FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service.	))))	Case No. 07-829-GA-AIR
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of an Alternative Rate Plan for its Gas Distribution Service.	))))	Case No. 07-830-GA-ALT
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval to Change Accounting Methods.	))))	Case No. 07-831-GA-AAM
In the Matter of the Application of The East Ohio Gas company d/b/a Dominion East Ohio for Approval of Tariffs to Recover Certain Costs Associated With a Pipeline Infrastructure Replacement Program Through an Automatic Adjustment Clause and for Certain Accounting Treatment.	))))))))	Case No. 08-169-GA-UNC
In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Recover Certain Costs Associated with Automated Meter Reading and for Certain Accounting Treatment.	))))))	Case No. 06-1453-GA-UNC

JOINT APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL THE CITY OF CLEVELAND, OHIO PARTNERS FOR AFFORDABLE ENERGY, THE NEIGHBORHOOD ENVIRONMENTAL COALITION, THE EMPOWERMENT CENTER OF GREATER CLEVELAND, CLEVELAND HOUSING NETWORK, AND THE CONSUMERS FOR FAIR UTILITY RATES

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November 14, 2008

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BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
THE CITY OF CLEVELAND,
OHIO PARTNERS FOR AFFORDABLE ENERGY,
THE NEIGHBORHOOD ENVIRONMENTAL COALITION, THE EMPOWERMENT CENTER OF GREATER CLEVELAND, CLEVELAND HOUSING NETWORK, AND THE CONSUMERS FOR FAIR UTILITY RATES

The Office of the Ohio Consumers' Counsel ("OCC") the City of Cleveland, the Ohio Partners for Affordable Energy, the Neighborhood Environmental Coalition, the Empowerment Center of Greater Cleveland, the Cleveland Housing Network, and the Consumers for Fair Utility Rates ("Citizens Coalition") (collectively "Joint Consumer Advocates") apply for rehearing of the October 15, 2008 Opinion and Order ("Order") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). Through this Joint Application for Rehearing, the Joint Consumer Advocates seek to protect approximately 1.2 million residential utility customers of The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO" 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 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.

B. The Commission erred by approving a rate design for a two-year transition period without establishing R.C. 4909.18 and R.C. 4909.19 as governing the process for determining the rate design that will be implemented after the two-year transition period.

C. 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.

D. 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.

E. The Commission erred by approving a rate design that unreasonably violates prior Commission precedent and policy.

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

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In this case, the Commission is placing its desire to ensure that DEO has sufficient revenues to cover its fixed costs over the interests of residential customers[1] and their desire to engage in conservation efforts. The Commission has identified two ways to protect the Company's revenue stream: (1) a straight fixed variable rate design; and (2) a decoupling mechanism. A straight fixed variable rate design provides the utility with greater guaranteed revenues by dramatically increasing the fixed monthly customer charge. In addition to greater guaranteed revenues the utility does not have to account for and refund to its customers any over-recovery, as would be necessitated by a rate design with a decoupling mechanism. Before the Commission makes an ultimate decision it should have all the facts and analysis it requires on the record.

In the Commission's Order there is recognition that indeed all facts and analysis are not available by the fact that the Commission has identified certain issues that must be further analyzed by the Company and/or other interested parties (e.g. the DSM Collaborative) who were ordered to perform studies and provide the Commission with certain information on a prospective basis.[2] The Commission is attempting to fill gaps in the record evidence it needs to make a decision on the appropriate rate design, by ordering these studies. A better course of action would be to order these studies and evaluate the results before implementing such dramatic changes in the way DEO charges its customers. Thus, a more complete evaluation intended to fully understand the implications of implementing the SFV rate design is imperative. Following such an

[1] This interest was clearly displayed by the hundreds of residential customers who attended the Local Public Hearings, the over 175 residential customers who testified at the Local Public Hearings and the over 275 letters submitted on the record, in opposition to the SFV rate design.

[2] Order at 23, 25 and 27.

evaluation, the interested parties should be entitled to their due process rights as the Commission undertakes a process to review the impacts of the SFV rate design, and determine the appropriate rate design going forward.

The Commission should reconsider its decision to implement the SFV rate design for a number of legal arguments made by parties opposed to the SFV rate design. DEO did not request the SFV rate design in its rate case application ("Application") and therefore failed to provide the customer notice required under Ohio law. In addition, the SFV rate design sends an improper price signal to the customer and adversely impacts the customers' conservation efforts by extending the payback period for energy efficiency investments. The SFV rate design unreasonably increases the fixed monthly customer charge in violation of the regulatory principle of gradualism.

The Joint Consumer Advocates are 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 Commercial and Industrial customers whose usage is as high as 3,000 Mcf per year, and 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 for charging low- users the same amount as large users. Finally, the low-income pilot program as ordered by the Commission in these cases is a smaller program than the pilot program ordered in the Duke Energy-Ohio ("Duke") rate case, despite the

fact that DEO is three times the size of Duke, and the well documented economic problems in DEO's service territory.

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 July 20, 2007, DEO filed a Pre-Filing Notice of its intent to increase rates for the natural gas distribution service that is provided through its gas pipelines. On August 30, 2007, DEO filed its Application in these cases ("Rate Case"), to increase the rates that customers pay.

Motions to Intervene were filed by the OCC,[3] Stand Energy Corporation ("Stand"),[4] OPAE,[5] Ohio Energy Group ("OEG"),[6] Interstate Gas Supply, Inc. ("IGS"),[7] the City,[8] the Citizens Coalition,[9] Integrys Energy Services, Inc. ("Integrys"),[10] Dominion Retail, Inc. ("Dominion Retail"),[11] Industrial Energy Users-Ohio ("IEU"),[12] Utility

[3] OCC Motion to Intervene (September 12, 2007).

[4] Stand Motion to Intervene (November 21, 2007).

[5] OPAE Motion to Intervene (July 26, 2007).

[6] OEG Motion to Intervene (August 1, 2007).

[7] IGS Motion to Intervene (August 17, 2007).

[8] City Motion to Intervene (June 17, 2008).

[9] The Citizen Coalition's Motion to Intervene (August 10, 2007).

[10] Integrys Motion to Intervene (January 7, 2008).

[11] Dominion Retail Motion to Intervene (September 17, 2007).

[12] IEU Motion to Intervene (September 24, 2007). (IEU on June 19, 2008 withdrew from these cases).

Workers Union of America ("Union"),[13] Ohio Oil and Gas Association ("OOGA"),[14] and Direct Energy Services, LLC. ("Direct").[15]

On September 13, 2007, the Company filed the direct testimony of nine Company witnesses and outside experts. On May 23, 2008, 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").

On September 20, 2007, DEO filed a first Motion to Consolidate its advanced meter reading ("AMR") program application with the rate case Application. The AMR Application was initially filed in 2006, and sought recovery for the funds to be used by the Company to pay for the AMR program through a cost recovery charge to customers.[16] The AMR Application projected AMR program costs of approximately $100-110 million

Then six months into the rate case review process, on February 22, 2008, DEO filed a second Motion to Consolidate.[17] This Motion to Consolidate sought to add yet another revenue requirement to the Rate Case Application -- this time a $2.6 billion (in 2007 dollars)[18] Pipeline Infrastructure Replacement ("PIR") Application.[19] The PIR Application was initially filed as a "UNC" filing, or an unclassified filing, and assigned

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[13] Union Motion to Intervene (December 28, 2007).

[14] OOGA Motion to Intervene (February 29, 2008).

[15] Direct Motion to Intervene (January 18, 2008).

[16] *AMR Application* at 6.

[17] *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio for Approval of Tariffs to Recover Certain Costs Associated with A Pipeline Infrastructure Replacement Program Through an Automatic Adjustment Clause, And for Certain Accounting Treatment*, Case No. 08-169-GA-UNC, Motion to Consolidate, (February 22, 2008). ("PIR Case").

[18] Based on the fact that the Company only calculates the PIR Application costs in terms of "2007 dollars" and the fact that the AMR Application costs have already increased by 10% in less than a year from $110-$110 million to $126.3 million, leads to inevitable conclusion that the PIR Application costs will far and away exceed the $2.6 billion price tag that the Company has identified in this case.

[19] *PIR Case*, Application (February 22, 2008) at 11.

Case No. 08-169-GA-UNC.

Between June 20 and June 23, 2008, OCC, DEO, OPAE, IGS, Integrys, the City, and the Coalition filed objections to the Staff Report, and Summaries of Major Issues.[20] On June 23, 2008, OCC filed testimony of eight witnesses,[21] and DEO filed the Supplemental Testimony of three witnesses.[22]

On August 22, 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, agreement to establish a pipeline infrastructure program with reasonable price caps, and establishment of a program to address the safety concerns and replacement of risers in a reasonable time period.[23] Under the Stipulation, all representatives of residential customers -- who will be forced to bear the impact of the SFV rate design -- OCC, OPAE,[24] the City, and the Citizens Coalition have reserved their right to litigate the rate design issue. The PUCO Staff, DEO and OOGA support of the SFV rate design which represents a radical departure from decades of PUCO regulation of natural gas Local Distribution Companies

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[20] OCC, DEO, OPAE, the City, and the Coalition were the only parties who filed objections that specifically addressed the rate design issue that was the subject of litigation in the evidentiary hearing.

[21] The following witnesses filed Direct Testimony on behalf of the OCC: Wilson Gonzalez, Steven B. Hines, Beth E. Hixon, Frank W. Radigan, Trevor R. Roycroft, Patricia A. Tanner, James D. Williams, J. Randall Woolridge.

[22] The following witnesses filed testimony on behalf of DEO: Vicki H. Friscic (Supplemental), Jeffrey A. Murphy (Second Supplemental), and Michael J. Vilbert (Supplemental).

[23] Staff Ex. No. 3B (Puican Second Supplemental Testimony) at 2-3 (August 25, 2008).

[24] OPAE is a provider of weatherization and essential infrastructure services to the low income residential consumers within DEO's service territory.

("LDCs") in Ohio. Noteworthy is that no group that purports to represent the interests of consumers supported the SFV.

The Commission held ten local public hearings between and July 28 and August 21, 2008,[25] and the evidentiary hearings were conducted between August 1 and 27, 2008. On August 26, 2008, the OCC filed rebuttal testimony,[26] and on August 27, 2008, DEO filed surrebuttal testimony.[27] The Attorney Examiners ordered an extremely short briefing schedule of only 14 days -- that incorporated the Labor Day Holiday -- for initial briefs, and only 6 days for reply briefs and included an unprecedented fifteen page limitation for the initial and reply briefs. As a result, OCC and other parties were forced to make difficult decisions about what legal arguments could and could not be advanced given the constraints imposed by the Commission. The initial briefs were due on September 10, 2008, and reply briefs due on September 16, 2008. An oral argument was conducted on September 24, 2008.

The Commission issued its Opinion and Order ("Order") on October 15, 2008, in which the Commission approved the SFV rate design, which all but ends the time-honored practice of billing customers per cubic foot of the gas they use, which is 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

[25] Order at 5.

[26] OCC Ex. No. 22 (Colton Rebuttal Testimony).

[27] DEO Ex. No. 1.5 (Murphy Surrebuttal Testimony).

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 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."[28]

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."[29] 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 * * *."[30]

The Joint Consumer Advocates meet the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10. Accordingly, the Joint Consumer Advocates respectfully request 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:

[28] *Id.*

[29] *Id.*

[30] *Id.*

A. 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.[31]

The Commission approved the SFV rate design for DEO's General Sales Service ("GSS") and Energy Choice Transportation Service ("ECTS") classes despite acknowledging that there was insufficient record evidence to support its decision, as is evidenced by its ordering future studies intended to establish findings on a prospective basis to validate its current decision. The areas of inquiry that the Commission has ordered be reviewed are as follows: 1) DEO is to perform a review of the cost allocation methodologies for the GSS/ECTS classes;[32] 2) following the end of the first year of the low-income pilot program, the Commission will "evaluate the program for its effectiveness in addressing our concerns relative to the impact on low-use, low-income customers;"[33] and 3) the DSM collaborative was ordered, as part of its review, "to develop energy efficiency program design alternatives and should consider those alternatives in a manner that strikes a balance between cost savings and any negative ratepayer impacts."[34] Thus, the Commission seems to recognize that its decision will cause harm to some customers and it attempted to mitigate that harm through a series of band-aides and studies. The clear and present fact remains that customers simply would be better off without the SFV and approval of the rate design as originally proposed by DEO.

R.C. 4903.09 requires the Commission to provide specific findings of fact and written opinions supported by record evidence. R.C. 4903.09 states:

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

[32] Order at 25.

[33] *Id.* at 27.

[34] *Id.* at 23.

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

In these cases, the Commission absent current and complete record evidence is attempting to create validation and support for its order to implement an SFV rate design through these prospective studies that could provide *sufficient* evidence to warrant the PUCO's reversal of its current position on the SFV rate design.

The Commission in its Order stated it was approving "[the SFV rate design for] the first two years of this transition period."[35] The Commission's Order for selected studies is inappropriate and a more comprehensive study is necessary to determine if the SFV rate design is just and reasonable and should be continued beyond the first two years of this transition period for the reasons discussed below. Moreover, there is no explanation or understanding of what may occur at the end of this two-year period.

1. The Commission Erred By Approving the SFV Rate Design and Ordering the Company to Study the GSS Class Cost of Service Study Prospectively.

The PUCO has failed to explain why as a policy matter it is just and reasonable to have low-volume residential users subsidize high-volume Commercial and Industrial, customers and high-use residential customers. Especially considering that in the GSS/ECTS classes the highest use customers are Commercial and Industrial customers,

[35] Order at 25.

who use up to 30 times the natural gas that the average residential customer uses.[36] The goal of rate design should be to eliminate inter and intra-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 subsidize the low-users since they generally contribute to system costs and are most likely making the least effort to conserve our nonrenewable resources.

The Commission recognized that the Company's established GSS/ECTS rate classes pose a potential inter-class allocation problem. The Commission Order stated:

> Therefore, the Commission is approving the first two years of this transition, however, prior to approval of rates for rates of the third year and beyond the Commission believes that a review of the cost allocation methodologies for the GSS/ECTS classes is appropriate. Therefore, DEO is directed to complete the cost allocation study required in the stipulation within 90 days of this order. Upon completion, DEO should submit a report and recommendation regarding whether the GSS/ECTS classes are appropriately comprised of both residential and nonresidential customers or whether the classes should be split. DEO shall also provide, if the recommendation is to split the classes, a recommended cost allocation per class. Upon review of the cost allocation study, the Commission will be establishing a process that will be followed to determine the appropriate rates in year three and beyond, as soon as practicable.[37]

It is unclear why the PUCO has ordered the Company to perform a study within 90 days, of its Order, but absent knowing what the results of the study are, the PUCO has demonstrated a willingness to wait for two years before addressing the study's results. It is unrefuted that DEO's GSS class is comprised of non-homogeneous residential and

[36] Based on average residential usage of 99.1 Mcf per year (Tr. Vol. IV (Murphy) at 17-18 (Aug. 25, 2008), and proposed maximum GSS class customer usage of 3,000 per year.

[37] Order at 25-26.

non-residential consumers with widely varying usage. The average residential customer in DEO's service territory uses 99.1 Mcf per year.[38] The average non-residential GSS customer uses 390 Mcf per year, or almost four times greater usage.[39] However, the largest consumption in the GSS class currently is in excess of 5,000 Mcf per year.[40] The Company's justification for combining residential with Commercial and Industrial customers in the GSS class was that such customers who use 1, 2, or 3 times the amount of gas as the average residential consumer exhibit similar load characteristics.[41] This argument ignores that while the load profile may be similar at these lower usage levels, there are other factors that demonstrate that the cost to serve these larger entities is greater.[42] This includes the amount of distribution pipe that is required because some of these establishments may not be clustered in more dense urban settings.[43] Nonetheless, this does not explain the inclusion of Commercial and Industrial customers who use more than 300 Mcf per year and use up to 3,000 Mcf per year, and therefore the GSS class cannot be considered homogeneous relative to the residential consumers' usage.

Reliance on DEO's cost of service study to support the radical change to the SFV rate design is equally inappropriate. The argument in favor of the SFV rate design is that it aligns the customers' cost share with the burden that the user places on the system.[44] Under the SFV rate design, no user should pay more than its appropriately allocated share

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[38] Tr. Vol. IV (Murphy) at 17-18 (August 25, 2008).

[39] *Id.* at 18-19.

[40] Staff Ex. No. 3B (Puican Second Supplemental) at SEP 1A, 1B, 2A, and 2B (August 25, 2008).

[41] Tr. Vol. IV (Murphy) at 32 (August 25, 2008).

[42] OCC Ex. No. 21 (Radigan Direct Testimony) at 6-8 (June 23, 2008).

[43] OCC Ex. No. 22 (Colton Surrebuttal Testimony) at 30-35 (August 26, 2008).

[44] http://nrri.org/pubs/electricity/rate_des_energy_eff_SVF_REEF_jul-08.pdf *A Rate Design to Encourage Energy Efficiency and Reduce Revenue Requirements,* at 8 (David Magnus Boonin) (July 2008).

of fixed costs. However, the record does not establish that all customers in the GSS class place the same burden on the system.[45] Without any more detail in the cost of service study, it is un-determined and un-determinable for this case who is actually responsible for the fixed costs that are recovered through the SFV rate design. Therefore, the same fixed charge should not be levied on residential customers and non-residential large usage (in excess of 300 Mcf per year) customers in the GSS class.

Absent actual homogeneous membership in the GSS customer class, there inevitably will be misallocations among customers within the GSS class. This is an issue that is addressed prospectively in the Stipulation.[46] However, a future remedy for the obvious current shortcomings of the class cost of service study relied upon in these cases to support the SFV rate design does little to assist the low-use residential consumers who will be most harmed by the SFV rate design during years 1 and 2. Moreover, it does nothing to establish a legal record that supports the Commission's decision.

2. The Commission Erred By Approving a Low-Income Pilot Program Without an Adequate Record to Support the Order.

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

> We recognize that, with this change to rate design, as with any change, there will be some customers who will be

[45] OCC Ex. No. 21 (Radigan Direct) at 24 (June 23, 2008) ("* * * future class cost of service studies should not assume, as DEO has done here, that the cost of service laterals and meters and regulators is independent of the size of the customers. Rather, these costs should have been allocated based on either the actual costs of service laterals and meters and regulators serving each class, or a sampling of the equipment that serves customers in each class combined with estimates of the average costs for each type of equipment. The existing cost of service study does not provide the detail needed to establish an average customer cost, or the customer costs that represent the costs of serving the lowest use customers in the class.").

[46] Joint Ex. No. 1 (Stipulation) at 11, (August 22, 2008).

> 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.[47]

The Commission's Order makes the statement that low-usage customers have not been paying the entirety of their fixed costs. This statement is made without citation, and without any prior Commission precedent that found that high-usage customers were over-paying fixed costs under the previous rate design. In fact, prior to the current proceeding and the recent Duke rate case, the PUCO has never made such a finding of fact. Instead customers are being forced to accept the financial fallout from this unsubstantiated claim being transformed into fact. 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 DEO's low-income customers, especially non-PIPP low-use and low-income customers, is unknown and debatable.

The record in these cases 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, and not after-the-fact**. The Commission has approved the SFV rate design without a full and complete understanding of the harm that it may cause. Using another governmental regulation analogy, this would be the equivalent to requiring

[47] Order at 26.

the FDA to grant approval unless it could prove the drug was harmful.[48] [49] [50] It is the responsibility of the manufacturer to demonstrate that the product is **not** dangerous.[51] Similarly it should not be the PUCO or the intervening parties' responsibility to prove that the SFV rate design is not just and reasonable, but instead it is the Company's burden to prove that it is just and reasonable.[52]

The SFV rate design approved by the Commission is bad public policy for DEO's low usage and low-income residential customers who will now be forced to subsidize DEO's larger use commercial, industrial and residential customers. The SFV rate design has the effect of making the distribution cost per Mcf that a customer faces higher at lower consumption levels than at higher consumption levels.[53] Such a rate design is inherently unfair to low-usage low-income customers, who because of their limited means, likely live in smaller dwellings, such as apartments, and use less natural gas than homeowners with larger 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

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

[49] *Id.*

[50] *Id.*

[51] *Id.*

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

[53] Staff Ex. No. 3B Puican Second Supplemental Testimony at Exhibit SEP-1A (August 25, 2008) (By way of example as usage increases the cost per Mcf decreases: 12 month usage of 5 Mcf Proposed Bill $167.25 Cost per Mcf = $33.45; 12 month usage of 100 Mcf Proposed Bill $362.72 Cost per Mcf = $3.6272; and 12 month usage of 5000 Mcf Proposed Bill $12,405.60 Cost per Mcf = $2.4811).

mortgage foreclosure crisis and with the country facing a looming recession, a fact initially raised by Company witness Murphy, and uncontested in the record.[54]

The Commission states a concern with the impact that the change in rate structure will have on some DEO customers, and recognizes that some relief is warranted for these customers; however, even without a study the Commission's Order is suspect.

> In the Duke case, we approved a pilot program available to a specified number of eligible customers, in order to provide incentives for low-income customers to conserve and to avoid penalizing low-income customers who wish to stay off of programs such as PIPP. We emphasized in the Duke case that the implementation of the pilot program was important to our decision to adopt a levelized rate design in that case. Therefore, the Commission finds that DEO should likewise implement a one-year low-income pilot program aimed at helping low-income, low-use customers pay their bills.
>
> As in the Duke case, the customers in the low-income pilot program shall be non-PIPP low-usage customers, verified at or below 175 percent of the poverty level. DEO's program should provide a four-dollar, monthly discount to cushion much of the impact on qualifying customers. This pilot program should be made available one year to the first 5,000 eligible customers.[55]

To the extent that the Commission has ordered this small offering to help low-use low-income customers who will be penalized through the implementation of SFV, it is entirely unclear why this benefit evaporates after one year when the SFV will be in place for a longer period of time. Moreover, the Commission failed to explain how DEO -- a company with almost 1.2 million residential customers or almost three times the number

[54] DEO Ex. No.1.1 (Murphy Direct Testimony) at 21-22 (September 13, 2007).

[55] Order at 26.

of residential customers that Duke has (approximately 378,000),[56] and with the well documented economic challenges in its service territory[57] -- should have such an important program that is one-half the size of Duke's. If the low-income pilot is to have any significance and benefit for non-PIPP low-income customers, then it must be available to a comparable number of customers -- which for DEO is 40,000 customers -- to take into account the larger number of DEO customers and the severe economic conditions in the DEO service territory.

The Commission's Order establishes a rationale for the low-income pilot program, but the Commission has no analysis to support how the approved pilot program will be sufficient to achieve the stated purpose. The Order stated:

> In the Duke case, we approved a pilot program available to a specified number of eligible customers, in order to provide incentives for low-income customers to conserve and to avoid penalizing low-income customers who wish to stay off of programs such as PIPP.[58]

The pilot program is approved by the Commission without the benefit of sufficient understanding of the extent of the need that the Commission alleges to address. As OCC witness Colton stated:

> We found that exactly half (50%) of Ohio's low-income natural gas customers had natural gas burdens of below the minimum necessary for those households to gain benefits from participation in the Ohio PIPP.[59]

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[56] http://www.puco.ohio.gov/emplibrary/files/util/utilitiesdeptreports/natlgascustchoiceenrollmentdec07.pdf (as of December 31, 2007 DEO had 1,129,559 residential customers and Duke had 378,281).

[57] DEO Ex. No.1.1 (Murphy Direct Testimony) at 21-22 (September 13, 2007).

[58] Order at 26.

[59] OCC Ex. No. 22 (Colton Rebuttal Testimony) at 23-24 (August 26, 2008).

A point that was convincingly made during the oral argument,[60] and with no record evidence to contradict Mr. Colton's projections, is that there could be as many as 54,000 low-income customers in DEO's service territory who are low-use customers.[61] In such a case, the Commission's pilot program for 5,000 customers for only one year constitutes the proverbial drop in the bucket and will not come close to meeting the need or achieving the goals.

Despite lacking a full and complete understanding and appreciation of the impact that the change in rate design will have on low-use/low-income DEO residential customers, the Commission has approved the SFV rate design with a pilot program supposedly important to its decision. However, the analysis of the impact of the pilot program will not take place for a year after the SFV rates are implemented. The Order states:

> Following the end of the pilot program, the Commission will evaluate the program for its effectiveness in addressing our concerns relative to the impact on low-use, low-income customers.[62]

Such a study, after the implementation of the SFV rate design, will only serve to demonstrate the adequacy or -- more likely -- the inadequacy of the pilot program. There

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[60] Tr. Oral Argument at 59-60 (Serio) (September 24, 2008) ("Well, I guess the problem with that assumption is Mr. Murphy's testimony identified articles that called Cleveland the poorest city in the United States, yet under the Company's 24-hour study only 15 percent of their customers are at the poverty level. Those two things seem to contradict each other. How can you have the poorest city in the country but only 15 percent of your customers are at the poverty level? Obviously, a large number of low-income customers fell through the cracks of the Company's study and are not accounted for, and we should know how those customers are impacted before a permanent change is implemented.").

[61] DEO Ex. No. 1.5 (Murphy Surrebuttal Testimony) at JAM 1.8 (August 27, 2008) (JAM 1.8 states PIPP customers at 108,167, 50% would be approximately 54,000).

[62] Order at 27.

is nothing in the Order that will assure a remedy to the harm the SFV rate design causes. That is why a more expansive study with a process at the conclusion of the study is what should have been ordered by the Commission.

3. The Commission Erred By Ordering an Evaluation of the DEO DSM Energy Efficiency Programs Without Looking at the Impacts the SFV Rate Design Has On These Programs.

The Commission ordered the demand side management ("DSM") collaborative to perform a review of DEO's energy efficiency programs. The Commission stated;

> Furthermore, we encourage the collaborative to address additional opportunities to achieve energy efficiency improvements and to consider programs which are not limited to low-income residential consumers. As part of its review, the collaborative should develop energy efficiency program design alternatives and should consider those alternatives in a manner that strikes a balance between cost savings and any negative ratepayer impacts. The energy efficiency programs should also consider how best to achieve net total resource cost and societal benefits; how to minimize unnecessary and undue ratepayer impacts; how process and impact evaluation will be conducted to ensure that programs are implemented efficiently; how to capture what otherwise become lost opportunities to achieve efficiency improvements in new buildings; how to minimize "free ridership" and the perceived inequity resulting from the payment of incentives to those who might adopt efficiency measures without such incentives; and how to integrate gas DSM programs with other initiatives. Noting that the stipulation establishes a collaborative and a threshold related to reasonable and prudent DSM spending above the current $4,000,000 commitment, the Commission directs that the collaborative shall file a report within nine months of this order, identifying the economic and achievable potential for energy efficiency improvements and program designs to implement further reasonable and prudent improvements in energy efficiency.[63]

[63] Order at 23.

While the Commission ordering a study is appropriate and needed, the Commission's directives for the study are incomplete and fail to also include a review of the SFV rate design and the impact that it has on conservation and energy efficiency efforts (e.g. extending the payback period).

The Commission's requirements for the DSM evaluation, as with the low-income pilot and the cost allocation studies, are not comprehensive in nature and will not address the impacts that the SFV rate design has on DEO's residential customers, a topic which needs to also be studied. These studies only nibble around the edges of the problems that OCC has identified with the SFV rate design, and therefore, the Commission should consider a more expansive study that will, in addition to the areas ordered by the Commission to be studied, also study the SFV rate design and its impact on DEO's GSS/ECTS customers.

The Commission in its Order discusses a number of issues that require analysis, but does not provide citation to the record to support its determination that the SFV rate design is in the public interest. The Commission stated:

> Our analysis does not end there, however. Before strictly applying cost causation, we must consider and balance other important public policy outcomes of rate design. Would strict application of cost causation discourage conservation? Would it disproportionately impact economically vulnerable consumers, including both low-income customers and those on a fixed income? Will customers understand the rate design? Does it generate accurate price signals? Can it be implemented without rate shock - that is, with sensitivity to gradualism? On balance, what style of rate design will result in the best package of possible public policy outcomes?[64]

[64] Order at 25.

The Commission raises legitimate issues for consideration, and in order to properly analyze each issue, the Commission should order an independent comprehensive DSM conservation program evaluation. OCC also posits that these are questions that should be answered *before* implementing SFV, not after. Such an evaluation would be comparable to the independent study that the signatory parties in the Columbia Gas of Ohio, Inc. rate case agreed upon.[65] The scope of the independent study should be cooperatively developed by DEO, Staff, OCC, OPAE and other interested parties, and should include, but not be limited to, the effects of the SFV rate design on: consumption decisions, conservation efforts and uncollectible account balances at all levels of income and usage levels; low- use/low- income customers consumption patterns; PIPP enrollments and arrearages; and, consumers energy efficiency investment decisions.

B. The Commission Erred By Approving A Rate Design For A Two-Year Transition Period Without Establishing R.C. 4909.18 and R.C. 4909.19 As Governing The Process For Determining The Rate Design That Will Be Implemented After The Two-Year Transition Period.

The Commission unreasonably implemented the SFV rate design for a two-year transition period without establishing the process that will govern the determination of the rate design for subsequent periods. The Commission Order stated:

> Therefore, the Commission is approving the first two years of this transition, however, **prior to approval of rates for rates of the third year** and beyond the Commission believes that a review of the cost allocation methodologies for the GSS/ECTS classes is appropriate. Therefore, DEO is directed to complete the cost allocation study required in

[65] *In the Matter of the Application of the Columbia Gas of Ohio, Inc. for Authority to Amend Filed Tariffs to Increase the Rates and Charges for Gas Distribution Service,* Case No. 08-72-GA-AIR, et al., Joint Stipulation at 19 (October 24, 2008).

> the stipulation within 90 days of this order. Upon completion, DEO should submit a report and recommendation regarding whether the GSS/ECTS classes are appropriately comprised of both residential and nonresidential customers or whether the classes should be split. DEO shall also provide, if the recommendation is to split the classes, a recommended cost allocation per class. **Upon review of the cost allocation study, the Commission will be establishing a process that will be followed to determine the appropriate rates in year three and beyond, as soon as practicable.**[66]

The Commission failed to discuss, let alone establish in its Order what process will be used to determine appropriate rates beginning in year three, merely noting that it will be establishing a process. Because the Commission's Order is silent on the details of the process, there are more questions than answers. It is unclear if the process will be limited to the Company and the PUCO. There is no determination as to whether there will be an opportunity to challenge the study, DEO recommendations, or the Commission's decision on the rate design in years three and beyond.

The extent of the uncertainty surrounding the studies it has ordered in these cases and the process that the Commission ultimately relies upon for establishing rates in year three and beyond are problematic. Consumer faith in the regulatory process necessitates the Commission not compromise due process by rubber-stamping a Company study. Therefore argument for an extensive independent study that thoroughly analyzes the impacts of SFV rare design on DEO's customers, as well as conservation efforts from all perspectives is an important consideration for the PUCO as earlier argued. However, the importance of an independent study is lost unless the Commission approves a process that is transparent and inclusive with appropriate due process protections.

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[66] Order at 25-26 (emphasis added).

Therefore, the Commission should on rehearing order a comprehensive independent study of the SFV rate design, have the study docketed for all interested parties, and establish the process in accordance with R.C. 4909.18 and R.C. 4909.19 so that all interested parties will have the benefit of notice, full discovery rights and an opportunity to be heard on the determination of DEO's rate design for years 3 and beyond.

C. 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 notice requirements contained in R.C. 4909.18, R.C. 4909.19, and R.C. 4909.43 are statutory and cannot be waived. The Commission in its Order unreasonably relies on arguments from DEO and Staff by stating:

> DEO and staff point out that the SFV rate design was not proposed in the application, but was recommended by the staff in the staff report that was issued eight months after the application was filed. Therefore, DEO and staff maintain that the statute did not require that the notice of the application reference the SFV and that the authority relied on by OCC is inapplicable.[67]

Under this interpretation, the explicit intent of consumer protection afforded by the statute could be completely negated by Staff proposing changes desired by a utility. Moreover, a decision by the Company to change its rate design position from its Application to align with the rate design position in the Staff Report does not relieve the Company of its statutory requirement to provide its customers with notice of the substance of its application and at the time such notice is required – with its application -

[67] Order at 27.

- not after the staff report is issued. Whether initially proposed by the Company, or adopted from a Staff proposal, does not change the fact that the notice requirements are statutory.

In as much as DEO did not file for the SFV rate design, both of its notices to consumers could not and did not mention the proposed rate design, and its impact and implications for customers, and are thus deficient and fatally inadequate. The Ohio Supreme Court has discussed the proper content of a public notice required by R.C. 4909.18(E) [68]and R.C. 4909.19 in *Committee Against MRT,*[69] stating:

> While generally the published notice required under R.C. 4909.19 need not contain every specific detail affecting rates contained in the application (indeed, such a requirement would be highly impractical and unnecessarily expensive), the **court notes that the statute does require that the "substance" of the application be disclosed; i.e., that the essential nature or quality of the proposal be disclosed to those affected by the rate increases.** Although there is no specific test or formula this court can apply in reviewing challenges made by subscribers with respect to the sufficiency of the notice provided by a utility, **it is clear, given the purposes of the publication required by R.C. 4909.19, that a highly innovative and material change in the method of charging customers should be included in the notice.**[70]

There can be no dispute that the move to the SFV rate design methodology – a rate design that will almost triple the fixed portion of the customer charge for DEO residential customer from $4.38 or $5.70 per month to up to $12.50 or $15.40 per month -- is a highly "innovative and material change" that required disclosure to customers.

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[68] R.C. 4909.18(E): A proposed notice for newspaper publication fully disclosing the substance of the application. ***.

[69] *Committee Against MRT et al. v. Pub. Util. Comm.* (1977), 52 Ohio St.2d 231, 371 N.E.2d 547.

[70] *Id.* at HN2. (Emphasis added).

In *Committee Against MRT*, the Court concluded that the notice must set forth the fact that the utility was seeking approval of a measured rate service proposal. In reaching its conclusion, the Court noted:

> 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 PUCO, 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.**[71]

The Ohio Supreme Court required the public notice to include reasonable substance of the proposal so that consumers could determine whether to inquire further as to the proposal or intervene in the rate case.[72] The Court also established two components that a company must meet to establish that the newspaper notice complies with R.C. 4909.18(E) and R.C. 4909.19. First, the company must demonstrate that the notice "fully discloses the essential nature or quality" of the application.[73] Second, the notice must be understandable and the proposal must be in a format "that consumers can determine whether to inquire further as to the proposal or intervene in the rate case."[74] Meeting both prongs is essential to providing an opportunity for every person to understand the full context of the proposal and be able to file an objection.

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[71] *Id.* at 234. (Emphasis added).

[72] *Id.* at 176.

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

[74] *Id.* at 176.

DEO's notices failed to meet either of the components established by the Ohio Supreme Court. First, on cross-examination, Mr. Murphy admitted that DEO's two public notices[75] did not fully disclose the essential nature or quality of the straight fixed variable rate design or the significant increase to the existing customer charge.

> Q. And if I look at OCC Exhibit No. 19, can you tell me where in the notice it indicates that the company was requesting a straight fixed variable rate design that would include a customer charge in excess of $5.70?
> A. **I don't see any specific reference to a straight fixed variable rate design.**[76]

Mr. Murphy also acknowledged that OCC Ex. No. 20 Legal Notice (May 30, 2008) dealt predominantly with the pipeline replacement program and not the SFV rate design.[77] In addition, the public notice contained in the Commission's June 27, 2008 Entry[78] was for the purpose of advising consumers of the local public hearings. The June 27 Entry mentioned the SFV rate design only in general terms[79] and it failed to disclose the potential level of rates under the SFV rate design.[80] DEO's notices failed to disclose both the substance of the change in the SFV rate design currently proposed by the Company and Staff, and the potential magnitude of the increase in the customer charge (from $4.38 or $5.70 to $12.50 or $15.40)[81] -- the hallmark of the move to an SFV rate design.

Second, DEO's notices could not be deemed understandable because the notices

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[75] OCC Ex. No. 19 (Application Proposed Notice for Newspaper Publication) and OCC Ex. No. 20 Legal Notice (Notice of Application to PUCO for Approval of Pipeline Replacement Cost Recovery Charge) (May 30, 2008).

[76] Tr. Vol. IV (Murphy) at 41-45 (August 25, 2008). (Emphasis added).

[77] *Id.*

[78] Entry at 4-6 (June 27, 2008).

[79] Tr. Vol. IV (Murphy) at 85 (August 25, 2008).

[80] *Id.* at 89.

[81] Notices also did not alert customers to the Staff proposed $17.50 monthly fixed rate charge contained in the Staff Report.

completely excluded the substance of the change that consumers need to understand, and would not cause interested consumers to inquire further. Finally, DEO would be unable to cure these deficient notices in a timely manner under R.C. 4909.43(B).

These notices were required to alert customers to the dramatic change to the rate design that they would face because DEO's customers have never faced a similar increase or modification to their fixed customer charge.[82] Because the proposed SFV rate design is such a dramatic change from the current DEO rate design, absent sufficient notices, consumers would have no reason to inquire further about the details of the Company's Application. Therefore, DEO's notices in these cases were insufficient to support a move to the SFV rate design as proposed by the Company and Staff, and the PUCO should therefore approve a rate design that includes a $5.70 monthly customer charge and the Rider SRR consistent with the notices that the Company provided its customers.

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 regulation 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

[82] OCC Ex. No. 21 (Radigan Direct Testimony) at Attachment FWR-2 (June 23, 2008).

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**.[83] DEO provided the following notice to the mayors and legislative authorities of each municipality pursuant to R.C. 4909.43:

> As customer usage declines, base rates would be adjusted automatically to keep our base rate revenues per customer the same. Customers would still gain all of the benefits of reduced gas costs, which comprise over three-fourths of a typical customer's bill.[84]

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.[85]

Furthermore, the notice does not describe the impact that a change to the rate design would have on the customer charge. In its Application, the Company proposed to increase the monthly customer charge from $4.38 to $5.70 in the West Ohio Division, and proposed no increase to the existing $5.70 monthly customer charge for the East Ohio Division[86]. The Commission approved a rate design that that features a fixed monthly customer charge of $12.50 in year one,[87] and $15.40 in year two.[88] These dramatic increases to the monthly fixed charge are not explained to consumers anywhere

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[83] R.C. 4909.19 (emphasis added).

[84] PFN at Tab 5 (July 20, 2007).

[85] Order at 25.

[86] PFN at Tab 5, Summary of Proposed Rates (July 20, 2007).

[87] Order at 14.

[88] *Id.*

in the notices the Company provided. Therefore, the substance of the notice did not sufficiently explain to consumers DEO's rate design that the Commission approved.

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.[89] 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.[90] 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.

[89] *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.

[90] *Id.*

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

The Commission stated in its Order:

> At those hearings, public testimony was heard from 57 customers in Youngstown, 15 customers in Lima, 10 customers in Canton, 31 customers in Akron, 17 customers in Cleveland, 15 customers in Geneva, 9 customers in Marietta, and 32 customers in Garfield Heights. At each public hearing, customers were permitted to testify about issues in theses cases.[91]

It must be noted that even all of this opposition and outcry was based on the original Company proposed customer charge increase from $4.38 to $5.70 in the West Ohio Division, and no increase to the existing monthly customer charge for the East Ohio Division.[92] 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 $12.50 and $15.40 per customer per month.[93]

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**

[91] Order at 5. It is noteworthy that the Commission is quick cite to the number of customers who testified at the Local Public hearings, yet the Order fails to demonstrate that the Commission **actually heard** the customers' concerns.

[92] DEO Prefiling Notice at Tab 5 ("I want to inform you that Dominion East Ohio intends to file a request for a base rate increase for gas delivery service and other tariff changes with Public Utilities Commission of Ohio (PUCO) in about 30 days. * * * would increase the monthly bill of a typical East Ohio residential customer by less than $4.50. West Ohio customers would see a monthly increase of less than $6, or 5 percent, **which includes an increase in their monthly service charge**. * * * the company is proposing that rates be the same for both East Ohio and West Ohio. As a result, the impact on West Ohio customers will be slightly different than the impact on East Ohio customers.

[93] Order at 14.

objection to the increase under R.C. 4909.19."[94] Without notice of the specific nature and dramatic increases to the customer charge incorporated in DEO's residential rate design, the public does not have the statutory opportunity to participate in the proceedings.

Finally, the Commission's ruling in this case seems to contradict the Commission's more recent November 5, 2008 Finding and Order in Pike/Eastern that:

> In particular, the Commission is concerned that the applicants are requesting waivers of its public notice requirements, **especially in light of the impact these applications would have on individual ratepayers**. Furthermore, we believe that it is essential that the applications contain sufficient information such that will [sic] be able to consider the merits of the request. **Without the necessary notice to customers** and the requisite information, the Commission is unable to appropriately review these applications.[95]

In the Pike/Eastern cases, the Commission rejected the waiver request because of the need for sufficient customer notice of the proposed changes. Yet in the DEO case, the Commission has approved the change in rate design **despite the fact that customers never received the necessary statutorily-required customer notice**. This begs the question, don't DEO's 1.2 million customers deserve the same level of notice as Pike/Eastern customers?

Therefore, the Commission should grant rehearing on the basis that the Company failed to provide its customers adequate notice of the SFV rate design as required by Ohio law.

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

[95] *In the Matter of the Application of Eastern Natural Gas Company for Approval of an Alternative Rate Plan Proposing a Revenue Decoupling Mechanism*, Case No. 08-940-GA-ALT, and *In the Mater of the Application of Pike Natural Gas Company for Approval of an Alternative Rate Plan Proposing a Revenue Decoupling Mechanism*, Case No. 08-941-GA-ALT, Finding and Order (November 5, 2008) at 3-4. (Emphasis added).

D. 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:

> (A) It is the policy of this state to, throughout this state:
>
> * * *
>
> (4) Encourage innovation and market access for cost-effective supply-and demand-side natural gas services and goods;[96]

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

[96] R.C. 4929.02.

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.[97] An SFV rate design does not meet the State policy of promoting energy efficiency[98] and violates the legislative mandate to the Commission to initiate programs to promote and encourage conservation.[99] It is important as part of the regulatory compact to make energy efficiency a success, that the Commission consider not only company incentives and revenues but also customer incentives to participate in programs. If customers invest in energy efficiency only to see their payback periods extended, this may have a chilling effect on continued investments in energy efficiency. Such an outcome is anathema to the intent of the law. Therefore, the SFV rate design results in the implementation of rates that are unjust and unreasonable, and the Commission should reverse its Order.

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."[100] It was widely argued that high natural gas commodity prices generally send a signal to consumers that encourages conservation.[101] The SFV rate design contradicts that basic message because it decreases the volumetric rate while significantly increasing the fixed portion. At a time when DEO's marginal

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[97] R.C. 4909.18 and R.C. 4909.19.

[98] R.C. 4929.02(A)(4).

[99] R.C. 4905.70.

[100] Order at 24.

[101] Tr. Vol. IV at 65 (Murphy); see also Staff Ex. No. 3 (Puican Prefiled Testimony) at 3-4 (July 31, 2008).

costs for natural gas and energy prices generally are increasing, the SFV rate design sends the wrong price signal to customers,[102] because as consumers use more natural gas the per unit price decreases under the SFV design.[103] In fact, in the second year of DEO's proposed phase in of the SFV rate design, the highest usage customers (the top 33.26 percent),[104] will see a 1.32 percent to 28.34 percent decrease in their total bills from their current bills.[105] This is absolutely the wrong price signal to send consumers making decisions on the consumption of a precious natural resource.

The SFV rate design fails to send the proper price signal to encourage conservation. 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.[106] The opportunity to develop a more stable revenue stream can be addressed by the implementation of decoupling mechanism with appropriate safeguards.

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[102] OCC Ex. No. 21 (Radigan Direct Testimony) at 10.

[103] Staff Ex. No. 3B Puican Second Supplemental Testimony at Exhibit SEP-1A (August 25, 2008) (By way of example as usage increases the cost per Mcf decreases: 12 month usage of 5 Mcf Proposed Bill $167.25 Cost per Mcf = $33.45; 12 month usage of 100 Mcf Proposed Bill $362.72 Cost per Mcf = $3.6272; and 12 month usage of 5000 Mcf Proposed Bill $12,405.60 Cost per Mcf = $2.4811).

[104] Puican Supplemental Testimony at Exhibit SEP-2B (At the 100.1 to 110 Mcf usage level the percent increase is positive for all usage levels above that the increase is negative which will apply to 33.26 percent of DEO's GSS customers (100 percent – 66.74 percent).

[105] *Id.*

[106] *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.").

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 removes the customers' incentive to invest in energy efficiency because the SFV rate design extends the pay back period for energy efficiency investments made by consumers.

The Commission 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 design that prevents a company from embracing energy conservation efforts is not in the public interest."[107] The PUCO failed to acknowledge that in order for DSM programs to work, the Company needs consumers to participate. That means that customers need incentives too. However, the PUCO has taken a giant step backwards by acknowledging, in its Order, that with the SFV rate design "there will be a modest increase in the payback period for customer-initiated energy conservation measures."[108]

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 State of Ohio policy) will see their investment returns diminished and payback periods lengthened as a result of an SFV rate design.[109] The SFV rate design discourages customer conservation. The SFV rate design approved by the Commission is sufficiently different to materially alter customer economies when contemplating an energy efficiency investment.

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[107] Order at 22.

[108] *Id.* at 24.

[109] OCC Ex. No. 21 (Radigan Direct Testimony) at 14.

As argued by OCC, "[t]he SFV rate design does not maintain the customer incentive to conserve and to control their utility bills."[110] 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 removes the Company's disincentive to promote energy efficiency and also rewards consumers who invest in energy efficiency. If the Commission believes that DEO 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. It was unreasonable for the PUCO to adopt the more extreme SFV rate design, which only benefits the Company.

The Commission should reverse its Order approving the SFV rate design on rehearing because the resulting rates are unjust and unreasonable.

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

The PUCO has identified gradualism as one of the regulatory principles that it has incorporated as part of its decision-making process.[111] However, for gradualism to have any legitimacy as a regulatory principle, it must be applied with a certain level of consistency and transparency and not haphazardly. Gradualism had been relied upon in prior cases in such a manner that customer charge increases were limited to $1.00 to

[110] *Id.*

[111] OCC Ex. No. 21 (Radigan Direct Testimony) at Attachment FWR-2 (June 23, 2008).

$2.00.[112] However, in these cases, the PUCO Staff claims that almost tripling the customer charge -- increases of $8.12 to $11.02 -- reflects gradualism.[113] The PUCO appears to unreasonably rely on the Company and Staff argument that the principle of gradualism has not been ignored by the implementation of the SFV rate design:

> DEO and staff advocate that the SFV proposal contains measures that satisfy the principle of gradualism. DEO submits that the two-year phase-in of the SFV rates will give the affected customers an opportunity to adjust to the elimination of past subsidies.[114]

Accepting increases with a magnitude of $8.12 and $11.02 per customer per month over a two- year period is done without any resemblance to the principle of gradualism, and demonstrates the PUCO's failure to be guided by its own regulatory principles in these cases. Such disregard for the principle of gradualism harms DEO's residential consumers and the regulatory process.

In addition to thirty-three years of prior precedent, the PUCO should be guided by the consumer outcry in these cases. The PUCO should not ignore the consumer opposition voiced against the proposed SFV rate design. At the ten local public hearings in these cases nearly 700 consumers attended with 175 providing testimony of which 63 testified against the SFV rate design. In addition, the docket contains over 270 handwritten and non-form letters filed by customers, many of whom are low- income customers or elderly customers on fixed incomes. The compelling arguments made by DEO's customers whose negative reaction and opposition to the rate shock that would be caused by the SFV rate design should not be disregarded by the PUCO when deliberating

[112] *Id.*

[113] Tr. Vol. IV (Puican) at 113-114 (August 25, 2008).

[114] Order at 21.

the rate design issue in these cases. The PUCO should heed its own words that were generally spoken at each of the local public hearings:

> The PUCO is not bound by staff's recommendations and we may permit some of it and we might reject others. **So at this point no decision has been made. We're here to hear what you have to say before we make that decision.**[115]

The PUCO should accord significant weight to the public testimony -- from those who will have to pay -- and reject the SFV rate design.

The Commission's Order approved a rate design for DEO's residential customers that features a fixed monthly customer charge of $12.50 in year one,[116] and $15.40 in year two.[117] Thus, after one-year, customers will see their customer charge nearly triple. Given that the current customer charge is $5.70 (DEO's East Ohio Division) and $4.38 (DEO's West Ohio Division) per month, these increases are not gradual increases. Rather these increases to the fixed portion of the customer charge represent enormous increases in the customer charge and they violate the principle of gradualism. 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

[115] Tr. Local Public Hearing Summit County (Commissioner Fergus) at 7 (August 21, 2008) (Emphasis added).

[116] Order at 14.

[117] *Id.*

charge of $7.79, based on principles of gradualism and stability.[118] As part of its decision, the Commission concluded:

> 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.**[119]

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."[120]

Both the Staff Report and the Opinion and Order in another Columbia Gas, Case No. 89-616-GA-AIR[121] 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.[122]

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

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

[119] *Id.* at 89. Emphasis added.

[120] *Id.*

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

[122] *1989 Columbia Gas* at 80.

> 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.**[123]

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.[124] 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.[125] 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."[126]

The same or similar statement appears in the Cincinnati Gas & Electric, Case No. 01-1228-GA-AIR, Staff Report,[127] in the Cincinnati Gas & Electric, Case No. 92-1463-GA-AIR Staff Report,[128] Columbia Gas of Ohio, Case No. 91-195-GA-AIR Staff

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

[124] OCC Ex. No. 21 (Radigan Direct Testimony) at Attachment FWR-2.

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

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

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

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

Report,[129] Dayton Power & Light Company, Case No. 91-415-GA-AIR Staff Report,[130] and the River Gas Company, Case No. 90-395-GA-AIR Staff Report.[131]

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

> Before strictly applying cost causation we must consider and balance other important public policy outcomes of rate design. * * * Can it be implemented without rate shock - that is, with sensitivity to gradualism?[132]

Historically, the principle of gradualism has been accepted in the form of mitigating a customer charge increase from $6.77 to $6.00[133] or from $5.23 to $5.00[134] or even keeping it at $5.70.[135] During that period when the gradualism principle was adhered to the commodity prices were generally more stable. However, there is no evidence to support an argument for adherence to the principle of gradualism only at a time when commodity prices are at a lower level. The Commission should adhere to the principle of gradualism when considering a $5.70 or $4.38 customer charges may increase to $12.50, or $15.40,

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

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

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

[132] Order at 25.

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

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

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

especially when the commodity prices are over $8.00/Mcf.[136] The need for gradualism grows as consumers face greater costs; the need does not decline.

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.

V. CONCLUSION

As demonstrated above, the Commission erred by approving a Straight Fixed Variable rate design for several reasons. First, 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. Second, the Commission's 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 DEO'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. Fourth, 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. For these reasons, the Commission should grant OCC's Application for Rehearing.

[136] Staff Ex. No. 3 (Puican Prefiled Testimony) at 4 (July 31, 2008) (SSO Price has ranged from $8.612 in January 2008 to $14.525 in July 2008).

Respectfully submitted,

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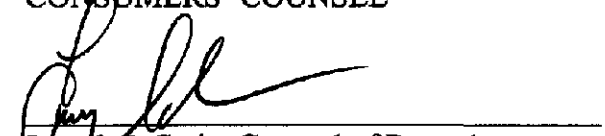

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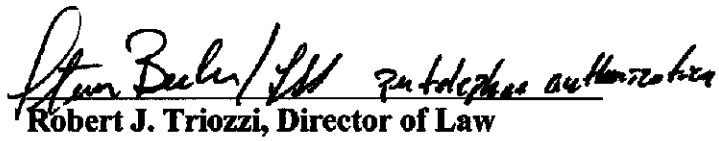

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Joint Application for Rehearing by the Office of the Ohio Consumers' Counsel, the City of Cleveland, the Ohio Partners for Affordable Energy, the Neighborhood Environmental Coalition, the Empowerment Center of Greater Cleveland, the Cleveland Housing Network, and the Consumers for Fair Utility Rates* has been served upon the below-named counsel via Electronic Mail this 14th day of November 2008.

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