BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

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TABLE OF CONTENTS

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APPLICATION FOR REHEARING
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THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Under R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of approximately 293,000 gas consumers of Vectren Energy Delivery of Ohio, Inc. ("VEDO" "Vectren" or " the Company"), applies for rehearing of the January 7, 2009 Opinion and Order ("Opinion and Order") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in these proceedings. A number of parties, including Vectren, OCC, PUCO Staff, and Ohio Partners for Affordable Energy ("OPAE"), reached a settlement agreement on most issues with the exception of rate design and notice. This settlement agreement was not opposed by the

other parties to the proceeding. The Commission's Order approved the settlement agreement, without modification, and ruled on the remaining issues of rate design and notice, finding that a Straight-Fixed Variable ("SFV") rate design should be implemented and concluding that notice of the SFV substantially complied with the statutes.

OCC asserts that the Commission's Order is unjust, unreasonable, and unlawful in the following particulars:

1. 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 and R.C. 4909.19.

2. The Commission erred by failing to provide Adequate Notice of the Second Stage Rate increases to the customers of Vectren, violating customers' due process rights under the 14th Amendment to the Constitution.

3. 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.

4. 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.

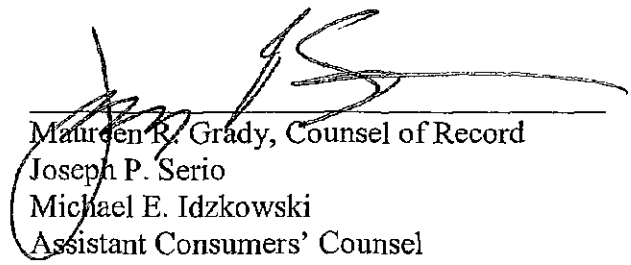
5. The Commission erred by approving a rate design that unreasonably violates prior Commission precedent and policy.

6. The Commission erred by imposing the SFV rate design against the manifest weight of the evidence resulting in unjust and unreasonable rates in violation of R.C. 4909.18 and R.C. 4905.22.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



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MEMORANDUM IN SUPPORT

I. PROCEDURAL HISTORY

On September 28, 2007, VEDO filed a Notice of Intent to File an Application for an increase in its gas rates and an Application for approval of Alternative Rate Plan for its Dayton and west central Ohio service area. VEDO subsequently filed its Application on November 20, 2007. The Application for a Rate Increase and an Alternative Rate Plan (together "Application") will affect all of VEDO's residential customers.

On November 5, 2007, the OCC, on behalf of the residential customers of VEDO, moved the Commission to grant OCC's intervention in this case. On November 6, 2007,

OPAE moved to intervene. The OCC and OPAE Motions to Intervene were granted on August 1, 2008.

On June 16, 2008, the PUCO Staff's Report of Investigation ("Staff Report") was filed, as well as the Financial Audit Report submitted by Eagle Energy LLC. OCC filed its Objections to the Staff Report on July 16, 2008. OCC and OPAE filed Intervenor testimony in opposition to the Company's Application on July 23, 2008.

Prior to the hearing in this proceeding, the parties, including OCC and OPAE entered into settlement discussions which resulted in a Stipulation and Recommendation ("Stipulation") that was filed on September 8, 2008. In the Stipulation, the parties agreed, in part, that the Company shall receive a revenue increase of $14,779.153;, receive total annual revenues of $456,791,425; and have an opportunity to earn an overall rate of return of 8.89%. The Stipulation also included the parties' agreement to a Sales Reconciliation Rider-A ("SRR-A") to allow the Company to collect deferred revenues previously approved by the Commission in Case No. 05-1444-GA-UNC.

However, the Stipulation did not resolve all issues. The Staff and Company proposals at hearing called for the implementation of the SFV rate design, which represented a significant departure from decades of PUCO precedent. OCC and OPAE opposed the SFV. Under the Stipulation, OCC and OPAE reserved their right to litigate the rate design issue[1] and the SFV rate design issue became the central issue in the evidentiary hearing that commenced on August 19, 2008.

In the evidentiary hearing in these cases, OCC presented testimony opposing the Staff's recommended implementation of an SFV rate design, and also testimony

[1] See Stipulation and Recommendation (Sept. 8, 2008), Paragraph 14.

demonstrating the adverse effect the SFV rate design will have on low-income customers, in particular.

Between September 3, 2008 and September 8, 2008, four public hearings were held in Sydney, Dayton, and Washington Court House. At those hearings, various customers of VEDO spoke in opposition to the rate increase proposed and the SFV rate design proposed by the Company and the PUCO Staff.

On September 26, 2008, the OCC and OPAE submitted a Joint Initial Brief on the rate design / SFV issue. VEDO and Staff also submitted Initial Briefs. On October 7, 2008, OCC, OPAE, VEDO and Staff filed Reply Briefs.

The PUCO issued its Opinion and Order on January 7, 2009, which imposed the SFV rate design on customers, similar to the Commission's rulings in the previous Duke[2] and DEO[3] rate cases.[4]

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that within thirty (30) days after an order is issued by 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."[5] Furthermore, the

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[2] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, Opinion and Order (May 28, 2008).

[3] *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, Opinion and Order (August 28, 2008).

[4] Opinion and Order at 11.

[5] R.C. 4309.10

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."[6]

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."[7] 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 * * *."[8]

OCC having been granted intervention on August 1, 2008 thus meets the statutory conditions that apply to an applicant for rehearing under R.C. 4903.10. Accordingly, OCC respectfully requests that the Commission hold a rehearing on the matters specified below.

III. ARGUMENT

Assignment of Error 1: The Commission Erred By Approving A Rate Design That Includes A Substantial Increase To The Monthly Residential Customer Charge, While Reducing The Volumetric Rates Without Providing Consumers Adequate Notice Of The Second Stage SFV Rates, All Of Which Is Required Under R.C. 4909.18 and R.C. 4909.19.

The Commission found in its Opinion and Order that the "notices at issue"[9] stated the reasonable substance of VEDO's rate design proposal and "provided sufficient information for consumers to determine whether to inquire further into the proposal or

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] The notices at issue were notices required under R.C. 4909.18 and 4909.19 which pertain to the newspaper notice publication requirements, and the pre-filing notice, required under R.C. 4909.43. OCC's Application for Rehearing is directed solely to the newspaper notice required under R.C. 4909.18 and 4909.19.

intervene in the case."[10] In addressing the newspaper notice required under R.C. 4909.18 and 4909.19, the Commission found that the notice had provided "sufficient information to consumers to understand that VEDO had proposed a new rate design along with its proposed increase in rates so that consumers could determine whether to inquire further into the case or to intervene."[11] The Commission's findings are unreasonable and unlawful and should be reversed by Entry on Rehearing.

A. The Content of the Notice

In a review of this issue, the key question is what did the newspaper notice say that allegedly gave sufficient information to consumers that would enable them to understand that VEDO had proposed a new rate design -- one which drastically departed from thirty years of ratemaking precedent:

> VEDO proposes changes to the rate design for Rate 310 (Residential Sales Service) and Rate 315 (Residential Transportation Service) that initiate a gradual transition to a **straight fixed variable rate** for distribution service.[12]

Then VEDO provided, as part of the "description of the proposed changes to the terms and conditions applicable to gas service,"[13] the proposed rates and the average percentage increase in operating revenue requested by the utility on a rate schedule basis. VEDO, however, **only provided notice of the proposed charges for Stage 1 rates** for Rate 310 and 315. The notice of the charges shows a customer charge of $16.75 per meter (November-April "winter rates") and $10.00 per meter (May-October "summer rates")

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[10] Opinion and Order at 16.

[11] *Id.*

[12] See VEDO Legal Notice Of Publication. Emphasis added.

[13] *Id.*

with volumetric charges of $0.11937 per Ccf for the first 50 Ccf plus and $0.10397 per Ccf for all Ccf over 50 Ccf.[14]

B. The Inadequacies of the Notice

The Notice did not include any explanation of what "straight fixed variable rate for distribution service" means, despite the Commission's conclusion that there was "sufficient information for a customer to understand that VEDO had proposed a new rate design." And "straight fixed variable" is surely not a concept that is widely understood by most customers. Nor does the Company explain what changes there are to initiate the gradual transition to the SFV rate design. Moreover, nowhere in the notice is a "gradual transition" defined. Missing from the notice as well are the actual Stage 2 rates;, the average proposed increase to customers under the Stage 2 rates;, and the date at which the Stage 2 rates are to go into effect (2010).

In addition, Stage 2 rates for Rate 310 and 315 were not even mentioned in the Notice. Under the Stage 2 rates proposed in Vectren's Application, the customer charge increases from Stage 1 level summer rates of $10.00 to $11.96. Under Stage 2, rates proposed by Vectren winter rates increase from Stage 1 levels of $16.75 to $20.04. The increased customer charges for Stage 2 were coupled with decreased volumetric rates for Stage 2 of $0.8574 per Ccf for the first 50 Ccf, and $0.7624 per Ccf for all volumes over 50. Without notice of the Stage 2 rates customers could not know or understand a real sense of the "changes" to rate design that were being proposed to implement the SFV rate design. Nonetheless, all that customers saw was the very first year of the proposal. This served to prevent the typical consumer from understanding that increasing the fixed portion of the customer charge and decreasing volumetric rates are what is meant by

[14] *Id.*

moving to the SFV rate design, where eventually there will be no volumetric charges and only a fixed flat rate customer charge.

Thus VEDO's customers were given a notice that 1) failed to explain what a straight fixed variable rate for distribution meant; 2) failed to describe what the gradual transition to this undefined straight fixed variable rate meant to them in terms of their customer charge and volumetric rates; 3) failed to alert customers that in 2010 the customer charge would be increasing again in the winter months to $20.04 and volumetric rates decreasing; 4) failed to show customers the impact of Stage 2 rates on their bill: and 5) failed to show the Company's overall plan to move to a full SFV -- with no volumetric rates and a high unavoidable fixed customer charge.

Instead, Vectren's customers were left with the impression that their customer charge would increase from $7.00 year round to $10.00 in the summer and $16.75 in the winter, when in reality there was much more of an increase to come to their fixed flat rate unavoidable customer charge. That increase would push the customer charge to $11.96 in the summer and to a whopping $20.04.

C. R.C. 4909.18 and R.C. 4909.19 Notice Requirements

The notice requirements contained in R.C. 4909.18 and R.C. 4909.19 are statutory and cannot be waived. R.C. 4909.18 provides that, unless otherwise ordered by the commission, the public utility must file, along with its application to the commission, "[a] proposed notice for newspaper publication fully disclosing the substance of the application."[15] 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

[15] O.R.C. 4909.18

three consecutive weeks in newspapers of general circulation throughout the affected areas "**the substance and prayer of its application**".[16]

The Ohio Supreme Court has stated that the purpose of R.C. 4909.18(E) is "to provide **any person**, firm, corporation, or association, **an opportunity to file an objection to the increase under R.C. 4909.19.**"[17] The Ohio Supreme Court has established two components that a utility 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.[18] 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."[19] Meeting both prongs is essential to providing an opportunity for every person to understand the full context of the proposal and determine whether or not to file an objection.

The Ohio Supreme Court holding in *Committee Against MRT*[20] was that the utilities failure to mention the innovative measured rate plan service failed to meet the notice requirements Because VEDO failed to disclose the "essential nature or quality" of the Stage 2 rates, it failed to meet the first prong of *Committee Against MRT*. As such, the notice is insufficient, thus violating R.C. 4909.18 and 4909.19, and depriving the Commission of jurisdiction with respect to Stage 2 rates.

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

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

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

[19] *Id.* at 176.

[20] *Committee Against MRT v. Pub. Util. Comm.*, 52 Ohio St.2d 231 (1977).

Because the Notice failed to disclose the nature or quality of VEDO's proposal, it deprived VEDO's customers of their opportunity to be heard. Customers reading the Notice would not have been able to determine whether to inquire further as to the proposal or intervene in the rate case. Had customers understood the drastic nature of the VEDO's proposal, and the dramatic further increases to the customer charge in Stage 2, coupled with decreased volumetric rates, they would have been able to determine whether to inquire further or intervene in this rate case. However, due to the insufficient information in the Notice, the public was denied an opportunity to present evidence at the hearing opposing Vectren's radical rate design and was denied the opportunity to challenge the level of customer charge to be imposed in Stage 2, and the appropriateness of transitioning to the SFV rate design in year 2 and beyond.

Vectren also failed to fulfill the second prong of the Notice test enumerated in *Committee Against MRT*, because the Notice was not understandable to customers to enable them to determine whether they should inquire or take further action. By using the term "straight fixed variable" to describe the proposal, Vectren appears to have deliberately chosen to not disclose the substance of its rate design proposal. Few customers understand -- or have ever even heard of the term "straight fixed variable." Moreover, although the Company did publish notice of the first stage of its proposal, VEDO did not publishing the Stage 2 impacts and its future plans to eliminate volumetric rates completely. Thus, customers could not and would not have understood the vast change in rate design being proposed by Vectren. This change fundamentally alters the way customers have been billed for gas distribution service over the past thirty years.

Thus, under the standards set forth in *Committee Against MRT*, the customers were unable to determine whether to inquire further into the Company's proposal.

Without all the crucial information about Stage 2 rates, the "essential nature or quality" of the proposal to increase Stage 2 rates to customers was not disclosed to VEDO's customers. Although customers may have been made aware that the Company was proposing changes to the rate design, the Notice gave no clue as to the magnitude of the proposed changes other than for the first year. Nor did it present Vectren's long-term plan beyond Stage 2 to eventually eliminate volumetric rates altogether and replace them with a single flat unavoidable customer charge.[21] Moreover, customers would not have been able to discern the true nature of the Company's proposal -- to eventually do away with volumetric rates and have one very high unavoidable flat rate customer charge -- a charge that is incurred no matter how little or how much gas is used.

Assignment of Error 2: The Commission Erred By Failing To Provide Adequate Notice of the Second Stage Rate Increases To The Customers Of Vectren, Violating Customers' Due Process Rights Under The 14th Amendment To The Constitution.

"The fundamental requisite of due process of law is the opportunity to be heard."[22] Due process for individuals is a constitutional right protected by the Fourteenth Amendment. The opportunity to be heard can have no meaning however, if one is not informed of the

[21] Indeed this is what the Commission in its Opinion and Order determined to do. The Commission ordered the customer charge to be increased to $18.37 per month, with no volumetric rate after the first year. See Opinion and Order at 15.

[22] *Grannis v. Ordean*, 234 U.S. 385, 394, 43 S. Ct. 779, 784 (1914), citing *Louisville& N.R. Co. v. Schmidt*, 177 U.S. 230, 236 (1900); *Simon v. Craft*, 182 U.S. 427, 436 (1901).

issues in contention and consequently can not make a decision as to whether to challenge or object to the matter.[23]

Since VEDO's notice did not sufficiently inform its customers of the issues in contention, VEDO's customers were unable to make a decision as to whether to challenge or object to the matter. Customers' opportunity to be heard could not be assured or assured under such circumstances. Consequently, customers' rights to due process in the form of an opportunity to be heard were violated.

Assignment of Error 3: 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 Opinion and Order acknowledged:

> Nonetheless, as we noted in Duke and DEO, we recognize that, with this change to rate design, as with any change, there will be some customers who will be better off and some customers who will be worse off, as compared with the existing rate design. **The levelized rate design will impact low-usage customers more,** since they have not been paying the entirety of their fixed costs under the existing rate design. Higher use customers who have been overpaying their fixed costs will actually experience a rate reduction.[24]

The Commission's Opinion and Order attempts to mitigate this adverse effect by claiming 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 proceeding or precedent that found that high-usage customers were over-paying fixed costs under the

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[23] See for example Mullane v. Central Hanover Band & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652 (1950), where the Court noted that "[t]he right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

[24] Opinion and Order at 14. Emphasis added.

previous rate design. In fact, the PUCO has never made such a finding of fact. Instead, this statement is made after-the-fact and in the face of over 30 years of precedent[25] using a rate design with a lower fixed customer charge and a higher volumetric rate. As a result, customers are being forced to accept the financial fallout from this unsubstantiated claim being transformed into fact. This statement by the Commission is a self-fulfilling conclusion to support an otherwise unsupportable decision. 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 VEDO's low-income customers, especially non-PIPP low-use and low-income customers, is debatable.

The record in this case does not answer the question of how the SFV rate design impacts the non-PIPP 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 in this case and in the Duke and DEO rate cases, without a full and complete understanding of the harm that it may cause. Using another governmental regulation analogy, this would be the equivalent to the FDA granting approval for a new

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

drug before knowing the full extent of any potential harmful effects of that new drug.[26] It is the responsibility of the drug manufacturer -- as a proponent -- to demonstrate that the product is **not** dangerous.[27] Similarly it is the responsibility of VEDO and Staff -- as the proponents of the SFV rate design -- to demonstrate that the SFV rate design will not harm non-PIPP low-income customers. It is not an 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 the change to an SFV rate design is just and reasonable.[28]

The SFV rate design approved by the Commission is bad public policy for VEDO's low usage and low-income residential customers who will now be forced to subsidize VEDO's larger and high-use 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.[29] 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 large homes. The SFV rate design is not only unfair to these customers with small incomes, it is extremely insensitive in its timing; coming on the heels of several years of belt-tightening by America's working poor, amidst a nationwide mortgage foreclosure crisis

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[26] *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).

[27] *Id.*

[28] 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.

[29] Staff Ex. No. 3 (Puican Direct Testimony) at 6 (August 22. 2008).

and with the country in a looming recession and possibly facing a depression, a fact uncontested in the record.[30]

The Commission stated a concern with the impact that the change in rate structure would have on some VEDO customers, and recognized that some relief was warranted for those customers. Such a finding resulted in an Opinion and Order that is internally inconsistent. On one hand the PUCO declared that the SFV rate design to be a superior option to a revenue decoupling mechanism with a lower fixed customer charge.[31] Yet, on the other hand, the PUCO acknowledged the negative impact that the SFV rate design would have on non-PIPP low-income customers.[32]

> In the previous cases, 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 have emphasized 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 VEDO should likewise implement a one-year low-income pilot program **aimed at helping low-income, low-use customers pay their bills**.
>
> As in the prior cases, 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.[33]

Thus for the first year of the SFV rate design, the eligible non-PIPP low income customers will only experience an increase from $7.00 per customer per month to $9.37

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[30] Opinion and Order at 15

[31] *Id.* at 11-13.

[32] *Id.* at 14.

[33] *Id.*, Emphasis added.

per customer per month.[34] However in year two -- when the pilot program expires -- the same non-PIPP low income customer will experience an even greater increase -- from $9.37 per customer per month to $18.37 per customer per month. Thus any "penalty" that may have been avoided in year one is more than doubled in year two and beyond.

To the extent that the Commission ordered this small offering to help low-use low-income customers who will be penalized through the implementation of SFV, it remains 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 why such an important program for VEDO should be only one-half the size of Duke's, especially with no evidence in the record that VEDO has half the non-PIPP low income customers that Duke has. 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 VEDO would be approximately 10,000 customers, and it should extend beyond year 1.

The Commission's Opinion and Order established a rationale for the low-income pilot program, but the Commission provided no analysis to support how the approved pilot program would be sufficient to achieve the stated purpose, for either year one or beyond. The Opinion and Order stated:

> In the previous cases, 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.[35]

[34] The increase will be limited to $2.37 because of the $5.00 pilot program credit.
[35] Opinion and Order at 14.

The pilot program was approved by the Commission without the benefit of sufficient understanding of the extent of the need that the Commission allegedly addressed. 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.[36]

Thus, it is not unreasonable to conclude that there are thousands of non-PIPP low-income customers in VEDO's service territory. In such a case, the Commission's pilot program for 5,000 customers for only one year is woefully inadequate and will not come close to meeting the need caused by the SFV rate design,or achieving the Commission stated goals.

Assignment of Error 4: 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 SFV rate design approved by the Commission 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;[37]

The SFV rate design approved by the Commission impedes the development of Demand Side Mangement ("DSM") innovation in Ohio for a number of reasons. The SFV rate design sends consumers the wrong price signal; it will harm consumers who

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[36] OCC Ex. No. 2 (Colton Direct Testimony) at 28 (July 23, 2008).

[37] R.C. 4929.02.

have invested in energy efficiency by extending the payback period; and it will take away control that consumers have over their utility bills.

Instead of impeding DSM programs, the Commission has a statutory duty to initiate programs that promote conservation. R.C. 4905.70 states:

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

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

The Commission has the responsibility to approve rates that are just and reasonable.[38] An SFV rate design does not meet the State policy of promoting energy efficiency[39] and violates the legislative mandate to the Commission to initiate programs to promote and encourage conservation.[40] 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 Opinion and Order on rehearing.

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

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

[40] R.C. 4905.70.

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

The Commission's Opinion and Order improperly stated that a "levelized rate design sends better price signals to customers."[41] This contradicts the fundamental tenet that high natural gas commodity prices generally send a signal to consumers that encourages conservation. The SFV rate design contradicts that basic message because it decreases the volumetric rate while significantly increasing the fixed portion. At a time when VEDO's marginal costs for natural gas and energy prices generally are increasing, the SFV rate design sends the wrong price signal to customers, because as consumers use more natural gas the per unit price decreases under the SFV design. 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. To the extent that the Company and/or Staff are concerned that the present rate design (consisting of a lower customer charge and a higher volumetric rate) does not enable the Company the ability to collect sufficient revenues, it should not be ignored that the regulatory principles have long been in place that a Company is not **guaranteed cost recovery**. Rather 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.[42] The opportunity to develop a more stable revenue stream can be

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[41] Opinion and Order at 12.

[42] *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.") Emphasis added.

addressed by the implementation of a decoupling mechanism with appropriate safeguards, in a manner that does not discourage customer conservation efforts.

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 Opinion and Order approving the SFV rate design on rehearing because the resulting rates are unjust and unreasonable.

B. 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 noted that a "critical"[43] component of its decision on the SFV rate design was the provision for energy efficiency projects. The Opinion and Order lauded the establishment of the programs because they were "consistent with Ohio's economic and energy policies."[44] However, the Opinion and Order was selective with what parts of the decision are consistent with the state economic policy and which parts are not. For example, the Opinion and Order imposed the SFV rate design despite the fact that it will lengthen the payback period for energy efficiency investments. Customers who have invested in energy efficiency measures such as additional home insulation, more efficient furnaces and water heaters -- as a rational response to increasing gas costs, and in response to the very same state economic and energy policies that the PUCO touted -- will see their investment returns diminished and payback periods

[43] Opinion and Order at 12.

[44] *Id.*

lengthened as a result of the change to an SFV rate design.[45] This is another reason that the SFV rate design discourages conservation.

This issue becomes even more important in light of the fact that many of the conservation efforts that customers have undertaken in the recent past were also based on the current rate design which provided customers greater incentive to conserve. This is because the current rate design consists of a lower fixed customer charge and a higher volumetric charge. Prior to the imposition of the SFV rate design, customers could see a direct reduction in bills as a result of less usage due to conservation efforts. Customers made those conservation investment decisions in good faith and in reliance on the regulatory rate design in place consistent with the very same policies that tout energy efficiency efforts. It is patently unfair to now change the rules that customers relied on.

A change to the SFV rate design will extend the payback period of energy efficiency investments because a greater portion of the bill will be recovered in the fixed charge and a smaller portion in the volumetric portion.[46] Mr. Puican dismissed this difference claiming that it was an artificial price signal.[47] But the fact remains that if the goal is to achieve maximum conservation, then the best price signal is one that includes the largest volumetric charge and the lowest fixed charge. This is consistent with the fact that the actual commodity of gas which comprises the largest portion of a customer's total bill is based on volume.

Mr. Puican attempted to defend his position by indicating that the artificial inflation of the volumetric charge beyond cost would lead to an over-investment in

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[45] OCC Ex. No. 3 (Novak Direct Testimony) at 21.

[46] Tr. Vol. VI (Puican) at 26 (Aug. 28, 2008).

[47] *Id.*

conservation.[48] However, despite this dubious claim, there is absolutely no evidence in the record of any instances of over-investment in conservation as a result of the current rate design.

Because the SFV rate design lengthens the pay back period for conservation investments, the SFV rate design has the effect of reducing the customer's incentives to invest in energy efficiency. The cost per unit under the SFV rate design declines as consumption grows which sends the wrong price signal, and the customers who invest in energy efficiency investments face longer payback periods.[49] The Commission was faced with a decision to implement a rate design that has a negative impact on a customer's payback analysis, or a rate design that positively impacts the payback analysis. In order to adhere to the state policy in R.C. 4929.02 and R.C. 4905.70, the Commission must implement the latter rate design. In these cases, that would be the rate design that includes a smaller customer charge ($7.00), a higher volumetric rate, and a decoupling mechanism with appropriate safeguards.

Making a radical rate design shift to a SFV rate design is especially unfair for customers who have invested to become more energy efficient as a response to actions urged by State and Federal energy efficiency policies. In this sense, an SFV rate design reduces some of the control customers have over their utility bills, because more of their bill is uncontrollable or fixed and less is controllable or dependent on their volumetric usage.

The reduction that would be made to the volumetric rate resulting from an increase to the customer charge under an SFV rate design could affect consumers'

[48] Id. at 27 (Aug. 28, 2008).

[49] OCC Ex. No. 3 (Novak Direct Testimony) at 21.

conservation investment decisions. Although the commodity costs do represent the largest portion of a residential customer's bill, the reality is that consumers have made conservation decisions based on the current level of volumetric billing. Based on this evidence, it is a given that the SFV rate design will reduce the benefits and will extend the payback period of energy efficiency investments. Therefore it should not be approved by the Commission.

In reality, each consumer is different in how they approach energy efficiency investment decision-making. The Commission's role is to put in place a rate design that will be most effective at removing barriers or most effective at promoting consumers' investment in energy efficiency. The only conclusion that the Commission can reach is that the SFV rate design, and the rates proposed there under, extend the payback period, and are therefore unjust and unreasonable and should not be approved by the Commission in these cases.

Assignment of Error 5: 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.[50] 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 or in a manner designed to merely justify the end results. Gradualism had been relied upon in prior cases in such a manner that increases to the fixed portion of the customer charge were limited to $1.00 to $2.00 per customer per month.[51] However, in this case, the PUCO Staff claimed that almost

[50] Staff Ex. No. 3 (Puican Direct Testimony) at 9.

[51] See footnotes 56-64.

doubling or tripling the customer charge -- increases of $6.37 and $11.37 -- reflect gradualism.[52] The PUCO unreasonably relied on the Company and Staff argument that the principle of gradualism has not been ignored by the implementation of the SFV rate design, despite a claim that, "the Commission is sensitive to the impact of any rate increase on customers, especially during these tough economic times[53]" the Opinion and Order nonetheless imposed increases of $6.37 and $11.37 per customer per month over a two-year period, without any resemblance to the principle of gradualism that the PUCO adhered to for over thirty years. Thus, after two years, customers will see their customer charge nearly triple. Given that the current customer charge is $7.00 per customer 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. This demonstrates the PUCO's failure to be guided by its own regulatory principles in these cases. Such disregard for the principle of gradualism harms VEDO's residential consumers and the regulatory process.

The Opinion and Order ignored numerous prior cases where gradualism was applied in a much more reasoned and measured manner. In a Columbia Gas case, , the Commission noted that the Staff recommended a Customer Charge of $6.00, which was lower than the calculated charge of $7.79, based on principles of gradualism and stability.[54] As part of its decision, the Commission concluded:

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

[53] Opinion & Order at 15.

[54] *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).

> 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.**[55]

In accepting the Staff position in the 1988 Columbia Gas case, the Commission noted that "[t]he Staff's application of the accepted ratemaking principles of gradualism and stability is reasonable."[56]

Both the Staff Report and the Opinion and Order in another Columbia Gas case,[57] 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.[58]

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

> We heard a great deal of testimony at the local hearings regarding the detrimental impact that an increase in the customer charge would have on low- income customers (See, Cincinnati Tr. 29-30, 54, 61, 93). **We believe that it is appropriate in this case to keep the customer charge at its current level in order to minimize rate shock that would otherwise be experienced by residential customers.**[59]

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

[56] *Id.*

[57] *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).

[58] *1989 Columbia Gas* at 80.

[59] *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.

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. 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.[60] This same language also appeared in Northeast Ohio casewhere the Staff Report stated, "[i]n recommending customer charges, Staff recognizes and prescribes to the established ratemaking principle of gradualism within the revenue distribution."[61]

The same or similar statement appears in the Cincinnati Gas & Electric, Case No. 01-1228-GA-AIR, Staff Report,[62] in the Cincinnati Gas & Electric, Case No. 92-1463-GA-AIR Staff Report,[63] Columbia Gas of Ohio, Case No. 91-195-GA-AIR Staff Report,[64] Dayton Power & Light Company, Case No. 91-415-GA-AIR Staff Report,[65] and the River Gas Company, Case No. 90-395-GA-AIR Staff Report.[66]

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

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[60] *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).

[61] *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).

[62] *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).

[63] *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).

[64] *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).

[65] *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).

[66] *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).

> 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?[67]

Historically, the principle of gradualism has been accepted in the form of mitigating a customer charge "increase" from $6.77 to $6.00[68] or from $5.23 to $5.00[69] or even keeping it at $5.70.[70] 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 $7.00 customer charge may increase to $13.37 or $18.37 per customer per month, especially when the commodity prices are over $8.00/Mcf.[71] The need for gradualism grows as consumers face greater costs; the need does not decline.

The problem with the Commission's Opinion and 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.

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[67] Order at 25.

[68] *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).

[69] *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).

[70] *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).

[71] Staff Ex. No. 3 (Puican Prefiled Testimony) at 3-4 (August 22, 2008).

Assignment of Error 6: The Commission Erred By Imposing The SFV Rate Design Against The Manifest Weight Of The Evidence Resulting In Unjust And Unreasonable Rates In Violation Of R.C. 4909.18 And R.C. 4905.22.

One of the keys to the PUCO's decision to impose the SFV rate design was the use of PIPP customers as a surrogate for all low-income customers.[72] In making this decision, the Commission completely accepted and relied on the testimony of the Staff witness on this issue.[73] It is noteworthy that other than making this statement, the Staff provided no objective evidence or statistical data to support this position. Instead, only a subjective conclusion was provided -- one that justified the end conclusion in favor of the SFV rate design. Inasmuch as Staff provided no objective data or statistical information in support of the statement, the OCC and other intervenors were denied an opportunity to explore the credibility of such information.

In contrast, the OCC presented the testimony of Roger Colton which relied on statistical analysis of data provided by the Energy Information Administration[74] and United States Census data.[75] Despite the fact that Mr. Colton based his observations and conclusions on objective data and statistical analysis, the Opinion and Order completely discounted his testimony.[76] In doing so the Commission held Mr. Colton's testimony to a significantly higher standard than the testimony provided by Staff. This double standard was unfair and had the impact of shifting the burden from Staff -- who relied on PIPP customers as a surrogate for all low-income customers -- to the OCC.

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[72] Opinion and Order at 13.

[73] *Id.*

[74] OCC Ex. No. 2 (Colton Direct Testimony) at 7 (July 23, 2008).

[75] *Id.* at 7-10.

[76] Opinion and Order at 13.

The Opinion and Order stated that the data relied on by Mr. Colton "may be unreliable."[77] However, this conclusion ignored Mr. Colton's explanation:

> The caution about census -- the use of census information on expenditures doesn't go to the sample size. The caution goes to using the American Community Survey to establish the -- the answer is yes I am aware of this caution. The caution goes to using the census data to establish the -- the actual dollar figure for a -- for a natural gas bill, and it doesn't apply simply to the American Community Survey. It applies to Department of labor's Consumer Expenditure Surveys and any other survey because people tend to overstate their -- their natural gas bills and I don't -- I didn't believe when I use this data, I use it because I don't believe that caution is applicable to -- to what I used it for in that I don't use the American Community Survey to say that the natural gas bill in Montgomery county or the natural gas bill in Ohio is $21.03. What I used it for was to establish the relationship between -- between incomes to look to see whether the bill for low income households versus middle income households versus high income households, what those relationships are.

The Opinion and Order nonetheless concluded that, "We find that the record demonstrates that low-income customers, **on average**, would actually enjoy lower bills under the levelized rate design."[78] The record may indicate that PIPP customers -- who are higher use customers -- may benefit from the SFV rate design, but the record does not indicate that non-PIPP low income customers will fare as well. In fact, by relying on an **average** of PIPP and non-PIPP customers to reach that conclusion, the PUCO actually confirmed Mr. Colton's testimony. This flaw underlies one of the key premises to the decision to impose the SFV rate design on customers. As such, both the premise and conclusion are flawed and the Commission should correct this flaw by reversing its decision on the SFV rate design.

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[77] *Id.*

[78] Opinion and Order at 13, Emphasis added.

Without the acceptance of Staff's unsupported statement regarding PIPP customers as a surrogate for non-PIPP low-income customers, it is uncontroverted that the SFV rate design has a negative impact on low-income customers. Thus the resulting rates are unjust and unreasonable.

IV. CONCLUSION

For the reasons set forth herein, the Commission should issue an Entry on Rehearing that reverses the Finding and Order approving the straight fixed variable rate design. Additionally, the Commission should reverse its finding that the notice provided for Stage 2 rates was sufficient, and should order the Company to reissue a corrected Stage 2 notice and conduct proceedings focusing on the appropriateness of the Stage 2 rates.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Application for Rehearing has been served upon the below-named persons via electronic transmission and by regular U.S. Mail Service, postage prepaid, this 6th day of February, 2009.

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