

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters.	)	
	)	Case No. 2024-1548
	)	
	)	On Appeal from the Public Utilities Commission of Ohio
In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of an Alternative Form of Regulation.	)	
	)	Ohio Pub. Util. Comm. Case Nos. 21-637- GA-AIR, 21-638-GA-ALT, 21-639-GA-UNC, and 21-640-GA-AAM
	)	
In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of a Demand Side Management Program for its Residential and Commercial Customers.	)	
	)	
	)	
In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Change Accounting Methods.	)	
	)	

**BRIEF OF AMICUS CURIAE OHIO ENVIRONMENTAL COUNCIL
IN SUPPORT OF APPELLANT**

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INTRODUCTION

The Ohio Environmental Council (OEC) opposes the settlement in this case because the settlement package unreasonably raises fixed rates without sufficient mitigating measures. In 2023, the Public Utilities Commission of Ohio (the “PUCO” or “Commission”) approved a settlement which increased Columbia Gas Ohio’s high fixed rates, up to \$58 by 2027. (Opinion and Order Modifying and Adopting the Stipulation, ¶ 147 (Jan. 26, 2023) (“Opinion and Order”); R. 185).¹ This practice of a high fixed rate, called straight fixed variable rate design, is relatively new to utility regulation. *See, Ohio Consumers’ Couns. v. Pub. Util. Comm.*, 2010-Ohio-134, ¶ 13 (hereinafter “*Consumers’ Couns. I*”).

When the Commission first approved these high fixed rates for natural gas utilities, it acknowledged higher fixed rates came with some negative consequences. *Id.* ¶ 30. In response, the Commission endorsed this new rate design in tandem with mitigating measures. *See e.g., Id.* ¶ 36. However, the Commission in this case divorced its precedent from these details and approved a high fixed rate without the same “critical” mitigating measures. *Id.*, (energy efficiency funding “critical” to the PUCO’s approval). Thus, the OEC asks this Court to reverse the Commission’s approval of the settlement and return this case for consideration of sufficient mitigating measures.

The OEC filed a comment in opposition, voicing its serious concerns. (Public Comment Regarding the Proposed Stipulation by the Ohio Environmental Council (Jan. 5, 2023); R. at Public Comment). In that comment, the OEC raised concerns with increasing the current fixed charge to such high levels when some Franklin County households were already spending as much as 10% of their income on energy bills. (*Id.* at 1). The OEC argued that raising such a high fixed charge while also eliminating the vast majority of programs which helped customers manage the

¹ “R.” refers to the Administrative Record Index prepared and filed by the clerk in this case.

remaining volumetric charges would further hurt customers. (*Id.*). The OEC was also concerned to see the fixed charge in the Settlement was significantly less than what Columbia Gas's parent company, NiSource, had requested in any of its other jurisdictions. (Direct Testimony of Karl Rabago (Nov. 14, 2022); R. 156). During the evidentiary hearing, the Commission struck this information from Mr. Rabago's testimony as irrelevant. (Transcript for hearing held on Wednesday, November 16, 2022 at the Public Utilities Commission of Ohio, 144:24-25 & 145:1-8; R. at Trans.).

The OEC continues to worry the settlement in this case is against the public interest and violates regulatory principles because it roughly doubles Columbia Gas's fixed charges over four years without mitigating the negative features of straight fixed variable rate design. The Commission failed to strike the appropriate balance when it approved such a high fixed rate without energy efficiency programs to counteract the decreased incentive from this high fixed charge. The OEC requests this Court reverse the Commission's decision and remand the case to strike a better balance between high fixed charges and mitigating measures like energy efficiency programs.

INTERESTS OF AMICUS CURIAE

The OEC is a statewide non-profit, non-partisan environmental and conservation organization focused on issues across Ohio. Over the past five decades, the OEC has advocated to protect the environment and health of all Ohio communities through legal and policy advocacy, decision-maker accountability, and civic engagement. We have thousands of members living in all corners of the state, including members in the Columbia Gas service territory. Our organization advocates for the reduction of energy waste which can, in turn, reduce harmful emissions such as

methane. This advocacy includes ensuring responsible natural gas distribution and energy waste reduction in natural gas consumption in Ohio.

The OEC has followed the development of utility-run energy efficiency programs in Ohio for many years, including directly intervening in natural gas cases before the Commission. *See, In re Vectren Energy Delivery of Ohio, Inc.*, PUCO No. 07-1080-GA-AIR, Petition to Intervene and Memorandum in Support (July 15, 2008). The OEC finds reducing the amount of energy waste in front of and behind the meter is a fundamental first step in protecting energy burdened families, limiting costs to the distribution system, and limiting harmful emissions. Based on our review of the Settlement in this case, the Commission's approval of an agreement that omits a comprehensive energy efficiency strategy harms the community, Ohio, and the energy distribution system itself. The OEC is requesting to join as an amicus curiae to support the Environmental Law and Policy Center and Citizens Utility Board of Ohio's request to overturn and remand the Commission's decision.

STATEMENT OF THE FACTS AND CASE

Amicus Curiae hereby adopts and incorporates by reference the Statement of the Facts and Case delineated by the Appellant.

STANDARD OF REVIEW

Under Ohio Revised Code section 4903.13 this Court shall reverse, vacate, or modify a PUCO order when it is "unlawful or unreasonable." Where parties to a case submit a settlement, this Court finds such agreements reasonable and lawful when they comply with the following three requirements:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?

In re Ohio Power Co. & Columbus S. Power Co. for Authority to Establish a Standard Service Offer, PUCO No. 11-346-EL-SSO, 27 (Dec. 14, 2011).

When evaluating a Commission’s application of these three prongs, this Court will not reverse findings of fact absent a demonstration that the commission's order is clearly unsupported by the record. *AT & T Communications of Ohio, Inc. v. Pub. Util. Comm.*, 88 Ohio St.3d 549, 555 (2000). “On questions of fact, the appellant bears the burden of demonstrating that the commission's decision is manifestly against the weight of the evidence or that the decision is so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.” *Monongahela Power Co. v. Pub. Util. Comm.*, 2004-Ohio-6896, ¶ 29.

ARGUMENT

This Settlement does not meet the second and third prongs of the three-part standard because it fails to strike the appropriate balance across the Settlement terms as a package. While the Commission cites its “long embrace” of a straight fixed variable rate design, (Opinion and Order, at ¶ 58; Suppl. 205), it remains a relatively new rate design. *Ohio Consumers' Couns. v. Pub. Util. Comm.*, 2010-Ohio-134, ¶ 15 (hereinafter “*Consumers’ Couns. I*”). For 30 years, natural gas rate design allocated most of a utility’s fixed costs through a variable usage charge, with only a small proportion of fixed costs recovered under a fixed monthly customer charge. *Id.* at ¶ 15. This rate design allowed customers significant control over their bill because reducing their usage could have a significant impact on their bill. (Direct Testimony of Roger D. Colton, 48 (May 13, 2022); R. at 84). By 2008, these price signals were working and customer natural gas usage was on the decline. *Id.* ¶ 16.

Starting in 2008, the Commission broke from this long-standing precedent towards a straight fixed variable rate design for all four of Ohio's large regulated natural gas utilities. (Opinion and Order, ¶ 60; R. 185). Under this new rate design, a utility covers a much higher percentage of its fixed costs through a fixed monthly charge, rather than a volumetric charge. *Consumers' Couns. 1* at 4. In a series of decisions in 2008 and early 2009, the PUCO approved a standard fixed rate design for Duke Energy Ohio, Dominion East Ohio Gas, Columbia Gas, and Vectren Energy. (Opinion and Order, ¶ 60; R. 185).

The Supreme Court of Ohio subsequently endorsed this move on appeal from the Duke and Dominion decisions based on the PUCO's finding that "conditions in the natural-gas industry called into question long-standing rate-making practices for gas companies." *Consumers' Couns. 1* at ¶ 16. That same year, this Court again approved straight fixed variable rates for natural gas utilities. *Ohio Consumers' Couns. v. Pub. Util. Comm.*, 2010-Ohio-6239, ¶ 34 (hereinafter "*Consumers' Couns. 2*"). In both decisions, this Court carefully reviewed the benefits and harms of straight fixed variable rate design against the specific circumstances of each case before upholding the Commission's orders. *Id.* at ¶ 29-37; *Consumers' Couns. 1* at ¶ 30 & 36.

At the time, this Court and the Commission acknowledged that a straight fixed variable rate design comes with some downsides to customers. *Consumers' Couns. 1* at ¶ 30. As with any change in rate design, "some customers will be better off and some customers will be worse off." *Id.* at ¶ 30. In a high fixed rate design, low-use, low-income customers are hurt the most because they cover the same proportion of distribution costs as high-use customers without causing the same strain to the distribution system. *Id.* As a high fixed rate limits a customer's ability to control their bill based on usage, it also reduces the customer's incentive to conserve energy. (Direct Testimony of Roger D. Colton, 48 (May 13, 2022); R. at 84).

When Columbia Gas moved to a straight fixed variable rate design in its last rate case, it included measures to mitigate these negative impacts. First, the company allocated \$1,152,000.00² of shareholder funding toward bill reductions for those hit hardest by high fixed charges: low-income, low-use customers. *In re Columbia Gas of Ohio, Inc*, PUCO No. 08-72-GA-AIR, 21 (Dec. 3, 2008). That case also committed \$1,850,000.00 of shareholder funds to bill payment assistance for low-income customers. *Id.* at ¶ 10. Thus, Columbia Gas's original transition to higher fixed rates came with over \$3 million of shareholder funds to offset the financial burden of higher fixed costs to low-income customers.³ Finally, to counteract any lessened incentive to customers to conserve energy, Columbia Gas also paired the higher fixed charge in its last rate case with a portfolio of energy efficiency programs. *Id.* at 5.

In the time since the Commission first approved a higher fixed rate design, the evidence continues to support the Commission's finding that low-income, low-use customers are hit the hardest by high fixed charges. The record evidence in this case contained testimony from multiple experts about the significant burden a high fixed charge puts on low-income customers. *See* (Direct Testimony of Roger D. Colton, 8-10 (May 13, 2022); R. 84); *see also*, (Direct Testimony of Karl Rabago (Nov. 14, 2022); R. 156); *see also*, (Direct Testimony of Robert B. Fortney (May 13, 2022); R. 83). OCC Witness Colton testified that studies across multiple federal agencies continue to confirm that low-income customers consume less energy. (Direct Testimony of Roger D. Colton, 8-10 (May 13, 2022); R. 84).

² \$288,000.00 per year times four years equals \$1,152,000.00 for the 2009-2012 term of the program.

³ \$1,152,000.00 of the pilot credits to low-income low use customers plus \$1,85,000.00 in bill payment assistance for all low-income customers equals a \$3,002,000.00 commitment from the Company's shareholders in 2008.

As the Commission revisits the straight fixed variable rate design as a less novel approach, it cannot abandon the guard rails it put in place the first time around just because it now looks at high fixed rates as an accepted practice.

1. The staggering size of the straight fixed variable rate approved in this case violates the public interest.

The Settlement fails to strike the balance required to satisfy the public interest prong. A public interest evaluation primarily focuses on whether the Settlement, as a package, represents a “fair and balanced compromise” among the competing interests in rate making. *In re Ohio Power Co.*, PUCO No. 20-585-EL-AIR, 2021 WL 5496172, at *39 (Nov. 17, 2021).

This calculation generally focuses on a balance between the burden of costs to the ratepayers against the benefits they will receive from the proposed spending. *In re Application of E. Ohio Gas Co.*, 2023-Ohio-3289, ¶ 52 (A high rate of return was balanced by capped overall costs and measures for reducing customers’ bills). This Court and the Commission have often found energy efficiency and measures that limit costs are persuasive factors in factors of the public interest. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Utilities Comm.*, 68 Ohio St. 3d 559, 564-565 (1994); *In re Vectren Energy Delivery of Ohio*, PUCO No. 18-298-GA-AIR, et al., Opinion & Order, ¶ 106 (Aug. 28, 2019) (“The Commission finds that the provisions of the Settlement to continue EE programs are in the public interest and that OCC’s recommendation to eliminate funding for non-low-income EE programs should be rejected.”).

A high rate alone does not violate the public interest as long as it includes provisions that meaningfully mitigate the burden of the higher rates to customers. *In re Application of E. Ohio Gas Co.*, 2023-Ohio-3289, ¶ 52. In that *East Ohio Gas* case, this Court rejected a challenge to the Commission’s approval of a 9.91% rate of return because settlement included multiple measures to mitigate rate impacts. *Id.* The Court reasoned that even though the case represented a high rate

of return, it also included rate caps, a \$310 million offset to depreciation expenses, and a \$750,000 shareholder funded heating-assistance program. *Id.*

In its initial approval of straight fixed variable rates for natural gas utilities, this Court cited the utilities’ “several steps” to address concerns about rate impacts to low-income, low-use customers. *Ohio Consumers’ Couns. v. Pub. Util. Comm.*, 2010-Ohio-134, ¶ 45 (“*Consumers’ Counsel I*”). These steps included still maintaining some fixed delivery costs as volumetric charges, phasing in the new rates, and “*increasing* the number of eligible customers for the low-income pilot program.” *Id.* (*emphasis added*)). This Court also cited the Commission’s commitment to evaluate the effectiveness of the bill credits for low-income, low-use customers to ensure they effectively assisted with limiting the financial burden of higher fixed rates. *Id.*

The Settlement package in this case does not meet the same public interest standard met in past cases because it has no meaningful mitigating measures to balance the high fixed rate. The \$3.5 million in customer bill payment assistance proposed in this case is only \$500,000.00 more than what Columbia Gas offered to customers 15 years ago. (Opinion and Order, ¶ 98 (Jan. 26, 2023); R. 185). Similarly, this case adds no increased funding to Columbia’s WarmChoice low-income weatherization program. (Opinion and Order, ¶ 93 (Jan. 26, 2023); R. 185). Unlike the *Consumers’ Counsel I* case which increased access to bill credits for low-income low-use customers, this settlement does not include a similar program and freezes the low-income weatherization funding at 2022 levels. (*Id.*). Finally, the settlement removes all other energy efficiency programs which help ratepayers manage the remaining volumetric charges on their bill. (*Id.*).

The relatively stagnant level of programs to help customers manage their bills, while nearly doubling the high fixed charge, distinguishes this case from past approvals of significant rate

increases. Unlike *East Ohio Gas*, where the \$310 million offset to depreciation expenses reflected in base rates responded to the higher rate of return, this settlement provides no response to the negative impacts of fixed charges. Fixed charges disproportionately impact low-use, low-income customers. Regardless of income, all customers will also feel the effects of raised rates year over year, through 2027. The settlement fails to benefit ratepayers as a package because it omits meaningful measures to balance these negative impacts.

2. The very high fixed rate in this case also violates the regulatory principle to encourage energy conservation.

The third and final prong for determining whether a settlement is “reasonable” is whether the agreement violates any regulatory principle or practice. *See Indus. Energy Consumers of Ohio Power Co.*, 68 Ohio St.3d 559, 561 (1994). There are several regulatory principles and practices which guide the Commission. *In re Application of E. Ohio Gas Co.*, 2023-Ohio-3289, ¶ 4. One such principle is to encourage energy conservation. *Id.*; (Direct Testimony of Karl Rabago, 26 (Nov. 14, 2022); R. 156). Ohio law does not bind the Commission to any one practice. *Consumers’ Counsel I*, at ¶ 20. However, this settlement is unreasonable because it includes a combination of factors that violate the regulatory principle of energy conservation. (the Commission is not bound by law to any one regulatory principle). The combination of a high fixed rate sending price signals that discourage conservation and the elimination of all but low-income energy efficiency programs create a significant violation of this important principle.

Encouraging energy conservation is a long-standing regulatory principle reflected in both statute and regulatory treaties. Two statutes in Ohio codify energy conservation as state policy. R.C. 4905.70; R.C. 4929.02(A)(12). Under the Title 49 section on the Public Utilities Commission’s general powers, “[t]he public utilities commission shall initiate programs that will promote and encourage conservation of energy” R.C. 4905.70 (*emphasis added*). Under the

Title 49 section governing alternative rate plans for natural gas companies, the law explains “[i]t is the policy of this state to, throughout this state: promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation.” R.C. 4929.02(A)(12). In addition to the statutory state policy, James Bonbright’s long-standing treatise on regulatory principles includes promoting the efficient use of energy. (Direct Testimony of Karl Rabago, 26 (Nov. 14, 2022); R. 156).

The Commission has regularly underscored the importance of the regulatory principle to encourage energy conservation through demand side management portfolios. *See, e.g., In re Vectren Energy Delivery of Ohio*, PUCO No. 18-298-GA-AIR, et al., ¶ 102 (Aug. 28, 2019). Since adopting the straight fixed variable rate design, natural gas utility rate cases in Ohio have consistently included energy efficiency portfolios over stand-alone low-income weatherization programs. *See Id.*; *see also, In Re Duke Energy Ohio, Inc.*, No. 07-589-GA-AIR, 10 (Aug. 1, 2007); *see also, In re East Ohio Gas Co., dba Dominion East Ohio*, PUCO No. 07-0829-GA-AIR, 5 (Oct. 15, 2008); *see also, In re Columbia Gas of Ohio Inc.*, PUCO Case No. 08-72-GA-AIR, 10 (Dec. 3, 2008); *see also, In re Vectren Energy Delivery of Ohio*, PUCO No. 07-1080-EL-AIR, 2-4 (Jan. 7, 2009). The Commission has also rejected Ohio Consumers’ Counsel’s request to remove all but low-income energy efficiency programs. *In re Vectren Energy Delivery of Ohio*, PUCO No. 18-298-GA-AIR, et al., ¶ 102 (Aug. 28, 2019).

This Court even acknowledged the regulatory principle of conservation the first time it reviewed a straight fixed variable rate design for natural gas utilities. *Ohio Consumers’ Couns. v. Pub. Util. Comm.*, 2010-Ohio-134, ¶ 13 (hereinafter “*Consumers’ Couns. I*”). In that case, this Court rejected the appellants’ arguments that the settlement violated the regulatory principle to encourage energy conservation. *Id.* at ¶ 35. This Court reasoned that because a straight fixed

variable rate design decouples the utility's revenue from sales, it encourages the utility to invest more in energy efficiency. *Id.* In fact, when finding the settlements were consistent with energy conservation, this Court noted provisions for low-income weatherization and \$9.5 million in a demand side management portfolio were "critical" to the Commission's decisions. *Id.* at 36. This Court also reasoned that even with the higher fixed rate, the price of delivering gas remained only 20 to 25 percent of a customer's overall bill, which left room for energy conservation and bill savings. *Id.* at ¶ 37.

The reduction in demand side management programs in this case is distinguishable from those past cases. While this Court does not require any particular levels of funding to meet energy conservation principles, the stagnation and reversal of demand side management portfolios is a stark contrast to past cases this Court has approved. The high fixed rate in this case will reduce customers' incentives to reduce usage. In past cases, that inaccurate price signal was less concerning because those cases also had a portfolio of programs, for multiple types of customers, which helped counteract this incentive. Here, there is no such demand side management portfolio. As a result, the stipulation in this case violates the principle to encourage energy conservation.

CONCLUSION

The OEC respectfully asks this Court to reverse the Commission's decision in this case and remand for further consideration of the appropriate level of straight fixed variable charges against meaningful mitigating measures. The Settlement in this case breaks with the rationale this Court used in past cases by removing or stagnating important mitigating measures to balance some of the negative outcomes of a straight fixed variable rate design. The Commission in this case stretched this Court's past precedent regarding acceptable straight fixed variable rate design. As a result, the Commission's approval of the settlement in this case is unreasonable.

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