

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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

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

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June 27, 2008

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The Office of the Ohio Consumers' Counsel ("OCC") applies for rehearing of the May 28, 2008 Opinion and Order ("Order") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). Through this Application for Rehearing, OCC seeks to protect approximately 380,000 residential utility customers of Duke Energy Ohio, Inc. ("Duke" or "Company") from the consequences of the straight fixed variable ("SFV") rate design ordered by the Commission.

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Order was unjust, unreasonable and unlawful and the Commission abused its discretion because:

- A. The Commission erred by approving a rate design that unreasonably violates prior Commission precedent and policy.
- B. The Commission erred by approving a rate design that includes an increase to the monthly residential customer charge without providing consumers adequate notice of the SFV rate design pursuant to R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43.

- C. The Commission erred by approving an SFV rate design that discourages customer conservation efforts in violation of R.C. 4929.05 and R.C. 4905.70.
- D. The Commission erred when it failed to comply with the requirements of R.C. 4903.09, and provide specific findings of fact and written opinions that were supported by record evidence.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and OCC's claims of errors, the PUCO should reverse its Order.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. PROCEDURAL HISTORY	4
III. STANDARD OF REVIEW	7
IV. ARGUMENT	8
A. The Commission Erred By Approving A Rate Design That Unreasonably Violates Prior Commission Precedent And Policy.....	8
1. The Commission’s Order violates PUCO precedent.	8
2. The Commission’s Order unreasonably approved an SFV rate design that is an unprecedented change in policy and magnitude.....	14
B. The Commission Erred By Approving A Rate Design That Includes An Increase To The Monthly Residential Customer Charge Without Providing Consumers Adequate Notice Of The SFV Rate Design Pursuant To R.C. 4909.18, R.C. 4909.19 And R.C. 4909.43.	17
C. The Commission Erred By Approving An SFV Rate Design That Discourages Customer Conservation Efforts In Violation Of R.C. 4929.05 And R.C. 4905.70.	20
1. The SFV rate design sends the wrong price signal to consumers.	22
2. SFV rate design does not remove the customers’ disincentive to invest in energy efficiency because the SFV rate design extends the pay back period for energy efficiency investments made by consumers.....	24
3. The Commission’s contention that the SFV rate design encourages Company participation in energy conservation efforts disregarded the fact that Duke has an existing DSM program.	26
D. The Commission Erred When It Failed To Comply With The Requirements Of R.C. 4903.09, And Provide Specific Findings Of Fact And Written Opinions That Were Supported By Record Evidence.....	28

1.	The record supports implementation of an SFV rate design as a pilot.	28
2.	The record fails to support the Order that low-income customers benefit from an SFV rate design.....	33
3.	The record does not support reliance on budget billing to support adopting an SFV rate design.	37
V.	CONCLUSION.....	39

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)	

MEMORANDUM IN SUPPORT

I. INTRODUCTION

At a time when the public rightly demands increased transparency and accountability in government, its regulation of utilities, and the process of setting energy prices, the PU CO has turned its back on transparency and accountability in favor of black box regulation that is wholly unaccountable. This is not good policy in the best of times, and it most certainly is not good policy in times like these when every dollar counts – when utility customers testify in public hearings, as they did in this case, about hard choices between food or heat during a long, cold winter.

In this case, the Commission is seeking to ensure that Duke has sufficient revenues to cover its fixed costs in a time when residential consumer usage is declining. The Commission has identified two ways that accomplish this objective: (1) a straight fixed variable rate design; and (2) a decoupling mechanism. A straight fixed variable rate design provides the utility with revenues by dramatically increasing the fixed

monthly customer charge. The utility collects its revenues and there is no accounting for any over-recovery. Customers can anticipate hearing from the utility at such time in the future when those revenues are no longer sufficient, but not before. On the other hand, a decoupling mechanism provides a solution that is more gradual in its application and that is trued-up on an annual basis to more fairly address the problem of lost revenues attributable to declining customer usage.

The one claimed benefit of the SFV rate design is that it gives the utility its revenue in an easy to administer fashion, however it also comes with a cost in that it discourages customers from making rational energy efficiency investments by increasing the pay back period. Such anti-conservational impacts must not be ignored. Another benefit of decoupling over the SFV rate design is that decoupling does not force small users - - especially low and moderate income consumers with small homes - - to subsidize larger and perhaps less efficient users by being charged the same amount regardless of consumption. And while the Commission relied on evidence in the record of a subset of low-income customers - - Percentage of Income Payment Plan (“PIPP”) customers, use more gas than the average consumers and thus benefit from the SFV rate design - - the Commission ignored the fact that not all low-income customers are PIPP customers, and evidence indicating that other low-income customers use less than the average customers and are in fact harmed by the SFV rate design. Furthermore, payments made by PIPP customers are not usage based but income based, so any change in rate for PIPP customers will not affect a PIPP customer’s consumption decisions while on PIPP.

OCC is particularly concerned about the effects of the SFV rate design on Ohio's working poor. From a social justice standpoint, a public policy that forces a struggling family living just above the poverty line in a small apartment with the thermostat turned low to pay as much as the wealthy homeowners with large homes is unconscionable. The Company and the Commission Staff have failed to demonstrate that such subsidies are not occurring. They have failed to provide evidence to demonstrate that all, or even a majority of low-income customers are using more natural gas than large customers, and they have failed to establish a public policy rationale to charging low users the same amount as large users.

In sharp contrast to these problems encountered with an SFV rate design is a decoupling mechanism which is accountable, transparent and fair. The utility gets its Commission-authorized revenues, but unlike the SFV rate design, customers have a mechanism that ensures fairness by providing a credit if the utility over-collects. Furthermore, a decoupling mechanism sends more accurate and appropriate price signals to customers encouraging less use and conservation. Decoupling provides customers the tools to lower their consumption. Decoupling also benefits society by motivating individual customers to engage in energy efficiency. According to a study by the American Council for an Energy-Efficient Economy ("ACEEE"), if consumption can be reduced by 1 percent per year every year for five years, then the price of natural gas can be reduced by 13% due to reduced demand.¹

OCC does not dispute that a utility is entitled to a reasonable opportunity to recover its authorized costs and revenues for serving customers. However, OCC disputes

¹ American Council for an Energy-Efficient Economy, Report No. U051, *Examining the Potential for Energy Efficiency To Help Address the Natural Gas Crisis in the Midwest*, (January 2005) at 5.

the rate design the Commission has chosen to achieve that goal. Decoupling is a transparent and accountable rate design; SFV is a black box, providing no transparency or accountability. Decoupling protects customers from over-compensating the utility; SFV simply guarantees utility cost recovery and revenue which may exceed the utility's revenue requirements. Decoupling provides the appropriate price signals for customers who conserve; while SFV sends contrary signals. Decoupling provides customers with more tools to control their usage; SFV reduces those tools. Decoupling encourages energy efficiency; SFV removes disincentives for the utility to promote conservation but discourages conservation by certain customers. Decoupling allows for gradual price increases; SFV results in large rate increases contrary to the concept of gradualism. Decoupling does not create social justice concerns of small users subsidizing large users; SFV ignores those social justice concerns. Decoupling requires an annual true-up -- a little extra work, but work that is merited and rightly expected by the public; SFV requires utility consumers to accept higher rates and expect little protection or concern from their government.

The Commission is strongly and respectfully urged to encourage conservation and protect vulnerable Ohioans by rejecting the straight fixed variable rate design and returning to the current rate design or adopting a decoupling mechanism with appropriate consumer safeguards.

II. PROCEDURAL HISTORY

On June 18, 2008, Duke filed a Pre-Filing Notice of its intent to increase rates for the natural gas distribution service that is provided through its gas pipelines. Duke also requested the continuation of its accelerated main replacement program ("AMRP") for

charging customers for the replacement of the pipelines in its service area. On July 18, 2007, Duke filed its application (“Application”) in these cases (“Rate Case”), to increase the rates that customers pay.

Motions to Intervene were filed by the Office of the OCC,² Stand Energy Corporation (“Stand”),³ Ohio Partners for Affordable Energy (“OPAE”),⁴ Ohio Energy Group (“OEG”),⁵ Kroger Co. (“Kroger”),⁶ Interstate Gas Supply, Inc. (“IGS”),⁷ City of Cincinnati (“City”),⁸ People Working Cooperatively (“PWC”),⁹ Integrys Energy Services, Inc. (“Integrys”),¹⁰ and Direct Energy Services, LLC. (“Direct”).¹¹

On August 1, 2007, the Company filed the direct testimony of sixteen Company witnesses and outside experts. On December 20, 2007, the PUCO Staff filed its Staff Report of Investigation (“Staff Report”) and the Report of Conclusions and Recommendations on the Financial Audit by Blue Ridge Consulting Services, Inc. (“Blue Ridge Report”).

Between January 18, 2008 and January 22, 2008, OCC, Duke, OPAE, OEG, IGS, Direct, Integrys and PWC filed objections to the Staff Report, and Summaries of Major

² OCC Motion to Intervene (July 12, 2007).

³ Stand Motion to Intervene (July 18, 2007).

⁴ OPAE Motion to Intervene (July 26, 2007).

⁵ OEG Motion to Intervene (August 1, 2007).

⁶ Kroger Motion to Intervene August 14, 2007).

⁷ IGS Motion to Intervene August 17, 2007).

⁸ City Motion to Intervene (August 24, 2007).

⁹ PWC Motion to Intervene January 16, 2008).

¹⁰ Integrys Motion to Intervene (January 18, 2008).

¹¹ Direct Motion to Intervene (January 18, 2008).

Issues.¹² On January 29, 2008, pursuant to a PUCO Entry,¹³ OCC filed testimony of six witnesses,¹⁴ and Duke filed the Supplemental Testimony of five witnesses.¹⁵ On February 22, 2008, Duke filed Second Supplemental Testimony for seven witnesses.¹⁶

On February 28, 2008, the parties to the cases entered into a Stipulation and Recommendation (“Stipulation”) that settled all issues except for the rate design issue involving the fixed monthly customer charge. The major issues that OCC and the other parties settled include *inter alia* a fair and reasonable revenue requirement, a fair compromise to the tariff subsidy issue, a continuation of the AMRP with reasonable price caps, and establishment of a program to address the safety concerns and replacement of risers in a reasonable time period.¹⁷ Under the Stipulation, OCC and OPAE reserved their right to litigate the rate design issue, and the City did not take a position on this issue. The PUCO Staff and Duke proposals for rate design represent a radical departure from decades of PUCO regulation of natural gas Local Distribution Companies (“LDCs”) in Ohio.

¹² OCC, Duke, and OPAE were the only parties who filed objections that specifically addressed the rate design issue that was the subject of litigation in the evidentiary hearing.

¹³ Duke Rate Case, Entry (January 7, 2008) Granting OCC’s Motion for Extension to file testimony.

¹⁴ OCC Ex. No. 1 (Adams Direct Testimony), OCC Ex. No. 2 (Hagans Direct Testimony), OCC Ex. No. 3 (Hayes Direct Testimony), OCC Ex. No. 4 (Hines Direct Testimony), OCC Ex. No. 5 (Gonzalez Direct Testimony), and OCC Ex. No. 6 (Yankel Direct Testimony).

¹⁵ Duke Ex. No. 17; (Hebbeler Supplemental Testimony); Duke Ex. No. 18 (Morin Supplemental Testimony); Duke Ex. No. 19 (P. Smith Supplemental Testimony); Duke Ex. No. 20 (Stork Supplemental Testimony); Duke Ex. No. 21 (Wathen Supplemental Testimony).

¹⁶ Duke Ex. No. 22 (Storck Second Supplemental Testimony); Ex. No. 23 (Morin Second Supplemental Testimony); Ex. No. 24 (Hebbeler Second Supplemental Testimony); Ex. No. 25 (Riddle Second Supplemental Testimony); Ex. No. 26 (Wathen Second Supplemental Testimony); Duke Ex. No. 27 (M. Smith Direct Testimony); Duke Ex. No. 28 (O’Connor Direct Testimony).

¹⁷ Staff Ex. No. 2 (Hess Direct Testimony) at 4-5.

The Commission held local public hearings in Cincinnati on February 25, 2008 and in Mason on March 11, 2008, and the evidentiary hearings were conducted on March, 5-6, 2008. On March 6, 2008, the OCC filed rebuttal testimony.¹⁸ The Attorney Examiners established a briefing schedule with initial briefs due on March 17, 2008, and reply briefs due on March 24, 2008.

The Commission issued its Opinion and Order (“Order”) on May 28, 2008, in which the Commission approved the modified SFV rate design. On June 3, 2008, OPAE filed a Motion to Stay Implementation of the May 28, 2008 Opinion and Order and Issuance of the Entry Approving the Tariffs (“Motion to Stay”). On June 4, 2008, OCC filed a letter in support of OPAE’s Motion to Stay. Later that same day, the PUCO issued an Entry denying OPAE’s Motion to Stay and approving Duke’s tariff’s. OCC advocates for the Commission to reconsider its decision to approve a modified SFV rate design and reject the unprecedented quadrupling of the monthly customer charge from \$6.00 to as much as \$25.33 and all but end the time-honored practice of billing customers per cubic foot of the gas they use as the most significant part of the customer distribution cost determined in a base rate proceeding.

III. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty (30) days after issuance of an order from the Commission, “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the

¹⁸ OCC Ex. No. 17 (Yankel Rebuttal Testimony); and OCC Ex. No. 18 (Gonzalez Rebuttal Testimony).

proceeding.” Furthermore, the application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”¹⁹

In considering an application for rehearing, Ohio law provides that the Commission “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.”²⁰ Furthermore, if the Commission grants a rehearing and determines that “the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same * * *.”²¹

OCC meets the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10. Accordingly, OCC respectfully requests that the Commission grant rehearing on the matters specified below.

IV. ARGUMENT

The Commission’s Entry was unjust, unreasonable and unlawful in the following particulars:

A. The Commission Erred By Approving A Rate Design That Unreasonably Violates Prior Commission Precedent And Policy.

1. The Commission’s Order violates PUCO precedent.

The Commission’s Order approved a rate, for Duke’s residential customers, design that features a fixed monthly customer charge of \$15.00 through September 30,

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

2008 (approximately four-months),²² \$20.25 for the balance of year one (approximately eight-months) and \$25.33 in year two and beyond.²³ Thus, after one-year, customers will see their customer charge more than quadruple. Given that the current customer charge is \$6.00 per month, these increases are not gradual increases. Rather these increases to the fixed portion of the customer charge represent enormous and unprecedented increases in the customer charge and they violate the principle of gradualism. Commissioner Centolella voiced his concern for the PUCO's pace to implement an SFV rate design by stating:

In my view, the pace of the transition in this case is more rapid than should be selected given the consumer expectations created by long-standing rate design practices * * *.²⁴

The Commission has consistently identified gradualism as one of the regulatory principles that it has incorporated as part of its decision-making process. Yet in these cases, the Commission ignored over thirty-years of precedent regarding the application of gradualism to the customer charge. The Commission's failure to be guided by its own regulatory principles in these cases is a reasonable basis for granting rehearing.

In a Columbia Gas, Case No. 88-716-GA-AIR, the Commission noted that the Staff recommended a Customer Charge of \$6.00, which was lower than the calculated charge of \$7.79, based on principles of gradualism and stability.²⁵ As part of its decision, the Commission concluded:

²² Order at 20.

²³ Order at 20, citing Joint Ex. No. 1 (Stipulation) at Exhibit 2.

²⁴ Order at Opinion of Commission Paul A. Centolella Concurring in Part and Dissenting in Part page 2 of 4.

²⁵ *In the Matter of the Applications of Columbia Gas of Ohio, Inc., to Establish a Uniform Rate for Natural Gas Service Within the Company's Lake Erie Region, Northwest Region, Central Region, Eastern Region, and Southeastern Region*, Case No. 88-716-GA-AIR et. al, ("1988 Columbia Gas"), Opinion and Order (October 17, 1989) at 87.

While it is true that the customer charge proposed by the staff might not recover all customer-related costs, *it is important to note that costs, while very important, are not the only factor to consider in establishing the charge. The Commission must also consider the customers' expectations, acceptance, and understanding in setting rates and balance these factors accordingly with the determined costs.*²⁶

In accepting the Staff position in the Columbia Gas case, the Commission noted that “[t]he Staff’s application of the accepted ratemaking principles of gradualism and stability is reasonable.”²⁷ Both the Staff Report and the Opinion and Order in another Columbia Gas, Case No. 89-616-GA-AIR²⁸ echoed the same belief in and reliance on gradualism.

The Commission noted that:

Staff contends that its proposed customer charge of \$6.25 is reasonable, since the customer charge is meant to provide a utility only with a partial recovery of its fixed costs and since the charge it proposes is in keeping with the accepted ratemaking principles of gradualism and stability.²⁹

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

We heard a great deal of testimony at the local hearings regarding the detrimental impact that an increase in the customer charge would have on low income customers (See, Cincinnati Tr. 29-30, 54, 61, 93). *We believe that it is appropriate in this case to keep the customer charge at its current level in order to minimize rate shock that would otherwise be experienced by residential customers.*³⁰

²⁶ Id. at 89. Emphasis added.

²⁷ Id.

²⁸ *In the Matter of the Applications of Columbia Gas of Ohio, Inc., to Establish a Uniform Rate for Natural Gas Service Within the Company’s Northwestern Region, Lake Erie Region, Central Region, Eastern Region, and Southeastern Region*, Case No. 89-616-GA-AIR et. al. (“1989 Columbia Gas”), Opinion and Order (April 5, 1990) at 80-82.

²⁹ *1989 Columbia Gas* at 80.

³⁰ Emphasis added. *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in Its Rates for Gas Service to All Jurisdictional Customers*, Case No. 95-656-GA-AIR, Opinion and Order (December 12, 1996) at 46.

The Staff view of gradualism, as noted throughout the many Staff Reports has been in the context of Company-proposed customer charge increases of only \$2.00 to \$4.00.³¹ In most cases, the Staff Report notes that in making its recommendation, the Staff recognized and prescribed to ratemaking principles of gradualism within the revenue distributions.³² This same language also appeared in Northeast Ohio, Case No. 03-2170-GA-AIR where the Staff Report stated, “[i]n recommending customer charges, Staff recognizes and prescribes to the established ratemaking principle of gradualism within the revenue distribution.”³³

The same or similar statement appears in the Cincinnati Gas & Electric, Case No. 01-1228-GA-AIR, Staff Report,³⁴ in the Cincinnati Gas & Electric, Case No. 92-1463-GA-AIR Staff Report,³⁵ Columbia Gas of Ohio, Case No. 91-195-GA-AIR Staff Report,³⁶ Dayton Power & Light Company, Case No. 91-415-GA-AIR Staff Report,³⁷ and the River Gas Company, Case No. 90-395-GA-AIR Staff Report.³⁸

³¹ OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at Exhibit WG-2.

³² *In the Matter of the Complaint and Appeal of Oxford Natural Gas Company from Ordinance No. 2896, Passed by the Council of the City of Oxford on February 7, 2006*, Case No. 06-350-GA-CMR, Staff Report (September 19, 2007) at 26.

³³ *In the Matter of the Application of Northeast Ohio Natural Gas Corp. for an Increase in its Rates and Charges for Natural Gas Service*, Case No. 03-2170-GA-AIR, Staff Report (August 29, 2004) at 44.

³⁴ *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in its Gas Rates in its Service Territory*, Case No. 01-1228-GA-AIR, Staff Report (January 1, 2002) at 57.

³⁵ *In the Matter of the Application of the Cincinnati Gas & Electric Company to File an Application for an Increase in Gas Rates in its Service Area*, Case No. 92-1463-GA-AIR, Staff Report (March 17, 1993) at 29.

³⁶ *In the Matter of the Application of Columbia Gas of Ohio, Inc., to Increase Gas Sales and Certain Transportation Rates Within its Service Area*, Case No. 91-195-GA-AIR, Staff Report (August 25, 1991) at 58.

³⁷ *In the Matter of the Application of the Dayton Power and Light Company for Authority to Amend its Filed Tariffs to Increase the Rates and precedents Charges for Gas Service*, Case No. 91-415-GA-AIR, Staff Report, (November 13, 1991) at 45.

³⁸ *In the Matter of the River Gas Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Service*, Case No. 90-395-GA-AIR, Staff Report (October 29, 1990) at 31.

Staff Witness Puican explained the Staff's shift away from the prior application of gradualism by noting that "the concept of gradualism makes sense when prices are relatively stable. There was simply no compelling need to make large changes in it."³⁹ Despite this justification, Staff offered no evidence to support this claim. Staff provided no support because this reasoning is flawed. Rather than needing gradualism when prices are relatively stable, gradualism is most needed and valued as a regulatory policy during a time of higher prices and greater price volatility. Gradualism in the form of mitigating a customer charge increase from \$6.77 to \$6.00⁴⁰ or from \$5.23 to \$5.00⁴¹ or even keeping it at \$5.70⁴² at a time when commodity prices are at a lower level is less important or necessary compared to when a \$6.00 customer charge may increase to \$15.00, \$20.25 or even \$25.33, and when the commodity prices are over \$8.00/Mcf.⁴³ The need for gradualism grows as consumers face greater costs; the need does not decline.

The Commission stated in its Opinion and Order that Staff held, "the evidence of record clearly indicates that Duke's revenue erosion problem is real and that the levelized rate design is the better way to balance the utility's desire for recovery of its authorized return with promotion of energy efficiency as a customer and societal benefit through

³⁹ Tr. Vol. I at 205-206.

⁴⁰ *In the Matter of the Application of the Cincinnati Gas & Electric Company to File an Application for an Increase in Gas Rates in its Service Area*, Case No. 92-1463-GA-AIR, Staff Report (March 17, 1993) at 29.

⁴¹ *In the Matter of the Application of the Dayton Power and Light Company for Authority to Amend its Filed Tariffs to Increase the Rates and precedents Charges for Gas Service*, Case No. 91-415-GA-AIR, Staff Report, (November 13, 1991) at 45.

⁴² *In the Matter of the Application of the Cincinnati Gas & Electric Company for an Increase in Its Rates for Gas Service to All Jurisdictional Customers*, Case No. 95-656-GA-AIR, Opinion and Order (December 12, 1996) at 45-46.

⁴³ OPAE Ex. No. 1 (Natural Gas Graph), Tr. Vol. I at 160.

control of energy bills.”⁴⁴ The Commission’s reasoning ignored the fact that, if there was a revenue erosion problem with Duke (which OCC and OPAE contended that there is not), the Company still has the option of filing an Application To Increase Rates On An Emergency Temporary Basis (AEM) which is defined on the Commission website as an application by a public utility to temporarily alter its rate structure to prevent injury to the business or public. (R.C. 4909.16). With this in mind, the alternative decoupling mechanism proposed by OCC could be adopted and Duke would still have a rate making option to fall back on, other than a full-blown rate case, if revenue erosion were to become too severe.

However, if the Commission is determined to move towards a SFV rate design, (which OCC argues it should not), the minimum the PUCO should consider on rehearing a more gradual approach to the ultimate goal of an SFV rate design. This would be consistent with Commissioner Centolella’s stated position that:

over the long-term, moving in the direction of a SFV rate design is preferable to keeping a modest customer charge and relying entirely on a decoupling adjustment.”⁴⁵

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

⁴⁴ Order at 13.

⁴⁵ Order at Opinion of Commissioner Paul A. Centolella Concurring in Part and Dissenting in Part at 1.

2. The Commission's Order unreasonably approved an SFV rate design that is an unprecedented change in policy and magnitude.

The Commission's Order neither explains its rationale for ignoring the principle of gradualism nor justifies disregarding thirty-years of Commission rate design precedent. In his rebuttal testimony OCC witness Gonzalez explained the regulatory principle of gradualism as being one in which a regulator attempts to *minimize* the impact of rate changes on the industry and customers.⁴⁶ In this case, the principle of gradualism takes on an important role because of the radical nature of the change in price the Commission has unreasonably approved and also because of the unprecedented sheer magnitude of the fixed monthly residential customer charge increase. Both of these factors are exemplified by the fact that prior to the filing of this case, no Ohio LDC had ever requested a customer charge as large as the \$15.00 customer charge initially approved through September 30, 2008,⁴⁷ let alone the \$20.25 or \$25.33 customer charges ultimately approved in these cases based solely on the Staff's recommendation.

Not only did OCC witness Gonzalez testify to the concept of gradualism as being one in which a regulator attempts to *minimize* the impact of rate changes on customers, the PUCO Staff also identified gradualism as a rate design principle.⁴⁸ Although Staff witness Puican testified that Staff had followed the same rate design methodology to calculate the customer charge since 1978,⁴⁹ and that Staff had previously put a "lot of

⁴⁶ OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 14.

⁴⁷ Order at 20.

⁴⁸ OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 14, See also, Staff Ex. No. 3 (Puican Direct Testimony) at 3-4, and Tr. Vol. I at 205.

⁴⁹ Tr. Vol. I at 204.

emphasis on the concept of gradualism,”⁵⁰ the only gradualism applied in this case was that instead of a move to a complete SFV rate design, the move was to a modified form of SFV that was to be phased in over a two-year period.⁵¹

In practical terms this meant that instead of an increase from the current \$6.00 monthly customer charge⁵² to a \$30 monthly customer charge⁵³ (400 percent increase), the increase would be limited to an increase of \$9.00 (150 percent increase) through September 30, 2008, and \$14.25 to a total customer charge of \$20.25 for the balance of year one (238 percent increase), and an increase of \$19.33 to a total customer charge of \$25.33 in year two (322 percent increase). Thus, the Commission applied gradualism in order to “limit” the increase in the customer charge in this case to only \$9.00 or 150 percent through September 30, 2008 and \$14.25, or 238 percent for the balance of year one, and \$19.33 or 322 percent in year two.⁵⁴

In previous cases, the largest difference between the current customer charge and the Staff recommended customer charge was \$4.34⁵⁵. The magnitude of the difference between the current customer charge (\$6.00) and the Commission approved customer charges in this case (\$9.00, \$20.25 and \$25.33) are more than two times larger than the largest previous differential.⁵⁶

⁵⁰ Tr. Vol. I at 205.

⁵¹ Tr. Vol. I at 209.

⁵² Although Duke Witness Smith attempted to characterize the current AMRP charge of \$5.77 as part of the customer charge, he ultimately acknowledged that the current customer charge does not include the AMRP charge and was only \$6.00. Tr. Vol. I at 171.

⁵³ Tr. Vol. I at 147.

⁵⁴ Tr. Vol. I at 171 (Any ensuing AMRP charge would be added to this customer charge for an even larger fixed charge).

⁵⁵ *In the Matter of the Application of Eastern Natural Gas Company to Increase Rates for Its Natural Gas Service Area and Related Matters*, Case No. 89-1714-GA-AIR, Staff Report, (June 14, 1990) at 22.

⁵⁶ *Id.*

The Commission's approved residential rate design in these cases constitutes a fundamental change from a position held for the previous 30 years⁵⁷ in which the Staff recommended a relatively small fixed charge and a larger variable charge to make up the total customer charge. The customer charge increases for Columbia Gas of Ohio, Inc. ("COH") have totaled only \$2.95 over a 26-year period, for DEO have been only \$1.70 over the same 26-year period and for Vectren Energy Delivery of Ohio ("Vectren"), they have totaled \$2.85 over a 25-year period.⁵⁸ The result is that the Commission's approved rate design in these cases has more than double, triple or even quadruple what other Ohio gas utilities and their customers have experienced over the past quarter century.

More importantly, the PUCO Staff Recommended Customer Charge has consistently been within \$2.50 of the then-current customer charge, with only one instance -- Eastern Natural Gas, Case No. 89-1714-GA-AIR -- where it was greater. This illustrates the radical departure the Commission has taken in these cases when compared to the past thirty years of rate design precedents. Moreover, given the volatility of natural gas prices and the fact that customers have had to absorb significant increases ranging from 200 to 300 percent, gradualism in distribution charges is a welcomed tool in the arsenal to keep gas service affordable for Duke residential customers.

⁵⁷ See Tr. Vol. I at 204, where Mr. Puican referenced a 1978 case. *In the Matter of the Application of Columbia Gas of Ohio, Inc., for an Increase in the Rates to be Charged and Collected for Gas Service in the Village of Mt. Sterling, Ohio*, Case No. 77-1309-GA-AIR, *In the Matter of the Application of Columbia Gas of Ohio, Inc., for an Increase in the Rates to be Charged and Collected for Gas Service in the City of Martins Ferry, Ohio*, Case No. 77-1428-GA-AIR, Opinion and Order (May 24, 1979) at 12-13. Where the Commission noted that "In these proceedings, applicant proposes to replace this rate with a rate structure incorporating a fixed monthly customer charge reflecting costs which do not vary with usage and a uniform rate per Mcf for gas consumed." at 12. The Commission further concluded that, "*The Commission has approved this type of rate schedule in the belief that it is cost-justified and with the interests of conservation firmly in view*" (emphasis added) at 13. Thus the Commission recognized a customer charge comprised of a low customer charge and a volumetric rate better served conservation.

⁵⁸ OCC Ex. No. 5 (Gonzalez Direct Testimony) at 9-10, and Attachment WG-1.

The Commission should adhere to its own precedent and reverse its Order on rehearing and approve a more gradual move to an SFV rate design over a longer-term period of time.

B. The Commission Erred By Approving A Rate Design That Includes An Increase To The Monthly Residential Customer Charge Without Providing Consumers Adequate Notice Of The SFV Rate Design Pursuant To R.C. 4909.18, R.C. 4909.19 And R.C. 4909.43.

The Commission's Order unreasonably and unlawfully approved the SFV rate design despite the fact that the impact on customers' bills resulting from such rate design had not been sufficiently noticed pursuant to Ohio law. The notice requirements for an application for a traditional rate case and for an alternative rate case can be found under R.C. 4909.18, 4909.19 and 4909.43. In this case, the Company failed to provide consumers notice with sufficient detail of the residential rate design as approved by the Commission.

R.C. 4909.18 provides that, unless otherwise ordered by the commission, the public utility must file, along with its application to the commission, "[a] proposed notice for newspaper publication fully disclosing the substance of the application." And, irrespective of whether the utility is required to file such notice with the commission, R.C. 4909.19 provides that the utility must publish once a week for three consecutive weeks in newspapers of general circulation throughout the affected areas *the substance and prayer of its application*.⁵⁹ Duke provided the following notice to the mayors and legislative authorities of each municipality pursuant to R.C. 4909.43:

⁵⁹ R.C. 4909.19 (emphasis added).

Finally, DE-Ohio also proposes a new rate structure for delivery service that is not based upon the volume of gas delivered. Rather than allowing our annual delivery revenues to fluctuate with volumes flowed, we will compare our sales each year to a benchmark, which is the weather normalized level of sales approved by the Public Utilities Commission of Ohio in our most recent general gas rate case, adjusted for new customers added since that time. We will then compare our actual sales to this baseline, and provide customers a credit or charge to account for the difference.⁶⁰

This notice describes a rate design that features a decoupling mechanism with annual true-ups which is substantially different than the residential SFV rate design that the Commission approved in its Order.⁶¹

Furthermore, the notice does not describe the impact that a change to the rate design would have on the customer charge. Under the Company's proposal the fixed customer charge was proposed to increase to \$15.00⁶² from its current \$6.00⁶³ per month. The Commission approved a rate design that initially implements a \$15.00 fixed customer charge (through September 30, 2008),⁶⁴ increases it to \$20.25 per month (for the balance of the first year, and then increases the customer charge to \$25.33 per month thereafter.⁶⁵ These dramatic increases to the monthly fixed charge are not explained to consumers anywhere in the notices the Company provided. Therefore, the substance of the notice did not sufficiently explain to consumers Duke's rate design that the Commission approved.

⁶⁰ PFN (June 18, 2007) at 8-2.

⁶¹ Order at 25.

⁶² PFN Exhibit 3 (June 18, 2007) at Sheet No. 30.14.

⁶³ PFN Exhibit 3 (June 18, 2007) at Sheet No. 30.13.

⁶⁴ Order at 20.

⁶⁵ Order at 20 citing Joint Ex. No. 1 (Stipulation) at Exhibit 2.

This is analogous to the *Committee Against MRT, et.al. v. Public Util. Comm.* Case in which Cincinnati Bell Telephone through an R.C. 4909.18 rate proceeding sought to change the existing rate design for its residential and business customers. In an accompanying exhibit filed with the Commission, Cincinnati Bell described the nature and effect of this new method of charging customers, whereby rates would be based on a minimum fee plus a usage charge.⁶⁶ However, except for a general reference to the exhibits which did contain information on the proposed new service, no mention of the service was made in the notices themselves.⁶⁷ The Court stated:

From reading the notice published in their local newspapers, subscribers opposed to usage rates would not have known of the innovative plan being introduced by the utility, would not have had any reason to view the exhibits on file with the commission, nor would they have had any interest in participating in the hearings held before the commission. Thus, because of the insufficient notice, appellants were not only denied an opportunity to present evidence at the hearings before the commission opposing the selection of the experimental area for measured rate service, but also were denied the opportunity to challenge the new rate service itself.

We therefore conclude that Cincinnati Bell, in order to insure an opportunity for its subscribers to be heard, was required under R.C. 4909.19 to specifically mention its proposed measured rate service in its published notice regarding rate increases.

Duke's notice in this case was likewise insufficient, and the Commission should reverse its Order.

⁶⁶ *Committee Against MRT, et .al. v. Public Util. Comm.* (1977), 52 Ohio St. 2d 231. (In this Case, Duke's residential rate design is changing from a low customer charge with high volumetric charge to a high customer charge with a low volumetric charge; whereas, in *Committee Against MRT*, Cincinnati Bell was changing its rate design from a high or flat fixed charge and no volumetric charge to a low fixed charge and a volumetric charge.

⁶⁷ *Id.*

The Commission stated in its Order that, “27 witnesses testified at two local hearings in Cincinnati while four people took the stand at the Mason hearing.”⁶⁸ It must be noted that even all of this opposition and outcry was based on the original Company proposed customer charge increase from \$6.00 to \$15.00.⁶⁹ The Commission did not provide the public, as required under R.C. 4903.083, with public notice regarding the fact that the Commission might approve future customer charges of \$20.25 and \$25.33.⁷⁰

The Ohio Supreme Court has stated that the purpose of R.C. 4909.18(E) is “to provide *any person*, firm, corporation, or association, *an opportunity to file an objection to the increase under R.C. 4909.19.*”⁷¹ Without notice of the specific nature and dramatic increases to the customer charge incorporated in Duke’s residential rate design, the public does not have the statutory opportunity to participate in the proceedings.

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

The Commission’s approval of an SFV rate design is 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:

* * *

⁶⁸ Order at 3.

⁶⁹ Duke Prefiling Notice at Current Tariff Sheet No. 30.13 (Customer Charge per month - \$6.00), and Duke Prefiling Notice at Proposed Tariff Sheet No. 30.14 (Customer Charge per month - \$15.00).

⁷⁰ Joint Ex. No. 1 (Stipulation) at Exhibit 2.

⁷¹ *Committee Against MRT, et.al. v. Public Util. Comm.* (1977), 52 Ohio St. 2d 231, 234. (Emphasis added.)

(4) Encourage innovation and market access for cost-effective supply-and demand-side natural gas services and goods;⁷²

For a number of reasons, approval of an SFV rate design by the Commission impedes the development of DSM innovation in Ohio. For example, the SFV rate design: sends consumers the wrong price signal; will harm consumers who have invested in energy efficiency by extending the payback period; and will take away control that consumers have over their utility bills.

The Commission has a statutory duty to initiate programs that promote conservation. R.C. 4905.70 states:

The public utilities commission shall initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs.

The SFV rate design serves the Company's limited cost recovery interests, but fails to promote conservation for the reasons discussed below. State Policy and statutory mandates direct the Commission to act such that the rate design influence has a positive effect on energy conservation.

The Commission has the responsibility to approve rates that are just and reasonable.⁷³ An SFV rate design does not meet the State policy of promoting energy efficiency⁷⁴ and violates the legislative mandate to the Commission to initiate programs to promote and encourage conservation.⁷⁵ In fact, the Commission has approved a sizeable amount of energy efficiency programs for Duke which are currently in place. It is

⁷² R.C. 4929.02.

⁷³ R.C. 4909.18 and R.C. 4909.19.

⁷⁴ R.C. 4929.02(A)(4).

⁷⁵ R.C. 4905.70.

important that as part of the compact to make energy efficiency a success, that the Commission consider not only company incentives and revenues but also customer incentives to participate in programs. If customers invest in energy efficiency only to see their payback periods extended, this may have a chilling effect on continued investments in energy efficiency. Such an outcome is anathema to the intent of the law. Therefore, the SFV rate design results in the implementation of rates that are unjust and unreasonable, and the Commission should reverse its Order on rehearing.

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

The Commission's Order improperly states that a "levelized rate design sends better price signals to customers."⁷⁶ It is widely accepted that high natural gas prices generally send a signal to consumers that encourages conservation.⁷⁷ The SFV rate design contradicts that basic message because it decreases the volumetric rate while significantly increasing the fixed portion. Commission Centolella echoed this consideration by stating:

Experience shows that there is a significant price response to increases in volumetric charges, as evidenced by the recent steep reductions in average per customer consumption as gas cost increased. Given that customer charges are paid to provide access to gas service, it is reasonable to expect comparatively less price response with respect to increases in the customer charge.⁷⁸

⁷⁶ Order at 19.

⁷⁷ Tr. Vol. I. at 160.

⁷⁸ Order at Opinion of Commission Paul A. Centolella Concurring in Part and Dissenting in Part page 2 of 4.

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,⁷⁹ because as consumers use more natural gas the per unit price decreases under the SFV design.⁸⁰ In fact, the highest usage customers (the top 35 percent),⁸¹ will see a 6 percent to 21 percent decrease in their total bills from their current bills.⁸² This is absolutely the wrong price signal to send consumers making decisions on the consumption of a precious natural resource.

The residential rate design plays an important role in the promotion of the energy efficiency programs in Duke's service territory. On cross-examination, Duke Witness Storck agreed that a rate design with a lower fixed customer charge and a higher volumetric rate would be the optimum rate design for the customer to achieve savings from its energy efficiency investments.

Q. The most optimum opportunity for consumers to realize true savings from their energy efficiency investments would be a rate design in which the customer charge is set as low as possible and the company recovers more base revenues through a volumetric rate?

A. That would probably be most for the customer, would be most benefit for the customer but not for the company * *

* ⁸³

As Duke admitted, the customer who would reap more savings from an investment in a high efficiency furnace would be the customer under the rate design that was structured with a lower fixed customer charge, such as \$6.00, and a higher volumetric charge as

⁷⁹ OCC Ex. No. 5 (Gonzalez Direct Testimony) at 14.

⁸⁰ Tr. Vol. I at 50; See also OCC Exhibit No. 5 (Gonzalez Direct Testimony) at 15.

⁸¹ OCC Ex. No. 5 (Gonzalez Direct Testimony) at WG-2.

⁸² OCC Ex. No. 5 (Gonzalez Direct Testimony) at 17.

⁸³ Tr. Vol. I at 30.

compared to the rate design with a higher fixed customer charge, such as \$15.00, \$20.25, or \$25.33 and a lower volumetric rate.⁸⁴ The Commission unreasonably ignored this analysis when approving the rate design in this case.

The SFV rate design fails to send the proper price signal to encourage conservation. The reasons for the Company's concern with the present rate design (consisting of a lower customer charge and a higher volumetric rate) has to do with collecting a fixed amount of revenue, no matter what the weather conditions and not the desire for the customers to conserve. It must be noted that rates are set by the Commission in order to permit the Company an "opportunity" to collect a fair rate of return -- rates are not designed to "guarantee" the utility anything.⁸⁵ However, the opportunity to develop a more stable revenue stream can be addressed by the implementation of decoupling mechanism with appropriate safeguards.

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

2. SFV rate design does not remove the customers' disincentive to invest in energy efficiency because the SFV rate design extends the pay back period for energy efficiency investments made by consumers.

The Commission in its approval of the residential rate design improperly looked at the conservation issue solely from the Company's perspective by stating, "that a rate

⁸⁴ Tr. Vol. I at 48.

⁸⁵ *Bluefield Water Works & Improvement Company v. Pub. Serv. Comm. of West Virginia*, 43S, Ct. 675, 692 (June 11, 1923) ("A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public * * *; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.").

design that prevents a company from embracing energy conservation efforts is not in the public interest.”⁸⁶ The PUCO failed to acknowledge that in order for DSM programs to work, the Company needs the consumers to participate. That means that customers need incentives too. However, the PUCO has taken a giant step backwards by admitting, in its Order, that the SFV rate design “will modest[ly] increase the payback period for customer-initiated energy conservation measures.”⁸⁷

The Commission’s decision to approve an SFV rate design is internally inconsistent with the following statement:

What we are attempting to do today is to provide appropriate incentives, through a rational pricing scheme, to encourage a reduction in the consumption of natural gas. By "rational", I mean a balanced approach that penalizes neither those whom have already squeezed the last cubic foot of natural gas from their budget, nor those whom might be inclined to "over-conserve".⁸⁸

It is uncontroverted in the record, that those customers who have invested in additional home insulation and purchased more efficient furnaces and water heaters as a rational response to increasing gas costs (and in response to Ohio State policy) will see their investment returns diminished and payback periods lengthened as a result of an SFV rate design.⁸⁹ The SFV rate design discourages customer conservation. OCC argued that the SFV rate design approved by the Commission is sufficiently different to materially alter customer economies when contemplating an energy efficiency investment.⁹⁰

⁸⁶ Order at 18.

⁸⁷ Order at 19.

⁸⁸ Order at Concurring Opinion of Chairman Alan R. Schriber page 1 of 3.

⁸⁹ OCC Ex. No. 5 (Gonzalez Direct Testimony) at 18.

⁹⁰ at Exhibit WG-3.

As argued by OCC, “[t]he SFV rate design does not maintain the customer incentive to conserve and further mutes the price signal to the customer.”⁹¹ Therefore, a decoupling mechanism provides more of a “proper balance” between the Company and the consumer, rather than an SFV rate design which only addresses the Company’s need for revenue stabilization. The decoupling mechanism addresses the Company’s need for revenue stabilization and also rewards consumers who invest in energy efficiency. If the Commission believes that Duke is under-earning and has a disincentive to promote energy efficiency, then the PUCO should approve a rate design which incorporates an appropriate decoupling mechanism. That approach would benefit both customers and the Company. Therefore, it was unreasonable for the PUCO to adopt the more extreme SFV rate design, which only benefits the Company.

3. The Commission’s contention that the SFV rate design encourages Company participation in energy conservation efforts disregarded the fact that Duke has an existing DSM program.

In these cases, the Commission relies on an argument that lacks merit as a means to support its decision to move to an SFV rate design. The Commission stated:

In contrast, under the current pricing scheme, the gas company has no incentive to encourage conservation because those same usage sensitive rates might flow through to fixed costs as consumption grows, much to the utility's advantage. Under the SFV, the fixed costs are covered and the company makes no money on the gas commodity. Therefore, the company might actually promote conservation more aggressively.⁹²

The Commission’s argument that the SFV rate design reduces the Company’s disincentive to promote energy conservation is also without merit in these cases because

⁹¹ OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 2.

⁹² Order at Concurring Opinion of Chairman Alan R. Schriber page 2 of 3.

Duke already has a three-year DSM pilot program in place.⁹³ The DSM pilot program was approved by the Commission prior to Duke's filing its Application in this case, and thus was done prior to and without the necessity of an SFV rate design. In addition, Duke has been spending \$2 million annually on low-income weatherization, and through these cases has agreed to spend another \$1 million.⁹⁴ Therefore, the Company has no disincentive to promote energy efficiency that needs to be reduced. In fact, if the Company deemed that it needed an "energy efficiency incentive" through an SFV rate design that incentive was set by the Company itself with its proposed \$15 fixed customer charge in its Application. There was absolutely no need for the Commission to increase the fixed customer charge by an additional 66.6%.

Unfortunately, the SFV rate design approved by the Commission fails to offer customers the necessary incentives to invest in energy efficiency and in fact constitutes a disincentive. The cost per unit under the SFV rate design declines as consumption grows which sends the wrong price signal, and the customers who invest in energy efficiency investments face longer payback periods.⁹⁵ The Commission was faced with a decision to implement a rate design that has a negative impact on a customer's payback analysis, or a rate design that positively impacts the payback analysis. The Commission's Order does not adhere to the state policy in R.C. 4929.02 and R.C. 4905.70, because it failed to approve the rate design that included a smaller customer charge (\$6.00), a higher

⁹³ *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), See also OCC Ex. No. 5 (Gonzalez Direct Testimony) at 12-13. (Duke's DSM Program is designed to reduce the level of usage by, at a minimum, .75 percent to two percent of verified annual energy reductions as a result of implementing the Company's comprehensive energy efficiency programs.).

⁹⁴ Joint Ex. No. 1 (Stipulation) at 12, ¶12.

⁹⁵ Tr. Vol. I at 50, 58.

volumetric rate, and a decoupling mechanism with appropriate safeguards. Therefore, the residential rate design as approved by the Commission, in these cases, is unjust and unreasonable because it is harmful to consumers and violates state law and should; therefore, be reversed by the Commission on rehearing.

D. The Commission Erred When It Failed To Comply With The Requirements Of R.C. 4903.09, And Provide Specific Findings Of Fact And Written Opinions That Were Supported By Record Evidence.⁹⁶

1. The record supports implementation of an SFV rate design as a pilot.

The Commission has admitted that the impacts of the dramatic change in residential rate design on conservation and low income consumers were unknown.

Chairman Schriber stated:

All told it is important that we arrive at a decision as expeditiously as possible. I believe that over the years the lesson to be learned is that we can never know with absolute certainty all of the facts and all of the possible outcomes.⁹⁷

It is unclear with such an admission by the Chairman, why the Commission did not first implement a pilot program before undertaking such a drastic policy change..

At the April 23, 2008 PUCO meeting, several Commissioners expressed concern about the lack of evidence in the record regarding the effects of an SFV rate design on low income users and conservation. Worried about “some customers who will inevitably be impacted quite negatively and potentially see substantial, double digit rate increases[,]” Commissioner Centolella stated:

⁹⁶ *Tongren v. Pub. Util. Comm.*, (1999) 85 Ohio St. 3d 87.

⁹⁷ Order at Concurring Opinion of Chairman Alan R. Schriber page 3 of 3.

I think it would be certainly helpful to the Commission for the Company to file in this case data showing for different deciles *
** what the sales figures actually are for residential customers, so that we can take a look at what those bill impacts are going to be, both for residential customers as a whole and also for some breakdown of low income customers, either by PIPP or HEAP or some combination thereof, depending on what the Company has the data for, so that we can actually see what those impacts are and can look at what alternatives -- what alternative approaches might have in terms of those impacts, because there's certainly going to be some customers who may be on fixed incomes for whom that impact could be substantial.⁹⁸

Echoing Commissioner Centolella's concern over a lack of evidence in the record regarding the effects of SFV, Commissioner Roberto stated:

I do not disagree with Commissioner Centolella in the least, that externalities are incredibly important. **We do not have good evidence in this record**, and I would urge in future cases that we should have some degree of information in front of us so that we can try to account for those externalities. Those externalities, **I am honestly not sure that we get a better result by going to decoupling or straight fixed variable, but in this case, I don't have the information in front of me to make a judgment on that.**"⁹⁹ * * *

A downside of straight fixed variable is certainly rate shock, and I am concerned with that. **And I would concur with Commissioner Centolella that we do not have in our record information that would allow me to assess the impacts of the required rate distribution- - redistribution on that volume of those low volume users in the lowest percentile of usage. And I would really like to have that kind of information in front of us as we weigh this.**¹⁰⁰

* * *

While philosophically, the straight fixed variable is appropriate, from my perspective, that is with the caution that we need to be sensitive to the rate impact and the rate shock. **And we do not have in front of us adequate information to make that judgment right now. And I do urge that we need to be able to**

⁹⁸ Attachment, Real Player Video of April 23, 2008 PUCO Meeting at 11 minutes 20 seconds. (Emphasis added).

⁹⁹ Id. at 29 minutes 25 seconds. (Emphasis added).

¹⁰⁰ Id. at 32 minutes 15 seconds. (Emphasis added).

understand, on the record, with the record before us, the actual impacts for high end users and low end users * * * .¹⁰¹

* * *

Specifically regarding the lack of evidence in the record about the effects of SFV on conservation, Commissioner Roberto stated:

* * * As a policy matter, I would stand strongly behind a conservation program -- any way that we can structure rates to lead to conservation and efficient use of energy. Some might suggest that having the high volume users subsidize low volume users would lead to that. I would disagree, because **the information that we have in front of us does not link high volume usage to inefficient usage. We simply don't know.** When we look at our PIPP users, for instance, we see overall increased usage. That does not suggest to me that our PIPP customers are making poor choices. It suggests possibly to me that our housing stock for our PIPP customers is not affording them the ability to make energy conservation choices.

Now, I don't have evidence in front of me that would support either of those conclusions, that our PIPP customers make bad choices or that they have poor housing stock. **That is not in the record. I can't make that judgment.** With that in front of me, I'm going to try to find a system that has the closest allocation of costs as best we have them in front of us."¹⁰²

* * *

Commission Chairman Alan Schriber also admitted that the Commission was uncertain of the impacts of SFV, stating:

If you want to start making a list of externalities, you will never get to the end, okay? And **we don't even know,** we can't even imagine, **the externalities that are going to occur.** And when it comes to internalizing the externalities, we can't even imagine who is going to be internalizing them or how. I mean, that's up for grabs and it's down the road and it will never -- that's a process that's never going to end as you can imagine. Externalities will always be there -- you improve one -- [and] pick up one somewhere else, that's just the nature of general equilibrium; it keeps going on and on and on. So, externalities -- it's a problem, but you know,

¹⁰¹ Id. at 58 minutes 18 seconds. (Emphasis added).

¹⁰² Id. at 30 minutes 21 seconds. (Emphasis added).

we have to begin somewhere, and I think straight fixed variable is a rational place to begin.

However, we have to think of the income effects, and **we've all agreed, we are not quite sure of the income impacts of straight fixed variable.**¹⁰³

There are examples of a more deliberate and more openly debated policy changes that the Commission undertook as pilot. One example is the manner in which residential Choice Programs have been implemented. Even now, over 10 years after the first programs were put in place as pilots,¹⁰⁴ the Choice Programs are still governed by the ultimate consumer protection, that the Commission could make any changes or modifications as needed.¹⁰⁵ The Choice Programs were developed over a period of years with all Stakeholders being able to participate in an open process. Moreover, each LDC individually addressed Customer Choice, and any one company plan was not forced on all others. The Staff and the Commission recognized the magnitude of the changes being proposed in the Choice Programs and dealt with the issue accordingly.

Another example is the implementation of a Wholesale Auction. Despite the fact that virtually all stakeholders have declared the wholesale auction for Dominion East Ohio (“DEO”) to be a success, the Staff has been hesitant to impose a similar wholesale

¹⁰³ Id. at 47 minutes 11 seconds. (Emphasis added.).

¹⁰⁴ *In the Matter of the Commission's Investigation of the Customer Choice Program of Columbia Gas of Ohio, Inc.*, Case No. 98-593-GA-COI; *In the Matter of the Commission's Investigation of the Energy Choice Program of the East Ohio Gas Company*, Case No. 98-594-GA-COI; *In the Matter of the Commission's Investigation of the Customer Choice Program of the Cincinnati Gas & Electric Company*, Case No. 98-595-GA-COI; *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Statewide Expansion of the Columbia Customer Choice Program*, Case No. 98-549-GA-ATA; *In the Matter of the Application of the East Ohio Gas Company for Authority to Implement Two New Transportation Services, for Approval of a New Pooling Agreement, and for Approval of a Revised Transportation Migration Rider*, Case No. 96-1019-GA-ATA, Finding and Order (June 19, 1991).

¹⁰⁵ Id. See also Order at Concurring Opinion of Chairman Alan R. Schriber at 3 (“All told, it is important that we arrive at a decision as expeditiously as possible. I believe that over the years the lesson to be learned is that we can never know with one hundred percent certainty all of the facts and all of the possible outcomes. This is precisely why the law has provided this Commission with the ability to react to adverse outcomes should they arise. This is the ultimate consumer protection.”).

auction on other large Ohio LDCs.¹⁰⁶ The Wholesale Auction process for DEO was considered a significant policy change in how LDCs purchase gas for sales customers. The DEO Wholesale Auction process took well over 13 months and was open to all Stakeholders.¹⁰⁷

In sharp contrast with the current proceeding, the Choice Program and Wholesale Auction were both the product of long deliberate processes that included participation by all Stakeholders **before** any decision was made. The deliberate nature of this review and implementation is magnified in this case as the PUCO did not merely impose the Customer Choice Program or the Wholesale Auction on Duke. Instead, in this case, Commission agreed to merely establish a process to discuss the Wholesale Auction issue. This begs the question of why the PUCO would be so deliberate with the Choice Program and Wholesale Auction -- programs that have resulted in quantifiable benefits for consumers -- and yet is so fast to act on the SFV rate design -- a change that produces no quantifiable benefits only for the Company and results in detriments for low-use low income customers.

Without an adequate record in this case, the Company could not and did not meet its statutory burden of proof and therefore, the SFV rate design should not have been approved. The more reasonable and prudent course of action for the Commission - - if it is insistent on adopting the SFV rate design - - would be to implement the SFV rate design as a pilot program with specific reporting requirement placed upon Duke to assure

¹⁰⁶ *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of a Plan to Restructure its Commodity Service Function*, Case No. 05-474-GA-ATA, Post-Auction Report of Dominion East Ohio Phase 1 Supply Auction, (August 29, 2006) at 4-5.

¹⁰⁷ *Id.* Opinion and Order (May 26, 2006).

all Commission inquiries and customer impacts are adequately evaluated before fully accepting the SFV rate design.

2. The record fails to support the Order that low-income customers benefit from an SFV rate design

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

We recognize that, with this change to rate design, as with any change, there will be some customers who will be better off and some customers who will be worse off, as compared with the existing rate design. The levelized rate design will impact low usage customers more, since they have not been paying the entirety of their fixed costs under the existing rate design. Higher use customers who have been overpaying their fixed costs will actually experience a rate reduction.¹⁰⁸

What is troublesome is that that the Commission in spite of the recognition of this adverse impact on low-use customers, has failed to explain why as a policy matter it is just and reasonable to have low volume users subsidize high volume users. The goal of rate design should be to eliminate inter-class subsidies to the maximum extent possible not create them, but if a subsidy is unavoidable, as a policy matter the rate design should be structured such that the high users be asked to subsidize low users.

While the record is clear as to the impact that the SFV rate design has on low-use customers; however, the actual impact that an SFV rate design will have upon Duke's low-income customers is unknown and debatable. The Commission acknowledged that:

¹⁰⁸ Order at 19.

with this change in rate design, as with any change, there will be some customers who will be better off and some customers who will be worse off, as compared with the existing rate design.¹⁰⁹

The record in this case, does not answer the question of how the SFV rate design impacts the low-income customer. It would seem axiomatic that such a fundamental question would be fully explored and analyzed prior to approving such a dramatic change in policy. The SFV rate design approved by the Commission is bad news for Duke's low-use low-income customers who will now be forced to subsidize Duke's larger use customers. The SFV rate design has the effect of making "the distribution cost per Ccf that a customer faces * * * higher at lower consumption levels than at higher consumption levels."¹¹⁰ Such a rate design is inherently unfair to low-usage low-income customers, who because of their limited means, likely live in smaller dwellings, such as apartments, and use less natural gas than wealthy homeowners with large homes. The SFV rate design is not only unfair to these customers with small incomes, it is extremely insensitive in its timing; coming on the heels of several years of belt-tightening by America's working poor, amidst a nationwide mortgage foreclosure crisis and with the country facing a looming recession.

Rather than recognizing SFV as injurious to Duke's low-income customers, Duke and the Staff witness assert that an SFV rate design is beneficial.¹¹¹ The Commission accepts in its Order Duke and the Staff's argument based upon the erroneous assumption

¹⁰⁹ Order at 19.

¹¹⁰ OCC Ex. No. 5 (Gonzalez Direct Testimony) at 14, See also Staff Ex. No. 3 (Puican Direct Testimony) at 5.

¹¹¹ Staff Ex. No. 3 (Puican Direct Testimony) at 5-6. (Staff witness Puican stated, "Because high-usage customers will benefit from the SFV rate design, and low-income customers are more likely to be high usage customers, it is reasonable to conclude that low-income customers are more likely to actually benefit from SFV.")

that Duke's PIPP customers, many of whom are high energy users, are representative of all of Duke's low-income customers.¹¹² However, the record reflects that PIPP customers constitute only 23 percent of the low-income households in Hamilton County, Duke's largest county served, and only about 10 percent of the total low income customers purchasing gas from Duke.¹¹³ The parties agree that PIPP customers have demonstrated higher use of energy than non-PIPP customers, and also that low-income customers are more likely to rent than own their homes, but the consensus ends there.¹¹⁴

The Commission erroneously stated that: "OCC and OPAE insist that the levelized rates will harm low-income customers and that the PIPP customer data is not indicative of other Duke low-income customers, but offered no data to support this contention (OCC Br. at 46-53; OPAE Br. at 4,8)."¹¹⁵ In actuality, OCC offered into evidence the latest Impact Evaluation by the Ohio Department of Development's Home Weatherization Assistance Program ("HWAP"), which found that PIPP weatherization participants "used 20 percent more energy than non PIPP [low- income] participants."¹¹⁶ In fact, it was the Company and Staff who offered no evidence to support their assertion that PIPP customers were an appropriate proxy for low-income usage.

Duke chose PIPP customers as a proxy for low income customers with little regard for the accuracy of such a choice. Duke examined only ten houses, via the Hamilton County Auditor's website, as the basis for the Company's assertions regarding

¹¹² Order at 15.

¹¹³ OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 4-6. There are 66,000 low income Duke customers in Hamilton County and over 100,000 low income customers in Duke's service territory. Tr. Vol. I at 221-222.

¹¹⁴ OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 5-7; Staff Ex. No. 3 (Puican Direct Testimony) at 5.

¹¹⁵ Order at 15.

¹¹⁶ OCC Ex. No. 18 (Gonzalez Rebuttal Testimony) at 6.

the characteristics of PIPP customer housing.¹¹⁷ With ten thousand households participating in PIPP in Duke service territory, the Company offers no explanation regarding how it can reasonably hold out the “top ten” PIPP customers’ homes as being a fair representation of the thousands of PIPP customers’ housing stock. The Company witness acknowledged that there was no characteristic analysis performed on the housing stock of the larger, low-income population.¹¹⁸ Therefore, it is unknown to the Company whether or not the inadequate sample used to evaluate PIPP participant housing is at all indicative or similar to the housing characteristics of the low-income population in general.

In addition, Duke witness Smith stated that he has no idea what percentage of the total low-income customer base is represented by PIPP customers.¹¹⁹ Without knowing the percentage of total low-income customer base represented by PIPP participants, the Commission cannot reasonably proffer this group of customers as being representative of a customer group of unknown size. Further, it is highly likely that those who are low income/low energy users may be eligible for one or more assistance programs, including PIPP, but choose not to participate in them due to the fact that their usage is low enough to be affordable under the former rate design.

The facts in evidence show that PIPP customers’ usage is not a good proxy for low-income customers’ usage; therefore, an SFV rate design is harmful to low-use and low-income customers who in actuality will subsidize Duke’s larger use customers.

Therefore, the Commission should reverse its Order on rehearing.

¹¹⁷ Tr. Vol. I at 82-83.

¹¹⁸ Tr. Vol. I at 83.

¹¹⁹ Tr. Vol. I at 81.

3. The record does not support reliance on budget billing to support adopting an SFV rate design.

The Commission unreasonably approved the SFV rate design because of its stabilizing effect on customer billings. The Commission stated:

The levelized rate design however, has the added benefit of producing more stable customer bills throughout all seasons because fixed costs will be recovered evenly throughout the year.

However, the record does not support the assumption that customers are interested in the stabilizing effect that the SFV rate design offers them. In fact, the argument that a larger fixed charge will levelize customer bills is irrelevant and without merit. Neither the Company nor the Staff¹²⁰ offered any valid studies to support the belief that consumers are interested in a forced levelized fixed charge. On cross-examination Duke witness Smith offered what was apparently the only study that was performed:

Q. My question is, Mr. Smith, did you look at any studies, opinion studies, where customers evidence a preference for fixed prices, yes or no?

A. Yes.

Q. Okay. And what was that study?

A. My own personal family use. I prefer cell phones with fixed minutes, fixed charge, fixed internet service.

Q. And you are, of course, representative of all residential customers?

A. I am certainly a residential customer, yes.¹²¹

¹²⁰ Tr. Vol. I. at 240.

¹²¹ Tr. Vol. I at 188, and 196.

A “study” with one data point, regarding a service where usage has no seasonality, is not a statistically significant study. This is a preference, not a study and Duke failed to maintain its burden of proof.

Unfortunately, the Commission was all too willing to accept the Company’s argument in support of its position. The Commission stated: “Customers are accustomed to fixed monthly bills for numerous other services, such as telephone, water, trash, internet and cable.”¹²² These services that the Commission relies upon for fixed charge billing examples do not involve the consumption of a precious natural resource except water, and Ohio water utilities still rely upon a rate design that incorporates a large volumetric based charge. In the recent Ohio American Water case, the PUCO Staff refused to support the increase to the customer charge requested by the Company.¹²³ In fact, instead of an increase, the PUCO Staff has proposed the current customer charge be decreased by 23.4 percent.¹²⁴

The Commission Order further misses the mark regarding budget billing.

Chairman Schriber stated:

Finally, those who argue that inadequate price signals are the biggest issue need only look at the impact of budget billing. What signal is being sent when the bill each month is the same regardless of consumption? Yet, is anyone recommending the elimination of budget billing?¹²⁵

¹²² Order at 18.

¹²³ *In the Matter of the Application of Ohio-American Water Company to Increase Its Rates For Water and Sewer Service Provided to Its Entire Service Area*, Case No. 07-1112-WS-AIR, Staff Report at 32 (May 28, 2008). (The Company’s current customer charge was \$9.41 and the Company proposed \$10.59).

¹²⁴ *Id.* at 35. The PUCO Staff has proposed a \$7.21 customer charge, or a 23.4 percent reduction (\$9.41 - \$7.21/\$9.41)..

¹²⁵ Order at Concurring Opinion of Chairman Alan R. Schriber page 2 of 3.

What is missing in the Chairman's analysis is that in the budget billing scenario, unfettered consumption will be remedied through the true-up mechanism. The SFV rate design does not include a true-up mechanism. Therefore, the concern that a customer is getting the wrong price signal when being sent the same bill each month, regardless of consumption, is legitimate for the SFV rate design.

It should further 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.¹²⁶ The evidence was uncontroverted and suggests that Duke's customers do not initiate budget billing because the natural leveling effect of their total energy bills, the gas and electric, form sort of a natural budget billing plan in itself.¹²⁷ 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, should be significant evidence to support the fact that they are not particularly interested in a levelized bill. The Commission should not force customers who have rejected budget billing to be forced to accept it in the form of a SFV rate design and then be told that this form of a levelized billing is a benefit, contrary to their own preferences.

V. CONCLUSION

As demonstrated above, the Commission erred by approving a Straight Fixed Variable rate design for several reasons. First, the extraordinarily large increase in the customer monthly charge produced by the SFV rate design unreasonably violates the Commission's prior precedent and policy of gradualism. Second, the Commission's

¹²⁶ Tr. Vol. I at 38.

¹²⁷ Tr. Vol. I at 38.

Order erred by unreasonably and unlawfully authorizing a residential rate design with customer charge increases that exceed the notice provided consumers pursuant to R.C. 4903.083, R.C. 4909.18, R.C. 4909.19 and R.C. 4909.43. Third, the Commission erred by approving an SFV rate design that discourages conservation in violation of R.C. 4929.02 and R.C. 4905.70. SFV sends the wrong price signals to Duke's consumers, extends the pay back period of consumer investments in energy efficiency, and thereby, does not remove customer disincentives to invest in energy efficiency. In addition, because Duke has an existing Demand Side Management program, SFV provides no additional incentive to Duke to participate in energy conservation programs. Fourth, the Commission erred when, in violation of R.C. 4903.09, it failed to provide findings of fact and written opinions supported by the evidence in the record. The record does not support the Commission's conclusions that low-income customers benefit from an SFV rate design, that budget billing supports an SFV rate design, or that SFV should be implemented, if at all, in any way other than a pilot program. For these reasons, the Commission should grant OCC's Application for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
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