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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**

DOMINION EAST OHIO'S MEMORANDUM CONTRA MOTION TO STAY

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I. INTRODUCTION

JCA's motion for stay is merely the latest edition of what has become an all-too-frequent tactical ploy by the self-styled Joint Consumer Advocates ("JCA")[1] to impede implementation of Commission Orders with which they disagree. In the past two-and-a-half years, the Office of Ohio Consumer's Counsel ("OCC") has filed at least six such motions before the Commission, while the Ohio Partners for Affordable Energy ("OPAE") has filed four in the past nine months alone.[2] None have been granted. The same result should apply here.

At issue is the Commission's October 15, 2008 Order which established a straight fixed variable ("SFV") rate design for The East Ohio Gas Company, doing business as Dominion East Ohio ("DEO"). That Order implemented SFV in two steps: Year One SFV rates in effect immediately (DEO implemented them on October 16, 2008); and Year Two rates (which increased the fixed component of the charges to customers with a corresponding decrease to volumetric base rates) to take effect in October 2009.

The timing of the instant motion is reason alone to reject it. The motion is, at once, too late and premature. JCA's arguments consist solely of broad-brush attacks on SFV itself. Yet neither JCA nor any of its members ever sought to stay the Year One SFV rates from going into effect. Having failed to do so, JCA now fails to present any argument as to how the mere

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[1] The Joint Consumer Advocates include the Office of the Ohio Consumers' Counsel, the City of Cleveland, the Neighborhood Environmental Coalition, the Empowerment Center of Greater Cleveland, the Cleveland Housing Network, the Consumers for Fair Utility Rates and Ohio Partners for Affordable Energy.

[2] *See, e.g., In re Application of Columbus S. Power Co. for Approval of its Elec. Sec. Plan; an Amendment to its Corp. Separation Plan; and the Sale or Transfer of Certain Generation Assets*, Case No. 08-917-EL-SSO, et al (motions dated Mar. 25, 2009 and Sept. 29, 2008); *In re Application of Duke Energy Ohio for Approval of an Elec. Sec. Plan*, Case No. 08-920-EL-SSO, et al (motion dated Sept. 29, 2008); *In re Application of The Cincinnati Gas & Elec. Co. To Modify its Non-Residential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish a Pilot Alternative Competitively-Bid Service Rate Option Subsequent to Market Development Period*, Case No. 03-93-EL-ATA, et al (motion dated Feb. 15, 2008); *In re Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates*, Case No. 07-589-GA-AIR, et al (motion dated June 3, 2008); *In re Application of Duke Energy Ohio To Modify Its Market-Based Standard Service Offer*, Case No. 06-986-EL-UNC (motion dated May 7, 2007).

transition from Year One rates to Year Two rates, both of which are modified SFV rates, will present any effects that are different in nature than SFV rates in general. Because JCA's complaints are really directed at SFV rates generally and not to Year Two rates specifically, JCA's attempt to stay Year Two rates is not timely.

On the other hand, to the extent that JCA could articulate some particularized adverse effect arising from the transition to Year Two rates (which JCA did not and cannot do), JCA nowhere demonstrates any reason to stay those rates at this time. Simply put, JCA presses its motion now, seeking expedited relief no less, despite the fact that the transition to Year Two rates will not occur until October – ***over six months away.*** JCA provides no reason why certain of its members' appeals will not be completed by the time Year Two rates are to be put into effect.

In addition to the odd timing of its request, JCA has failed to show why the relief it seeks is appropriate, not to mention required. As JCA acknowledges, the Commission applies a four-factor test in determining whether to stay one of its orders, to wit: (1) whether there is a strong likelihood of success by movant on the merits; (2) whether the movant will suffer irreparable harm absent a stay; (3) whether other parties will suffer harm if a stay is granted; and (4) whether the public interest favors a stay. JCA has failed to show any of the four factors is present here. JCA's attempt to show a likelihood of success on the merits consists of three after-thought, conclusory sentences. Its offerings on the balance of harms amount to little more than repackaging already-presented – and already-rejected (more than once) – arguments. In addition, JCA's concept of the "public interest" is muddled and indefensible. The relevant public interest at issue here is the public's interest in a rate structure that fairly allocates the costs of providing service among DEO's customers. The Commission properly found that SFV rates best

accomplish that objective. DEO's costs are overwhelmingly fixed. Non-residential customers have subsidized (and will continue to subsidize) residential customers. SFV rates properly address these issues. The transition from Year One rates to Year Two rates is merely a step toward the goal of the appropriate allocation of costs among DEO's customers. In short, JCA's dissatisfaction with SFV rates is not a basis for staying the implementation of Year Two SFV rates.

II. ARGUMENT

A. JCA Has Failed To Show Any Of The Four Factors That Must Be Met To Justify A Stay.

Commission orders are effective on the day that they are filed, unless the Commission specifically states otherwise. R.C. 4903.15. A stay of any order should be rare and "should only be given after substantial thought and consideration." *MCI Telecomm. Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St. 3d 604, 606 (Douglas, J., dissenting). As JCA acknowledges, Justice Douglas' dissent in *MCI* articulated what has become the accepted four-factor test governing stay requests. In particular, in evaluating a party's request to stay an order, the Commission must consider:

> [i] whether the seeker of the stay has made a strong showing of the likelihood of prevailing on the merits; [ii] whether the party seeking the stay has shown that without a stay irreparable harm will be suffered; [iii] whether or not, if the stay is issued, substantial harm to other parties would result; and above all in these types of cases [iv] where lies the interest of the public. [*Id.*]

As demonstrated below, JCA cannot show any of these four elements here.

1. Because JCA's arguments merely repeat previously rejected arguments, JCA's appeal is not likely to succeed on the merits, much less make a "strong showing" of that likelihood.

The four-factor test for stays of Commission orders was taken nearly verbatim from the test that Ohio courts use to evaluate motions for preliminary injunction. *See, e.g., Schaller v.*

Rogers (10th Dist.), 2008-Ohio-4464, ¶ 30. Courts applying that test hold that the "likelihood of success" prong is the "weightiest of the four." *Bridgewater Dairy, LLC v. U.S. Dept. of Agriculture* (N.D. Ohio Feb. 22, 2007), No. 3:07 CV 104, 2007 WL 634059, *17. A movant's failure to show likelihood of success is "usually fatal" to its request. *Id.*; *Gonzales v. Nat'l Board of Medical Examiners* (6th Cir. 2000), 225 F.3d 620, 625; *see Michigan State AFL-CIO v. Miller* (6th Cir. 1997), 103 F.3d 1240, 1249 (holding that "preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed"); *Chapin v. Nameth* (7th Dist.), 2009-Ohio-1025 (affirming denial of preliminary injunction after concluding only that there was no likelihood of success); *Schaller*, 2008-Ohio-4464 (same). Here, JCA has failed to demonstrate any likelihood of success on the merits, let alone the "strong showing" that is necessary.

In its memorandum, JCA recites a by now familiar litany of arguments that share one thing in common: all have been considered and rejected by the Commission, more than once. JCA argues that: (i) SFV undermines conservation and energy efficiency measures; (ii) low-income, low-use customers subsidize high-volume customers under SFV; and (iii) there was insufficient public notice of the SFV rate design during the rate case. The Commission has considered *and properly rejected* each of these arguments.

JCA pressed its conservation arguments both prior to the Commission's October 15, 2008 Order and in JCA's application for rehearing. (*See* Entry on Reh'g dated Dec. 19, 2008, ¶ 16 ("[T]he Consumer Groups' argument regarding conservation was fully considered and rejected in the [October 15, 2008] order.").) Undaunted, JCA again argues that SFV does not provide "DEO's residential customers with the necessary price signals that would encourage energy efficiency investments." (Mem., p. 6.) As the Commission has already noted, that is simply not

true. Under SFV, consumers who conserve gas "will equally enjoy the full benefit of those efforts for the commodity portion of their gas bill, which typically represents 75 to 80 percent of their total gas bill." (Entry on Reh'g, ¶ 16; Tr. IV, p. 90 (Murphy Re-Cross).) In fact, the Commission determined that SFV is a "better choice" than decoupling, under which conservation savings are "not guaranteed." (Entry on Reh'g, ¶ 16.) JCA offers nothing new to disturb that finding now.

Second, the Commission found that JCA's argument regarding intra-customer class subsidies lacked record support. (Op. and Order dated Oct. 15, 2008, p. 25.) Although JCA argues that "low-use, low-income residential customers will subsidize larger, high-use commercial and industrial customers," the Commission found that the record evidence suggests the exact opposite. (*Id.* at 25 ("[T]o the extent that there is an intra-class subsidy there is evidence that it may be from nonresidential users to residential users."); Tr. I, p. 235 (Andrews Re-Direct), p. 237 (Andrews Re-Cross).) Moreover, the Commission found that concerns about subsidies must be balanced against the need to provide a more equitable cost allocation among all customers, so that "everyone pays his or her fair share." (Op. and Order, p. 24.) JCA ignores this consideration in its motion.

Third, the Commission rejected JCA's notice argument twice in this case, and rightly so. (*See, e.g., id.* at 27; Entry on Reh'g, ¶ 13.) As more fully discussed below, *see infra.* at 10-12, DEO's rate application did not include SFV, so DEO did not include SFV in its notice. Staff recommended consideration of SFV *eight months after DEO's application was filed.* (Entry on Reh'g, ¶ 13.) And, as the Commission correctly noted, once Staff raised the issue, the public hearing notice "did appropriately state that one of the issues in the case was rate design and SFV." (*Id.*) The Commission has properly rejected this argument (repeatedly), and JCA has

nothing new to say on the subject; JCA thus cannot rely on this argument to show a likelihood of success on the merits now.

Given the weakness of its arguments, JCA understandably glosses over the likelihood-of-success requirement for a stay, devoting just three conclusory sentences to that portion of its argument. (Mem., p. 16.) Instead of addressing the merits requirement head on, JCA attempts to repackage its merit arguments in terms of other factors in the test, such as irreparable harm or public interest. (*Id.* at 5-6, 9-14.) But this change does not disguise JCA's true objectives: it seeks to rely on – for the third time – arguments identical to those it raised in its post-hearing briefing and its rehearing application. The Commission has properly rejected these arguments. Reciting them yet again brings JCA little to show a likelihood of success on the merits, much less the "strong showing" necessary to obtain a stay.

2. Neither JCA, its members nor the customers that they purport to represent will suffer irreparable harm without a stay.

JCA argues that a stay is needed to prevent irreparable harm, which purportedly comes in three forms: (i) "lost opportunities" for conservation by consumers; (ii) nonrefundable overpayment and subsidies by residential customers; and (iii) lack of public notice of SFV. As discussed above, the Commission properly rejected each of these arguments when the JCA parties presented them during the merits phase of the rate case. As shown below, because JCA's arguments are substantively inaccurate, JCA cannot use them to show irreparable harm. JCA's inability to show irreparable harm resulting from the transition to Year Two rates independently precludes the relief JCA seeks in its motion for stay.

(a) Consumers will not suffer "lost opportunities" to conserve energy.

JCA argues that Year Two rates will discourage consumers from conserving natural gas. (Mem., p. 9.) According to JCA, under Year Two rates, "No matter how little gas a customer

uses or how great their conservation efforts are, the fact remains that their distribution bill will not go down." (*Id.*)

JCA is simply wrong to suggest that Year Two rates disincentivize conservation. Under Year Two rates, the volumetric component continues to be the ***overwhelming*** portion of a customer's bill – as much as 75 to 80%. (Entry on Reh'g, ¶ 16 (commodity portion "represents 75 to 80 percent" of total bill); Tr. V, pp. 22-23 (OCC witness Radigan acknowledging that the total bill is "biggest driver of usage decisions" and that gas cost is largest portion of most bills); Tr. IV, pp. 66 (Murphy Cross), 87 (Murphy Re-Direct).) Customers who use more gas will continue to pay more. Similarly, for every unit decrease in consumption, customers will continue to see a corresponding decrease in their bill. This is true of SFV rates generally, and remains true under both Year One and Year Two of the SFV rate design that the Commission approved here.

Moreover, JCA completely overlooks DEO's critical role in achieving conservation goals. As the Commission correctly noted, "A rate design that prevents a company from embracing energy conservation efforts is not in the public interest." (Op. and Order, p. 22.) The Commission approved the SFV rate design because the Commission understood a fundamental flaw in DEO's traditional rate design – DEO was forced to recover approximately 30% of its fixed distribution costs through volumetric charges. (Tr. IV, p. 89 (Murphy Re-Cross).) As the Commission recognized, so long as DEO had to rely heavily on volumetric charges to meet its fixed costs, DEO would have no incentive to encourage conservation; in fact, DEO's financial incentives ran in exactly the opposite direction. (Op. and Order, p. 22 (describing "societal benefit to promoting conservation by removing" "incentive to increase gas sales").)

By approving a modified SFV design, the Commission substantially reversed this disincentive by easing DEO's reliance on volumetric charges. Under Year One rates, DEO currently recovers 71% of its fixed costs through a fixed charge. (DEO Ex. 1.4, p. 8 (Murphy Fourth Supplemental Direct).) Under Year Two rates, this figure rises to 84%. (*Id.*; Op. and Order, p. 25.) As the Commission recognized, the less DEO relies on volumetric charges to meet its fixed costs, the more incentive DEO has to encourage and foster conservation among its customers. (*Id.* at 25.)

Delaying Year Two rates, as JCA requests, would halt this progress in its tracks. SFV encourages conservation both by consumers and DEO. Thus, the real harm to conservation efforts would be if the Commission acceded to JCA's request and stayed Year Two rates.

(b) JCA's arguments regarding alleged overpayments and subsidies ignore record evidence.

JCA complains that if Year Two rates are implemented and later reversed, low-income, low-use customers will be forced to "overpay" without recourse. (Mem., pp. 7-8.) This argument again ignores the record evidence presented in this case. As the Commission found, low-income customers are actually ***better off*** under a pure SFV design, which is more closely reflected in Year Two rates:

> [T]he majority of low-income customers actually use more natural gas, on average, than the customers whose means place them above 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]. [Op. and Order, p. 23.]

The Commission's finding is undeniably correct. DEO serves two categories of low-income customers: those on a percentage-of-income payment plan ("PIPP") and those not on PIPP. No one disputes that PIPP customers use more gas than the average customer and, therefore, will be billed less as the amount of the volumetric charge decreases (as it does from

Year One to Year Two). (*See* OPAE Post-Hearing Br., p. 4.) This benefits not only PIPP customers, but all customers. Because PIPP customers will accumulate a lower arrearage, the remaining customers will accordingly pay less under the PIPP rider. Similarly, among non-PIPP customers with household incomes at or below 175% of the federal poverty level, "[t]he largest 90% . . . 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. (DEO Ex. 1.5, p. 3 (Murphy Surrebuttal).) In short, the evidence shows that most low-income customers – regardless of PIPP qualification – use ***more*** gas than DEO's average residential customer, and thus would ***benefit*** from the transition from Year One to Year Two rates.[3]

Moreover, JCA overlooks a potential benefit of SFV rates. During unusually cold winters (like the one just past), customers' gas usage will likely be higher than normal. Under those conditions, customers paying for service under SFV rates (*i.e.*, lower volumetric charges) experience ***lower*** bills than they otherwise would under a rate design more weighted towards volumetric based charges. In fact, this is exactly what happened to DEO's residential customers in the winter of 2008-2009. Specifically, DEO's residential customers ***saved*** approximately $5.7 million under SFV rates in effect as compared to the previous traditional rate design.[4] As the volumetric charge continues to decrease in the transition from Year One to Year Two rates, DEO's customers could see additional savings if next winter brings similarly colder than normal temperatures.

JCA also argues that DEO's recently-released Cost-Of-Service Study ("COSS") demonstrates that certain residential customers subsidize commercial and industrial customers

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[3] The Commission also ordered the establishment of a low-income pilot program, which provides a monthly bill discount for 5,000 non-PIPP customers. (*See* Op. and Order, p. 26.) This program, which is currently underway, also mitigates any adverse effect from a change in rates for low-income customers.

[4] *See* Affidavit of Larry J. Rice, attached here as Exhibit 1.

under SFV. (Mem., pp. 14-15.) But, again, just the opposite is true. When PIPP program expense and PIPP rider payments are properly factored into cost of service, it is undisputed that ***non-residential*** customers subsidize ***residential*** customers both under the Year One rates ***and*** under the Year Two rates. Specifically, even under Year Two rates, residential customers in the GSS/ECTS class will account for a 6.59% rate of return, while non-residential customers in that class account for a 9.38% rate of return. (*See* Mem. Contra JCA's Joint Mot. to Reopen the Rec. dated Feb. 13, 2009, pp. 7-8.) Given that residential customers will continue to receive a subsidy even under Year Two rates, it is hard to see how those rates will "irreparable harm" residential customers.

The only "harm" suffered by residential customers under SFV rates or the transition to Year Two rates is a reduction in the subsidy that these customers have enjoyed. That is hardly a reason to grant a stay.

(c) The Commission has repeatedly rejected JCA's argument regarding public notice of SFV.

JCA argues that because DEO's application notices did not mention SFV, the notices were deficient and the public was deprived of due process, thus allegedly causing "irreparable harm." (Mem., pp. 10-13.) As with its other arguments, this is nothing the Commission hasn't heard – and rejected – more than once. (*See* Op. and Order, p. 27; Entry on Reh'g, ¶ 13) No matter how many times JCA makes this argument, JCA 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.

Because DEO's application did not contain SFV, its application notices were not required to announce it. *See* R.C. 4909.18(E) (requiring newspaper notice "fully disclosing the substance

of the application"); R.C. 4909.19 (requiring publication of "substance and prayer" of application); R.C. 4909.43(B) (requiring notice of "intent of the public utility to file an application, and of the proposed rates to be contained therein").[5]

Once the Staff included the issue, the parties and the public received the statutorily required notice. In particular, 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." Here, the Commission's public hearing notice 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 dated June 27, 2008, p. 6.)[6]

As the Commission noted in rejecting JCA's notice argument previously, JCA's position would require a utility to refile its application anytime it chooses to support a position outlined in a Staff report. (Op. and Order, p. 27.) It would also prohibit Staff from raising any issues in the Staff report that were not raised in the application without requiring the applicant to refile. This is absurd, and nothing in the statutes requires it. Rather, the notice statutes contemplate at least two rounds of notices: one after the application, and one in advance of the hearing. This two-round notice is designed to ensure that interested parties receive notice both of what the applicant originally seeks and of any issues that Staff has raised in advance of the hearing. That is exactly what happened here.

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[5] Notably, none of the cases cited by JCA have anything to do with the statutes at issue, or with utility rate-making generally.

[6] The parties received a second form of notice as well. Another statute, R.C. 4909.19, requires the Commission to publish and provide notice of the Staff report, "a copy of which shall be sent by certified mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the Commission deems interested." No one disputes that the Commission properly provided notice of the Staff report under R.C. 4909.19. Thus, all interested parties had timely notice that SFV was an issue that Staff raised in these proceedings.

Moreover, the record shows that the statutorily required array of notices worked—the public was well aware of the SFV/rate design issue as demonstrated by what two of JCA's members called an "unprecedented" level of public participation directed almost exclusively to the SFV 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 . . . .").) JCA itself noted that testimony from "63 of 175" consumers and "over 275 [consumer] letters" was directly related to SFV. (Reh'g App., pp. 1 n. 1, 36.) Seven parties[7] representing the interests of residential customers participated in this case, and all received notice of and litigated the SFV proposal.[8]

In sum, JCA has failed to show that irreparable harm will result from the move from Year One SFV rates to Year Two SFV rates. Absent such a showing, its request for stay must be denied.

3. If the stay is issued, DEO and many of its customers will be harmed.

Not only has JCA failed to show irreparable harm to those on whose behalf it purports to speak, it has also failed to acknowledge and address properly the harm that would result to others if the Commission granted JCA's request for stay. The four-factor test requires the Commission to consider "whether or not, if a stay is issued, substantial harm to ***other parties*** would result." *MCI Telecomm.*, 31 Ohio St. 3d at 606 (emphasis added). JCA improperly tries to narrow this inquiry to only whether ***DEO*** will be harmed. (*See* Mem., pp. 15-16.) But that ignores the

[7] 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.

[8] JCA also argues that the SFV rate design may cause low-use customers to migrate from DEO's system because of alleged price increases. JCA offers no evidence in support of this argument. Absent any evidence supporting this alleged migration, the Commission should reject this argument.

potential for harm to DEO's other customers that would result from a delay in Year Two rates. And, in any event, JCA is wrong to assert that DEO itself would not be harmed if a stay is granted.

(a) DEO's customers will suffer harm if a stay is granted.

As noted above, even under Year Two SFV rates, residential customers continue to receive subsidies. Those subsidies are smaller, however, than under Year One SFV rates. Accordingly, continuing the Year One rates, as JCA requests, would extend the time during which the higher Year One subsidies remain in effect, harming those who are forced to provide the subsidies. (*See* Mem., p. 15.)

Second, JCA ignores one of the main purposes of the Commission's SFV order: to provide a more equitable cost allocation among customers, regardless of usage, that is better aligned with cost causation. (Op. and Order, pp. 22, 24; DEO Ex. 1.4, p. 11 (Murphy Fourth Supplemental Direct) (discussing why SFV provides for "more equitable distribution of cost" than decoupling).) This is an important consideration in utility rate-making. As the Ohio Supreme Court has held, "Although different criteria or classifications may be utilized in the establishment of reasonable utility rate structures, the basic underlying consideration is that of cost of service rendered." *City of Columbus v. Pub. Util. Comm.* (1992), 62 Ohio St. 3d 430, 438 (internal quotation marks omitted); *see also* R.C. 4909.151 (authorizing the Commission to "consider the costs attributable to . . . service" in the ratemaking process). In this case, OCC's own rate design witness agreed that "properly designed rates send proper price signals when they properly reflect the company's costs." (Tr. V, p. 25 (Radigan Cross).)

Now, JCA asks the Commission to backtrack on the Commission's commitment to the equitable allocation of costs among DEO's customers, and to prolong the period in which some customers are asked to pay more than their fair share. (*See* Op. and Order, p. 24 (SFV "fairly

apportions the fixed costs of service . . . so that everyone pays his or her fair share.").) The Commission should reject that invitation.

(b) DEO will suffer harm if a stay is granted.

Moreover, contrary to JCA's assertions, DEO will suffer harm if a stay is granted. As the Commission noted, "[t]he natural gas market is now characterized by volatile and sustained price increases, causing customers to increase their efforts to conserve gas." (*Id.* at. 22.) As a result, the Commission found that DEO's reliance on a volumetric charge to recover its fixed costs is increasingly risky, threatening its "ongoing financial stability [and] its ability to attract new capital to invest in its network . . . ." (*Id.*; DEO. Ex. 1.4, p. 9 (Murphy Fourth Supplemental Direct (explaining that "recovery of a greater portion of fixed cost" "significantly reduces the adverse revenue impact" from energy conservation).) DEO showed that under Year One rates, it will recover 71% of its fixed costs through the fixed charge; while under Year Two, this number rises to 84%. (DEO Ex. 1.4, p. 8 (Murphy Fourth Supplemental Direct).) The transition to Year Two rates, then, offers important protection for DEO's financial stability.

In the Stipulation and Recommendation approved by the Commission in this case, DEO agreed to significantly expand its annual demand side management spending from $3.5 million to $9.5 million with the understanding that the Commission would approve one of two rate designs: (i) a traditional rate design combined with a decoupling mechanism; or (ii) a transition to SFV type rates. (*See* Stipulation and Recommendation, pp. 4-5.) A stay of Year Two rates would delay the transition to the SFV rate design and thereby increase DEO's exposure to reduced revenues arising from the conservation that will result from increased demand side management spending.

Moreover, the ongoing economic downturn has made over-reliance on volumetric rates even more risky as a cost-recovery strategy than it was when the Commission first entered its

Order. With industrial production slowing, and consumers increasingly seeking to cut costs, volumetric natural gas rates could well lead to under-recovery of DEO's fixed costs. (*See id.* at 12-13 (noting DEO's forecast of continued decline in gas use-per-customer).) If load is lost, whether through lost customers or reduced usage per customer, DEO may not recover its Commission-approved revenue requirement. JCA's analysis ignores this irreparable harm to DEO.

4. A stay is not in the public interest.

Under the public interest prong of the four-factor test, a stay in this case in not appropriate. The public interest in rate-making proceedings requires the Commission to balance many competing considerations (*e.g.*, conservation, transparency, rate stability, fairness) along with the interests and concerns of a variety of stakeholders (*e.g.*, residential and non-residential customers, interest groups, the utility and its shareholders). *See* R.C. 4909.151, 4929.02. It requires that the Commission ensure both the continued availability of the commodity and a reasonable price for it. R.C. 4929.02. Inevitably, whenever rates are changed, "there will be some customers who will be better off and some customers who will be worse off." (Op. and Order, p. 26.) The best the Commission can do is to ensure the careful presentation and consideration of those competing factors, and to mitigate any undue burdens.

JCA begins its discussion by quoting Justice Douglas' observation that Commission orders "have effect on everyone in this state – individuals, business and industry." (Mem., p. 4.) But throughout its Motion, JCA ignores the truth of that statement. Rather than accounting for the broad and diverse stakeholders affected by the Commission's Order, JCA rests its argument on a single slice of DEO's broad customer base. JCA selectively ignores large portions of the record and the repeated, consistent rulings of the Commission in this case. JCA's approach is not in the public interest. In short, utility rate-making does not favor JCA's narrow focus.

Based on the record evidence in this case, the public interest weighs in favor of the timely implementation of the Commission's SFV orders, including Year Two rates, which are the product of the careful evaluation and balancing that statutes require. As fully explained in its Orders, the Commission rightly found that, on balance for ***all*** customers and DEO, the transition to SFV Year Two best advances customers' interests in stable, transparent bills. It will also further DEO's need for adequate, reliable revenue. It will provide fairness in the allocation of cost of service. And it will promote conservation. (*See* Op. and Order, pp. 24-25.) Unlike JCA, the Commission has considered the full public interest.

III. CONCLUSION

For the above reasons, JCA's motion to stay should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum Contra Motion to Stay was delivered to the following persons by electronic mail this 15th day of April, 2009.

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EXHIBIT 1

STATE OF OHIO)
) ss:
COUNTY OF CUYAHOGA)

Larry J. Rice, being first duly sworn, states as follows:

1. I am Manager, Customer Support Services for The East Ohio Gas Company d/b/a Dominion East Ohio ("DEO").

2. I compiled and analyzed data showing the total usage on DEO's distribution system from November 2008 through February 2009 (*i.e.*, the winter months of 2008-2009).

3. This data shows that between November 2008 and February 2009, DEO's customers used approximately 7.33 Bcf of gas more than would have occurred under normal weather during that time period for residential customers. In fact, for each of those four months, gas usage was higher than projected due to the colder than normal temperatures.

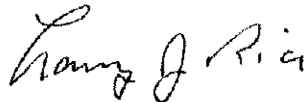
4. I also calculated the cost of this additional 7.3 Bcf for residential customers, based on both the traditional rate design (*i.e.*, the rate design in place prior to October, 2008) and the current SFV rate design.

5. Under the traditional rate design, the additional 7.33 Bcf gas usage due to colder than normal weather would have cost DEO's residential customers approximately $10.68 million in base rates plus associated gross receipts taxes. Under current SFV rates, this amount of additional gas usage cost just $4.97 million.

6. Therefore, as compared to what they would have paid under traditional rates, DEO's residential customers saved approximately $5.71 million under SFV rates during the winter of 2008-2009.

7. This result is not surprising. As compared to traditional rates, the SFV Year One rates contain a lower volumetric charge. Therefore, during periods of higher-than-normal consumption, SFV's lower charge for incremental usage results in lower bills for customers.

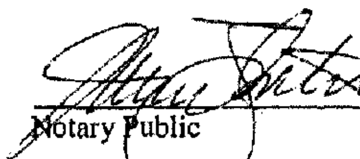
8. A true and accurate copy of a table reflecting the calculations described above is attached as Exhibit LJR-1 to this affidavit.



Larry J. Rice

Sworn to before me

this 14 day of April, 2009.



Notary Public

J. MICHAEL ZONTINI, Attorney
NOTARY PUBLIC - STATE OF OHIO
My Commission Has No Expiration Date
Section 147.03 R. C.

EXHIBIT LJR-1

	Nov	Dec	Jan	Feb	Total
Volumes using Planned HDD	11,560,562	17,664,737	19,928,687	17,498,094	66,652,080
Volumes using Actual HDD	12,892,134	18,709,768	24,740,623	17,643,530	73,986,055
Difference	1,331,572	1,045,031	4,811,936	145,436	7,333,975
Traditional					
Rate ($5.70 Customer Charge)	$1.3917	$1.3917	$1.3917	$1.3917	$1.3917
GRT	$0.0641	$0.0641	$0.0641	$0.0641	$0.0641
Total Rate Traditional Delivery	$1.4558	$1.4558	$1.4558	$1.4558	$1.4558
SFV					
Rate ($12.50 Customer Charge)	$0.6480	$0.6480	$0.6480	$0.6480	$0.6480
GRT	$0.0298	$0.0298	$0.0298	$0.0298	$0.0298
Total Rate SFV Delivery	$0.6778	$0.6778	$0.6778	$0.6778	$0.6778
Dollars Traditional (Volume Difference)	$1,938,503	$1,521,356	$7,005,216	$211,726	$10,676,801
Dollars SFV (Volume Difference)	$902,540	$708,322	$3,261,530	$98,577	$4,970,968
Difference	($1,035,963)	($813,034)	($3,743,686)	($113,149)	($5,705,833)

	Nov	Dec	Jan	Feb	Total
HDD					
Planned	659	986	1,117	956	3,718
Actual	753	1,053	1,418	965	4,189
Difference	94	67	301	9	471
% Difference	14%	7%	27%	1%	13%