the Applicant to conduct an internal audit of its methods and processes for allocating service company charges.

⁹ Staff Ex. No. 2 (Hess Direct Testimony) at 3.

- It commits the Applicant to discuss and /or review several low income issues.
- It commits the Applicant to a sharing mechanism for off-system transactions.¹⁰

The Staff through pre-filed testimony¹¹ and in cross-examination¹² touted the benefits of the SFV rate design, yet Mr. Hess did not include those alleged benefits in his recitation of the Stipulation benefits. Failure to include the SFV rate design benefits in Mr. Hess's recitation shows that the SFV rate design issue was intended to be decided by the Commission's order in these proceedings, following the evidentiary hearing, and not based on any Stipulation. That is the agreement of the parties to the Stipulation, and that is how Mr. Hess testified.

There was also testimony filed by the Company in support of the Stipulation. That testimony amplified the parties' understanding that the rate design issue remained unsettled by the Stipulation. Duke witness Smith stated:

Q. PLEASE GENERALLY DESCRIBE THE STIPULATION.

A. This Stipulation, filed with the Commission on February 28, 2008, *represents a resolution of all but one of the issues* among the Parties relating to the Company's application for an increase in gas rates and alternative regulation plan. Except where specifically noted otherwise, the terms of the Stipulation adopt the recommendations made by the Staff Report of Investigation ("Staff Report") in this proceeding. In summary, the Stipulating Parties agree that DE-Ohio shall increase its annual gas distribution base rates by approximately \$18.2 million. Such increase will eliminate, over a two-year period, \$6 million, or roughly one-third, of the residential subsidy as reflected in the Company's revised cost of service study. The Stipulation provides that DE-Ohio will file its actual Accelerated Main Replacement Program ("AMRP") data for the last nine months of 2007. The data will support an adjustment

¹⁰ Staff Ex. No. 2 (Hess Direct Testimony) at 3-4.

¹¹ Staff Ex. No. 2 (Puican Direct Testimony) at 3-8.

¹² Tr. Vol. I at 213, 224-225, 231, 235,

of Rider AMRP, which will be implemented effective May 1, 2008, subject to refund. *The Stipulation resolves all issues in the case except for the issue of the fixed vs .volumetric rate design and/or a sales decoupling rider, which will be litigated and decided by the Commission.*¹³

The Stipulation and Staff testimony agree that the Stipulation did not settle the rate design issue. Nonetheless, the Company attempts to identify the SFV rate design as a benefit under the Stipulation. The Company does so by incorrectly attributing to Mr. Hess a statement touting the SFV rate design as a benefit under the Stipulation which Mr. Hess did not include in his testimony.¹⁴ Therefore the Commission should rely on evidence presented at hearing and not the Stipulation in order to decide the rate design issue in these cases.

The fact that the Staff and the Company would argue that the Stipulation covers the subject of this litigation when the language in the Stipulation so clearly carves out the rate design issue is not only disingenuous, but it also sends a chilling message to parties who negotiate in good faith. The message is that we should not enter into Stipulations that partially resolve issues, because the agreement to litigate what cannot be resolved -- and to recognize it as such -- may not be honored. The benefit of a Stipulation on limited issues over no Stipulation is that it provides the parties the ability to come together and agree on what can be agreed to while at the same time it allows a more narrowed focus in the litigation. Should the Commission take the view that the Stipulation covers the rate

¹³ Duke Ex. No. 29 (P. Smith Settlement Supporting Testimony) at 2. (Emphasis added).

¹⁴ Duke Brief at 5-6, footnote 18.

design issue, despite explicit language in the Stipulation and testimony to the contrary, parties will have to re-evaluate the wisdom of partially settling any cases.

B. The General Assembly's Requirements for Just and Reasonable Rates Are Met by Continuing the Traditional \$6.00 Monthly Customer Charge and Rejecting the PUCO Staff's and Company's Proposed SFV Rate Design Proposal for a \$25.33 Monthly Charge.

1. The SFV Rate Design is Unjust and Unreasonable.

Rates must be just and reasonable.¹⁵ The rates proposed by Duke and the Staff are neither. The Staff dedicates a large portion of its Brief in an effort to support its SFV rate design proposal.¹⁶ However, as OCC argued throughout its Initial Brief, and will further argue below, that for every argument made in favor of an SFV rate design, the same argument holds true for a decoupling mechanism. However, one major difference is that with an SFV rate design there is no customer-related benefit, while under a decoupling mechanism there is. If both alternatives address the same problem, but one provides additional benefits for customers, the choice should be in favor of the greater benefits for the customers who will pay the increased rates that come from this case.

The Staff states that the SFV rate design is “one whose time has come due to volatile and sustained increases in the price of natural gas, coupled *with over a decade of reduced residential consumption.*”¹⁷ However, reliance on this alleged reduction in residential consumption is misplaced because this alleged decline in residential consumption has been neither steady nor consistent from year to year as the Staff would like the Commission to believe. As Mr. Yankel testified:

¹⁵ E.g. R.C. 4909.19.

¹⁶ Staff Brief at 6-16.

¹⁷ Staff Brief at 6. (Emphasis added).

Although there is an overall decline in this data over this period, it is anything but steady or relatively even from year to year. The drop between 2000 and 2001 was 8%,¹⁸ * * *. Moreover, usage increased in both 2002 and 2003 (remember that these numbers are weather normalized). In 2003 the usage per customer was 4% higher than it was in 2001. * * * in 2004 * * * usage per customer dropped 5%. Things stayed steady in 2005 and then in 2006 everyone reduced consumption by an incredible 9%.¹⁹

Even more telling, is the fact that Duke is only forecasting a total three percent drop in usage per customer over the 5-year period 2008-2012. In light of the fact that the historical average residential consumption data has been as volatile as natural gas prices, and that the Company's forecasts for future residential consumption declines are much more moderate than historical experience, the Commission should decide that the SFV's time has not yet come.

The reduction in average residential consumption has allegedly resulted in Duke experiencing revenue erosion. The Staff has stated: "nearly six million dollars of the total \$34.1 million revenue deficiency identified by Duke in this case is attributable to declining customer usage."²⁰ Even if this were true, this means that only 17.6 percent (\$6 million/\$34.1 million) or \$1 million per year of the alleged revenue deficiency was caused by the declining customer usage that has been experienced by Duke since its last rate case six years ago.²¹ The SFV rate design is a drastic response to address a problem that is not certain and that Staff admits Duke only "may" experience in the future.²² It would appear that OPAE may have properly characterized the SFV rate design as a

¹⁸ 2000's usage level per residential customer was 94.57 Ccf and 2001 dropped to 87.15 Ccf.

¹⁹ OCC Ex. No. 6 (Yankel Direct Testimony) at 49-50.

²⁰ Staff Brief at 7.

²¹ *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, Opinion and Order (May 30, 2002).

²² Staff Brief at 8, footnote 14.

“solution in search of a problem,”²³ and the Commission should not feel compelled to offer Duke the solution.

However, if the Commission determines that the Company’s argument regarding declining usage per customer has merit, then the Commission should resolve this issue through the adoption of an appropriate decoupling mechanism that includes the safeguards OCC witness Gonzalez recommended.²⁴ This solution would be more measured, and would not be as drastic as implementation of an SFV rate design.

2. The Staff’s SFV Proposal Violates Longstanding Principles of Rate Design, Because It is Rate-Shocking to Customers and is Not Gradual in Its Design.

The Staff has correctly admitted that the SFV rate design is “a significant departure from established rate design policy.”²⁵ Established rate design policy includes the objectives of gradualism and avoiding rate shock.²⁶ However, the Staff has significantly mischaracterized its implementation of the SFV rate design proposal as being a “tempered and gradual” fashion. Merriam-Webster defines gradual as:

1 : proceeding by steps or degrees 2 : moving, changing, or developing by fine or often imperceptible degrees.²⁷

The proposed increase to Duke’s existing customer charge under Staff’s proposal in this case would be 238 percent in year one, and 322 percent in year two.²⁸ Under no definition of the word “gradual” would an increase of 238 percent or 322 percent be

²³ OPAE Brief at 13.

²⁴ OCC Ex. No. 5 (Gonzalez Direct Testimony) at 12-14.

²⁵ Staff Brief at 8.

²⁶ OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 13-14, See also Staff Report at 23.

²⁷ <http://www.merriam-webster> online dictionary (last visited March 21, 2008).

²⁸ OCC Brief at 18.

considered imperceptible. Rather an increase of that magnitude must, by definition, constitute a sharp or sudden increase. The Staff's delayed implementation of this drastic change in rate design over two years rather than "all at once" is a dismal and fundamental failure by Staff to follow its stated intention to gradually implement its proposal.

The Staff attempts to argue that its SFV proposal incorporates and applies gradualism "to the maximum extent possible."²⁹ This claim is wrong. The maximum extent possible could easily have included an increase at a significantly lower level if gradualism had truly been a goal. The Company offers a camouflaged argument that highlights the residential customer is paying \$11.77 per month today (customer charge plus AMRP Rider).³⁰ What the Company fails to include in their argument is how much the AMRP Rider rate will be increasing over the next eleven years under the Stipulation. The AMRP charge is proposed to increase from \$1.30 per month in year one to \$12.20 per month in year eleven.³¹ Thus residential customers would be paying a total fixed charge of \$37.53 per month³² in year eleven.³³ Inclusion of the AMRP charge as part of the customer charge in only one half of the equation, while excluding it in the other is, at best, misleading if not completely disingenuous.

The Staff uses the excuse of "times of price volatility and reduced utility sales" as justification for the proposed rate design.³⁴ However, as Mr. Puican stated on cross-examination, should these circumstances turnaround (gas prices returned to the pre-2000-

²⁹ Staff Brief at 12.

³⁰ Duke Brief at 12.

³¹ Joint Ex. No.1 (Stipulation) at Exhibit 4, page 3.

³² \$25.33 customer charge + \$12.20 AMRP charge = \$37.53 total fixed charge.

³³ Joint Ex. No. 1 (Stipulation) at Exhibit 4, page 3.

³⁴ Staff Brief at 12.

2001 winter prices), the Staff would not seek a change back to the traditional rate design.³⁵ The Staff's rate design proposal is one-sided and places the Company's interests above those of customers. If the SFV rate design was truly a response to high and volatile gas prices, then a reduction in that same level and volatility for gas prices would warrant a return to the current rate design. That is the benefit of a decoupling mechanism, it is symmetrical in its design, such that increased average residential consumption would result in a credit to the consumers' bills, and if average residential consumption decreased Duke would receive additional revenues.

Moreover, as noted in OCC's Initial Brief, gradualism is more needed when the price increases are greater and not when they were only a few dollars. Staff has made gradualism an important factor in the past when proposed increases were \$2.00 or \$3.00, and when the commodity cost for gas was less than half of today's level. In this case, a proposed increase of \$14.25 or \$19.33 when combined with an AMRP charge and an \$8.00 to \$10.00 gas commodity charge, calls for a closer adherence to the principles of gradualism and not merely paying lip service to them.

The Staff, in its Initial Brief, attempts to distance its position from thirty-years of Commission precedent, by stating:

It is neither fair nor accurate to characterize this fixed component as a customer charge, as the OCC will assuredly do, 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.³⁶

³⁵ Tr. Vol. I at 236.

³⁶ Staff Brief at 8.

Contrary to the Staff's statement, the fixed component is indeed a customer charge, and appears as such in Duke's tariffs.³⁷ Furthermore the types of fixed costs that are being recovered through the customer charge are (and always have been, at least for the past 30 years) the same type of fixed costs.³⁸ The Company may only be minimally compensated for its fixed costs with a \$6.00 customer charge (that only comprises a portion of the base charges a customer pays), but when the volumetric rate that the Company charges is taken into consideration, Duke is compensated for the fixed costs. To assert that it is set at an artificially low level is disingenuous because the Staff played a significant role in the development of the setting of that rate, which was established in Duke's last rate case, and was approved by the Commission.³⁹ This argument is nothing more than revisionist history done in order to justify the ends desired.

The Staff has unreasonably claimed that the SFV rate design favors low-use customers. The Staff claimed, "the Staff has chosen to retain a variable base rate component that contains two usage tiers in an effort to minimize impacts on low-use residential customers."⁴⁰ The facts on the record are that customers who use less than the average (e.g. low-use) will be harmed under an SFV rate design that forces them to subsidize high use customers (even those with a high income). OCC witness Gonzalez has estimated that 65 percent of Dukes residential customers will be harmed by as much as 6 to 21 percent when compared to the high-use residential customers.⁴¹ This estimate

³⁷ Tr. Vol. I at 171.

³⁸ Tr. Vol. I at 217.

³⁹ *In the Matter of the Application of the Cincinnati Gas and Electric Company for an Increase in Rates*, Case No. 01-1228-GA-AIR, Staff Report at 54-57 (January 18, 2002), See also Opinion and Order at 10 (May 30, 2002)

⁴⁰ Staff Brief at 9.

⁴¹ OCC Ex. No. 5 (Gonzalez Direct Testimony) at 17 and WG-2.

was based on a higher revenue requirement appearing in the Staff Report. The lower revenue requirement in the Stipulation coupled with the same high fixed customer charge only aggravates the situation. Therefore, a higher percentage of residential customers than OCC's earlier estimate are now worse off when compared to a rate design with a fixed \$6.00 customer charge and a higher volumetric charge. Because the SFV rate design significantly reduces the two tier volumetric rate that the Staff is touting, the two usage tiers do little to help low-use customers.

The Staff also improperly argues that under the SFV rate design "all residential customers will benefit from better economic price signals and spreading recovery of distribution service costs out evenly over the entire year."⁴² The only "price signal" sent to a customer under the proposed SFV rate design is that consumers can use as much gas as they want because it does not matter. The distribution rate will be the same. Moreover, as OCC argued extensively in its Initial Brief, the SFV in fact does not send a proper price signal.⁴³

It should also be pointed out that currently only approximately 20 percent of Duke's natural gas residential customers have chosen to participate in Duke's budget billing program.⁴⁴ This demonstrates that only a small percentage of customers want a fixed bill amount every month as proposed by the SFV. Furthermore, there is no evidence on the record to support the Staff's arguments that customers want a levelized bill. If customers wanted a levelized bill, they would take advantage of the budget billing option. Mr. Smith on cross-examination agreed with the possibility that its customers do

⁴² Staff Brief at 15-16.

⁴³ OCC Brief at 36-38.

⁴⁴ Tr. Vol. I at 38.

not enroll in the budget program because the natural rise and fall of their total energy bills, (gas and electric), form sort of a natural budget billing plan in itself.⁴⁵ The fact that the vast majority (80 percent) of Duke's natural gas customers have not chosen the budget billing option is a revealed preference and, is significant evidence to support the fact that customers are not particularly interested in a levelized bill. To the extent that customers have elected not to participate in budget billing, the Commission should not ignore that preference, and should not impose an SFV rate design and the same budget billing principle on customers.

3. The Staff Overstated the Benefits of the SFV Rate Design.

The Staff describes several alleged benefits of the SFV rate design.⁴⁶ Numerous of these benefits; however, as argued throughout OCC's Brief, and as will be argued further herein, can be similarly touted under a rate design that incorporated the current \$6.00 fixed customer charge, a volumetric rate and an appropriate decoupling mechanism. The Company on cross-examination agreed with that assessment.⁴⁷

There are also benefits the Staff touts regarding the Staff's rate design proposal which cannot be supported. First the Staff states:

an SFV rate design aligns the price signal, and revenue recovery, with the fixed-cost structure of providing gas distribution service.”⁴⁸

⁴⁵ Tr. Vol. I at 38.

⁴⁶ Staff Brief at 9-10.

⁴⁷ OCC Brief at 65-66, (Decoupling mechanism will spread recovery of fixed distribution costs throughout the year); Tr. Vol. I at 20-21 (Decoupling mechanism will mitigate revenue erosion); Tr. Vol. I. at 21 (Maintains a strong incentive for residential customers to implement efficiency measures); Tr. Vol. I at 30 (Creates economic efficiencies for utility in the long run, reducing working capital requirements and keeping rates lower).

⁴⁸ Staff Brief at 9.

As was noted in OCC's Initial Brief, it is widely accepted that high natural gas prices generally send a signal to consumers that encourages conservation.⁴⁹ The SFV rate design contradicts that basic message because it decreases the volumetric rate while significantly increasing the fixed portion. At a time when Duke's marginal costs for natural gas and energy prices generally are increasing, the SFV rate design sends the wrong price signal to customers,⁵⁰ because as consumers use more natural gas the per unit price decreases under the SFV design. As OPAE argued, "[s]etting a fixed rate because a cost is allegedly fixed is not a price signal, it is simply a bill."⁵¹

The Company argues that the modified SFV rates allow Duke a better opportunity to earn its authorized return because the Company will recover more of its fixed costs through fixed charges.⁵² The Company states that a full SFV rate design would require that the Company charge approximately \$30.00 per month to fully recover all of its fixed charges.⁵³ The Company would, therefore, not need to include a volumetric charge as part of the rate design. With such a rate design the Company would be guaranteed the recovery of all its base revenues without concern for revenue erosion due to a warmer than normal winter because the volumetric rate would be \$0.

Under the Staff proposal, the Company would recover 67.5 percent (\$20.25/\$30.00) of its base revenues through a fixed charge in year one and 84.4 percent (\$25.33/\$30.00) of its base revenues through a fixed charge in year two. The more Duke recovers through the fixed charge, the less the Company needs to recover through a

⁴⁹ Tr. Vol. I. at 160.

⁵⁰ OCC Ex. No. 5 (Gonzalez Direct Testimony) at 14.

⁵¹ OPAE Brief at 10.

⁵² Duke Brief at 10.

⁵³ Tr. Vol. I at 147, 158.

volumetric rate, and the less risk the Company faces from the uncertainties of weather. The risk of weather is thus shifted to Duke's customers. Under the Company's rate design, in its Application, which incorporates a weather-normalized decoupling mechanism, the Company retains the risk for weather. The Commission should not allow the Company to shift the additional risk for weather to its customers by adopting a SFV rate design.

a. The Unjustness of SFV was Foreshadowed Years Ago In the Wake of Customer Outrage that Prompted the PUCO to End a Program that Reduced Customer Control of Their Utility Bills in Favor of Protecting Gas Utility Revenue Collections.

The Commission should reject the Staff's and Company's SFV proposal because it places the risk of revenue erosion due to weather on the customers' shoulders. Customers have historically not been accepting of charges that are not based on consumption. That was a lesson the Commission and Columbia Gas of Ohio, Inc. ("COH") learned in a prior case.

In that COH case, the Commission approved a pilot program intended to neutralize the affects of weather on the Company's earnings.⁵⁴ The weather normalization adjustment ("WNA") pilot program proved to be a well-reported public debacle for the Company and the Commission that spiraled downward until the PUCO revoked the program in 1995 after just two months in effect.⁵⁵ The PUCO ruling to

⁵⁴ *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Service*, Case No. 94-987-GA-AIR, Opinion and Order at 5 (September 29, 1994).

⁵⁵ *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Service*, Case No. 94-987-GA-AIR, Entry at 1 (February 8, 1995).

revoke the program was preceded by over 1,500 public inquiries,⁵⁶ with many consumers voicing dissatisfaction and outrage over this program.⁵⁷

**b. The PUCO Staff's and Company's SFV Proposal
is Unjust for Lower Income Customers.**

The Commission has the responsibility to approve rates that are just and reasonable. R.C. 4909.19 states:

Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall * * *. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems *just and reasonable*. (Emphasis added).⁵⁸

The Staff has made the following unsupported argument for an SFV rate design:

Benefits lower income customers (whose use tends to be higher than average residential usage) through lower bills.⁵⁹

The problem with the Staff's position is that the Staff relies on the PIPP customers' usage data to be a proxy for the low-income customers' usage.⁶⁰ Duke has approximately 10,000 PIPP customers in its service territory,⁶¹ and as Herbert Walker of Community Action Agency testified at the local public hearing there are 80,000 PIPP eligible low-income customers in Hamilton county alone.⁶² Using PIPP as the sample or proxy for the non-PIPP low-income customer is inappropriate because PIPP customers pay based on

⁵⁶ *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Service*, Case No. 94-987-GA-AIR, Entry at 1 (February 8, 1995).

⁵⁷ *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Service*, Case No. 94-987-GA-AIR, See Docket (January 30, 1995 through October 17, 1995). (See in excess of 30 docket entries containing customer letters (some with ten or more letters attached) and in excess of 40 government ordinances were passed.).

⁵⁸ See also 40905.22, and 4909.15.

⁵⁹ Duke Brief at 9.

⁶⁰ Tr. Vol. I at 220.

⁶¹ OCC Ex. No. 15 (Company response to Staff Data Request 17-075).

⁶² February 25, 2008, 4:00 p.m. Local Public Hearing, Tr. at 62.

percentage of income and not based on usage. It may be that PIPP customers may pay more than the non-PIPP low-income customers because they are not receiving the same price signals

Furthermore, there are no studies that the Company or Staff can point to *in the record* that support this position.⁶³ Rather, the Company relies on an unseen and undocumented “Missouri study” which was not entered into the record, and as such can not be relied on.⁶⁴ At the same time, both the Company and the Staff have ignored the findings in a Home Weatherization Assistance Program (“HWAP”) study that was entered into the record.⁶⁵

As OCC witness Gonzales stated: “Many low income households have been weatherized in that time. With average net savings from weatherization measured at 231 therms per single family home in the Duke’s service territory per year,⁶⁶ this also works to reduce the energy usage of low income household relative to the average Duke customer. In 2006 alone, the Duke-sponsored programs “reached over 1500 people or households through in-home services and education programs.”⁶⁷ Therefore, the Staff’s reliance on PIPP customers as a proxy for the usage of low-income customers is not valid, and as such the conclusion that low-income customers may benefit from an SFV rate design is flawed.

⁶³ Tr. Vol. I at 56.

⁶⁴ Duke Brief at 15. See *Tongren v. Pub. Util. Comm.* (1999), 85 Ohio St.3d 87, which requires that documents or information relied on by the Commission in a decision, must be a part of the record.

⁶⁵ OCC Ex. No. 16.

⁶⁶ Id. at 22.

⁶⁷ OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 7.

Moreover, the OCC’s position that an SFV rate sends the wrong price signal and discourages conservation was recently validated. A case with parallel issues was decided by the North Carolina Utilities Commission (“NCUC”) involving Duke’s sister company, Duke Energy Carolinas, LLC, and its fixed payment plan (“FPP”).⁶⁸ The FPP provided electric consumers an option to receive a levelized or fixed bill for a twelve month period without a true-up. In response to the NCUC’s order Duke filed comments and its studies on the impact of the FPP on energy conservation and peak demand.⁶⁹

Based on this data that showed FPP participants increased electric usage during the initial three-year of enrollment, the North Carolina Attorney General’s Office recommended that “the Commission should require Duke * * * to close the FPP * * * to new customers and phase customers off of” * * * [this program] over a time period that the Commission finds reasonable.”⁷⁰ In agreement, the Commission’s Public Staff stated, “[I]t would be inconsistent to allow the continuation of programs that have the effect of encouraging increased electric usage at a time when the Commission is pushing the State’s utilities to develop new energy conservation programs.”⁷¹ Similarly, under an SFV rate design as consumption increases the per unit cost decreases which is against the public interest in promoting conservation.

⁶⁸ *In the Matter of the Request by Duke Energy Carolinas, LLC for Approval of a levelized Billing Program*, Docket No. E-7, SUB 710 Order March 14, 2008). (Attachment No. 4).

⁶⁹ Id. at 4, Duke filed actual FPP usage data showing that the average usage for Duke’s FPP customers had increased as follows:

Usage Increase – Actual vs. Predicted Percentage Increase

Year 1 on FPP	9.3%
Year 2 on FPP	2.9%
Year 3 on FPP	1.3%

⁷⁰ Id. at 8.

⁷¹ Id. at 9.

4. The PUCO Staff's and Company's SFV Proposal is Contrary to the General Assembly's Statutory Framework For Regulation of Public Utilities and Their Services in a Transparent Manner that Can be Seen by the Ohio Public and in Which the Ohio Public can Participate.⁷²

The PUCO Staff favors its proposal in part because the utility revenues it would guarantee will make unnecessary the filing and litigation of rate cases in the future. The Staff describes its proposal as being in conformity with sound policy and regulatory reasoning. The Staff described OCC's proposal to maintain the customer charge at \$6.00 (instead of the PUCO Staff's proposal for \$25.33) as being "closed minded"⁷³ and "oblivious to present facts and circumstances."⁷⁴ In support, the Staff sarcastically states its view of OCC's proposal:

Let Duke or any other LDC in Duke's situation simply file annual rate cases and we can address any revenue deficiency questions in resource-intensive, litigated results.⁷⁵

Far from being "close-minded," OCC is *customer-minded*, and intends that the Commission consider erosion of customers' control of their bills instead of the PUCO Staff's twin focus on claimed erosion of utility revenues and avoidance of participation in the ratemaking process. The rate case process which the PUCO Staff so much wants to avoid is intended by the Ohio General Assembly to be a transparent process by which the rates that Ohioans pay for utility services are set in the public light, along with review of service quality and other matters affected with the public interest.

⁷² R.,C. 4909.19.

⁷³ Staff Brief at 10.

⁷⁴ Staff Brief at 10.

⁷⁵ Duke Brief at 10-11.

Rather than annual rate cases that the PUCO Staff projects, the Company has filed two rate cases in a twelve-year period.⁷⁶ Even Mr. Puican noted that two rate cases in a twelve-year period were not unreasonable.⁷⁷ Contrary to the Staff's argument, OCC is not arguing for annual rate cases,⁷⁸ and more importantly, nor is it what OCC believes would actually transpire if the Staff's SFV rate design is rejected. The Company has the opportunity under the statutory scheme of the Ohio General Assembly, should it suffer significant enough revenue erosion, to file a distribution rate case at most any time. It is entirely possible that the next distribution rate case would not be any sooner than six to eight years from the completion of this case,⁷⁹ but it is even more likely that the time periods between rate cases could be even longer. The Company also has the opportunity to *not* file for a rate case and avoid rate review at times when it is making enough (or a lot) of money.

Staff stated that there have been notable instances of departure from traditional regulation that have proven to be successful.⁸⁰ However, in addition to the fact that those changes were more deliberately considered and applied than the current SFV rate design proposal in this case, the examples cited by Staff involved measures of deregulation that included a trade-off of risk and reward for both the utility and customers, and the insertion of competition in lieu of regulation.

In this case, the imposition of an SFV rate design would not be deregulation, but rather un-regulation because the Company would still have the protection of a regulated

⁷⁶ Tr. Vol. I at 212.

⁷⁷ Tr. Vol. I at 211-212.

⁷⁸ Duke Brief at 11.

⁷⁹ Tr. Vol. I at 236.

⁸⁰ Staff Brief at 1.

rate of return, while at the same time getting the additional benefit of insulation from Commission review under the guise of a rate case filing.

Both Staff and the Company acknowledged that the SFV rate design would, in part, achieve the goal of fewer rate case filings. However, this goal is misplaced in light of the fact that Duke has only had two rate cases in the past twelve-year period. There is currently no legal requirement or policy that directs the Commission to reduce the occurrence of rate cases.⁸¹ To the extent that the SFV rate design would further lengthen the time span between rate cases, then Duke would be empowered to function as an unregulated monopoly. Commission-ordered investigations and customer-initiated complaint cases⁸² -- the latter of which are filed in far fewer numbers than utility rate filings--would have to serve as the substitute for timely and regular Commission review in rate case filings.

Moreover, if the Staff's argument is a veiled shot at a decoupling mechanism, that criticism also misses the mark. First, the Company has five riders on the electric side of its business and those apparently haven't caused any administrative problems or annual rate cases.⁸³ Moreover, to compare an annual true-up of a decoupling mechanism to a rate case is a gross exaggeration. In fact, a decoupling mechanism can more fairly address the Staff's concern of frequent rate cases, since under decoupling the Company would file a rider to assure it collects its full revenues -- but subject to consumer safeguards that do not exist under the SFV approach. The benefit for the customer is that if the Company over-recovers, the rider can provide a credit back to the customers.

⁸¹ Tr. Vol. I at 158-159, Tr. Vol. I. at 235.

⁸² R.C. 4905.26.

⁸³ Tr. Vol. I at 191

There is no such benefit for customers under an SFV where any over-collection of revenues is swallowed by the Company, never to be seen by the customers whose hard-earned cash provided them those over-recoveries.

In addition, the Staff unfairly criticizes OCC by stating:

[s]imply because something has been the same way for thirty-years that is not a valid reason to shy away from needed change. Nor does blind adherence to the status quo refute compelling reasons to implement the tempered SFV rate design that Staff is proposing in this case.⁸⁴

It is no small irony that the Staff itself has failed to recognize new rate design mechanisms in this case that OCC has supported -- that being decoupling. The decoupling, with appropriate consumer safeguards, would provide a better balance of interests by protecting customers and providing them the opportunity to be credited when the Company's revenues exceed those authorized by the Commission. No such balance exists with the SFV.

The Staff seems to be of the opinion that only its proposal warrants consideration and opposition emanates from a closed-mind. In fact, OCC is looking to the future with an open mind for protecting conservation, rates -- and the residential customers that benefit from both. OCC has advocated for another alternative, one that offers the Company the same benefits as an SFV rate design, but also, and more importantly, offers additional benefits to consumers.

Contrary to the Staff's allegation, OCC's opposition to SFV rate design has nothing to do with how difficult it would be to explain to OCC's constituents.⁸⁵

⁸⁴ Staff Brief at 11.

⁸⁵ Staff Brief at 11.

Furthermore, the Staff criticizes OCC by stating “OCC’s singular purpose is to advocate only on behalf of residential customers and thus it need not (and is not) concerned with a balance between utility and customer interests. The Staff asserts that it “has no such luxury.”⁸⁶ But Ohio consumers do not have the luxury of abiding \$25 customer charges, guaranteeing utility revenues and losing the rate process that for decades has been the state process visible to them for airing their utility issues. It is the OCC’s statutory duty and responsibility to represent the interests of these residential consumers.⁸⁷ Neither the Staff nor the Company represents the interests of residential customers. Yet the Staff and the Company are quick to assign a benefit from the SFV rate design despite the fact that they do not have the sole interest of the very same residential customers who will have to pay the costs from the SFV rate design.

Interestingly, the PUCO Staff does not speak of the utility, Duke, as having a singular interest of shareholders that corresponds to what the PUCO Staff claims as a singular interest of OCC. In any event, OCC has presented a position that reflects a vision for the future that is balanced between consumers and shareholders, in the interest of Ohio.

The parties who are concerned about the residential customers that must pay the higher bills under the SFV rate design in this case oppose this change. This position is supported by the letters and public testimony at the local public hearings. The Staff should be more concerned about finding the right balance that affords protection to residential customers. Through its position in this case, it appears that the Staff has

⁸⁶ Staff Brief at 4.

⁸⁷ R.C. 4911.02.

abandoned the residential class. If the Staff were really interested in balancing the residential customer's interests with that of the Company, they would support decoupling -- as they did in Vectren.⁸⁸

C. The PUCO Staff Rate Design Proposal Should Promote Conservation under R.C. 4929.02(A)(4) and R.C. 4905.70, but Fails To Do So.

The Commission's approval of an SFV rate design would be contrary to Ohio policy. The SFV rate design does not promote customer efforts to engage in conservation of natural gas, and instead would encourage increased usage of natural gas. Such a rate design is contrary to the State policy which states:

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

* * *

(4) Encourage innovation and market access for cost-effective supply-and demand-side natural gas services and goods;⁸⁹

In addition, 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 Staff places too much emphasis on the fact that the base rate portion of the bill represents only 20 to 25 percent of the total residential customers' bill.⁹⁰ As a result,

⁸⁸ *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 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 Mechanism*, Case No. 05-1444-GA-UNC, Order, (August 22, 2007).

⁸⁹ R.C. 4929.02(A)(4).

⁹⁰ Staff Brief at 13 ("opponent's arguments selectively focus only upon the base rate that represents only 20 to 25 % of the residential customers' bill.").

Staff claims that consumers will make conservation decisions only based on the remaining 75 to 80 percent of their bill. This might be true if customer only had to pay that 75 to 80 percent of their bill. However, customers are required to pay the entire bill, thus it is a given that they make conservation decisions based on how those decisions impact their total bill. The fact of the matter is that consumers make investment decisions on the margin.

As OCC witness Gonzalez testified, increasing the current \$6 customer charge to the \$15 charge in the Company's original application, or to the Staff's proposed \$25.33 customer charge in year two, will significantly decrease the payback and overall savings of a consumer's energy efficiency investment, which in turn, may impact their decision to invest in energy efficiency.⁹¹ Mr. Puican admitted as much under cross-examination stating: "And I understand the question, the decrease in the volumetric rate will cause people to be less inclined to conserve possibly at the margin * * *."⁹² The SFV rate design therefore, creates a disincentive for consumers to participate in conservation efforts.

Nonetheless, the Staff dismisses the payback period arguments by stating:

This argument is irrelevant because a customer who has already made such an investment in response to high gas prices is not going to then turn around and remove it simply because prices fall or a new rate design is implemented.⁹³

This argument by Staff misses the point. OCC's argument was not directed at customers who have already made the investment decision. Those decisions were made with the

⁹¹ OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 12; See also OCC Ex. No. 5 (Gonzalez Direct Testimony) at Exhibit WG-3.

⁹² Tr. Vol. I at 243; See also Tr. Vol. I at 138 ("In our forecast model we look at prices on the margin").

⁹³ Staff Brief at 14.

best information available at the time of the investment. If circumstances change, they are potentially harmed, but their response would not be to reverse their decision. Instead OCC was focused on those customers facing the conservation investment decision now, and in the near future. The point behind energy efficiency and conservation is to encourage customers to increase their activities on a going-forward basis. As Duke witness Storck stated on cross-examination, if the useful life of a furnace is 20 years, then one twentieth of Duke's customers are potentially in the market for a new furnace each year.⁹⁴ Those are the customers OCC is concerned with, and who may decide not to spend the extra money for a 90 percent efficient furnace and instead purchase the less expensive (and less energy efficient) 80 percent efficient furnace because the reduction in savings extends the payback period too long.

The Staff also argues that the SFV rate design removes the significant and obvious past disincentives for Duke to promote and invest in energy efficiency programs.⁹⁵ This is a moot point, because Duke already has a natural gas DSM three-year pilot program in place.⁹⁶ The natural gas DSM programs are designed to attain the level of usage reductions as suggested by OCC witness Gonzalez "at a minimum, .75 percent to two percent of the verified with annual reductions."⁹⁷ The DSM program was approved by the Commission prior to Duke's filing its Application in this case and provides the Company with recovery of lost revenues associated with the programs, and

⁹⁴ Tr. Vol. I at 47-48.

⁹⁵ Staff Brief at 14.

⁹⁶ *In the Matter of the Application for Recovery of Costs, Lost Margin and Performance Incentives Associated with Implementation of Natural Gas Demand-Side Management Programs by the Cincinnati Gas and Electric Company*, Case No. 06-93-GA-UNC, Amended Application, (August 16, 2006).

⁹⁷ OCC Ex. No. 5 (Gonzalez Direct Testimony) at 12.

thus was done without the necessity of an SFV rate design. In fact, the lost revenues recovery mechanism was Duke's choice; therefore, Duke needs no further disincentive to promote energy efficiency investments, such as an SFV rate design. Furthermore, having put those DSM programs in place, the Commission should give those programs time to work before pulling the rug out from under them and imposing an SFV rate design.

The Staff also argues that "artificially inflating the volumetric rate beyond its true variable cost distorts the conservation analysis and leads to over-investment in conservation efficiency measures."⁹⁸ As Mr. Gonzalez testified: "For years, compelling arguments have been made that market failures in the energy efficiency markets have led to underinvestment in energy efficiency. These barriers include:"⁹⁹

- *Market barriers*, such as the well-known "split incentive" barrier, which limits homebuilders' and commercial developers' motivation to invest in energy efficiency for new buildings because they do not pay the energy bill; and the transaction cost barrier, which chronically affects individual consumer and small business decision-making.
- *Customer barriers*, such as lack of information on energy saving opportunities, lack of awareness of how energy efficiency programs make investments easier, and lack of funding to invest in energy efficiency.
- *Public policy barriers*, which can present prohibitive disincentives for utility support and investment in energy efficiency in many cases.
- *Utility, state, and regional planning barriers*, which do not allow energy efficiency to compete with supply-side resources in energy planning.

⁹⁸ Staff Brief at 13.

⁹⁹OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 10-11 citing "National Action Plan for Energy Efficiency," US DOE/EPA, July 2006, page ES-5. These market failures are also recognized in the Concurring Opinion of Commissioners Paul A. Centolella and Valerie A. Lemmie, in *Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Supplemental Opinion and Order, pages 4 -5.

- *Energy efficiency program barriers*, which limit investment due to lack of knowledge about the most effective and cost-effective energy efficiency program portfolios, programs for overcoming common marketplace barriers to energy efficiency, or available technologies.¹⁰⁰

Duke also acknowledged that barriers exist in the residential sector because the level of individual savings tends to be small.¹⁰¹ Given the barriers that exist to investing in energy efficiency technology today, it is illogical to believe that by approving a rate design for 20-25 percent of the customers' natural gas bill -- even if the entirety of that rate was volumetric -- the consumers' conservation response could lead to an over-investment in energy efficiency.

Moreover, there is no evidence that maintaining the current rate design is artificially inflating the volumetric rate. Absent such evidence, the Staff's argument lacks merit.

D. Commission Approval of the SFV Rate Design Through the Stipulation Would Be A Violation Of the Three-Prong Test.

The Stipulation was filed on February 28, 2008 and all twelve parties entered into the Stipulation that resolved issues *other than the design of residential rates*.¹⁰² OCC and OPAE reserved their right to recommend the time-honored rate design methodology of a low fixed monthly customer charge (\$6.00) combined with a charge per cubic foot of gas

¹⁰⁰ OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 10-11.

¹⁰¹ OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 12; citing *In the Matter of the Application for Recovery of Costs, Lost Margin, and Performance Incentive Associated with the Implementation of Electric Residential Demand Side Management Programs by The Cincinnati Gas & Electric Company*, Case No. 06-91-EL-UNC, Amended Application (August 16, 2006) at 6. (Those users tend to be overlooked by energy service companies because the level of individual savings is small. However, collectively, the savings can be significant, making this an important effort. These smaller consumers also have the most market barriers hindering action including lack of information, expertise, training, and capital. Duke Energy Ohio, working with the Interested Stakeholders, has developed a wide-ranging set of DSM programs to address these market barriers for all consumers in its targeted consumer classes.”)

¹⁰² Joint Ex. No. 1 (Stipulation) at 1 footnote 1.

used, and to oppose the Staff and Duke's challenge to convention with their proposal for a very high monthly customer charge (ultimately \$25.33).¹⁰³

The approval of an SFV rate design cannot be accomplished through the Stipulation, because there is no settlement of the issue. However both the Company¹⁰⁴ and Staff¹⁰⁵ have made the argument in their briefs that the settlement resolves the residential rate design issues. Their argument is a violation of the Stipulation. If however, the Commission inappropriately modifies the Stipulation to consider the rate design issue as part of the settlement, then, under the PUCO settlement criteria, the should adopt OCC's proposed rate design that includes continuing the \$6.00 customer charge and reject the Duke and PUCO Staff proposals for an SFV rate design and a \$25.33 customer charge.

The standard of review for consideration of a Stipulation has been discussed in a number of Commission cases and by the Ohio Supreme Court. See, e.g., *CG&E ETP Case*, PUCO Case No. 99-1212-EL-ETP, et al., at 65 (July 19, 2000). Among other places, the Ohio Supreme Court has addressed its review of stipulations in *Consumers' Counsel v. Pub. Util. Comm.*, (1992), 64 Ohio St. 3d 123, 125. Citing *Akron v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 155, 157, the Ohio Supreme Court stated in *Consumers' Counsel* that:

The Commission, of course, is not bound to the terms of any stipulation; however, such terms are properly accorded substantial weight. Likewise, the commission is not bound by the findings of its staff. Nevertheless, those findings are the result of detailed investigations and are entitled to careful consideration.

¹⁰³ Joint Ex. No. 1 (Stipulation) at 5, footnote 7.

¹⁰⁴ Duke Brief at 5-16.

¹⁰⁵ Staff Brief at 6.

In *Duff v. Pub. Util. Comm.* (1978), * * * in which several of the appellants challenged the correctness of a stipulation, we stated:

A stipulation entered into by the parties present at a commission hearing is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The commission may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing.¹⁰⁶

The Court in *Consumers' Counsel* considered whether a just and reasonable result was achieved with reference to criteria adopted by the Commission in evaluating settlements:

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?¹⁰⁷

The settlement of the rate design issue was not a product of serious bargaining. The Company improperly claims that nine or ten of the twelve Parties agreed to the modified SFV rate design in the Stipulation.¹⁰⁸ First only two parties (Staff and the Company) support the SFV rate design. Second, the rate design issue only impacts Duke's residential customers, who according to the Stipulation itself are represented by OCC and the City,¹⁰⁹ with OPAC's representation noted on a more limited basis.¹¹⁰ OCC and

¹⁰⁶ *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St. 3d 123, 125.

¹⁰⁷ *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St. 3d 123, 126.

¹⁰⁸ Duke Brief at 9. See also Tr. Vol. I at 157, 196; Tr. Vol. II at 79-80.

¹⁰⁹ Joint Ex. No. 1 (Stipulation) at 2, footnote 3.

¹¹⁰ Joint Ex. No. 1 (Stipulation) at 2, footnote 3 OPAC is a provider of weatherization and essential infrastructure services to the low income residential within DE-Ohio's service territory.

OPAE clearly stated their opposition to the rate design issue.¹¹¹ The City specifically stated it was taking no position on the issue.¹¹² The natural gas Marketer parties (Direct, IGS, Integrys, and Stand) raised no objections to the Staff Report on the rate design issue, and did not participate or take a position in the evidentiary hearing on this issue. OEG and Kroger are industrial/commercial parties with no interest in a residential customer issue.

In addition, OEG and Kroger raised no objections to the Staff Report on the rate design issue, and did not participate or take a position in the evidentiary hearing on this issue.

PWC has not formally taken a position on the rate design issue. However, even if PWC supports the SFV rate design, the Commission should not consider PWC to be a representative of Duke's residential customers. A review of PWC's Articles of Incorporation states that PWC's corporate purpose is:

The purpose or purposes for which said corporation is formed are: To educate and train economically disadvantaged individuals to secure and retain employment and any other purpose for which a non-profit corporation may be formed. The corporation shall be organized and operated exclusively for educational and charitable purposes.¹¹³

There is nothing stated in the PWC's Articles of Incorporation that would suggest its purpose is to represent residential customers on public utility issues. In addition, the Stipulation itself does not recognize or acknowledge PWC as a residential customer representative. Therefore, the Commission should not take seriously Duke's attempts to

¹¹¹ Joint Ex. No. 1 (Stipulation) at 5, footnote 7.

¹¹² Joint Ex. No. 1 (Stipulation) at 5, footnote 7.

¹¹³ PWC Articles of Incorporation at 3 (February 10, 1975). (Attachment No. 1).

portray PWC's limited participation in these cases into anything other than the Company using PWC as a friendly-surrogate for residential representation. This is all too familiar a scenario in Duke's cases before the Commission. PWC intervenes into a case at the last minute,¹¹⁴ PWC does no discovery, PWC files no testimony, PWC does no cross-examination, and PWC does not write a brief. The Commission should further discount PWC's participation in these cases, because while PWC did file minimal objections to the Staff Report, those objections did not pertain to the rate design issue.

The only remaining parties are the Company and the Staff who have formally placed their positions on the record. All other parties, as noted above, have either specifically stated opposition to this issue (OCC and OPAE), or not taken a position on the issue whatsoever (City,¹¹⁵ Stand,¹¹⁶ OEG¹¹⁷, Direct and Integrys¹¹⁸). Despite claims by Staff and the Company to the contrary, the record shows that Duke and the Staff are the only parties who recommend that the Commission approve an SFV rate design.

Furthermore, the Stipulation provisions show that it was not the product of serious negotiation on the rate design issue. The decision was made to carve out the residential rate design issue from a settlement. This scenario cannot represent serious negotiations.

The Commission has also recognized that the settlement must be a package which reflects the give and take of the negotiation process. What OCC negotiated in this case was the opportunity to litigate the rate design issue. OCC's willingness to settle all the other issues that were settled was based on the express understanding, as reflected in the

¹¹⁴ Duke Prefiling Notice was filed on June 18, 2007, PWC intervened on January 16, 2008.

¹¹⁵ City Letter (March 24, 2008).

¹¹⁶ Stand Letter (March 20, 2008).

¹¹⁷ OEG Reply Brief at 2 (March 21, 2008).

¹¹⁸ Direct and Integrys Reply Brief at 2 (March 24, 2008).

Stipulation in triplicate, that the Commission would decide the rate design issue from the evidence presented at hearing without a settlement -- and not from a reference point of a partial settlement of the rate design issue.

Finally, the facts in this case do not fit within the criteria that the Commission used in first implementing the three-prong test in the Zimmer Case, Case No. 84-1187-EL-AIR. In the Zimmer Case, there was a great deal of emphasis placed on the diversity of the parties agreeing to the settlement.¹¹⁹ The Commission concluded:

There can be little doubt his first standard -- whether the settlement is a product of serious bargaining among capable, knowledgeable parties -- has been satisfied. As described by Mr. Barrows in his testimony, this stipulation is the result of six weeks of intensive negotiations (Staff Ex. 1, at 3). * * *. The diversity of the interests represented by the signatories is remarkable, a fact which, of itself, is strong testimony to the reasonableness of the settlement package. In short, the Commission has no cause for concern as to the efficacy of the negotiations which produced the stipulation and recommendation.¹²⁰

The only thing remarkable about the diversity of the parties supporting the SFV rate design -- is the lack of diversity. Of the 12 parties in the case, only Staff and the Company support the SFV position. OCC and OPAE oppose the SFV rate design, while the other parties took no position on the issue. This is a dramatic contrast with the number of parties who actually supported the Zimmer Stipulation, and more importantly the scope of interests represented by that agreement.

The Commission further opined as to what constituted diversity, pointing to the testimony at the local public hearings:

¹¹⁹ *In the Matter of the Restatement of the Accounts and Records of the Cincinnati Gas and Electric Company, The Dayton Power and Light Company, and Columbus & Southern Ohio Electric Company*, Case No. 84-1187-EL-UNC, Opinion and Order at 7 (November 29, 1985).

¹²⁰ *Id.* at 7.

Although some of the public witnesses testifying in this proceeding opposed the settlement (Tr. I, 39, 52, 68, 84; Tr. II, 35, 54, 62, 122, 129, 139; Tr. III, 23), a substantial majority urged the Commission to adopt the stipulation. These witnesses included *ratepayers* (Tr. I, 60, 64, 82, 93, 102; Tr. II, 27, 89, 90, 92, 94, 121), elected *representatives and other public officials* (Tr. I, 24, 95; Tr. II, 24, 44), *union representatives* (Tr. I, 65, Tr. II, 1236; Tr. III, 18, 59, 76), stockholders (Tr. I, 102; Tr. II 91), *economic development consultants* (Tr. I, 29, 90), *representatives of various Chambers of Commerce* (Tr. I, 35; Tr. II 148; Tr. III, 66), a *representative of a trade association* (Tr. I, 86; Tr. II, 24), and a *representative of various public interest groups* (Tr. II, 72, 111; Tr. III, 71).¹²¹

In contrast to that wide-scale diversity, the only parties supporting the SFV rate design are the Staff and the Company, neither of whom represents the interests of the residential customers who will be forced to live with the consequences of this change in policy. The OCC and OPAE, who are concerned about residential customers, oppose this change. Based on the Commission's original intent, under the first prong of the test, there is no diversity of supporting parties that would allow the Commission to find the Stipulation reasonable. And as the Staff has pointed out, they are concerned with interests other than just residential customers.

Finally, another factor the Commission found compelling in the Zimmer Case was the fact that there were forty-three public witnesses who testified at local hearings, and a substantial majority of these witnesses, representing a broad cross-section of consumer, labor, investor community, and governmental interests urged the Commission to approve the settlement.¹²² This case presents a stark contrast to the Zimmer Case, because the overwhelming majority of the 33 witnesses who testified at the local public hearings in

¹²¹ Id. at 11. Emphasis added.

¹²² *In the Matter of the Restatement of the Accounts and Records of the Cincinnati Gas and Electric Company, The Dayton Power and Light Company, and Columbus & Southern Ohio Electric Company*, Case No. 84-1187-EL-UNC, Opinion and Order (November 29, 1985) at 6.

Cincinnati and Mason,¹²³ as well as, the numerous consumer letters¹²⁴ docketed in this case, are clearly *opposed* to the rate design proposal of the Company and Staff.

Moreover, a review of the transcript from the three local public hearings indicates that ratepayers,¹²⁵ representatives of various public interest groups¹²⁶ and representatives of public agencies¹²⁷ all testified in *opposition to the SFV rate design*. This contrasts with the Zimmer Case, where the majority of the witnesses supported the Stipulation.

The Commission should not consider the unprecedented rate design advanced by the Company and the Staff under the criteria for review of partial stipulations. The rate design issue was not settled, but has been litigated and the Company and Staff should not be permitted to take advantage of the settlement process to avoid meeting the burden of proof on the rate design issue. The adoption of the Stipulation and incorporating the Staff Report's proposed SFV rate design is a violation of the criteria set out by the Commission and the Ohio Supreme Court.

The Company improperly states that the modified SFV rates do not violate any important regulatory principle or practice. Such a claimed Stipulation between Duke and the Staff would violate numerous regulatory principles and practices.¹²⁸ Most fundamentally, the alleged Stipulation would violate Ohio law. Among the most

¹²³ OCC Brief at 22-25. It must also be noted that letters in opposition to the rate case in general and the SFV rate design in particular, continue to be filed by interested consumers. See letter of Mr. and Mrs. John Hunter filed on March 19, 2008. See also from the city of Mason filed on March 20, 2008.

¹²⁴ OCC Brief at 21-22.

¹²⁵ February 25, 2008, 4:00 p.m. Local Public Hearing. at 11, 12, 13, 17, 19, 23, 25, 27, 30, 44, 59; 6:30 p.m. at 17, 18, 19, 22, and 24.

¹²⁶ February 25, 2008, 4:00 p.m. Local Public Hearing at 39, 49, 53, and 57.

¹²⁷ February 25, 2008 4:00p.m. Local Public Hearing at 32, 36, 47, 60; 6:30 p.m. at 23; March 11, 2008 Local Public hearing at 14.

¹²⁸ OCC Brief at 35.

egregious violations would be that the proposed SFV rate design violates the State's energy policies contained in R.C. 4905.70 and R.C. 4929.02(A)(4).¹²⁹

The SFV rate design does not promote energy efficiency. Because under the SFV rate design, the cost per unit declines as consumption grows thereby sending the wrong price signal. It also penalizes customers who have invested in energy efficiency investments or may discourage other customers from making the energy efficiency investment because under SFV rate design, they face longer payback periods.¹³⁰ In order to adhere to the state policy in R.C. 4929.02(A)(4) and R.C. 4905.70, the Commission must implement a rate design that includes a smaller customer charge (\$6.00), a higher volumetric rate, and a decoupling mechanism with appropriate safeguards. The effect of the Commission's approval of such a violation in these cases would also have a chilling effect on consumers' conservation efforts. Adoption of the SFV as part of a supposed Stipulation would also violate a regulatory practice that has existed for decades where parties have settled the issues that they could and agreed to litigate those that they could not.

Finally, the Company has improperly argued that the modified SFV rates will benefit customers and are in the public interest. The Company and Staff's proposed rate design settlement does not provide a benefit to ratepayers or serve the public interest. Approval of a rate design -- which sends consumers improper price signals and extends payback periods of their energy efficiency investments -- is harmful to consumers and should not be approved by the Commission. Furthermore, the rate design proposal is contrary to the state policy to encourage innovation and market access for cost-effective

¹²⁹ OCC Brief at 35.

¹³⁰ Tr. Vol. I at 50, 58.

supply-and demand-side natural gas services and goods¹³¹ and violates the legislative mandate that 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.¹³²

E. The Commission Should Determine that Administrative Notice Should Not Have Been Taken in These Cases or, in the Alternative, the Commission Should Not Rely on the Documents Administratively Noticed.

It was not proper for the Attorney Examiner to take administrative notice of the documents that the Company produced at the end of the hearing regarding tariffs from other jurisdictions. And in its Brief, Duke relied on the Attorney Examiner taking administrative notice of these documents. But, as discussed below, administrative notice was not proper in these cases.

At hearing and over OCC's objections, the Attorney Examiner ruled:

EXAMINER BULGRIN: Okay. I will tell you what, I will sustain your objection on this witness. The company is free though to on brief note and ask for administrative notice of whatever tariff examples that you want to bring us.¹³³

Having seen the Company's use of the documents in its Initial Brief, OCC requests that the Commission conclude that administrative notice of the documents from other jurisdictions was not proper.¹³⁴

¹³¹ R.C. 4929.02 (A)(4).

¹³² R.C. 4905.70.

¹³³ Tr. Vol. II at 86.

¹³⁴ Company Brief at 13. (Utilization of Duke Ex. Nos. 51, 40, 42, 43, and 53).

Administrative notice of facts or documents in a Commission hearing is governed generally by a statutory rule (Ohio Rules of Evidence 201) and by holdings from several Ohio Supreme Court cases. Administrative notice is generally permitted of any adjudicative fact not subject to reasonable dispute because it is either generally known within the territorial jurisdiction of the Commission, or capable of “accurate and ready determination” by a source whose accuracy cannot be reasonably questioned.¹³⁵

1. An Administratively Noticed Fact Must be One Not Subject to a Reasonable Dispute Because it is Generally Known Within the Territorial Jurisdiction of the Court.

A recent appellate decision explained the “subject to a reasonable dispute” language of the rule as it applies to judicial notice:

“Matters of which a court will take judicial notice are necessarily uniform or fixed and do not depend upon uncertain testimony, for as soon as a matter becomes disputable it ceases to fall under the head of common knowledge and so will not be judicially recognized.” *Union Oil Co. of California v. Mayfield Hts. Bd. of Zoning Appeals* (Jan. 15, 1987), Cuyahoga App. No. 52017, quoting *McCoy v. Gilbert* (1960), 110 Ohio App. 453, 463, 169 N.E.2d 624.¹³⁶

In these proceedings, and over numerous objections by the OCC, counsel for the Company testified to the authenticity of numerous documents through his cross-examination of OCC witness because the OCC witnesses could not identify the documents that they had not seen before. Based on the failure to establish any foundation for the majority of the documents,¹³⁷ the Attorney Examiners then correctly struck the cross-examination of the witness, ruling:

¹³⁵ Evid. R. Rule 201.

¹³⁶ *Polivka v. Cox*, No. 02AP-1364, 2003-Ohio-4371.

¹³⁷ Tr. Vol. II at 17, 36-42

After reviewing Mr. Yankel's responses to the exhibits presented to him in cross-examination by Duke, it's clear that he was unfamiliar with those documents, and it is appropriate to strike the cross-examination by Duke.¹³⁸

Furthermore, the Attorney Examiner should not have taken administrative notice of these documents, because they are not generally known within the territorial jurisdiction of the Commission -- Ohio.

In opposite to this case, the Commission routinely takes notice of material from other cases from **its own** docket. In a recent case, the Commission noted that "It is not an unusual or novel concept that the Commission, on its own motion, should take administrative notice of a public document, such as a tariff, that exists in its own records."¹³⁹ In another case, the Commission similarly declared that "As an administrative agency, the Commission can take administrative notice of documents and evidence filed in other [PUCO] cases."¹⁴⁰

Contrary to Ohio caselaw, the documents for which administrative notice was sought by Duke¹⁴¹ were clearly not from the territorial jurisdiction of the Commission. Accordingly, the Commission should determine that administrative notice should not have been taken in these cases or, in the alternative, the Commission should not rely on the documents administratively noticed.

¹³⁸ Tr. Vol. II at 45-46.

¹³⁹ *In the Matter of the Application of United Telephone Company of Ohio d/b/a Embarq for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 07-760-TP-BLS, Entry on Rehearing at 44 (February 13, 2008).

¹⁴⁰ *Re Columbia Gas of Ohio, Inc.*, Case No. 04-1680-GA-UNC, Entry on Rehearing at 14 (March 16, 2005).

¹⁴¹ National Association of Regulatory Commissions ("NARUC") resolutions and other utility company tariffs.

2. The Commission Should Disregard the Documents Administratively Noticed by the Attorney Examiner Because Some of the Documents were Incomplete and, in the Interest of Fairness, the Entire Document Should have been Introduced.

One example of documents that the Commission took administrative notice of, but should be given no weight whatsoever, are tariffs from utilities that allegedly have implemented or proposed SFV rate designs.¹⁴² The Tariffs that Duke relies on were incomplete and lack any foundation or probative value.

Because Duke did not offer the entire tariffs at hearing, or attach the same to their brief, the Company's argument is misleading. For completeness, OCC attaches hereto the tariffs that Duke had not provided, pursuant to Evid. R. 106 which states:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it.

For example, the alleged SFV rate that the Company offers in support from the Oklahoma Natural Gas Company offers its customers a choice between an SFV rate (\$20.00 service charge) and a more traditional rate (\$9.00 service charge).¹⁴³ However, a closer review of the Atlanta Gas Light rate tariff indicates that four of the nine elements that make up the rate vary with the maximum demand imposed on the system by the

¹⁴² Duke Brief at 13, Table 1.

¹⁴³ Attached hereto as Attachment. No. 2, Oklahoma Natural Gas Company, Tariff 101 Rate Choices A and B pages 1-3 (Approved October 6, 2005) (See also Oklahoma Natural Gas Company online customer service rate information, [http://www. Oneok.com/customerservicerateinfo](http://www.Oneok.com/customerservicerateinfo)).

customer on the coldest day of the year, so customer usage does impact their fixed costs.¹⁴⁴

Finally, the Columbia Gas of Ohio, Inc. (“COH”) rate is simply proposed by COH, and the Commission has not taken any action on this rate. Therefore, three of the five rates offered as examples by the Company of SFV rates from around the country are in fact inconsistent with the SFV rate design offered by the Company in these cases. Therefore, the probative value of these documents is lacking, and they should be deemed irrelevant for purposes of this proceeding, and should be given no weight.

Other documents that Duke relied upon were alleged to be NARUC Resolutions. Even if the NARUC Resolutions are true and accurate representations -- a fact that has not been established -- they are not binding on the Commission. In fact, there is no evidence in the record that the Ohio Commission even supported these resolutions. It is equally plausible that the Commission could have opposed these resolutions. Either way the record is not clear.

The Attorney Examiners took administrative notice, ruling that, “they are publicly available documents * * * *for what that’s worth.*”¹⁴⁵ This final comment is indicative of the non-existent probative value of these documents. However, the Company has relied on them in their Brief. For all the reason stated above, it was improper for the Commission to have taken administrative notice, and the Company’s reliance on the documents should be assigned no probative value.

¹⁴⁴ Attached hereto as Attachment No. 3, Atlanta Gas Light Residential Delivery Service Rate Schedule Third Revised Sheet No 1.1 (Effective May 1, 2002).

¹⁴⁵ Tr. Vol. II at 135. Emphasis added.

III. CONCLUSION

The Commission should decide the rate design issue from the evidentiary record in these cases. The Stipulation does not resolve the rate design issue as the Company and Staff unreasonably argued. The Commission should decide that the rate design which most properly balances the interests of the Company and its customers is one which includes a \$6.00 customer charge and a volumetric rate.

In the event the Commission finds merit in the Company's argument that it needs to be protected from revenue erosion due to declining usage per customer -- which is another way of saying that the public utility needs more protection than does its customers, then a properly designed decoupling mechanism should be implemented with proper safeguards.

The Commission should implement OCC's arguments in favor of thirty-years of traditional rate-making policy and respect the regulatory principle of gradualism. The SFV proposal is fundamentally flawed in as much as the proposed rate design issue would drastically alter the rate design for the residential class. The SFV sends the wrong price signals and is anti-conservational. It also results in low-use customers subsidizing high-use customers which is inconsistent with public policy. In addition, adoption of the SFV rate design proposal in the Stipulation would be done absent of residential support for this rate design change, and would result in the Commission violating numerous regulatory principles and practices.

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 *Post-Hearing Reply Brief of the Office of the Ohio Consumers' Counsel* has been served upon the below-named counsel via Electronic Mail this 24th day of March 2008.

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STATE OF OHIO
DEPARTMENT OF STATE



TED W. BROWN
SECRETARY OF STATE

E0040-1161

RECEIPT NO. 51626

E040-1161

DATE 2/19/75

463441
NUMBER

RECEIVED OF
OR FILED BY DINSMORE, SHOHL ET AL

THE SUM OF \$ 25.00 FOR FILING ARN

PEOPLE WORKING COOPERATIVELY, INC.

ARN \$ 25.00

RETURNED TO: 51626
DINSMORE, SHOHL ET AL
ATT: W. N. FREEDMAN
511 WALNUT ST.
CINCINNATI, OH 45202

TOTAL FEE \$ 25.00

NAME:
PEOPLE WORKING COOPERATIVELY, INC.



E0040-1162



TED W. BROWN
Secretary of State

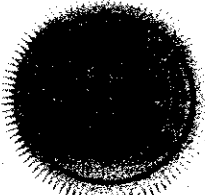
Certificate

463441

It is hereby Certified that the Secretary of State of Ohio has custody of the Records of Incorporation and Miscellaneous Filings; that said records show the filing and recording of: AKN of PEOPLE WORKING COOPERATIVELY, INC.

United States of America
STATE OF OHIO
Office of the Secretary of State

Recorded on Roll E040 at Frame 1163 of the
Records of Incorporation and Miscellaneous Filings.



Witness my hand and the seal of the Secretary of State, at the City of
Columbus, Ohio, this 14TH day of FEBRUARY, A. D. 19 75

A handwritten signature in cursive script, reading "Ted W. Brown".

TED W. BROWN
Secretary of State

E040-1163

463441
ARTICLES OF INCORPORATION

OF

PEOPLE WORKING COOPERATIVELY, INC.

APPROVED

By: P.O.
Date: 2-14-75
Amount: 25.00

51626

The undersigned, citizens of the United States, desiring to form a corporation, not for profit, under Sections 1702.01 et seq., Revised Code of Ohio, do hereby certify:

First. The name of said corporation shall be People Working Cooperatively, Inc.

Second. The place in Ohio where the principal office of the corporation is to be located is 2720 Glendora Avenue, Cincinnati, Hamilton County, Ohio 45219.

Third. The purpose or purposes for which said corporation is formed are: To educate and train economically disadvantaged individuals to secure and retain employment and any other purpose for which a non-profit corporation may be formed. The corporation shall be organized and operated exclusively for educational and charitable purposes.

Fourth. The following persons shall serve said corporation as trustees until the first annual meeting or other meeting called to elect trustees:

<u>Names</u>	<u>Addresses</u>
Margie Bradshaw	1224 Republic Street, Cincinnati, Ohio 45210
Earlene Collier	2608 Melrose Avenue, Cincinnati, Ohio 45206
Charles R. Hirt, Jr.	4460 Glenhaven Road, Cincinnati, Ohio 45238
George R. Schoen	2720 Glendora Avenue, Cincinnati, Ohio 45219

Fifth. In the event the corporation shall terminate or dissolve, after payment of all liabilities, any remaining assets shall be distributed to other organizations exempt under section 501(c)(3) of the Internal Revenue Code or to a governmental unit to be used exclusively for public purposes.

E0040-1164

IN WITNESS WHEREOF, we have hereunto subscribed our names
this 10th day of February, 1975.

Margie Bradshaw
Margie Bradshaw

Earlene Collier
Earlene Collier

Charles R. Hirt, Jr.
Charles R. Hirt, Jr.

George R. Schoen
George R. Schoen

Incorporators

E0040-1163

ORIGINAL APPOINTMENT OF STATUTORY AGENT

OF

PEOPLE WORKING COOPERATIVELY, INC.

The undersigned, People Working Cooperatively, Inc., an Ohio corporation, not for profit, with its principal office in Cincinnati, Hamilton County, Ohio, hereby appoints George R. Schoen, a natural person resident in the county in which the undersigned has its principal office, as its statutory agent upon whom any process, notice or demand required or permitted by statute to be served upon the undersigned may be served. The complete address of said statutory agent is 2720 Glendora Avenue, Cincinnati, Ohio 45219.

DATED AT Cincinnati, Ohio, February 10, 1975.

PEOPLE WORKING COOPERATIVELY, INC.

By George R. Schoen
George R. Schoen, Trustee + Secretary

Margie Bradshaw Charles R. Hirt, Jr.
Margie Bradshaw, Trustee + Secretary Charles R. Hirt, Jr., Trustee + Secretary

ACCEPTANCE OF APPOINTMENT

TO: People Working Cooperatively, Inc.

The undersigned hereby accepts appointment as statutory agent of the above corporation upon whom any process, notice or demand required or permitted by statute to be served upon for above corporation.

George R. Schoen
George R. Schoen

DATED: February 10, 1975.

OKLAHOMA NATURAL GAS COMPANY
P. O. BOX 401, OKLAHOMA CITY, OKLAHOMA

Page No. 1
Tariff 101

**RATE SCHEDULE 101
RATE CHOICES A AND B
RESIDENTIAL GAS SERVICE**

Availability

Natural gas service under this rate schedule is available to any individually metered single family residential customer for domestic uses at any point on the Company's system. Natural gas service under this tariff is also available to any individually metered single family residential customer for domestic uses at any point on the system of another pipeline with respect to which the Company has an agreement with such pipeline or is taking gas pursuant to a tariff for such service but only to the extent that: (1) such single family residential meter exists as of the effective date of this tariff; (2) service is required by operation of law; or (3) service is agreed to by such other pipeline.

This tariff shall also be available for individually metered two-family dwellings when the customer meets the following two (2) criteria: (1) The customer is responsible for payment of the bill; and (2) The customer is an occupant of one of the two dwellings served by the single meter. This rate shall not be available for any 3-(or more)-family dwellings served by one meter. The Company shall have the right to determine and confirm from time to time that the customer meets the criteria contained herein. Denial of access to the property to determine compliance with such criteria shall constitute grounds for denial of service pursuant to this tariff.

Gas service is not available under this rate schedule for resale to others or for standby service.

Rate Choices

The charge for recorded consumption of gas at one point of delivery in any month is as follows:

	<u>Service Charge</u>	<u>Delivery Fee</u>
For Rate Choice A	\$9.00	\$1.9967 Per Dth
	<u>Service Charge</u>	<u>Delivery Fee</u>
For Rate Choice B	\$20.00	\$0.2367 per Dth

Date Issued October 7, 2005 Date Effective October 7, 2005

Authorized by 512287 PUD 200400610 October 4, 2005
(Order No.) (Cause No.) (Date of Letter)

Issued by [Signature] Mgr. - Rates & Regulatory Rptg.
(Name of Officer) (Title)

APPROVED

OCT 6 2005

DIRECTOR OF
PUBLIC UTILITIES

Customer Choice Rate Placement

Each customer's individual rate schedule will be determined based on the annual normalized volume at the customer's service location for the twelve (12)-month period ending on July 31, 2005. If the customer's service location's annual normalized volume is less than 75 Dth, then the customer's account will be placed on Choice A.

If the customer's service location's annual normalized volume is 75 Dth or greater, then the customer's account will be placed on Choice B.

An anticipated annual normalized usage level assessment will be conducted on each new service and for existing service as of July 31, 2005 that has less than twelve (12) months of service. The results of this assessment will decide the initial rate choice for the new account.

A customer may switch rate choices at any time during the year provided that the customer agrees to remain on the alternative rate choice for a period of no less than twelve (12) months after switching options. Changes will be effective with the Customer's next scheduled bill.

Each year, the Company shall undertake a customer specific billing assessment and issue a credit for all customer accounts meeting the following criteria: 1) must be on choice B, 2) must be under the TAC option, 3) must have 12 consecutive billing periods on choice B at the time of the evaluation, 4) must have usage of less than 70 Dth. The credit will equal the difference between what was billed to each account under choice B and what would have been billed under choice A for the 12 month evaluation period.

Note: Meter readings will be recorded in hundreds of cubic feet (.1 Mcf) or multiples thereof.

Commodity Cost of Gas

The indicated rates do not include the applicable commodity cost of gas which shall be added pursuant to Special Terms and Conditions, Tariff No. 1001.

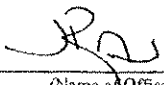
APPROVED

Date Issued October 7, 2005 Date Effective October 7, 2005

OCT 6 2005

Authorized by 512287 PUD 200400610 October 4, 2005
(Order No.) (Cause No.) (Date of Letter)

DIRECTOR OF
PUBLIC UTILITIES

Issued by  Mgr. - Rates & Regulatory Rptg.
(Name of Officer) (Title)

Subject to:

Special Provisions

Tariff

Purchased Gas Adjustment Clause	1001
Gross Receipts & Franchise Tax Adjustments	1011
Order of Curtailment	1031
Miscellaneous Special Charges	1041
Miscellaneous Terms and Conditions	1051
Unrecovered Purchased Gas Cost Adjustment	1071
Commission Assessment Fee	1075
Take or Pay Settlement Amortization Rider	1091
Temperature Adjustment Clause	1141
Line Loss Rider	1191

Payment

Bills are to be paid within 20 days after the date of Company's bill to Customer.

Date Issued October 7, 2005 Date Effective October 7, 2005

Authorized by 512287 PUD 200400610 October 4, 2005
(Order No.) (Cause No.) (Date of Letter)

Issued by  Mgr. - Rates & Regulatory Rptg.
(Name of Officer) (Title)

APPROVED

OCT 6 2005

DIRECTOR OF
PUBLIC UTILITIES



UNDERSTANDING YOUR BILL

Oklahoma Natural Gas Company's residential rate structure has been simplified to make it easier to understand. And, there are two different rate plans to better match your individual natural gas consumption.

Plan A is for lower-volume customers whose annual consumption is 75 Dekatherms* or less. Plan B is better for those who use larger annual volumes of natural gas-more than 75 Dekatherms a year.

Remember, these plans only affect what Oklahoma Natural Gas Company charges you for service and delivering the gas. The cost of fuel-the natural gas you consume-is separate and is based on the amount ONG actually paid to buy the gas on your behalf. The company makes no profit on the sale of natural gas.

Rate Plan A (less than 75 Dekatherms per year) - [view a Plan A bill](#)

Service Charge (monthly) - \$9.00

Delivery Charge per Dekatherm - \$1.9967

Rate Plan B (more than 75 Dekatherms per year) - [view a Plan B bill](#)

Service Charge (monthly) - \$20.00

Delivery Charge per Dekatherm - \$0.2367

*A Dekatherm is a measurement of energy content. One Dekatherm is the approximate energy content of 1,000 cubic feet of natural gas.

73 0000000000000000 000004176

Natural Gas Terms

Cost of Gas (COG) Cost of Gas (referred to as Customer Fuel Cost in Oklahoma) includes the cost the company pays for natural gas, as well as related storage and transportation costs. The COG may also contain other charges approved by the appropriate regulatory authority. State statutes or regulations do not allow the company to mark up the costs of gas.

Customer Charge or Service Charge Customers pay a Customer or Service Charge to help cover the fixed costs of providing natural gas service. Fixed costs include bill processing, meter reading, meter equipment, service line maintenance and customer service personnel.

Delivery Charge Customers pay a Delivery Charge to have natural gas delivered to their residence or business. The charge is based on billed gas usage and may vary monthly.

Cost of Service (Oklahoma) Cost of Service includes the Service Charge and Delivery Charge, as well as additional fees related to ensuring that gas and related services are available when you need them.

Service Fee (Oklahoma) The Service Fee represents a portion of the cost associated with maintaining the company's ability to meet its customers' needs during times of peak demand. This charge applies only to certain rates.

WNA (Kansas and Texas) The Weather Normalization Adjustment (WNA), which is related to normal weather, is applied to the billed usage and appears as a credit, if it is colder than normal, or a debit, if it is warmer than normal. In Kansas, the factor changes annually in April. In Texas, the factor changes monthly.

Gas Hedge Program (Kansas) The Gas Hedge Program is designed to minimize price volatility in the natural gas market. The gas hedge charge is used to protect customers from extreme price increases that may otherwise occur. This charge was previously included in the cost of gas charge.

Temperature Adjustment/TAC (Oklahoma) The Temperature Adjustment offsets the impact of weather variations. It is based on historical weather information and has the effect of reducing bills in colder-than-normal weather and increasing bills in warmer-than-normal weather.

Units of Measure

Ccf- Abbreviation for 100 cubic feet.

Mcf- Abbreviation for 1,000 cubic feet.

Dth- Abbreviation for 1,000,000 Btu's (1 MMBtu)

Btu Adjustment (Oklahoma) This adjustment is for the heat content of the gas. Btu is the abbreviation for British Thermal Unit, a measurement of the heating value of natural gas.

Constant The Constant is a pressure factor or meter factor used to convert metered volume to billing volume.

By sending a check as payment, you authorize us to complete the payment by electronic debit. If we do, the account will be debited in the amount of the check as early as the day we receive the check; afterward, the check will be destroyed. You may opt out by contacting Customer Service.

Términos del Natural Gas

Costo del gas (COG) El costo del gas (Designado como el costo de Combustible del Cliente en Oklahoma) incluye la cantidad que la compañía paga por el gas natural, además de los costos relacionados de almacenaje y transporte. En el COG también puede haber otros cargos aprobados por la autoridad reguladora correspondiente. Las leyes o normas estatales no permiten que la compañía aumente el precio del gas.

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WNA (Kansas y Texas) El ajuste de normalización del clima (WNA), que se relaciona con el clima normal, se aplica al uso cobrado y aparece como un crédito, si hace más frío que lo normal; o un débito, si hace más calor que lo normal. En Kansas, el factor cambia cada año en abril. En Texas, el factor cambia cada mes.

Programa "Gas Hedge" (Kansas) El Programa Gas Hedge (Protección contra cambios en el precio del gas) está diseñado para protegerle de la inestabilidad del mercado de gas natural. Cobramos el honorario de "gas hedge" para proteger al cliente de los aumentos extremos del precio que, de otra forma, podrían afectarle. Este honorario se cobró anteriormente como parte del "costo del gas."

Ajuste de la temperatura/TAC (Oklahoma) El ajuste de la temperatura compensa el impacto de las variaciones del clima. Se basa en información del clima pasado. Tiene el efecto de reducir las cuentas cuando el clima es más frío que lo normal y de incrementar las cuentas cuando el clima es más caliente que lo normal.

Unidades de medida

Ccf: la abreviatura de 100 pies cúbicos.

Mcf: la abreviatura de 1,000 pies cúbicos

Dth: la abreviatura de 1,000,000 Btu (1 MMBtu)

Ajuste del Btu (Oklahoma) Este ajuste es para el contenido térmico del gas. Btu significa Unidad Térmica Británica, la medida del valor térmico del gas natural.

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For Your Safety – All Customers

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Para su seguridad – Todo cliente

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RATE SCHEDULE(S) AVAILABLE UPON REQUEST
GAS SERVICE INFORMATION - RETAIN FOR YOUR RECORDS

TELECOMMUNICATIONS DEVICE FOR THE DEAF
TULSA 918-438-6392 • OKLAHOMA CITY 405-232-1488

For service, bill inquiries, or assistance, call
Phone: 800-554-5453
www.ong.com

Oklahoma Natural Gas Company
P.O. BOX 401
Oklahoma City OK 73101-0401

Help take the ups and downs out of your natural gas bill. Find out about the Average Payment Plan.

Page 1 of 1

CUSTOMER NAME
CUSTOMER ADDRESS
ANYTOWN OK 74102-0000

Last Payment Credited: \$32.45 on 10-26-05 Thank you!	Total Amount Due \$79.00
	Current Charges Due 11-22-05
	Account Number 000-0000000-000

Statement Date 10-31-05 RATE 101 PLAN B	Customer Fuel Cost (per Dekatherm) \$11.04400
---	---

Service Charge	\$50.00
Delivery Fee @ \$0.33670/Dth	1.07
Riders and Other Fees	3.67
Temperature Adjustment	14
Cost of ONG Service	\$21.88
Customer Fuel Costs	49.70
City Tax	2.94
County Tax	.27
Franchise Fee	2.21
Current Monthly Charges	Totals
Total Amount Due	\$79.00

Your Energy Use

The bar chart displays monthly energy usage in Dekatherms (Dth). The y-axis ranges from 0 to 25 Dth. The x-axis lists months from October (O) to September (S). Usage peaks in January at approximately 22 Dth and is lowest in May at approximately 2 Dth.

Month	Energy Use (Dth)
O	2
N	3
D	4
J	10
F	12
M	22
A	10
M	5
J	4
J	3
A	3
S	3

Month

Meter Number or Station	Service Period From To	Meter Reading Present Previous Constant	Units Delivered (Mcf)	Heat Content Adjustment (\$/Btu)	Units Billed (Dekatherms)
0000000	09-27-05 10-26-05	1510 1487 1000	4.3	0.2	4.5

Quarterly savings resulting from ONG settlement approved by the OCC order 453681: \$16. Total savings to date: \$16

OKLAHOMA
NATURAL
GAS

OKLAHOMA NATURAL GAS COMPANY

Please return this coupon along with your check.

The Salvation Army's Share the Warmth Program helps disadvantaged Oklahomans with home heating costs. To contribute, please include an overpayment and check here.

Amount payment enclosed (please clearly show dollar and cent amounts)

Account Number	000-0000000-000
Current Charges Due	11-22-05
Total Amount Due	\$79.00
Total Enclosed \$	

#000079 4000000000#
#BWND FVM
#0000000000000000#

CUSTOMER NAME
CUSTOMER ADDRESS
ANYTOWN OK 74102-0000

OKLAHOMA NATURAL GAS
PO BOX 400000
OKLAHOMA CITY OK 73102-0000

01251

45 0000000000000000 000007900

Natural Gas Terms

Cost of Gas (COG) Cost of Gas (referred to as Customer Fuel Cost in Oklahoma) includes the cost the company pays for natural gas, as well as related storage and transportation costs. The COG may also contain other charges approved by the appropriate regulatory authority. State statutes or regulations do not allow the company to mark up the costs of gas.

Customer Charge or Service Charge Customers pay a Customer or Service Charge to help cover the fixed costs of providing natural gas service. Fixed costs include bill processing, meter reading, meter equipment, service line maintenance and customer service personnel.

Delivery Charge Customers pay a Delivery Charge to have natural gas delivered to their residence or business. The charge is based on billed gas usage and may vary monthly.

Cost of Service (Oklahoma) Cost of Service includes the Service Charge and Delivery Charge, as well as additional fees related to ensuring that gas and related services are available when you need them.

Service Fee (Oklahoma) The Service Fee represents a portion of the cost associated with maintaining the company's ability to meet its customers' needs during times of peak demand. This charge applies only to certain rates.

WNA (Kansas and Texas) The Weather Normalization Adjustment (WNA), which is related to normal weather, is applied to the billed usage and appears as a credit, if it is colder than normal, or a debit, if it is warmer than normal. In Kansas, the factor changes annually in April. In Texas, the factor changes monthly.

Gas Hedge Program (Kansas) The Gas Hedge Program is designed to minimize price volatility in the natural gas market. The gas hedge charge is used to protect customers from extreme price increases that may otherwise occur. This charge was previously included in the cost of gas charge.

Temperature Adjustment/TAC (Oklahoma) The Temperature Adjustment offsets the impact of weather variations. It is based on historical weather information and has the effect of reducing bills in colder-than-normal weather and increasing bills in warmer-than-normal weather.

Units of Measure

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Btu Adjustment (Oklahoma) This adjustment is for the heat content of the gas. Btu is the abbreviation for British Thermal Unit, a measurement of the heating value of natural gas.

Constant The Constant is a pressure factor or meter factor used to convert metered volume to billing volume.

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Rate Schedules
Residential Delivery Service
Third Revised Sheet No. 1.1
Effective: May 1, 2002

Residential Delivery Service

Rate R-1

1. Availability

To any Firm Retail Customer for Residential Service at a Residence consisting of four or fewer dwelling units.

2. Rate

The rate shall consist of an Annual Customer Charge, Dedicated Design Day Annual Capacity Charge, Annual Peaking Service Charge and Annual Meter Reading Charge as set forth more fully in the Summary Rate Sheet in effect from time to time. Except for the Dedicated Design Day Annual Capacity Charge, the Customer shall pay 1/12 of the annual charges per month. For bills rendered on and after February 1, 2001, except as provided in Section 8 below, the Dedicated Design Day Annual Capacity Charge shall be billed in accordance with the following schedule:

Month	Percentage
January	18%
February	19%
March	15%
April	8%
May	4%
June	3%
July	3%
August	3%
September	3%
October	3%
November	7%
December	14%

3. Multiple Billing

When the Company provides Residential Service through a single meter installation for two, three or four apartments in a single building or to a number of separate dwelling houses under common ownership on the same Premises, the Annual Customer Charge shall be multiplied by the number of individual dwelling units, and 1/12 of such product shall be paid each month.

Residential Delivery Service (continued)

Rate R-1

4. Minimum Monthly Bill

The minimum monthly bill shall be the sum of the monthly portion for the following charges: Annual Customer Charge, Dedicated Design Day Annual Capacity Charge, Annual Peaking Service Charge and Annual Meter Reading Charge, plus taxes.

5. Seasonal Disconnect/Reconnect

When service is disconnected and reconnected at a single location within a 12-month period, the Customer shall pay a charge of \$25 in addition to the Service Establishment Charge in Part I Section 5 of this tariff. The \$25 additional charge is not applicable for the reconnection of service Shut-off for Non-payment.

6. Unmetered Gas Light Service

Where an unmetered gas light is at a Premises the Design Day Capacity will be increased by the average daily use of such light.



Residential Delivery Service (continued)

Rate R-1

7. Straight Fixed-Variable Sculpting Adjustment

All rates contained within this rate schedule are annual rates designed to comply with Straight Fixed-Variable rate design methodologies required by state law. Consistent with Straight Fixed-Variable rate design, the Company recognizes the revenues from the collection of these annual rates on a uniform monthly basis. As set forth in Section 2 above, the Company has "sculpted" the annual Dedicated Design Day Capacity charge to reflect the seasonality of the residential class usage. For financial accounting purposes, the Company monthly records into a deferred revenue account the difference between the Straight Fixed-Variable Dedicated Design Day Capacity revenues recognized and the Sculpted Dedicated Design Day Capacity collected. The company reconciles such deferred revenue account annually for the period of February 1 through January 31, and applies the appropriate positive or negative adjustment (the SFV Sculpting Adjustment) to the DDDC for a subsequent period.

8. Additional Terms and Provisions

Service under this schedule is subject to the Tariff, including the Terms of Service and Rules and Regulations of the Company, as filed with and approved by the Commission from time to time, as well as all future Riders and tariff provisions made applicable to service under this schedule by the Commission from time to time, including without limitation, the Social Responsibility Rider, Pipeline Replacement Program (PRP) Cost Recovery Rider, Franchise Recovery Rider, Environmental Response Cost Recovery Rider and the Social Responsibility Cost Rider.

Atlanta Gas Light Company
Base Charges For Residential Customers

DDDC Factor: 1.300
 Peaking Pool Group? Yes
 Base Charges for the Month of: January 2008

<u>Charge Name</u>	<u>Rate</u>		<u>Charge</u>
1 Customer Charge	\$9.05	Per Customer	\$9.05
2 Design Day Capacity Charge	\$11.53	Multiplied by the DDDC Factor	\$14.99
3 Meter Reading Charge	\$0.71	Per Customer	\$0.71
4 Peaking Charge	\$0.94	Multiplied by the DDDC Factor	\$1.22
5 Franchise Recovery Fee	\$0.4853	Multiplied by the DDDC Factor	\$0.63
6 Social Responsibility Charge	\$0.2839	Per Customer	\$0.28
7 Customer Education Charge	\$0.00	Per Customer	\$0.00
8 Environmental Response Costs Charge	\$0.7592	Multiplied by the DDDC Factor	\$0.99
9 Pipeline Replacement Program	\$1.29	Per Customer	\$1.29
Total			<u>\$29.16</u>

*Note: Rates and Charges are actual through January 2008
 Any forward-looking rates are estimates and are subject to change.*

<u>Charge</u>	<u>Description</u>
1 Customer Charge	This charge covers the fixed costs that are unique to an individual customer. (For example, the meter, regulator, and the service lines.)
2 Design Day Capacity Charge	This charge recovers all common costs of providing delivery service based on a customer's demand on Atlanta Gas Light Company's system on the coldest day of the year.
3 Meter Reading	This cost will recover the costs of reading the customer's meter.
4 Peaking Service	This charge recovers the cost of operating liquefied natural gas and propane. The charge is only applicable to certain areas of the state.
5 Franchise Recovery Cost	This amount is added to the customer's bill each month to recover fees that Atlanta Gas Light Company pays to cities for the right to use public rights-of-way for the company's gas lines and other facilities.
6 Social Responsibility Cost Rider	The Social Responsibility Cost covers the cost of providing a senior citizens discount to eligible customers. The rider is charged to all residential customers who are not receiving the senior citizens discount.
7 Customer Education	This charge covers the cost of providing customer education regarding deregulation. Program ended as of April 1, 2001.
8 Environmental Recovery Cost	This charge recovers costs associated with the environmental clean-up of Manufactured Gas Plants.
9 Pipeline Replacement Program	This charge covers the cost of replacing aging gas mains and services within Atlanta Gas Light Company's pipes system.

On August 21, 2007, the Commission issued an Order in these dockets for the purpose of investigating the impact of Duke's FPP and PEC's BBP on energy conservation and peak demand. The Order noted that, when Commission approval of these programs was originally requested, certain intervenors expressed a concern that these programs might lead to a lack of conservation by program participants. In addition, the Order also noted that Duke filed a request to revise its FPP on June 8, 2007. In the Staff Conference agenda item which presented this requested revision to the Commission for its consideration, the Public Staff stated that "FPP reports have indicated that, on average, customers who have enrolled in this Program during the first couple of years have increased their energy usage and their contributions to the peak demand at higher levels than a typical residential customer." The Order stated that, given the fact that these programs now have a history of operation and in view of recent legislative developments, the Commission believes it is appropriate to investigate the impact of these programs on energy conservation and peak demand. Therefore, the Order required Duke and PEC to

file comments and any studies on the impact of these programs on energy conservation and peak demand by September 21, 2007, and allowed intervenors to file reply comments by October 22, 2007.

The following sections of this Order present the procedural history of these dockets since the issuance of the August 17, 2007 Order; a summary of the comments of the parties; and the conclusions of the Commission.

PROCEDURAL HISTORY

On September 6, 2007, the Attorney General filed a notice of intervention pursuant to G.S. 62-20.

On September 20, 2007, the North Carolina Waste Awareness Network, Inc. (NC WARN) filed a motion to intervene that was granted by Commission Order dated September 28, 2007.

PEC and Duke filed comments on September 20, 2007, and September 21, 2007, respectively.

On October 22, 2007, the Attorney General filed reply comments. On that same date, the Public Staff filed a motion for an extension of time until October 25, 2007, for itself and all intervenors to file reply comments. The Commission granted the Public Staff's motion by Order dated October 23, 2007.

On October 25, 2007, the Public Staff filed its reply comments. NC WARN also filed reply comments on October 26, 2007.

On November 2, 2007, Duke filed a motion requesting that it be permitted to file rebuttal comments to the reply comments of the Public Staff, the Attorney General, and NC WARN by November 9, 2007. The Commission granted Duke's motion by Order dated November 5, 2007. On November 7, 2007, PEC also sought approval to file rebuttal comments.

On November 9, 2007, Duke and PEC each filed rebuttal comments.

COMMENTS

DUKE: In its comments, Duke noted that it requested Commission approval of the FPP program in 2002 based upon industry data indicating that certain customers highly value a payment option with bill amount certainty. According to Duke, the key benefits of the FPP are the certainty of a fixed bill amount for twelve months, irrespective of weather; the peace of mind that results from knowing there will not be a settle up in the twelfth month;

and, for customers on the Automatic Payment Plan (bank draft), the convenience of knowing the exact amount drafted each month. Duke launched its FPP program in the summer of 2002. Over 110,000 North Carolina customers participate in FPP, which represents approximately 7.5% of the residential class. Duke stated that the impacts of the FPP program on energy conservation and system peak demand are in the range predicted when the FPP program was initially approved and are consistent with Duke's Equal Payment Plan (EPP), which has been in place since 1958.

Duke asserted that its FPP program provides customers with a highly valued billing option. Duke reported that nine renewal campaigns have produced response rates ranging from 83% to 95%, with an average of 90% for all campaigns. Market research studies conducted in 2004 and 2007 indicated that FPP customers have a high level of satisfaction with this program and a higher level of satisfaction with Duke than customers not participating in FPP.

Duke pointed out that the Commission Order approving the FPP concluded that the potential impact of the FPP on energy conservation did not appear to go significantly beyond that experienced under the EPP, a payment plan to which no party objected. Duke stated that any levelized billing program, either with a true-up, such as the EPP, or without a true-up, such as the FPP, can result in increased usage by the customer as the price impact of increased usage is delayed.

At the inception of FPP, Duke relied on its EPP usage data in order to estimate the increased usage for FPP customers. Then Duke began capturing actual FPP usage data in order to estimate increased usage for purposes of developing customers' monthly fixed payments. Usage adders have been adjusted based on trends shown in the data. Duke furnished the following table which shows the factors (in percentages) currently in use for developing customers' monthly fixed payment amounts. The adders are designed to capture the increased usage and to compensate the Company for the increased risk associated with accepting a fixed payment amount.

	<u>Year on FPP</u>			
	<u>1</u>	<u>2</u>	<u>3</u>	<u>4 or More</u>
Usage Adder	5.00%	4.0%	0.0%	0.0%
Normal Growth	0.30	0.3	0.3	0.3
Price Response Factor	<u>1.66</u>	<u>1.7</u>	<u>1.7</u>	<u>0.0</u>
Subtotal	6.96	5.96	1.96	0.30
Value Risk Factor	<u>2.16</u>	<u>2.16</u>	<u>2.16</u>	<u>2.16</u>
Total FPP Adder (Rounded)	9.1%	8.1%	4.1%	2.5%

The Company stated that it has also compared the actual metered usage data of

FPP customers to predicted usage data (based on actual weather experience) in order to approximate the increased usage that is anticipated due to the existence of a fixed monthly payment. The data was gathered from eight enrollment campaigns involving twenty 12-month periods. The usage data was adjusted to exclude the impact of changes due to temperature, but included what would be considered normal growth in customer usage. The average increased usage for Duke's FPP customers developed from this data is presented in the following table.

<u>Usage Increase – Actual vs. Predicted</u>	<u>Percent Increase</u>
Year 1 on FPP	9.3%
Year 2 on FPP	2.9%
Year 3 on FPP	1.3%

Duke opined that this data demonstrates that, as predicted and as seen with EPP customers, FPP customers on average have increased their energy usage somewhat in the first couple of years on the program; however, this trend quickly declines as customers remain on the program.

Duke reported that it has also gathered data related to the impact of FPP on peak demand. Load research data was gathered for a statistical sample of FPP customers and compared to a control group of customers with similar load profiles. The Company found that the FPP sample population indicates a higher usage at peak times than the control group. However, Duke stated that the overall impact on the Company's peak is insignificant given that the kWh sales to customers on FPP are about 2% of Duke's total kWh sales. In 2004, the FPP sample population showed 31% higher usage than the control group, which would affect the system peak by about 0.3%. Further, Duke stated that this trend has declined year by year. In 2006, the FPP sample population showed 11% higher usage, which would affect the system peak by 0.2%. Because a residential customer's air conditioning is likely to be operating continuously during the hours around the summer peak, it seems improbable to Duke that an FPP customer uses more energy at peak times than a non-FPP customer. Duke submitted that the impact on peak demand implied by the data described above may also be attributable to unidentified differences between the FPP sample and the control group.

Duke added that it is exploring options that capitalize on the appeal of FPP while delivering energy efficiency results. Initial customer research shows that energy efficiency options packaged with a fixed bill increases customer interest in such energy efficiency programs and would be likely to increase the level of customer participation in such programs. Duke plans to look for opportunities to combine FPP with energy efficiency options, thereby increasing the likelihood of participation in Duke's overall energy efficiency efforts and increasing energy conservation on the part of FPP customers.

In summary, Duke believes that the FPP is a voluntary billing option with exceptionally high customer satisfaction. The FPP has an effect on usage similar to that occurring under the Company's EPP and, on average, causes increased usage within expected limits during the early years of FPP participation without significantly impacting system peak demand. Duke stated that it will continue to evaluate the opportunity to couple FPP with energy efficiency options. Therefore, Duke submitted that it should continue to offer this valued billing option to its North Carolina retail customers.

PEC: PEC noted that it introduced its BBP in 2004 because industry data indicated that customers highly valued the bill certainty provided by this type of payment option. In addition, PEC submitted that industry evidence showed that customers like a guaranteed billing option and are willing to pay a fee for that guarantee.

In PEC's comments concerning increased usage, PEC stated that it routinely compares the actual and predicted usage of BBP participants (although a formal study was not available). PEC predicts participant usage based upon the most recent 24 months of a customer's usage, adjusted to reflect normal weather. PEC furnished the following table which compares predicted usage to actual usage during the program year for all completed 12 month contract terms:

<u>Participant Year</u>	<u>Enrollment</u>	<u>% Change from Predicted Usage</u>
First	76,213	6.94%
Second	47,242	2.99%
Third	22,285	1.68%

PEC explained that, because the table above shows changes based upon 24 months of usage to determine predicted usage, the percentage changes shown in the table do not represent a true change in annual consumption resulting from the availability of the BBP. According to PEC, the expected increase in usage after three years of participation in the BBP equals 8.6%. PEC stated that the 8.6% expected increase in usage is consistent with PEC's experience with its EPP.

Concerning the impact of its BBP on peak demand, PEC stated that it does not have any relevant data. In creating the BBP, PEC discussed the impact of the program on peak demand with its consultant and concluded that the BBP would not have a significant impact on peak demand. PEC's consultant explained that the primary lifestyle change customers implement when moving to a fixed payment plan is to adopt more comfortable HVAC settings. However, on the peak day when outdoor temperatures approach or exceed 100 degrees, a customer's air conditioning system is operating continuously regardless of whether the thermostat is set at 78 or 75 degrees. Therefore, the impact on the utility's demand does not change. According to PEC, its consultant's view was based primarily on load research conducted by Georgia Power, which concluded that their customers'

demand contribution to the system peak hour was virtually the same before and after the customers received the fixed bill payment option. PEC also reported that it had recently spoken with representatives of Gulf Power and that Gulf Power's research had led to the conclusion that there is minimal impact on system peak demand due to the availability of a fixed payment plan option. Based on the information received from its consultant and the results of studies conducted by Georgia Power and Gulf Power, PEC does not believe that its BBP option has a significant impact on the system peak demand.

PEC also stated that nearly 95% of BBP participants elect to continue the plan when renewal contracts are offered and that such a high renewal rate indicates customer satisfaction with the bill certainty associated with this type of service. In addition, a consultant hired by PEC to conduct telephone surveys in 2005 and 2006 to assess customer satisfaction with the BBP concluded that the program achieved an overall satisfaction rating of 87% in 2006. That consultant also concluded that overall satisfaction was so high that there is little room for improvement in the program. PEC has also found that the offering of diverse products and services is viewed positively by customers. While products such as electronic billing, bank drafts, Green Power, credit card payments, outdoor lighting or fixed payment plans do not appeal to all customers, PEC asserted that many customers highly value such products and view PEC positively for offering them.

PEC reported that it encourages all BBP participants to practice conservation in order to reduce their future BBP payments. This is accomplished by providing an "Energy Conservation" fact sheet to all participants at the time that PEC acknowledges the customer's request for BBP service. Additionally, PEC advises the customer by letter and sends the same fact sheet if a customer's usage exceeds predicted levels by 30% or more for three consecutive months in order to help the customer avoid automatic removal from the BBP. PEC is also engaged in developing new demand side management (DSM) and energy efficiency (EE) programs to encourage customers to shift load and reduce energy. In PEC's opinion, the high level of customer satisfaction with the BBP gives customers greater confidence in other PEC programs, such as DSM and EE, so that PEC believes that BBP will be an excellent marketing channel to more effectively meet its customers' overall energy requirements.

In summary, PEC believes that levelized payment plans, such as the BBP or the EPP, do cause a customer to initially increase usage for one to three years, but do not significantly increase the system peak demand. PEC submitted that the BBP is a highly valued payment option for over 55,000 customers in North Carolina representing over 5% of residential accounts. Renewal rates indicate that nearly 95% of participants request to remain on the program after the first year, highlighting their overall satisfaction with the plan. PEC also anticipates that offering the BBP will enhance customer acceptance of other utility programs, such as future DSM and EE offerings. Overall, PEC concludes that the BBP meets customer needs with only minimal impact on generation additions and should continue to be offered.

REPLY COMMENTS

ATTORNEY GENERAL'S OFFICE: The Attorney General's Office (AGO) stated that it understands that Duke's FPP customers and PEC's BBP customers enjoy the certainty of knowing that their electric bill will be the same each month irrespective of the amount of electricity they use. However, the AGO believes that the Commission should discontinue these fixed payment plans for two reasons. First, the FPP and BBP result in increased usage of electricity without providing any significant benefit beyond that which is available under the EPPs. Second, the FPP and BBP are contrary to the Commission's goal of promoting energy conservation.

The AGO believes that the EPPs offered by Duke and PEC provide customers with essentially the same budgeting tool as the FPP and BBP. However, the AGO contended that the effects of the two billing plans on conservation are quite different. According to the AGO, the FPP or BBP customer is automatically paying for increased usage as part of the tariff and there is no yearly true-up. Conversely, an EPP customer will very obviously pay in month twelve for increased usage if the EPP customer does not conserve. The AGO believes that EPP customers have far more incentive to conserve since they can avoid a large true-up payment, or even receive a true-up credit, in month twelve.

The AGO also noted that both Duke and PEC asserted that the effects of the FPP and BBP on peak demand are negligible because all customers run their air conditioning continuously on hot days. However, the AGO believes that a utility's demand is affected by each consumer's choice of thermostat settings. The AGO furnished an example in which an EPP customer sets a thermostat at 78 degrees while an FPP or BBP customer sets a thermostat at 75 degrees. Using this example, the AGO submitted that when the EPP customer's house temperature reaches 78 degrees, the air conditioning turns off and the EPP customer endures a bit of discomfort because lowering the thermostat will cost the EPP customer at the time of the 12-month true-up. Conversely, when the FPP or BBP customer's house temperature reaches 78 degrees, the air conditioning continues to operate until the house temperature reaches 75 degrees, because the FPP or BBP bill will be the same in month twelve even if the customer conserves electricity. Therefore, the FPP or BBP customer continues contributing to the peak demand.

The AGO also contended that the FPP and BBP are inconsistent with public policy. The AGO first cited G.S. 62-2(a)(3a), pursuant to which electric utilities have a duty to give energy efficiency and conservation equal consideration with generation options in meeting their customers' needs. The AGO also cited G.S. 62-155, under which the Commission is required to set rates in a manner that promotes conservation. In the 2005 IRP proceeding, Docket No. E-100, Sub 103, the Commission concluded in its Order dated August 31, 2006, that there is a need for a renewed focus on energy efficiency and conservation. According to the AGO, the Commission's Order was based largely upon the

testimony of over one hundred consumers and the general agreement among the parties that rising fuel costs, the prospect that additional baseload generation would be needed, and heightened environmental concerns have brought about the need for more attention to DSM, energy efficiency, and conservation as alternatives to building new generating facilities. Finally, the AGO cited Senate Bill 3 as the most recent public policy statement on the need for all consumers to conserve electricity. However, the AGO argued that the FPP and BBP send the opposite message because those programs tell customers that if they have the money to pay a monthly fixed amount, they need not be concerned with conservation. Therefore, the AGO stated that the Commission should correct this inconsistency by closing the FPP and BBP.

In summary, the AGO recommended that the Commission should require Duke and PEC to close the FPP and BBP to new customers and phase customers off of these programs over a time period that the Commission finds reasonable.

NC WARN: NC WARN recommends that the FPP and BBP be discontinued because these programs encourage customers to increase their usage of electricity. NC WARN believes the basic problem with these programs is that they do not provide customers with any feedback about their electricity use that encourages them to use less electricity. NC WARN stated that the increased use by customers in these programs has been documented in this case and that customers in these programs simply use more electricity than do other customers. While NC WARN acknowledged the popularity of these programs, it stated that such popularity does not translate into a positive policy that benefits the customers, the utilities or the State in general.

NC WARN took the position that the FPP and BBP are demand increasing programs (DIP) and are contrary to the Commission's clear mandate to promote energy conservation. According to NC WARN, any program that increases electricity sales should be closely scrutinized by the Commission under G.S. 62-2(a)(3a) to determine if any positive factors outweigh the negative ones. NC WARN believes that eliminating DIPs like these would have a direct and significant impact on the need to build new power plants.

Given the focus of several recent Commission dockets concerning energy efficiency and the mandate of Senate Bill 3, NC WARN stated that here is one opportunity for the utilities to eliminate demand without causing ratepayers any increase in their bills. The monthly service charge and fees for risk associated with these programs are designed to recover the actual costs of the programs.

NC WARN added that it fully agrees with the AGO's comments. Therefore, NC WARN recommended that the Commission require the utilities to close the FPP and BBP to new customers and phase out existing customers as soon as possible.

PUBLIC STAFF: The Public Staff stated that it was not surprising that FPP and BBP

participants are very well satisfied with these programs because they enable customers to hedge against the risks of adverse weather and to increase their electrical usage at no short-term cost.

The Public Staff also stated that it disagreed with Duke and PEC that FPP and BBP participants use no more energy at the peak than other customers. According to the Public Staff, utilities often assert that air conditioning units run continuously at the peak, but common experience shows that this assertion is incorrect. The Public Staff claimed that an air conditioner runs continuously at the peak only in unusual situations, such as when a unit is undersized. Moreover, the Public Staff pointed out that a utility's residential load at system peak does not consist entirely of air conditioning. Customers use other appliances at the time of peak. The Public Staff added that, after reviewing the peak usage studies cited in Duke's comments, and comparing those studies to data submitted by Duke in its annual reports on the FPP to the Public Staff and the AGO, the Public Staff believes that a reasonable range of increased peak usage for FPP participants on a going forward basis is from 10% to 20%. Although PEC has not conducted any studies of BBP participants' peak usage, the Public Staff believes it is reasonable to assume that their usage patterns are generally similar to the FPP participants of Duke.

Concerning the annual usage of FPP and BBP participants, the Public Staff noted that Duke and PEC stated that the typical first-year FPP and BBP participant experiences an increase of 7% to 9% in annual usage over the preceding year, and in subsequent years, usage by participants continues to increase, but at a slower pace. The Public Staff reported that Duke had advised the Public Staff that the average third year FPP customer's usage is about 9.9% higher than the customer's usage before the year he or she joined the program. Similarly, PEC stated that the typical increase in usage after three years of BBP participation is about 8.6%. After its review of the utilities' comments, the Public Staff concluded that the usage increases estimated by Duke and PEC appear to be reasonable.

In summary, the Public Staff stated that it is aware of the widespread acceptance of the FPP and BBP and their usefulness as a hedging mechanism for customers. Nevertheless, in the Public Staff's view, these programs are no longer appropriate and should be terminated. According to the Public Staff, the General Assembly and the people of the State have become increasingly concerned about the need to conserve electric power and minimize emissions of pollutants and greenhouse gases. Further, the Commission has encouraged the utilities to increase their energy efficiency efforts, and much of the impetus for this encouragement has come from the utilities themselves. The Public Staff also cited Senate Bill 3, which declares that it is the policy of the State "[t]o promote the development of renewable energy and energy efficiency." The Public Staff believes it would be inconsistent to allow the continuation of programs that have the effect of encouraging increased electric usage at a time when the Commission is pushing the State's utilities to develop new energy conservation programs. Therefore, the Public Staff recommended that the FPP and BBP be closed to new customers; that existing

agreements relating to participation be allowed to continue into effect, but not be renewed or extended beyond their current terms; and for any further relief the Commission may deem just and proper.

REBUTTAL COMMENTS

DUKE: In its rebuttal comments, Duke requested that the Commission not discontinue the FPP billing option, as recommended by the AGO, NC WARN and the Public Staff, and urged the Commission to allow the Company to continue to make that option available to the customers who highly value a payment option with bill amount certainty. Duke stated that the program renewal rates clearly show that customers electing to participate in FPP are extremely satisfied with the program.

In response to the AGO's position that the FPP signals customers that they need not be concerned with conservation, Duke stated that it has always been clear that any levelized billing program, either with a true-up (the EPP) or without a true-up (the FPP), can result in increased usage by the customer because the price impact of increased usage is delayed. Duke argued that the AGO and NC WARN are simply incorrect in implying that a FPP customer has no incentive to conserve electricity, because an FPP customer's fixed payment amount for the next year is based on the customer's usage in the prior period.

Contrary to NC WARN's characterization of the FPP as a demand increasing program, Duke characterized the FPP as a customer billing option, such as the EPP. Further, Duke stated that its comments demonstrated that the impact of the FPP on system peak is minimal and that NC WARN's claim that eliminating this option would have a direct and significant impact on the need to build new power plants is also incorrect.

Duke agreed with the intervenors that energy efficiency and conservation must be taken into consideration in meeting customers' energy needs and that there is heightened concern in this regard. Duke stated that it has increased its efforts in this area as evidenced by its request for approval of a new energy efficiency plan in Docket No. E-7, Sub 831. However, Duke believes that promoting this policy goal need not be at the expense of providing customers with valued options such as the FPP. Rather than accept the tyranny of "either/or", Duke reported that it is exploring options that capitalize on the appeal of the FPP while delivering energy efficient results. As noted in its earlier comments, Duke stated that it will look for opportunities to incorporate FPP with energy efficiency options. Therefore, Duke requested that the Commission consider delaying any decision that would discontinue the FPP billing option until resolution of matters related to the proposed energy efficiency plan in Docket No. E-7, Sub 831.

PEC: PEC stated that it offers the BBP because its customers indicated a strong desire for this service. PEC now has over 62,000 customers subscribing to the BBP.

According to PEC, the issue before the Commission is whether this customer option should be eliminated because it may result in incremental increases in electricity usage. PEC believes that a thorough evaluation makes it apparent that the potential of the BBP for causing incremental increases in electricity usage is not a valid basis for depriving 62,000 customers of this service. PEC also stated that a service offering that improves the utility's load factor is desirable because it allows the utility to provide more efficient and economical service. Furthermore, PEC stated that it has several other tariffs that arguably result in incremental electricity usage, including its declining block rate tariffs, the Large General Service Real Time Pricing tariff, and its economic development rate tariffs. PEC submitted that all of these tariffs meet important customer needs, just like the BBP tariff, and should not be withdrawn.

PEC believes that the BBP should not be terminated if meeting customer needs and customer satisfaction are important goals.

CONCLUSIONS

The Commission Order issued in this proceeding on August 17, 2007, required Duke and PEC to file comments and any studies on the impact of these programs on energy conservation and peak demand.

With respect to the impact of these programs on energy conservation, Duke's filing shows that FPP customers increase energy usage on average by 9.3% in the first year, 2.9% in the second year, and 1.3% in the third year as compared to predicted energy usage. PEC's filing shows that BBP customers increase energy usage by 6.94% in the first year, 2.99% in the second year, and 1.68% in the third year as compared to the predicted level of energy usage. Thus, based on the studies of Duke and PEC, the average FPP or BBP customer increases energy usage approximately 7% to 9% in the first year of participation. However, the increases in usage decline in the second and third years of participation. The average increase in usage in the third year of participation is approximately 1% to 2% over the predicted level of usage. Overall, PEC stated in its comments that the average increase in usage after three years of participation in the BBP is approximately 8.6% and, according to the comments of the Public Staff, Duke has stated that the average third year FPP participant's usage is about 9.9% higher than the usage in the year before the customer enrolled in the FPP. The Public Staff also stated that the usage increases estimated by Duke and PEC appear to be reasonable.

Concerning the impact of these programs on peak demand, Duke reported that load research data gathered for a statistical sample of FPP customers and compared to a control group showed that FPP customers had 31% higher usage at peak than the control group in 2004. Duke also reported, however, that this trend has declined year by year and that, in 2006, the FPP sample showed 11% higher usage. Further, Duke stated that the impact on peak demand implied by the data may be attributable to unidentified differences between the FPP sample and the control group. PEC stated that it has no data regarding the impact of its BBP on peak demand. Both PEC and Duke believe it is improbable that FPP or BBP customers use more energy at peak than other residential customers because they believe air conditioning units run continuously at peak. The Public Staff does not believe air conditioning units run continuously at peak, except in unusual situations, and noted that a utility's residential load at peak consists of more than air conditioning. Based upon its review and Duke's data and studies, the Public Staff believes that a reasonable range of increased peak usage for FPP participants on a going-forward basis is from 10% to 20% and that it is reasonable to assume a similar usage pattern for PEC's BBP participants.

Both Duke and PEC acknowledge that customers in these programs initially increase energy usage, but they believe that these voluntary billing options should continue to be offered. Duke reported that over 110,000 of its North Carolina customers are currently enrolled in the FPP, and PEC reported that it now has over 62,000 customers

subscribing to the BBP. The utilities believe that renewal rates in excess of 90% and marketing research indicate exceptionally high customer satisfaction with these programs.

Both Duke and PEC also submit that these programs could be coupled with EE or DSM initiatives and believe that the high level of customer satisfaction associated with these programs could increase customer acceptance of a combined offering.

The AGO, NC WARN, and the Public Staff argue that these programs should be closed to new customers and phased out for existing customers. The AGO stated that these programs result in increased energy usage without providing any significant benefit to customers beyond that which is available under the EPP and that these programs are contrary to the Commission's goal of promoting energy conservation. NC WARN agrees with the AGO and added that the popularity of these programs does not translate into a positive policy that benefits customers, the utilities or the State in general. NC WARN believes that the basic problem with these programs is that they do not provide customers with any feedback about their electricity use that encourages them to use less electricity. The Public Staff believes that the usage increases estimated by Duke and PEC for the FPP and BBP are reasonable and that the same factors which cause participants to increase their overall usage would similarly lead them to increase their usage at peak times. Despite the widespread acceptance of the FPP and BBP, the Public Staff believes these programs are no longer appropriate in light of the enactment of Senate Bill 3 and the fact that the Commission has expressed interest in new energy conservation programs and that they should be terminated.

After careful consideration of the entire record in this proceeding, the Commission concludes that the FPP and the BBP should be closed to all customers who are not enrolled in, or have not made application to participate in, these programs as of the date of this Order, but that Duke and PEC should be allowed to indefinitely continue to offer these programs for the limited purpose of allowing renewals by participants who were enrolled or had applied to participate in these programs at the time of closure. The Commission has reached this conclusion in an attempt to balance its obligation to encourage appropriate energy efficiency, conservation and demand side management efforts, G.S. 62-2(a)(3a), (4), and (10), on the one hand, and its obligation to ensure the implementation of just, reasonable and economical rates for consumers, G.S. 62-2(a)(3) and (4), on the other.

The undisputed information in the record establishes that customers that have opted to participate in the FPP and BBP programs have a high degree of satisfaction with this billing option. Although most customers taking service under the FPP and BBP likely pay a higher per unit charge than customers taking service under more traditional rate schedules as a result of the inclusion of a risk factor and an administrative fee in the development of the annual fixed payment amount, these additional payments compensate the utilities for the additional risks they face as a result of the existence of the programs, and the Commission has previously concluded that these fees are just and reasonable. Before a customer begins to take service under these programs, he or she is given an

estimate of his or her proposed fixed payment amount and information concerning his or her past bills. At the end of each contract period, the utilities provide each customer with the updated fixed payment amount and a statement of the amounts he or she would have paid under more traditional rate schedules. As a result, a customer electing to participate in these programs should be well aware of the fact that he or she is paying a premium for the opportunity to participate in these programs, effectively eliminating any concern that the FPP and BBP schedules unfairly overcharge customers compared to more traditional rate schedules. Thus, there is no reason for the Commission to reject the utilities' claims that participating customers are highly satisfied with the FPP and BBP, and we conclude that this fact should be taken into consideration in deciding these dockets. However, the fact that customers like the FPP and BBP is not conclusive in light of the countervailing considerations that the Commission must take into consideration as well.

All information submitted in this proceeding shows that FPP and BBP participants increase electric usage during the initial three years of enrollment. In addition, the record suggests that program participation may be associated with increased peak demand as well. As the AGO, NC WARN, and the Public Staff have correctly pointed out, the General Assembly and the Commission have placed increased emphasis on the importance of energy efficiency, conservation, and demand side management as a solution for the challenges resulting from higher fuel and other input prices, increasing demand and the potential need for the construction of new generating facilities. The factors that have led to this increased emphasis on energy efficiency, conservation and demand side management have become much more pronounced than they were at the time that the FPP and BBP were initially approved. In fact, this change in circumstances is the reason that the Commission undertook a review of the FPP and BBP in this proceeding. In addition, we now have evidence of the actual nature and extent of the impact of the FPP and BBP on customer consumption and peak demand. Upon carefully weighing the information in the present record, the Commission concludes that the high level of customer satisfaction with the FPP and BBP programs does not justify the impact on customer energy consumption and peak demand resulting from the addition of new customers to these programs. As a result, the Commission concludes that, given the fact that the FPP and BBP tend to result in increased usage and peak demand by program participants, particularly in the initial year of program participation, and the Commission's desire to encourage cost-effective energy efficiency, conservation and demand side management efforts, the continued availability of the FPP and BBP plans to new participants is not in the public interest and that these plans should be closed to new customers.

The Commission's decision to eliminate the FPP and BBP for new customers does not, however, resolve the question of what should be done about the fact that there are approximately 170,000 satisfied residential customers currently receiving service on these plans. Although the Commission has an obligation to foster cost-effective energy efficiency, conservation and demand side management efforts, it also has a duty to ensure that appropriate options are available to consumers. G.S. 62-133.6(g). As a result, the

Commission has to balance the desire of existing customers to remain on these programs with the Commission's interest in facilitating appropriate energy efficiency, conservation and demand side management efforts. In reaching the conclusion that existing program applicants and participants should be allowed to remain on the FPP and BBP, the Commission concludes that the relatively limited increased usage and peak demand associated with service provided to these customers is outweighed by the countervailing policy of allowing utilities to provide desirable service alternatives.

No party to this proceeding has suggested that the mere fact that a rate, tariff or programs results in some degree of increased usage, standing alone, necessitates a decision to eliminate the availability of that rate schedule. Although the record suggests that the long-standing EPP programs offered by both Duke and Progress have effects on customer usage and peak demand similar to that resulting from the FPP and BBP, there has been no call in this proceeding for the elimination of the EPP. On the contrary, the parties to this proceeding seem to uniformly support the EPP. During recent periods of high natural gas prices, the Commission has called on natural gas utilities to expand the availability of EPP programs to assist customers in their efforts to cope with markedly higher bills. While the fact that there is an annual true-up associated with the EPP that is not found in the FPP and BBP might mean that EPP customers have a greater incentive to conserve than customers participating in the FPP and BBP, the present record does not contain any evidence verifying the correctness of this conclusion. As a result, given the similar effect of these plans on customer usage and peak demand and the fact that there have been no challenges to the continued existence of the EPP, the Commission concludes that all parties agree that the mere fact that a particular rate has a tendency to result in increased customer usage or peak demand, standing alone, does not justify the complete elimination of that tariff.

Furthermore, the undisputed evidence suggests that the largest increase in customer consumption under the FPP and BBP comes in the first year of participation. In other words, year by year comparisons of the rate of increase in usage shows that the usage increase is greatest in the first year of participation and that the rate of increase in usage declines in both years two and three. No information on usage beyond the third year was furnished or available. While the exact impact of these programs on peak demand is not as clear, one can safely assume that the same rate of increase pattern would exist with respect to peak demand. Thus, the energy efficiency, conservation and peak demand control benefit that would result from closing the FPP and BBP to new customers is significantly greater than any benefit that would result from ending the FPP and BBP for existing program participants. Any argument to the contrary assumes that existing FPP and BBP customers that return to more traditional rate schedules will reduce their energy consumption to previous levels, a proposition for which there is no support in the record. Any customer that has actual usage that exceeds estimated usage by 30% or more for three consecutive months is subject to removal from the FPP or BBP, so that there is a remedy if an existing customer significantly increases his or her usage while

remaining on the FPP or BPP. As a result, by closing the FPP and BPP to new customers, the Commission will have achieved the bulk of the energy efficiency benefits that are available from modification or elimination of the FPP and BPP without depriving existing program customers of the benefits of a program with which they are satisfied.

The record further reflects that there is at least some possibility that the availability of the FPP and BPP can be associated with improved energy efficiency and conservation efforts. Both Duke and PEC indicated that the high levels of customer satisfaction associated with the FPP and BPP could provide a platform for enhanced energy efficiency, conservation and demand side management efforts. In allowing existing customers to stay on the FPP and BPP, the Commission concludes that Duke and PEC should explore the prospects for combining the FPP and BPP with enhanced energy efficiency, conservation and demand side management efforts and file a report with the Commission within six months from the date of this Order updating the Commission about the status of this effort and proposing the adoption of any FPP or BPP-related energy efficiency, conservation or demand side management programs that should be considered in conjunction with the continued availability of the FPP and BPP to existing customers.

In addition, the effect of the Commission's decision to allow existing FPP and BPP participants to remain on those schedules after they are closed to new customers is tantamount to a phase-out of these two programs. Although renewals will be allowed on a grandfathered basis, as participants decide not to renew participation, move out of the service areas, or move to different residences or dwelling units within the service areas, any impact of these programs on usage and peak demand will be reduced and eventually eliminated. Although the proponents of eliminating the FPP and BPP have urged the Commission to remove existing customers from the programs, all of them recognize the need for an appropriate transition mechanism for the 170,000 customers currently taking service under these programs. The Commission's decision to allow existing customers to remain on these programs until they are no longer eligible or no longer wish to participate is a transition mechanism that differs from the approaches urged by the AGO, NC WARN, and the Public Staff only insofar as it provides for a longer transition period than each of them thought to be appropriate.

In summary, the Commission believes this decision is fair and reasonable; that it will promote harmony between Duke, PEC, and their consumers; and that it is consistent with the full range of policy objectives that the General Assembly has instructed the Commission to implement. The Commission believes that the result reached in this proceeding represents a fair balance between the need to encourage energy efficiency, conservation and demand side management and the need to provide customers with rate schedules which serve their interests. As a result, the Commission concludes that Duke's FPP and PEC's BPP should be closed to new customers and that existing customers, including customers who have made application to participate in these programs as of the date of this Order, should be allowed to remain on the FPP and BPP until those customers

either elect to refrain from, or become ineligible to continue, participating in these programs.

IT IS, THEREFORE, ORDERED as follows:

1. That the Fixed Payment Program tariff of Duke and the Residential Balanced Bill Payment Plan tariff of PEC shall be closed to new participants effective as of the date of this Order;

2. That Duke and PEC shall be allowed to continue to offer these programs on a grandfathered basis for the limited purpose of renewals by participants who had enrolled in or applied to participate in these programs as of the date of this Order;

3. That Duke and PEC shall file a report with the Commission within six months of the date of this Order updating the Commission concerning their efforts to develop programs that work in conjunction with the Fixed Payment Program and the Balanced Bill Program to encourage energy efficiency and conservation by customers continuing to take service under those tariffs; and

4. That Duke and PEC shall continue to file and provide the program reports required by the previous Commission Orders in these dockets.

ISSUED BY ORDER OF THE COMMISSION.

This the 14th day of March, 2008.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in cursive script that reads "Patricia Swenson".

Patricia Swenson, Deputy Clerk

mr031408.01

Commissioners Robert V. Owens, Jr., Lorinzo L. Joyner, and William T. Culpepper, III concur in part, but dissent with respect to the Majority's decision to allow renewals by participants in these programs.

DOCKET NO. E-7, SUB 710
DOCKET NO. E-2, SUB 847

Commissioners Lorinzo L. Joyner and Robert V. Owens, Jr., Concurring in Part and Dissenting in Part: We concur with the decision to close Duke's Fixed Payment Program plan and PEC's Balanced Bill Payment plan to new participants. However, we dissent from the Majority's decision to allow Duke and PEC to continue to offer these programs to current participants indefinitely, on a grandfathered basis. Instead of allowing customers to renew enrollment in these programs, we believe that the Commission should have required that existing agreements between Duke and PEC and their customers be terminated at the end of their current terms.

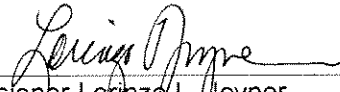
The information filed in these dockets clearly shows that these programs cause increased usage and higher peak demands which are contrary to the public policy goals of promoting energy efficiency and conservation.¹ While the Commission's decision to close these programs to new participants will allow Duke and PEC to avoid the highest increase in usage that has been shown to occur in the first year of participation, the negative impact of these programs is not limited to the initial year of participation. According to the record, participants also continue to increase usage in years two and three, by 3.0% and 1.5%, respectively. Further, Duke's load data for 2006 indicates that FPP customers have 11% higher usage at time of peak and the Public Staff believes that a reasonable range of increased peak usage by participants in these programs on a going-forward basis is from 10% to 20%. Given this evidence, we are hard pressed to understand why the Majority has opted to allow Duke and PEC to offer 170,000 customers renewals in these programs, especially in the face of opposition from all the consumer representatives that intervened in these dockets.

The Majority stresses the popularity of the programs and contends that its decision to permit Duke and PEC to allow renewals their current FPP and BPP customers is tantamount to phasing them out over time. We find absolutely nothing in the Majority Order that causes a phase-out. Before and after the Majority's decision, existing program participants control when and if their participation in the programs ends. So long as a participating customer does not voluntarily leave the program, does not move out of the service area or does not move to a different dwelling, he may continue in the program indefinitely.

We appreciate the fact that participating customers value the opportunity to enroll in these plans and that virtually all of them respond positively to the Companies' renewal campaigns. Under different circumstances we would likely support their ability to continue to enroll and renew. However, the promotion of energy efficiency and conservation are

¹ The importance of these goals has been re-emphasized in recent legislative enactments, which served as the impetus for the Commission, on its own motion, to institute the instant investigation. See Order Requesting Further Information, issued 21 August 2007, in Docket No. E-7, Sub 710, and E-2, Sub 847. ("In view of recent legislative developments, the Commission believes it is appropriate to investigate the impact of Duke's FPP and Progress' BPP on energy conservation and system peak demand.")

declared public policy goals that appear throughout Chapter 62 of the North Carolina General Statutes. Having first concluded as a matter of public policy that these programs should be closed to new applicants, the Commission was then required to balance the promotion of energy conservation and the desires of 170,000 customers. Because we do not believe that the programs' popularity, standing alone, transformed them from bad public policy into good public policy, we think that the balance struck by the Majority missed the mark. If the negative impacts of these programs necessitated their closure to new participants, then those same negative impacts should have compelled the Commission to prevent indefinite renewals.



Commissioner Lorenzo L. Woyner



Commissioner Robert V. Owens, Jr.

DOCKET NO. E-7, SUB 710
DOCKET NO. E-2, SUB 847

Commissioner William T. Culpepper, III, concurring in part and dissenting in part:

I can certainly understand and appreciate the reasoning behind the Majority's decision to allow the continuation of the FPP and BPP programs on a grandfathered basis, because this represents a middle-ground compromise between the positions of the parties to these dockets. However, I am of the opinion that a decision that allows these programs to continue indefinitely with respect to over 170,000 existing residential customers plus some unknown number of new customers who have applied to participate in these programs as of the date of this Order is effectively at odds with the current public policy of this State (as recently espoused by our General Assembly's enactment of Senate Bill 3) that has led this Commission to unanimously conclude that the subject programs should be closed to new participants. Moreover, I am of the belief that the customer satisfaction elements cited by Duke and PEC in their comments can also be achieved by properly designed EPP programs. In this regard, I am of the opinion (having not been convinced otherwise by the record before the Commission in these dockets) that the EPP program sends more appropriate price and energy conservation signals to the residential customer than do the FPP and BPP programs.

Therefore, while I concur with all of the members of the Commission in closing the FPP and BPP tariffs to new participants, I dissent from the Majority's decision to allow a continuation of these tariffs for existing participants and applicants. I believe that it would have been more in line with current public policy to have adopted the Public Staff's recommendation that existing FPP and BPP agreements be allowed to continue into effect, but not renewed or extended beyond their current terms.



Commissioner William T. Culpepper, III

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Summary: Reply Reply Brief by the Office of the Ohio Consumers' Counsel. electronically filed by Mrs. Bonnie C Morava on behalf of Office of the Ohio Consumers' Counsel