FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of VEDO Energy Delivery of Ohio, Inc., for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters.	)	Case No. 07-1080-GA-AIR
In the Matter of the Application of VEDO Energy Delivery of Ohio, Inc., for Approval of An Alternative Rate Plan for a Distribution Replacement Rider to Recover the Costs of a Program for the Accelerated Replacement of Cast Iron Mains and Bare Steel Mains and Service Lines, a Sales Reconciliation Rider to Collect Difference Between Actual and Approved Revenues, and Inclusion in Operating Expense of the Costs of Certain Reliability Programs.	)	Case No. 07-1081-GA-ALT

REPLY BRIEF
OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Maureen R. Grady, Counsel of Record
Joseph P. Serio
Michael E. Idzkowski
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (telephone)
grady@occ.state.oh.us
serio@occ.state.oh.us
idzkowski@occ.state.oh.us

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I. INTRODUCTION

On September 26, 2008, the Staff of the Public Utilities Commission of Ohio ("Commission" or "PUCO") and Vectren Energy Delivery of Ohio, Inc. ("VEDO," or "Company"), filed their briefs to convince the PUCO to institute a radical change to the way customers are billed and pay for gas utility service in the VEDO service territory. The Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Partners for Affordable Energy filed a joint brief to protect VEDO's residential consumers from this radical change that will discourage conservation efforts, cause low-use customers to leave

the system (and strand costs), and unreasonably shift the risk of collecting revenue from the Company to customers, without any corresponding benefit to customers.

II. SUMMARY

The PUCO Staff and the Company present the Commission with a proposal for rate design that drastically departs from at least thirty years or more of rate-making precedent. The alleged need for and purpose of the rate design is that customers are using less gas than they have used since the prior (2006) VEDO rate case[1]. VEDO argues the customers' reduced usage puts it at greater risk of not collecting its fixed distribution charges. This rate design is known as "straight fixed variable" or "SVF."

OCC proposes a rate design that is consistent with the Commission's past precedent and seeks to implement a supplemental tool called decoupling in order to eradicate the Company's disincentive to promote energy efficiency. While the primary objective of the decoupling, from OCC's perspective, is to promote energy efficiency, the decoupling also will assist the Company in collecting their fixed distribution costs and will reduce the Companies' risk of revenue collection.

So the Commission is faced with two different regulatory tools and must choose between them in this rate case. Both SFV and decoupling in the end accomplish similar objectives. And yet from a customer's perspective the choice is clear—decoupling is the just and reasonable choice, not SFV. Decoupling provides an important symmetry—a symmetry that is lacking in SFV. Under decoupling, if the revenues collected from

[1] *In the Matter of the Application of Vectren Energy Delivery of Ohio, inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Service and Related matters*, Case No. 04-571-GA-AIR.

customers exceed the amount reflected in setting rates (the base period), customers receive the benefit in the form of a credit.[2] Under SFV if the Companies over-recover their costs the excess revenue is pocketed by the utility and not returned to customers.

Moreover, the impact of adopting an SFV rate design can be harmful to low-income customers. OCC's witness Colton testified that data supports the conclusion that low-income customers will be harmed, though Vectren's witnesses Ulrey and Overcast posit otherwise. Should the Commission take its chances and implement SFV in the hope that it will not harm low-income customers? The more measured and appropriate approach is to not to take such chances when a viable alternative--decoupling--exists that will not impair low-income customers' ability to remain on the system.

While decoupling will require more regulatory oversight than SFV, such oversight is part of every public utility's regulatory compact in Ohio: in exchange for the *opportunity* to earn a fair and reasonable rate of return, the utilities are subject to regulation. From the customers' perspective, choosing a regulatory tool for the sole purpose that it requires less oversight and is less contentious than other tools, suggests regulatory abdication at best.

Customers of VEDO have voiced their opposition to moving to a SFV rate design time and time again, in this proceeding, in the Duke proceeding,[3] and in the Dominion East Ohio Gas proceeding.[4] The Commission should not only hear these customers, it should listen. SFV should not be adopted. It is not needed, may harm low-income

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[2] Company Ex. 9 at 11 (Ulrey Direct Testimony).

[3] *In re Duke Rate Case,* Case No. 07-589-GA-AIR.

[4] *In re Dominion Rate Case,* Case No. 07-829-GA-AIR

customers, and provides a one-sided benefit to the utility only. Decoupling, which achieves most if not all of the objectives of SFV, and provides potential customer benefits, is the just and reasonable solution.

III. ARGUMENT

A) NOTICE

1. VEDO failed to provide adequate notice to consumers of the Stage 2 proposed SFV rates as required by R.C. 4909.18(E) and 4909.19. Therefore, the Commission cannot approve such rates.

VEDO makes numerous arguments in its initial brief pertaining to both notice under R.C. 4909.43(B) and notice under 4909.18(E) and 4909.19.[5] Because notice under R.C. 4909.18 and 4909.19 pertains directly to the residential customers OCC represents, OCC will focus its reply on the violations of those statutes.[6]

With respect to the notice requirements of R.C. 4909.18 and 4909.19, VEDO claims that the notice discloses the nature of SFV, and thus residential customers were not harmed. Id. at 23. Furthermore, the Commission approved the notice, the Company argues, and OCC failed to timely apply for rehearing of that Entry.

[5] See VEDO Initial Brief at 19-23.

[6] One of the arguments VEDO makes on R.C. 4909.43(B) is that OCC has no standing to raise issues of defective notice because the notice is directed to municipalities. While it would appear that VEDO is basing its arguments on federal principles of standing, OCC notes that the Ohio Supreme Court has recognized exceptions to such standing requirements. See for example *Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999). However, because VEDO has chosen not to provide citation or authority to any of its notice arguments, it is difficult to respond to them. In turn, the commission should consider the lack of cited authority when assessing the strength of the arguments made by VEDO. And, OCC's residential customers reside in the municipalities affected by R.C. 4909.43 notice, and this should be sufficient to satisfy any standing requirements that may be present.

2. OCC may raise claims related to the Commission's lack of jurisdiction, due to deficient notice, even assuming *arguendo* the claims could have been appealed earlier because jurisdictional arguments cannot be waived.

There is a fundamental tenet of jurisdiction that subject matter jurisdiction can never be forfeited or waived.[7] OCC's jurisdictional arguments can be summed up as follows: Because the company failed to properly notice customers of the Stage 2 rates as required by R.C. 4909.18 and 4909.19, the Commission cannot approve the Stage 2 rates. The Stage 2 rates represent the second step toward achieving a full SFV rate design. Under Stage 2 the customer charge increases to $22.00 during the winter and $10.00 during the summer months, with volumetric rates decreasing. Stage 2 is to be implemented in 2010.

In *Time Warner v. Pub. Util. Comm.*[8], the Ohio Supreme Court was faced with other public utility statutes creating similar jurisdictional issues. There the Court was grappling with the telephone alternative regulation statutes. The Court, *sua sponte*, asked parties to brief the issue of whether the Commission exceeded its statutory authority when it used R.C. 4927.04(A) to set Ameritech's rates. Ameritech had filed under R.C. 4927.04(A), without filing "an application pursuant to section 4909.18 and 4909.19 of the Revised Code" for an increase in rates. The PUCO claimed that the Court did not have jurisdiction over this issue as none of the parties had raised this issue. The Court did not agree and went on to find the Commission had exceeded its authority: "We disagree.

[7]See for example, *Baltimore & Ohio Ry. Co. v. Hollenberger*, 76 Ohio St. 177, 182-183 (1907) ("It has ***long been a universal rule that an objection to the jurisdiction of the 'subject matter' cannot be waived...").

[8] *Time Warner v. Pub. Util. Comm.*, 75 Ohio St. 3d 229 (1996).

Subject matter jurisdiction cannot be waived. *See, e.g., Gates Mills Invest. Co. v. Parks* (1971), 25 Ohio St. 2d 16, 20, 54 Ohio Op. 2d 157, 159, 266 N.E.2d 552, 555."[9] For the reasons that follow, we hold that the commission exceeded the scope of its statutory authority when it used alternative rate-setting methods to establish Ameritech's basic local exchange service rates below and reverse the order of the commission."[10]

The *Time Warner* holding addressing subject matter jurisdiction is important here because it defines how subject matter jurisdiction relates to the PUCO. While the PUCO in *Time Warner* generally had jurisdiction over the Ameritech application, the Court ruled that the Commission could not exercise its subject matter jurisdiction without following the statute, R.C. 4927.04(A). In other words, the PUCO had failed to meet the statutory conditions that would allow it to exercise jurisdiction. In *Time Warner* the unmet statutory condition was that Ameritech did not file a R.C. 4909.18 application for a rate increase.

Similarly, OCC has argued here that VEDO has not met the statutory condition as it pertains to the notice statutes, R.C. 4909.18 and 4909.19. Thus, consistent with the Court's holding in *Time Warner* while the PUCO generally has jurisdiction over VEDO's application, it cannot exercise its jurisdiction without requiring VEDO to correct the

[9] In *Gates Mills Investment*, jurisdictional arguments on a zoning ordinance were raised for the first time at the Supreme Court, and not at the trial court and court of appeals below. The Appellees argued that Appellants should be estopped from challenging jurisdiction because the Appellant's claims were not timely. The Court permitted the jurisdictional arguments to be raised, and cited Civil Rule 12(H) and *Jenkins v. Kelller*, 6 Ohio St. 2d 122(1966) as authority for its ruling.

[10] *Time Warner* at 233.

notice.[11] The Company failed to fulfill the statutory conditions that would allow the PUCO to exercise jurisdiction.

As OCC has often pointed out, the PUCO is a creature of statute, and possesses no authority other than that specifically granted.[12] While the Commission has subject matter jurisdiction over VEDO's application, it cannot exercise that jurisdiction without requiring VEDO to follow R.C. 4909.18 and 4909.19. Where jurisdiction of subject matter exists, but a statute has prescribed the mode and limits within which it may be exercised, a court/agency must exercise jurisdiction in accordance with the statutory requirements.[13] Otherwise, although the proceedings are within the court/agency's general subject matter jurisdiction, any judgment rendered is void because the statutory conditions for exercising that jurisdiction have not been met.[14] The Commission cannot exceed its subject matter jurisdiction by considering the Stage 2 rates when the Company failed to follow the statutes. The Commission is without jurisdiction to approve the Stage 2 rates. [15]

VEDO seeks to inhibit OCC from arguing that the Commission lacks jurisdiction to raise this issue because OCC failed to apply for rehearing of the Entry which approved

[11] *See* for example *Ohio Association of Realtors v. Pub. Util. Comm.*, 60 Ohio St.2d 172, 176 (1979), where the Court found that since legal notice required by R.C. 4909.19 had not been given, the PUCO's order was unreasonable and unlawful. The Court then required the cause remanded for the purposes of reissuing appropriate notices and conducting further hearings upon the application.

[12] *See* for example, *Cincinnati v. Pub. Util. Comm.*, 96 Ohio St. 270, 274 (1917), *Ohio Central Tel. Corp. v. Pub. Util. Comm.*, 166 Ohio St. 180, 182 (1957), *Penn Central Transportation Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 99 (1973).

[13] 22 Oh Jur.3d Courts and Judges 243.

[14] *Id.*, citing *State ex rel. Parsons v. Bushong*, 92 Ohio App. 1012 (3d Dist. Allen County 1945).

[15] *Ohio Association of Realtors v. Pub. Util. Comm.*, 60 Ohio St.2d 172 (1979); *Committee against MRT v. Pub. Util. Comm.*, 32 Ohio St.2d 231 (1977).

the public notice. It is a well known doctrine, however, that subject matter jurisdiction can never be forfeited or waived.[16] The Ohio Supreme Court has consistently determined that timeliness is not an obstacle to jurisdictional arguments: "The failure of a litigant to object to subject matter jurisdiction at the first opportunity is undesirable and procedurally awkward. But it does not give rise to a theory of waiver..."[17] Nor can the signatory parties or the Attorney Examiner confer jurisdiction on the commission either by their conduct[18] or by their consent.[19]

Thus, VEDO's arguments that OCC is precluded from raising these jurisdictional issues should be summarily rejected. Beyond any doubt, the arguments ignore the legal precedent that absolutely allows jurisdictional arguments, including notice, to be raised at any time, even for the first time at the appellate level.

3. Notice required under R.C. 4909.18 and 4909.19 failed to convey the substance and prayer of the Stage 2 rates, thereby depriving customers of the ability to decide whether to object or be heard on that portion of the application.

Although VEDO claims that its notice conveyed the essential nature of the SFV proposal to increase customer charges from the current level of $7.00, a review of the notice proves fatal to VEDO's arguments. The newspaper notice VEDO alleges "clearly disclose[s] the nature of the rates proposed by VEDO" is as follows: "VEDO proposes changes to the rate design for Rate 310 (Residential Sales Service) and Rate 315

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[16] *Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235 (U.S. 2006).

[17] *Gates Mills Investment v. Parks*, 25 Ohio St. 2d 16, 19-20 (1971).

[18] *In the Matter of Erie Lackawanna Ry. Co.*, 563 F.2d 784 (6th Cir. 1977).

[19] 22 Oh Jur.3d Courts and Judges 241.

(Residential Transportation Service) that initiate a gradual transition to a straight fixed variable rate for distribution service." Then VEDO provided, as part of the "description of the proposed changes to the terms and conditions applicable to gas service," the proposed rates and the average percentage increase in operating revenue requested by the utility on a rate schedule basis. VEDO, however, provided notice of the proposed charges for Stage 1 rates only for Rate 310 and 315. The notice of the charges shows a customer charge of $16.75 per meter (November-April) and $10.00 per meter (May-October) with volumetric charges of $0.11937 per Ccf for the first 50 Ccf plus and $0.10397 per Ccf for all Ccf over 50 Ccf. Nowhere in the notice is an explanation of what a "straight fixed variable rate for distribution service" means. And "straight fixed variable" is surely not a concept that is widely understood by most customers. Moreover, nowhere in the notice is a "gradual transition" defined. To imply, as VEDO does, that a move from $7.00 per month to $22.00 (Stage 2) during winter months is "gradual" is patently misleading. Missing from the notice as well is the actual Stage 2 rates, the average proposed increase to customers under the Stage 2 rates, and the date at which the Stage 2 rates are to go into effect (2010).

Without all the crucial information about Stage 2 rates, the "essential nature or quality" of the proposal to increase Stage 2 rates to customers was not disclosed to VEDO's customers. Under the Ohio Supreme Court holding in *Committee Against MRT,*[20] VEDO's failure to disclose the "essential nature or quality" of the Stage 2 rates causes the notice to be insufficient thus violating R.C. 4909.18 and 4909.19, and depriving the Commission of jurisdiction with respect to Stage 2 rates. The insufficient

[20] *Committee against MRT v. Pub. Util. Comm.*, 32 Ohio St.2d 231 (1977).

notice deprived VEDO's customers of their opportunity to be heard—customers reading the notice would not have been able to determine whether to inquire further as to the proposal or intervene in the rate case.

B) ARGUMENTS FOR WHY STRAIGHT FIXED VARIABLE RATE DESIGN SHOULD NOT BE ADOPTED

1. The effect of SFV on low-income customers is disputed by the parties to this proceeding. Rather than implement SFV amidst such controversy, the prudent course of action would be to use decoupling instead which could have a positive impact upon low-use and low-income customers.

The Company claims that there is no evidence on the record that SFV will have a negative impact on *low-income* customers. VEDO Brief at 13-15. VEDO dismisses OCC Witness Colton's conclusion to the contrary by claiming that Colton's state-wide analysis did not specifically focus on VEDO's *low-income* customers. And, according to Witness Ulrey, VEDO's *low-income* customers consume on average more natural gas than all but the highest income residential customers. Id. at 15.

While there is a dispute between OCC and VEDO on how much *low-income* customers consume, leading to a question on the impact of SFV on *low-income* customers, it is clear that SFV will increase rates paid by *low-use* customers. The adverse effect of this rate design on *low-use* customers is demonstrated in the Staff Report Schedule E-5 pages 1 and 2. For *low-use* residential customers who take less than 100 ccf per month in the winter there would be a monthly net increase over current rates ranging from $8.05 (31.89%) to $10.23 (139.37%) with the increase being more dramatic as consumption levels decrease. For low-use residential customers who take less than 90 ccf per month in the summer there would be a monthly net increase over current rates

ranging from $1.11 (4.72%) to $3.15 (49.2%) with the increase being more dramatic as consumption levels decrease. In fact, the Company acknowledged the negative impact of SFV on low-use customers when Mr. Ulrey testified that VEDO may experience a drop off in *low-use* customers.[21] Indeed the seasonal structure of the SFV as well as the Company's initial proposal to impose an avoided customer charge, are indications that the Company expects to lose some *low-use* customers.

So the question then becomes whether VEDO's *low-use* customers are VEDO's *low-income* customers, and if so, does the Commission want to protect these vulnerable customers from the impact of SFV? The question of whether *low-usage* customers are *low-income* customers in this case turns on which experts the Commission wants to believe. The Company and OCC submitted evidence that contradicts the others' position. If the Company and not OCC is correct, then *low-income* customers should not be harmed by SFV. If OCC, and not the Company, is correct, *low-income* customers would be harmed by SFV.

The prudent course of action for the Commission to take is that which is the most protective approach for customers. Rather than risk the fate of *low-income* customers by imposing an untested rate design upon them, the Commission should use the alternative regulatory tool of decoupling. Under decoupling there is no evidence to suggest that *low-income* or *low-usage* customers would be harmed. In fact, with the symmetry brought by decoupling, *low-usage* and *low-income* customers could see reduced bills. This is the type of win-win situation that the Commission should embrace in lieu of a decision with debatable consequences.

[21]Tr. III at 93-96 (Ulrey).

2. **SFV will be detrimental to conservation efforts because it lengthens the payback period and encourages high usage. Moreover, there is no evidence to suggest that the current rate structure will result in overinvestment in conservation.**

Both VEDO and the Staff claim that SFV will not be detrimental to conservation efforts.[22] However the public testimony, in the form of correspondence docketed by VEDO's customers as well as testimony given at the local public hearings, belie these claims.

> "The restructured rates would have an adverse effect on lower usage, lower-income customers and create disincentives to use less natural gas through energy efficiency efforts." --Don and Ellene Prizler (Dayton, Ohio).[23]

> "I also oppose Vectren's proposal to shift from a predominantly volumetric charge to a predominantly flat rate. This will result in customers paying the same fixed charge regardless of the size of their home or apartment. If the customers try to be energy efficient and conserve energy by using less gas (I do), this flat rate will offset any intended savings to the delivery portion of their bill. It is possible that the customers will consider not attempting to be conservative or energy efficient."—Joanne H. Meyer [24]

> "If Vectren's request to shift from usage-based charges to merely delivery charges is granted, not only will cost to consumer rise significantly, thus creating financial hardships, but incentives to conserve will be greatly reduced....A flat rate charge is a disincentive to conserve and will add to greenhouse emissions, not decrease them. Vectren is displaying an astounding lack of environmental and economic sense." Davida M. Amsden, Ph.D. (Dayton, Ohio)[25]

> "I oppose raising the flat-rate customer charge since it will negatively impact consumers who attempt to conserve energy and result in customers who use less natural gas paying the same customer charge as higher usage

[22] Staff Ex. 3 at 4-5 (Puican Direct Testimony); Company Ex. 8a at 23 (Overcast Rebuttal Testimony).

[23] Correspondence docketed at the PUCO (Sept. 24, 2008).

[24] Correspondence docketed at the PUCO (Sept. 10, 2008).

[25] Correspondence docketed at the PUCO (Sept. 2, 2008).

customers. Increasing the fixed customer charge limits the ability for consumers to control their monthly bills by being more energy efficient which is critical as the cost of natural gas continues to rise." Shirley and Allen Doll (Dayton, Ohio)[26]

"Schemes that remove reward for conservation are detrimental to the conservation of the environment." Elsa Barber (Troy, Ohio)[27]

"I oppose raising the flat-rate customer charge, this change will have an adverse effect on lower-usage, lower income customers and also have a negative impact on energy efficiency efforts by creating a disincentive to use less gas." Evelyn Chinn (Tipp City, Ohio)[28]

Yet despite such compelling remarks from VEDO's customers, Staff and Company continue to support the change to SFV. Another reason to support SFV, from the Staff's perspective, is that when volumetric rates are artificially inflated (as they allege under the current rate design) it can lead to overinvestment in conservation.[29] Indeed an economic theory of the current rate design leading to overinvestment in energy efficiency, was recently espoused by Chairman Schriber during the Dominion East Ohio case.

This economic theory is nothing more and nothing less than a theory. There is no evidence in this proceeding (nor in the DEO or Duke proceedings) that current investment (made by VEDO customers) in energy efficiency has reached the point of optimization. Staff's own witness Mr. Puican admitted on cross-examination this very fact -- he has

[26]Correspondence docketed at the PUCO (Aug. 22, 2008).

[27]Correspondence docketed at the PUCO (Aug. 22, 2008).

[28] Correspondence docketed at the PUCO (July 30, 2008).

[29]Staff Ex. 3 at 4-5(Puican Direct Testimony).

seen no evidence of an over-investment in conservation up to now.[30] With energy efficiency efforts just beginning (aside from weatherization) it is a giant and remarkable leap to the conclusion that there will be over-investment in energy efficiency by VEDO customers if the rate design is not immediately and drastically changed in this case. Without any evidence of actual over-conservation, this theory has no merit as a driver for the need for SFV rate design. Furthermore, OCC questions the entire concept of "over-investment" in conservation, and posits the question of why a customer decision to invest in conservation efforts is a bad thing -- especially if that is what the customer wants to do. Given the lack of evidence of "over-conservation" it is unreasonable to design rates around such a purely theoretical concept.

Although the Company and Staff are concerned with the theory of "over-conservation" they ignore the reality of the impact of SFV on the actual conservation efforts of VEDO's customers. In doing so they fail to address the fact that the SFV rate design can be unfair to any individual VEDO residential customer who attempted to reduce energy consumption through prior energy efficiency investments (i.e. customers who have invested in additional home insulation and purchased more efficient furnaces and water heaters, etc.) outside of any Company-sponsored Demand Side Management ("DSM") program. This is because the large fixed-cost nature of the SFV rate design diminishes the value of reduced consumption by consumers, because the resulting smaller portion of the customers' bill is determined by the volumetric rate. This will increase the time required for customers to achieve a payback of their costs.

[30] Tr. Vol. IV (Puican) at 110 (August 25, 2008).

Moreover, beyond changing the parameters of a customer's economic decision to conserve, pricing under the SFV rate design favors large users and encourages consumption -- a price signal that is contrary to the State of Ohio policy to encourage conservation.[31] The fact remains that the SFV rate design reduces costs to high use customers and thus encourages more use. The parties advocating for SFV rate design have yet to explain away this internal inconsistency.

Investing in energy efficiency technology, not increasing usage, should be the rational response to increasing gas costs (and to Ohio State policy),[32] and yet under SFV customers who conserve will see their investment returns diminished and payback periods lengthened. By diminishing the value of consumption reductions, customers not only lose the ability to manage their utility bills, but more importantly, lose the incentive to invest in more energy efficiency.

3. It is inappropriate to blindly follow the Commission's holding in the Duke Energy Rate Case when the Commission's decision in this case should be based on the record produced here.

Staff relies heavily on the recent Duke Energy Rate Case ("Duke Rate Case"),[33] where the Commission implemented SFV, and argues that the Commission's holding there "applies squarely to this case." Id. at 11. Staff argues that the PUCO decision in the Duke case established a new policy for rate design.[34]

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[31] R.C. 4929.02 and R.C. 4905.70.

[32] Id.

[33] *In re Duke Rate Case,* Case No. 07-589-GA-AIR.

[34] Staff Initial Brief at 1-2.

Although many of the arguments for SFV rate design are the same as those previously discussed in not only the Duke Rate Case but also the Dominion East Ohio Case ("DEO Rate Case"),[35] each case, including VEDO's, must be decided based upon the record. VEDO's case deserves full consideration without any presumption or predetermination that the SFV is needed now for VEDO's customers.

Instituting a radical change to the rate design in this case is even more alarming because there are many fundamental questions that remain unanswered regarding the implications of the SFV rate design upon customers -- especially low-use and low-income customers. These very questions were raised by the PUCO Commissioners at the April 23, 2008 Sunshine Meeting,[36] and again at the September 25, 2008 Oral Argument before the PUCO in the DEO Rate Case.

Moreover, while urging the Duke result, the Staff ignores a key aspect of the Duke Order. In Duke, the PUCO identified the Pilot Low Income Program as a key component of its SFV rate design issue:

> Thus, crucial to our decision to adopt Duke and Staff's proposed rate design is the Pilot Low income program aimed at helping low-income, low use customers pay their bills. This new program will provide a four dollar, monthly discount to cushion much of the impact on qualifying customers.[37]

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[35] *In re Dominion Rate Case,* Case No. 07-829-GA-AIR.

[36] *In re Duke Rate Case,* Case No. 07-589-GA-AIR, OCC Application for Rehearing, at 28-30 (June 27, 2008).

[37] *In re Duke Rate Case,* Case No. 07-589-GA-AIR et al., Opinion and Order at 19-20 (May 28, 2008).

In fact, the PUCO took the step of doubling the size of the program in order to address the low-income, low-use issue, and pointed out that it would evaluate the program's effectiveness and its concerns at the end of the pilot.[38]

Despite the PUCO's emphasis on the ruling in Duke, the Staff failed to include a similar pilot program for VEDO. If the PUCO is going to proceed with the SFV rate design, which OCC does not support, it should establish a similar program for VEDO, and order a Pilot Low Income Program for eligible low use low income customers and corresponding program evaluation.[39]

Moreover, as OCC explained in its Initial Brief[40] there ought to be further conditions adopted if the PUCO determines to enact an SFV approach for VEDO customers. These conditions include delaying the implementation of SFV until the more facts are known such as the impact of SFV on low-use and low-income customers, and the impact on lost revenues and lost customers. Also if SFV is to be enacted, it should be phased in and limited in the number of customers it is applied to. An independent auditor should also be hired to determine if there is over-recovery of revenues under SFV, with over-recovery being refunded to customers.

4. The Staff and the Company have failed to show that there needs to be a change to the Commission's traditional precedent on rate design. Nor has either Staff or Company shown that the prior Commission decisions setting Vectren's current rate design are in error.

[38] *Id.*

[39] See *Id.* where the PUCO expanded the Pilot Low Income Program to 10,000 eligible customers of Duke's 424,000 total customers (Duke Order at 2).

[40] See OCC initial Brief at 30.

It is clear that implementing an SFV rate design, on a flashcut basis, or otherwise, is a drastic break from the Commission's long standing policy of designing rates.[41] The Commission has generally approved a rate design aimed at keeping a minimal customer charge accompanied by a volumetric component. In the past, this rate structure has been acceptable to the companies and their customers. As recently as 2006, Vectren sought to extend the current rate design structure emphasizing a minimal customer charge.[42]

The current rate design structure represents long-established precedent of the Commission. The Ohio Supreme Court has opined that the although the Commission should be willing to change its position when the need therefore is clear and it is shown that prior decisions are in error, it should respect its own precedent to assure predictability which is important in all areas of law.[43] The Staff and the Company nonetheless have failed to meet the burden of proving there is a clear need to change rate design and that the prior 30 years of rate design decisions by the Commission are erroneous.

Staff is reluctant to call the past rate design decisions erroneous, even admitting that traditional rate design allowed utilities an opportunity to recover their recommended revenue requirement.[44] The Staff argues that this was only true however, when gas consumption remained level or increased.[45] In fact, if gas consumption was increasing

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[41] See Staff Brief at 9-10.

[42]See VEDO Application filed in *In the Matter of the Application of Vectren Energy Delivery of Ohio, inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Service and Related matters*, Case No. 04-571-GA-AIR.

[43] *Cleveland Elec. Illum. Co. v. Pub Util. Comm.*, (1975) 42 Ohio St. 2d 403,431.

[44] Id.

[45] Id.

beyond the level built into rates, the utility would actually be afforded more than its opportunity to recover its revenue requirement. All other things being equal, the gas utility would have benefited by collecting additional revenue from its base customers and perhaps collecting even more revenue from new customers and added throughput caused by new customers. So, during times of level or increased usage the rate design emphasizing a minimal customer charge benefited utilities.

But now, if the Company's data is to be believed,[46] the trend in level or increased usage has **supposedly** reversed. VEDO testified that its ability to collect costs from customers is in jeopardy because as customers use less gas, its ability to collect the cost of service from such customers has diminished.[47] In other words, now that the utilities no longer benefit from the traditional rate design, they want to change the rules so that once again they can be provided with more than an opportunity to earn their authorized rate of return. The SFV is their new rate design of choice for optimizing their revenue collections from customers, and Vectren attempts to cloak its motive (collecting more revenues) for implementing SFV by claiming it is seeking SFV so that it can embrace energy conservation efforts.[48]

And for various reasons the PUCO Staff is leading the cause for billing Ohio customers under the SFV formula. According to the Staff there are several reasons justifying a shift from the historical rate design.[49] First, Staff has suddenly focused on the

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[46]Company Ex. 9 at 5-6 (Ulrey Direct Testimony)

[47]Company Ex. 9a at 4 (Ulrey Supplemental Testimony)

[48] VEDO Brief at 8.

[49] Staff Brief at 10.

notion that in this case, it must remedy the decades of incorrect cost recovery where fixed distribution costs were recovered in large respect through volumetric rates.[50] Second, Staff asserts that SFV provides rate certainty by leveling the distribution charges.[51] Third, Staff focuses on the fact that if SFV is implemented it will reduce the need for frequent rate cases. SFV also eliminates the need for decoupling which involves "controversial reconciliations and weather adjustments," according to the Staff.[52]

But no valid argument has been made on the most important question of what is the law of Ohio, that rates without the SFV rate design would deny the Company its *opportunity* to achieve a fair rate of return? Indeed the Ohio General Assembly provided the application process that is at issue in this case for utilities to seek adjustments toward an opportunity for a fair rate of return

Furthermore, whether and to what extent customers have reduced usage since VEDO's last rate case is disputeable. While VEDO claims customers have significantly reduced usage, one must consider the source of the alarm. In fact, OCC's consultant Novak provided testimony that VEDO's weather-normalized use per customer has actually remained level for the last six years. Thus, in this case, there is no real need to establish SFV rate design because gas consumption on a weather-normalized basis has not declined for VEDO.

All of the Staff's other rationales for changing the historic rate design have always existed and were never acted upon as a reason to adopt SFV. They are not in and of

[50] Id.

[51] Id. at 11.

[52] Id. at 10.

themselves a legitimate basis for mandating SFV. For instance, fixed costs associated with utility service for customers have not suddenly changed. Fixed costs and the level of fixed costs associated with providing utility service have remained essentially static for many, many years. The need for rate certainty for customers again is not a new phenomena. The prior rate design seemed perfectly adequate in that respect. Moreover, there is a distinct lack of evidence to bear out the fact that customers want SFV in order to have rate certainty. Rather, the public testimony and docketed correspondence argues otherwise. Reducing the need for frequent rate cases should not be a goal of rate design. While reducing rate cases may be a regulatory goal, rate cases do serve purposes, when rate cases are filed, parties have the opportunity to analyze all aspects of a utility's finances, including areas where expenses might have decreased, and therefore should be taken into account in setting new rates. And the evidence in this proceeding does not bear out the fact that Vectren can commit to not filing rate increases as frequently when it invokes SFV. While the Staff also seizes upon the notion that SFV will not entail controversial proceedings that decoupling is expected to produce, the Staff has no experience to draw upon in this respect as decoupling has not yet been implemented in tariffed rates.

In summary, Staff and Company have failed to define how there is a real need in this case for the Commission to overturn its rate design decisions in favor of a drastic new and unprecedented rate design called SFV. Likewise, they have failed to prove how the prior Commission decisions on rate design, setting a minimal customer charge and volumetric rates, are in error.

IV. CONCLUSION

In this case the Company and the Staff support a radical change to rate design. This change is radical in the sense that it overturns more than thirty years of rate design practice under which the customer charge and volumetric rates were applied in this jurisdiction. It is radical in the sense that only three out of fifty states in the U.S. have adopted a full SFV.

SFV need not and should not be adopted in this proceeding. In fact, the record argues against its adoption. The Company and Staff have failed to show how there is a real need for a change in the current rate design. They have failed to show that the current rate design denies the utility the *opportunity (which is not the guarantee provided by SFV)* to earn its fair and reasonable rate of return. Moreover, there has been no evidence to suggest that the Commission's long standing precedent in designing rates, with minimal a customer charge, is in error.

Additionally, the adoption of SFV is inappropriate because it will cause problems for VEDO's customers. There is a concern that SFV may have adverse impacts on low-usage and low-income customers. Also, SFV will undermine customers' energy conservation efforts, contradicting Ohio law which seeks to encourage such efforts.

Instead, the Commission should adopt weather-normalized decoupling. Such decoupling is symmetrical, providing benefits to both the company and its customers. SFV does not. Moreover, decoupling accomplishes much of the same objectives as SFV. It addresses the issue of alleged reduced average use per customer. It removes the Company's disincentives to engage in conservation efforts. And it leaves the current rate structure intact, giving customers the ability, though conservation, to reduce their bills,

though reduced volumetric usage. Finally, there is no evidence on the record to suggest that decoupling will harm customers, as SFV is likely to do.

If the Commission is to adopt some form of SFV, which OCC is not recommending, it should only do so once it has studied the impact of SFV on low-use and low-income customers and lost customers and lost revenues. Moreover, the Commission should consider structuring alternative approaches to SFV which would include pilot programs of limited scope and duration. Additionally the Commission should consider a more gradual move to SFV if it is determined that SFV is appropriate. A flash cut approach to SFV would be inappropriate and in contravention of the rate design principle of gradualism, a principle that even Staff and Vectren recognize. That gradual move however will necessarily require the filing of another case because the Commission cannot implement a staged approach in this case, due to Vectren's failure to provide the public with notice of Stage 2 rates.

Respectfully submitted,

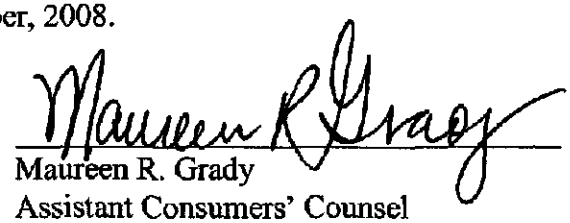
JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Maureen R. Grady, Counsel of Record
Joseph P. Serio
Michael E. Idzkowski
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574
grady@occ.state.oh.us
serio@occ.state.oh.us
idzkowski@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply *Brief of the Office of the Ohio Consumers' Counsel* was provided to the persons listed below via first class U.S. Mail, postage prepaid, this 7th day of October, 2008.



Maureen R. Grady
Assistant Consumers' Counsel

PARTIES

Werner Margard
Assistant Attorney General
Public Utilities Commission of Ohio
180 East Broad Street, 9th Floor
Columbus, OH 43215

John W. Bentine
Counsel for Interstate Gas Supply
Chester, Wilcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus, OH 43215-4259

John Dosker
General Counsel
Stand Energy Corporation
1077 Celestial Street Suite 110
Cincinnati, OH 45202-1629

Samuel C. Randazzo
Gretchen J. Hummel
Lisa G. McAlister
McNees Wallace & Nurick, LLC
21 East State Street, 17th Floor
Columbus, OH 43215

Ronald E. Christian
Executive Vice President, General Counsel
VEDO Corporation
P.O. Box 209
Evansville IN 47702-0209

W. Jonathan Airey
Gregory D. Russell
Vorys, Sater, Seymour & Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008

Trent A. Dougherty
Director of Legal Affairs
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212

David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lime Street
P.O. Box 1793
Findlay, OH 45839-1793