26

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 Deployment Through an Automatic Adjustment Clause, and for Certain Accounting Treatment	**Case No. 06-1453-GA-UNC**

MEMORANDUM CONTRA 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

TABLE OF CONTENTS

Page

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 Deployment Through an Automatic Adjustment Clause, and for Certain Accounting Treatment	**Case No. 06-1453-GA-UNC**

MEMORANDUM CONTRA 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

The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO"), pursuant to Rule 4901-1-35, Ohio Administrative Code, files its Memorandum Contra the Application for Rehearing by the self-styled Joint Consumer Advocates ("JCA").[1] For the reasons that follow, the Commission should deny JCA's Application for Rehearing ("Application").

I. INTRODUCTION

On October 15, 2008, following months of discovery, and extensive briefing and testimony—including ten public hearings at locations throughout DEO's service area—the Commission approved a straight fixed variable ("SFV") rate design for DEO. (*See* Order dated Oct. 15, 2008 ("Order"), p. 23.) The Commission's 34-page Order carefully considered a wide range of rate design factors including cost transparency, revenue stability, price signal accuracy, fairness, impact on low-income customers, gradualism, promotion of conservation, and a variety of other public policy considerations. Based on its detailed analysis of these factors, the Commission concluded that SFV was "preferable" to the decoupling rider that the OCC and other individual JCA parties advocated. (*Id.*)

JCA's Application for Rehearing largely rehashes arguments that the Commission has already considered and rejected in this case (sometimes more than once). In particular, JCA presses three arguments: (i) additional studies ordered by the Commission suggest an inadequate record; (ii) DEO and the Commission did not fully comply with statutory notice requirements; and (iii) the Order violates statutory and public policies. None of these arguments have any merit. They neither undermine the Commission's decision to adopt SFV, nor provide a basis for rehearing.

[1] The Joint Consumer Advocates include 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.

As to the first, the studies the Commission ordered have no bearing on the propriety of the Commission's rate design decision. The Commission concluded that SFV more closely tracks legitimate rate-design goals than does a decoupling rider. The studies the Commission ordered are not intended to gather information relevant to that assessment. Nor will they. At most, they may offer additional information to better calibrate certain aspects of the SFV rates. Thus, the studies' potential results could only further advance the Commission's decision here, not undermine it.

JCA's arguments relating to inadequate notices and violations of statutory and public policy principles (*e.g.*, conservation and gradualism) do not support rehearing either. JCA pressed these arguments already in this case (sometimes more than once), and the Commission expressly considered and rejected them in its Order. JCA offers nothing new in support of its arguments here, and they should be rejected again. *See In re the Application of Columbus So. Power Co.*, Case No. 07-63-EL-UNC, Entry on Rehearing, p. 14 (Nov. 28, 2007) (holding that because parties "have raised no new issues on rehearing that have not already been thoroughly considered . . . [a]ccordingly, the Commission concludes that the applications for rehearing filed by AEP-Ohio and OCC should be denied in their entirety.").

In short, JCA has failed to show that the Order is "unreasonable or unlawful." R.C. 4903.10. Accordingly, JCA's Application should be denied.

II. ARGUMENT

A. The Record Evidence Is More Than Adequate To Support The Order.

JCA's claim that the Order is based on "insufficient record evidence," (App., p. 8), blinks at reality. As required by statute, the Commission's 34-page Order carefully considered and clearly explained the reasons it adopted SFV. In crafting that Order, the Commission relied on a record containing dozens of pages of briefs, hours of testimony and argument, and still more

hours of public comment. In light of the record, JCA not surprisingly is unable to identify even a single reason the Commission cited in favor of SFV that lacks support in the current record.

Nor does JCA fare any better in asserting that, because "more facts" may be gleaned from the additional studies the Commission ordered, the current record is somehow inadequate. In fact, in even pressing this argument, JCA relies on a flawed understanding of the purposes those studies are designed to serve. At core, JCA's only real complaint is that it did not like the outcome of the first hearing, but that is no reason to open a second one. JCA's "insufficient evidence" argument should be rejected.

1. The Commission's Order fully complies with R.C. 4903.09.

R.C. 4903.09 requires that, in contested cases, the Commission must file "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." The Commission certainly did so here.

The Commission's 34-page Order carefully considered the parties' arguments and explained the rate design decision in great detail. The Order includes sections explicitly devoted to conservation, gradualism, price signals, simplicity, revenue stability, effect on low-income customers, intra- and inter-class subsidization, customer usage, fairness and many other factors. The Order includes 24 enumerated findings of fact and seven legal conclusions. And in evaluating the SFV design against the decoupling rider, the Commission specifically found that:

- SFV will produce "more stable customer bills through all seasons";
- SFV "has the advantage of being easier for customers to understand";
- SFV "sends better price signals to consumers";
- SFV "promotes the regulatory objective of providing a more equitable cost allocation among customers, regardless of usage"; and

- "It is in the public interest to move to SFV as soon as practicable."

(*See* Order, pp. 24-25.)

In arriving at these conclusions, the Commission relied on a record that includes approximately 570 pages of written testimony and briefs from the parties; written correspondence from customers, 6 days' worth of live testimony and input from over 150 customers at 10 public hearings held throughout DEO's service area. (*See* Order, p. 4.)

Every Commission finding regarding SFV is supported by concrete (and, in many cases, unrebutted) evidence. Notably, JCA has failed to show that any portion of the Order regarding SFV lacks record support. Both the Order and supporting record easily meet the standard of R.C. 4903.09. Simply put, JCA's disagreement with portions of the Order does not mean the Order is baseless.

2. The additional studies and pilot program ordered by the Commission do not undermine its rate-design decision.

Having failed to substantiate its claim that the Order lacks support, JCA contends that (after months of proceedings) the Commission should vacate its Order because there may be more facts yet to be discovered. These new facts, according to JCA, may arise from cost-of-service and demand-side-management ("DSM") studies and a low-income pilot program, both mandated by the Commission. (*See* App., pp. 8-22; Order, pp. 23, 25, 26-27.) JCA's argument, however, rests on a flawed understanding of the purpose of those initiatives.

(a) The cost-of-service study is consistent with the Commission's on-going review of the SFV rate design.

In its Order, the Commission requires DEO to complete a General Sales Service/Energy Choice Transportation Service ("GSS/ECTS") cost-of-service study within 90 days. (Order, p. 25.) The purpose of this study is ultimately to determine "whether the GSS/ECTS classes are appropriately comprised of both residential and nonresidential customers, or whether the classes

should be split." (*Id.*) Whatever the outcome of that study, though, it will not contradict the Commission's choice to move to SFV.

To start with, JCA misunderstands the purpose of the study. JCA suggests that the reason the Commission ordered the study was a concern that SFV rates will result in "low-volume residential users subsidiz[ing] high-volume Commercial and Industrial customers and high-use residential customers." (App., p. 9.) This is demonstrably wrong. In fact, as the Commission noted, "to the extent that there is an intra-class subsidy there is evidence that it may be from nonresidential users to residential users." (Order, p. 25.) Further, this subsidy will be exacerbated by the "continuation of the inclining block volumetric rate" during the two-year period covered by this Order. (*Id.*) These statements are supported by the record. Cliff Andrews, a Business Development Manager at DEO, unequivocally testified that if there is any subsidy taking place, high-volume nonresidential customers are subsidizing residential customers. (Tr. I (Andrews Re-Dir.), p. 235, (Andrews Re-Cross), p. 237.) According to Mr. Andrews, if the rate class did not include nonresidential customers, residential customers would pay more. (*Id.* at 235.)

JCA apparently believes that the cost of service study will support its view that SFV is inappropriate to apply to the GSS/ECTS rate classes. JCA's complaint that the combined class is inappropriate because it contains "non-homogeneous residential and non-residential consumers," however, founders on the facts. (*See* App., pp. 10-11.) Admittedly, residential and non-residential customers, on average, use different amounts of gas. But such a difference says nothing about the relative *costs* those customers impose on DEO's distribution network, which is the key inquiry here. As to that issue, the record evidence shows that the fixed costs are the same for low and high-volume customers. DEO witness Jeffrey Murphy, DEO's Director of

Pricing and Regulatory Affairs, testified that DEO's "operation and maintenance expenses" and "other major elements of the cost of service" "are predominantly fixed in nature and do not vary with usage." (DEO Ex. 1.4, p. 9.) Further, Mr. Murphy testified that low-volume and high-volume customers have similar load patterns. (Tr. IV (Murphy Cross), p. 32.) Indeed, as the Commission noted, "a strict cost causation analysis of the facts in this matter leads to the conclusion that each GSS/ECTSA customer should bear an equal proportion of the distribution costs." (Order, p. 25.) At the hearing, OCC attempted to rebut this evidence by pointing to differences in infrastructure used to serve high-volume customers. But on cross-examination, OCC's rate design witness Frank Radigan admitted that he had never reviewed anything that depicted actual equipment used by DEO. (Tr. V (Radigan Cross), pp. 27-28.) In short, the record provides ample basis for the Commission's approval of a combined rate class.

In fact, the cost study is not related to the Commission's current rate order at all, but rather to the Commission's stated belief that "an expeditious transition to a *full* straight fixed variable rate design is appropriate." (Order, p. 25 (emphasis added).) As the Commission noted, even after two years, DEO will be recovering "only 84 percent of its fixed costs in the fixed distribution service charge." (*Id.*) Moreover, even within that 84 percent, "the inclining block volumetric rate" will lead to intra-class subsidies. (*Id.*) Thus, the Commission's (entirely prudent) inquiry is whether, in continuing down the road to "a full straight fixed variable rate design," the classes should be split. (*See id.*) In sum, that the Commission has the foresight to address that issue in a proactive manner does not in any way suggest that the record evidence supporting the current Order is somehow inadequate.

Based on its misunderstanding of the purpose of the study, JCA asks that the Commission retract its Order because more facts may be discovered through the GSS/ECTS study. Even if

JCA was correct about the study's purpose (and it is not), this request must be rejected. Apparently, JCA believes that anytime JCA can conceive of facts other than those in the record that may impact the decision, the Commission should be prevented from acting. By tying the Commission's hands merely because a party believes more facts may come to light, however, JCA would prevent any action from ever being undertaken — particularly if that action was something with which JCA disagreed. Not surprisingly, nothing about Ohio law or regulatory practice supports giving JCA effective veto power over Commission action based on JCA's ephemeral musings about possible future facts. Under Ohio law and the Commission's rules, the proper approach is for a party to put its evidence in the record, not to speculate after a decision is made.[2]

(b) The low income pilot program is consistent with the Commission's SFV decision.

JCA similarly seeks rehearing based on the fact that the Commission has required the adoption of a pilot program for "low-income, low-use customers." (*See* Order, pp. 26-27.) This argument also fails.

First, the pilot program does not reflect a defect in SFV, but rather the reality that for "any change, there will be some customers who will be better off and some customers who will be worse off, as compared with the existing rate design." (Order, p. 26.) Given this fact, the Commission concluded that it made sense to relieve some of the burden on low-income or low-use customers, and it adopted a program designed to mitigate that effect. That the Commission chose to do so is not a reason to revisit its determination.

[2] In directing DEO to perform a cost-of-service study, the Commission approved SFV for two years, leaving open the question of DEO's rate design after this "transition" period. (Order, p. 25.) JCA objects that the Commission has not yet established a procedure to determine DEO's rate design after the two-year period. (App., p. 20.) Nothing, however, requires the Commission to establish such a procedure at this time, and in light of the additional studies ordered by the Commission, DEO believes it would be unnecessary and inappropriate for the Commission to do so.

Second, JCA's suggestion that the pilot program is a concession that SFV will harm low-*income* customers is flat wrong. (App., p. 13.) The Commission correctly found that SFV *helps* low-income customers:

> the majority of low-income customers actually use more natural gas, on average, than the customers whose means place them about 175 percent of the federal poverty level. Thus, low-income customers, on average, would actually enjoy lower bills under the strict application of cost causation principles [such as through SFV].

(Order, p. 23.)

The record evidence clearly supports the Commission's finding. As explained in DEO's post-hearing reply, DEO serves two categories of low-income customers: those on a percentage-of-income payment plan ("PIPP") and those not on PIPP.[3] (*See* DEO Post-Hearing Reply, p. 10.) It is undisputed that PIPP customers will, on average, pay less under SFV than under traditional rates. (*See* OPAE Post-Hearing Br., p. 4.) DEO serves approximately 108,000 PIPP accounts. (*See* DEO Ex. 1.5 (Murphy Sur.), p. 2.)

Moreover, DEO found that, among non-PIPP customers at or below 175% of the federal poverty level, average annual use was 95 Mcf, just 4 Mcf below DEO's residential average. (*Id.* at 1-3.) In fact, "[t]he largest 90% of [those] accounts had an average 12-month usage level of 103 Mcf, and the largest 80% had an average of 110 Mcf," both of which are in excess of the residential average. (*Id.* at 3.) There are 59,000 of these non-PIPP low-income customers, which when combined with DEO's 108,000 PIPP accounts equal "approximately 15 percent of [DEO's] entire customer base." (Tr. VI (Murphy Cross), p. 69.) In short, the evidence shows that most low-income customers—regardless of PIPP—use *more* gas than DEO's average residential customer, and thus would *benefit* from a transition to SFV. (*See* Order, p. 23.)

[3] Customers eligible for PIPP must be at or below 150% of the poverty level. (*See* http://www.puco.ohio.gov/PUCO/Consumer/Information.cfm.)

OCC tried to rebut this evidence at the hearing, but failed. It presented evidence regarding energy *expenditures*, not usage. (*See* OCC Ex. 22 (OCC witness Roger Colton), pp. 11, 17-18.) Yet expenditure data is a poor proxy for usage, especially when attempting to make comparisons between low-income and other customers. Many low-income customers benefit from programs (like PIPP) that keep their gas expenditures artificially low compared to their actual usage. Further, OCC's data is particularly unreliable because it is not limited to customers in DEO's service territory, but is derived from customers throughout Ohio and the United States. (*See id.* at 11-19, 20.) Without evidence that these larger classes of customers are similar in their gas usage patterns to DEO customers, this data is meaningless.

JCA's argument that DEO's data undercounts its low-income customers is similarly flawed. (*See* App., p. 17.) JCA baldly asserts that there may be 54,000 low-income customers in DEO's service territory not counted in DEO's data, but it has never presented evidence to support this claim. (*See id.*) Rather, JCA bases this argument on its supposition that PIPP participants represent 50% of low-income DEO customers. (*See* App., p. 16.) As described above, however, this supposition rests on data from customers outside DEO's service territory. Moreover, even assuming JCA's assertion about the number of low income customers is correct, that would mean that DEO serves roughly 216,000 low-income customers. Nevertheless, DEO has provided concrete *actual usage* data for approximately 167,000 of them—over 75% of JCA's own total. This is a significant sample size by any reckoning.[4]

Third, JCA's focus on the distribution component of the bill as the reason for the pilot study misses the fact that distribution costs are a very small component of the total picture. As

[4] JCA argues that because Cleveland is the "poorest city in the United States," low-income customers must comprise well over 15% of DEO's total customer base. (App., p. 17 n.60.) This does not follow. JCA points to no evidence regarding the percentage of Cleveland residents who are low-income customers. Morever, JCA ignores the fact that a significant number of DEO's customers do not reside in the city of Cleveland. JCA's comparison has no statistical value whatsoever, and it should be ignored.

the Commission itself concluded, "[t]he natural gas market is now characterized by volatile and sustained price increases," and this commodity price is the "biggest driver of the amount of a customer's bill." (Order, pp. 22, 24; *see* Oral Argument Tr., pp. 13-14, Slides 2-3.)

The low-income pilot program is an effort to provide some relief to low-income customers during these "tough economic times." (Order, p. 26.) This does not undermine SFV. In fact (as JCA ignores), many (if not most) low-income customers will actually face *lower* bills under SFV. The Commission's requirement that DEO implement a low use, low-income pilot program does not justify rehearing.

(c) The Commission's DSM directives have no bearing on its SFV findings.

JCA suggests that the Commission's decision to order a DSM study somehow undermines the SFV decision, and further that the DSM evaluation should occur "*before* implementing SFV."[5] (App., p. 20 (original emphasis).) It offers no meaningful support for this position, however. Nor could it.

Without question, DSM programs are worthwhile, and the DSM collaborative will be an important vehicle for implementing those programs. (*See* Stip. at ¶¶ 3.C, 3.D.) That is exactly why DEO stipulated both to participation in the collaborative and to significant increases in DSM funding.[6] (*See id.*) But the DSM collaborative and related programs have nothing to do with the rate design decision here. Nothing prevents the parties from undertaking significant DSM programs within the SFV design. Indeed, as the Commission found, one of the key

[5] Notably, while JCA suggests that implementation of SFV should await completion of the Commission-ordered studies, it has not suggested that the increase in DSM spending await completion of the DSM evaluation. Such inconsistency belies the case for any delay. Apparently, JCA does not believe the actions it favors should await further study, but wants actions with which it disagrees to await further review. Commission action should not depend on whether JCA approves of the result.

[6] DEO also appreciates the Commission's recommendations for the work of the collaborative, *see* Order at 23, and notes that these items will be addressed by the group.

attributes of rate structures that decouple gas volume throughput and fixed cost recovery (such as SFV) is that such rate structures remove the "disincentive to promote conservation" that a utility would otherwise face if its fixed cost recovery depended on the volume of gas it delivered. (Order, p. 22.)

The Commission approved SFV because, among other things, it achieves fairness to customers, improves revenue stability for DEO[7], enhances statutory policies like conservation, and removes structural disincentives for DEO to engage in DSM. The portion of the Commission's Order requiring investigation of DSM initiatives thus does not contradict the ruling on SFV; it is entirely consistent with that decision.

B. Every Notice Required By Statute Has Been Provided In This Case.

JCA also seeks to support its rehearing request by rehashing its twice-rejected argument that the notices that DEO and the Commission provided were somehow inadequate. (App., pp. 22-30.) This argument is no more availing now than it was the first two times JCA parties raised it in this case. (*See, e.g.,* OCC Post-Hearing Br., pp. 3-6; OCC Rehearing App. dated Apr. 18, 2008, pp. 15-16 (arguing notice issue in connection with DEO's Pipeline Infrastructure Replacement plan).) The Commission has rejected it twice before, and should do so again. (*See* Order, p. 31 (Conclusion of Law No. 2); Entry, pp. 2-3, 5-6 (July 31, 2008); Entry, pp. 11, 12 (May 28, 2008).) The statutory scheme contemplates *two* notices: one to provide notice of the utility's application, and one (later in time) to provide notice of the hearing. Here, both notices were provided in the statutorily-prescribed manner, and each notice was entirely accurate.

[7] Contrary to JCA's assertion that SFV provides greater guaranteed revenues, the rate design approved by the Commission could produce less revenue than the decoupling mechanism favored by JCA. (*See* App., p. 1.) A decoupling mechanism that combines a lower fixed charge with a true-up of base rate revenues for reduced use per customer would in many cases provide more "guaranteed" revenues than a transitional SFV rate design that includes a volumetric component, however small, and a higher fixed charge which expose the utility to reduced revenues from declining use per customer and customer count such as that experienced by DEO in recent years. (*See* Staff Rep., p. 45.)

1. DEO provided all necessary notices in this case.

(a) DEO complied with all "application" notice statutes.

Three statutes govern notices of content of "applications." *See* R.C. 4909.18(E) ("the substance of the application"); R.C. 4909.19 ("the substance and prayer of each application"); R.C. 4909.43(B) ("intent of the public utility to file an application, and of the proposed rates to be contained therein"). JCA's sole complaint about DEO's "application" notices is that the notices did not mention SFV. No matter how many times JCA makes that argument, however, they cannot change one key fact: *DEO's "application" did not include an SFV proposal.* Rather, the May 23, 2008 Staff Report, issued some eight months *after* DEO filed its application, marked the first appearance of a specific SFV rate design in this case. Prior to that report, there was no SFV rate design proposal in this case.

Not only was there no basis for DEO to include SFV in its statutorily-required notice, but doing so would have violated the law. The statutes, as JCA notes (*see* App., p. 23), required DEO to disclose the "substance" of its application. The statutes further specify the time when that notice shall occur: R.C. 4909.18 states that the notice shall accompany the application; R.C. 4909.19 says that the utility shall publish the notice "once a week for three consecutive weeks" after it files its application; and R.C. 4909.43(B) (when it applies) requires the utility to provide notice in advance of its application. At the time DEO was statutorily-required to provide notice (and for months after), an SFV rate design proposal was not part of the "substance" of DEO's application. Thus, DEO would have violated law by including SFV in its notice.

In light of these undisputed facts, JCA's reliance on *Committee Against MRT* misses the mark, just as it did the first time OCC cited it. (*See* App., pp. 23-24, 28 (citing *Committee Against MRT v. Pub. Util. Comm.* (1977), 52 Ohio St.2d 231); *see also* OCC Post-Hearing Br., p. 4.) That case, as JCA correctly notes, requires a utility to disclose the proposals actually "in the

application." (*Id.*) DEO did just that. Further confirming the point, the prejudice the Court noted as the basis for its decision in *Committee Against MRT*—the lack of "an opportunity to present evidence at the hearings" and "to challenge [the proposal] itself"—is not present here. (*See* App., p. 24 (quoting *Committee Against MRT*, 52 Ohio St.2d at 234).) As described more fully below, adverse parties received ample notice that SFV would be an issue at the hearings, and they appeared at the hearings to offer evidence.

In contrast to JCA's inappropriate citation to *Committee Against MRT*, JCA ignores the Ohio Supreme Court's decision in *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (1990), 51 Ohio St.3d 150, which is on point regarding the notice required in this case. There, two intervenors challenged a Commission rate case order that raised a "carrier common line charge" ("CCLC"). The intervenors argued that the utility (GTE) did not mention the CCLC in its R.C. 4909.19 public notice. *Id.* at 152. The Court rejected this argument, explaining that because "GTE did not propose, in its application, to increase the CCLC; the CCLC increase, consequently, was not within the 'substance and prayer' of the application." *Id.* at 153. There, the application notice also informed the public that "intervening parties may make recommendations different from the proposals in the application and that the commission may even adopt different recommendations." *Id.* DEO's notice includes a nearly identical statement. (*See* Notice of Intent, dated July 20, 2007, at Sch. S-3.)

The same result should follow here. There is no dispute that DEO gave proper notice of the content of its application. JCA's only complaint is that DEO failed to give notice of SFV, eight months before it was introduced into the case. This argument has been rejected by the Ohio Supreme Court. It has been rejected two times by the Commission in this case. And, as a practical matter, it makes no sense. The Commission should thus reject it again.

(b) The public hearing notice complied with R.C. 4903.083.

JCA fails to mention the only notice statute applicable to issues raised after DEO files its application. This statute, R.C. 4903.083, requires the Commission to provide public notice of hearings and to offer a "brief summary of the then known major issues in contention as set forth in the respective parties' and intervenor's objections to the staff report." The Commission met that requirement here.

As noted above, the SFV proposal was first introduced in the Staff Report. A month later, the Commission specified the content of the public hearing notice, which listed "major issues" including "[t]he level of the monthly customer charge that customers will pay" and "[r]ate design, including consideration of decoupling and straight fixed variable mechanisms." (*See* Entry, p. 6 (June 27, 2008).) By disclosing the existence of these issues, the public hearing notice satisfied R.C. 4903.083.

In its Application, JCA now complains that this notice is inadequate because it "mentioned the SFV rate design only in general terms" and "failed to disclose the potential level of rates" under SFV. (App., p. 25.) This argument fails. First, JCA cites no authority for the proposition that the notice must go beyond a general description of the issues or disclose actual rate levels. In fact, R.C. 4903.083's requirement of a "brief summary" of major issues demonstrates otherwise.[8]

Further, even assuming the public hearing notice was defective (and it was not), such defect does not invalidate the notice itself. R.C. 4903.083 provides:

> The public utilities commission shall determine a uniform format for the content of all notices required under this section. Defects in the content of

[8] In fact, although discussing an R.C. 4909.19 application notice, the Court in *Committee Against MRT* provides an explanation for why such detail is not required in public notices, i.e., that an application notice "need not contain every specific detail affecting rates contained in the application (indeed, such a requirement would be highly impractical and unnecessarily expensive).") *Committee Against MRT*, 52 Ohio St.2d at 233.

> said notice *shall not affect the legality of notices published under this section* provided the public utilities commission meets the substantial compliance provision of section 4905.09 of the Revised Code. (Emphasis added.)

R.C. 4905.09, in turn, provides that substantial compliance by the Commission "is sufficient to give effect to all its rules, orders [and] acts." In this case, the public hearing notice specifically notified the public of issues involving the monthly customer charge and SFV. There is no basis for reversal of the Commission's Order.

2. JCA's notice argument invites absurd results.

Not only does JCA's notice argument fly in the face of the plain statutory text, but it also invites absurd results. Under JCA's interpretation, anytime the Staff Report recommends something not contained in a utility's application, the case would go back to "square one." The utility would have to refile its application, reissue a first round of notices, and rewind the 275-clock for a decision.

This is not what the notice statutes require. Instead, they contemplate two rounds of notices: one *after* the application, and one *before* the hearing. Because both the application and staff reports are considered in rate-making, both require notices. Because there are two rounds of notices, no issues raised in those materials are missed.

This is precisely what happened in this case. DEO gave proper statutory notice of the substance of its application. Following the Staff Report's introduction of SFV in this case, the Commission ordered a public hearing notice that reflected this new proposal. These notices complied fully with the notice statutes. JCA's interpretation has no basis in those statutes and runs counter to established regulatory practice. It should be rejected.

3. No person or party lacked notice of the SFV proposal in this case.

Even if the notices in this case were deficient (and they were not), JCA cannot show that anyone suffered prejudice. In fact, the many filings by parties opposed to SFV make it abundantly clear that the public was well aware of the SFV/rate design issue. (*See, e.g.*, OCC Post-Hearing Br., p. 1 (recounting that an "unprecedented . . . number of consumers attend[ed]" the local public hearings," with participants primarily concerned about SFV); Citizens Coalition Post-Hearing Br., p. 1 ("Public participation in this case has been almost unprecedented . . . .").) In its Application, JCA itself notes that testimony from "63 of 175 consumers" and "over 275 [consumer] letters" were directly related to SFV. (App., pp. 1 n. 1, 36.) All told, *seven* parties representing the interests of residential customers participated in this case.[9] All of these parties received notice of the SFV proposal, objected to it, briefed it and participated in oral argument regarding it.

The general public was notified of the SFV proposal, and many commented on it, either in public hearings or in written correspondence. The rate design issue and the SFV proposal were noticed and contested from start to finish.[10] In light of the actual evidence presented at the hearing, complaints about notice are a canard. The Commission was correct to reject this argument before, and it should do so again.

---

[9] OCC, OPAE, the City of Cleveland, The Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, Cleveland Housing Network, and The Consumers for Fair Utility Rates.

[10] JCA's reference to the Commission's order in the Pike/Eastern case is plainly irrelevant. There, two gas utilities sought *waivers* of public notice requirements contained in Rule 4901:1-19-05, O.A.C, such that the utilities would have to provide no public notice *at all*. (*See* Entry, Case Nos. 08-940-GA-ALT and 08-941-GA-ALT (Nov. 5, 2008).) As explained above, DEO and the Commission provided proper notices in this case.

C. The Commission's Decision Is Consistent With Public Policy.

1. The adoption of SFV promotes conservation.

JCA argues that SFV frustrates Ohio's statutory imperative to encourage conservation, specifically by sending the wrong price signal and lengthening payback periods for energy-efficient investments. (*See* App., pp. 32-35.) As when the OCC first raised it, however, this argument ignores a key undisputed fact: under SFV, customers who use more, pay more, and thus conservation incentives remain in place.

JCA correctly points out that in transitioning to SFV, the volumetric charge will decrease while the fixed charge will increase. It is similarly correct that with this change, low-use customers will pay more than before, and high-use customers will pay less than before.

However, JCA wrongly concludes from this that SFV penalizes conservation and encourages consumption. What JCA fails to appreciate is that under SFV, the overwhelming portion of the bill (approximately 80%) is the commodity charge. (*See* Tr. V, pp. 22-23 (OCC witness Radigan acknowledging that total bill is "biggest driver of usage decisions" and that gas cost is largest portion of most bills).) Customers who use more gas will continue to pay more, and the total bill will clearly reflect those usage choices. Further, although high-use customers will pay less under SFV than before, this has nothing to do with conservation. Rather, as the Commission well knows, this is because SFV partially corrects the subsidy of fixed distribution costs from high-use to low-use customers. (*See* Order, p. 24 (noting "inequities within the existing rate design that cause higher-use customers to pay more of their fair share of the fixed costs than low-use customers).) In fact, even under SFV, high-use customers continue to pay a portion of the distribution costs associated with low-use customers. (*See* Tr. I (Andrews), p. 219.) No one – not even JCA – can dispute the fact that customers pay more under SFV when

they use more. And with natural gas prices remaining high by historical standards, the incentive to conserve under SFV remains high as well.

For the same reasons, JCA's observation that SFV lengthens payback periods also misses the mark. (*See* App., p. 34.) Because customers who invest in energy-saving measures use less gas, they will see reduced commodity costs. That does not change under SFV. And because commodity costs represent the overwhelming portion of the monthly bill, those customers will see a clear, timely improvement in their bottom line.

The same cannot be said for the Sales Reconciliation Rider ("SRR") favored by JCA. Under the SRR, if weather-normalized gas consumption declines in the aggregate, "the decoupling rider is increased in a subsequent period to offset the impact on base rate revenues." (DEO Ex. 1.4, p. 10.) Therefore, "[i]f my neighbor conserves more than I do, my costs go up when the decoupling rider is subsequently adjusted to reflect his reduced [usage]." (*Id.* at 11.) As a result, the level of a customer's distribution charge is ultimately determined by decisions made in prior periods by other customers. And as the number of true-ups increases over time, the customer's bill reflects less and less of his actual current usage. By distorting prices in this way, the SRR deprives customers of clear, timely information that provides incentives to conserve. Similarly, the SRR makes it virtually impossible to determine the true payback period for a conservation investment. SFV thus is a superior conservation alternative.

JCA's remaining assertions also suffer from fundamental flaws. For example, without any evidence to support its position, JCA asserts that high-use commercial and industrial customers "are most likely making the least effort to conserve our nonrenewable resources." (*See* App., p. 10.) JCA also suggests that cross-subsides are generated because some industrial and commercial establishments "may not be clustered in more dense urban settings." (*Id.* at 11.)

The tariff list of communities served reveals, however, that DEO also has residential customers in areas that are not "dense urban settings." (*See* Notice of Intent, dated July 20, 2007, Tab 3.) JCA claims that "[t]he record in these cases does not answer the question of how the SFV rate design impacts the low-income customer" when, in fact, the record does answer that question – just not in the way that JCA prefers. (*Id.* at 13.) While other many examples could be cited, they all suffer from the same defect: long on questionable rhetoric, and lacking record support.

2. The SFV proposal satisfies the principle of gradualism.

The impact of rate changes should be minimized to the extent reasonably possible. (*See* Staff Ex. 1., p. 28.) This is known as gradualism. Contrary to JCA's argument, the SFV proposal approved by the Commission reflects this concern in several ways:

- DEO will not recover the full amount of its distribution costs through the fixed charge. (*See* DEO Ex. 1.4, p. 8.) Rather, the fixed charge will cover only 84% of annual base-rate revenues for the average residential customer. (*See id.*)
- DEO will phase in SFV rates over two years. (*See* Order, p. 25.)
- DEO has agreed to a nearly three-fold increase in DSM spending, plus additional funding for support of low-income customers. (*See* Stip., ¶ 3.C & n.2.)

(*See also* DEO Post-Hearing Br., pp. 12-13.) Each of these measures will mitigate the effects of the SFV transition to customers, and the additional DSM funds should provide significant relief to low-income families most sensitive to rate changes. And, importantly, as the Commission found, the average low-income family will actually *benefit* under the SFV rate structure. (Order, p. 23.)

JCA ignores these mitigating features and focuses solely on the increase in the fixed charge under SFV. (*See* App., pp. 35-41.) There is no question that the transition to more equitable rates under SFV will lead to higher fixed charges and higher bills for certain customers.

Of course, those changes are caused primarily by the elimination of past subsidies, and they will be softened by the mitigation measures described above.

Moreover, although gradualism is an important consideration, it should not be used to block the transition to SFV—which is both more equitable for DEO's customers and more stable for DEO—especially when that transition will be accompanied by the meaningful mitigation described above. *See In re Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589, et al, Entry on Rehearing, p. 4 (July 23, 2008) (denying rehearing on gradualism issue, explaining that gradualism is "only one of many important regulatory principles" and that gradualism concerns were satisfied where levelized rate design is implemented over two-year period and accompanied by low-income pilot program); *In re Application of The Toledo Co. for Authority to Amend and Increase Certain of its Rates*, Case No. 95-299, et al, Entry on Rehearing, p. 17 (June 12, 1996) (denying rehearing on gradualism issue, where Commission had "balance[d] the many competing concerns to establish fair rates," including gradualism). The Order (and the parties' Stipulation) reflect careful attention to gradualism in the context of the larger rate-design decision, and thus gradualism concerns fail to provide any basis for rehearing.

III. CONCLUSION

For the above reasons, DEO respectfully requests that the Commission deny JCA's Application for Rehearing.

Respectfully submitted,

David A. Kutik (Counsel of Record)
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
dakutik@jonesday.com

Andrew J. Campbell
JONES DAY
325 John H. McConnell Blvd., Suite 600
P. O. Box 165017
Columbus, Ohio 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
ajcampbell@jonesday.com

ATTORNEYS FOR THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum Contra Application for Rehearing of the Joint Consumer Advocates was delivered to the following persons by electronic mail this 24th day of November, 2008.

David A. Kutik

Interstate Gas Supply, Inc.
John Bentine, Esq.
Mark Yurick, Esq.
Chester, Wilcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, OH 43215-4213
jbentine@cwslaw.com
myurick@cwslaw.com

Office of the Ohio Consumers' Counsel
Joseph Serio, Esq.
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
serio@occ.state.oh.us

Ohio Partners for Affordable Energy
David Rinebolt, Esq.
P.O. Box 1793
Findlay, OH 45839-1793
drinebolt@aol.com

UWUA Local G555
Todd M. Smith, Esq.
Schwarzwald & McNair LLP
616 Penton Media Building
1300 East Ninth Street
Cleveland, Ohio 44114
tsmith@smcnlaw.com

The Neighborhood Environmental Coalition, The Empowerment Center of Greater Cleveland, The Cleveland Housing Network, and The Consumers for Fair Utility Rates
Joseph Meissner, Esq.
The Legal Aid Society of Cleveland
1223 West 6th Street
Cleveland, OH 44113
jpmeissn@lasclev.org

Dominion Retail
Barth E. Royer
33 South Grant Avenue
Columbus, OH 43215-3927
barthroyer@aol.com

Stand Energy Corporation
John M. Dosker, Esq.
General Counsel
1077 Celestial Street, Suite 110
Cincinnati, OH 45202-1629
jdosker@stand-energy.com

Integrys Energy Services, Inc.
M. Howard Petricoff
Stephen M. Howard
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com

The Ohio Oil & Gas Association
W. Jonathan Airey
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
wjairey@vssp.com

Stephen Reilly
Anne Hammerstein
Office of the Ohio Attorney General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215
stephen.reilly@puc.state.oh.us
anne.hammerstein@puc.state.oh.us

Robert Triozzi
City of Cleveland
Cleveland City Hall
601 Lakeside Avenue, Room 206
Cleveland, Ohio 44114-1077
RTriozzi@city.cleveland.oh.us
SBeeler@city.cleveland.oh.us