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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of	)	
Vectren Energy Delivery of Ohio, Inc. for	)	
Approval, Pursuant to Revised Code	)	
Section 4929.11 of Tariffs to Recover	)	Case No. 05-1444-GA-UNC
Conservation Expenses and Decoupling	)	
Revenues Pursuant to Automatic	)	
Adjustment Mechanisms and for Such	)	
Accounting Authority as May be Required	)	
to Defer Such Expenses and Revenues for	)	
Future Recovery through Such	)	
Adjustment Mechanisms.	)	

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**APPLICATION FOR REVIEW AND INTERLOCUTORY APPEAL  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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January 3, 2007

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Pursuant to Ohio Adm. Code 4901-1-15, the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Vectren Energy Delivery of Ohio, Inc. ("Vectren" or "Company"), hereby submits to the Public Utilities Commission of Ohio ("PUCO" or "Commission") this application for review and interlocutory appeal of the Attorney Examiner's Entry ("Entry") issued in this proceeding on December 29, 2006.<sup>1</sup> OCC respectfully moves the legal director, deputy legal director, attorney examiner or presiding hearing officer to certify this appeal to the full Commission.<sup>2</sup> OCC also argues for the PUCO to hear the interlocutory appeal of the reopening issue without the need for certification, pursuant to Ohio Adm. Code 4901-1-15(A)(2).

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<sup>1</sup> As required by Ohio Adm. Code 4901-1-15(C), a copy of the Entry is attached.

<sup>2</sup> Ohio Adm. Code 4901-1-15(B).

As set forth in the attached Memorandum in Support, the Entry included a number of rulings, and two of those rulings are the subject of this appeal. First, the Entry contains an error in the ruling that Section 4929.05, Revised Code, is the statutory authority for going forward with the hearing required<sup>3</sup> as a result of OCC's Notice of Withdrawal and Termination. Second, the Entry contains an error by treating the Revised Stipulation and Recommendation, filed by Vectren, Ohio Partners for Affordable Energy ("OPAE"), and the PUCO Staff ("Staff") on December 21, 2006, as a request to reopen the proceeding.

This appeal presents new and novel issues of law and policy and should be certified to the Commission to avoid undue prejudice to OCC and potentially others. The appeal regarding the reopening issue also represents the potential termination of the "right to participate" that OCC has in PUCO proceedings,<sup>4</sup> which can be heard by the Commission without certification. The Commission should reverse or modify the Entry, under Ohio Adm. Code 4901-1-15(E).

The reasons for these arguments are more fully stated in the following memorandum.

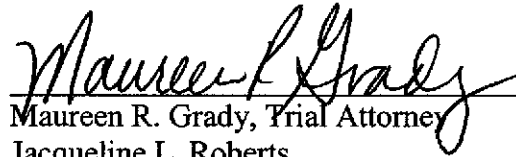
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<sup>3</sup> The Notice of Withdrawal and Termination triggers "the opportunity to present evidence through witnesses, to cross examine all witnesses, to present rebuttal testimony, and to brief all issues which shall be decided based upon the record and briefs as if this Stipulation had never been executed." Stipulation and Recommendation at 10 (April 10, 2006).

<sup>4</sup> *Ohio Consumers Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, ¶ 20.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL

A handwritten signature in cursive script, reading "Maureen R. Grady", is written over a horizontal line.

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**MEMORANDUM IN SUPPORT**

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**I. BACKGROUND**

Vectren is a natural gas distribution company serving 290,800 customers in the Dayton area. Vectren filed this case in 2005, to propose a demand-side management (energy efficiency) program and ratemaking mechanisms to recover program expenses and revenue reductions resulting from customers' diminished use of natural gas. OCC is the state's advocate for residential utility consumers, pursuant to Revised Code Chapter 4911, and is the sole advocate for residential customers that signed the settlement dated April 19, 2006.<sup>5</sup>

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<sup>5</sup> OPAE is a provider or a group of providers that is in the business of offering weatherization programs. As noted by the Supreme Court of Ohio in discussing a case where OPAE signed a settlement, OPAE's interest as a provider of weatherization programs is not the interest of a residential consumer advocate. *Ohio Consumers Counsel v. Pub. Util. Comm.*, 109 Ohio St. 3d 328, 335 (2006).

That settlement would have resolved all issues in this case -- and in a way favorable to consumers -- but for the PUCO's material modification of the settlement in the Order dated September 13, 2006. The PUCO's modification of the settlement replaced energy efficiency programs for a broad base of customers with a restrictive program offering merely weatherization services and for only low-income customers and at \$2 million funding level, with OPAE administering the program. Vectren, with its automatic rate increase mechanism under the PUCO's modification, and OPAE, with its \$2 million for weatherization, seemed to suffer no heartburn from the PUCO's modification of the settlement and indeed commenced to work toward the disembodiment of the settlement signed with OCC.<sup>6</sup>

Against this backdrop, the Entry addressed a variety of complex and unusual issues. The Entry contains an appropriate determination that the Stipulation of April 21, 2006 should be terminated, pursuant to OCC's Notice of Withdrawal and Termination. An evidentiary hearing was ordered, as required under the terms of the OCC's Notice of Withdrawal and Termination.

The rider that was filed in accordance with the ruling on the April 21, 2006 Stipulation was judiciously determined in the Entry to be "no longer in effect." The Attorney Examiner wisely determined that the signatory parties' request for approval of the Revised Stipulation would not be approved. The signatory parties were ordered to

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<sup>6</sup> On October 23, 2006, Vectren filed a "Memorandum in Response to the Office of the Ohio Consumers' Counsel Application for Rehearing." In its "response" (or, in reality, Memorandum Contra) Vectren endorsed the modifications made by the Commission and attempted to refute OCC's legal arguments. OPAE also docketed a letter in the proceeding, on October 23, 2006, pledging support for the modifications made by the Commission and provided extra-judicial evidence to support the need for weatherization services. The Commission's Order was devoid of such evidence, as pointed out by OCC in its Application for Rehearing.

file “a document” that sets out all the terms of the Revised Stipulation, filed by Vectren and OPAE on December 21, 2006.

In addition, the Entry ruled on two other controversial issues that are the subject of this appeal. First, the Entry stated, “[i]n accordance with Section 4929.05, Revised Code, a hearing is required for consideration of the alternative rate plan.”<sup>7</sup> Second, it ruled in the Entry that “[t]he stipulation may be considered a request by the signatory parties to reopen the proceeding.”<sup>8</sup>

OCC seeks interlocutory review of these two rulings in the Entry, which OCC presents herein as four issues:

1. The Entry unlawfully allows Vectren to avail itself of (and subject customers to) alternative regulation while remaining subject to rate of return regulation, contrary to Revised Code 4929.01(A) *et seq.*
2. The Entry unlawfully allows Vectren to avail itself of (and subject customers to) alternative regulation, without establishing that Vectren has met the requirements for alternative regulation under, *inter alia*, Revised Code 4929.04(A) *et seq.*
3. The Entry unlawfully allows Vectren to avail itself of (and subject customers to) alternative regulation in spite of Vectren’s failure, under Revised Code 4929.05, Revised Code, to file its application pursuant to Revised Code 4909.18.
4. The Entry is in violation of Ohio Adm. Code 4901-1-34 by the ruling that the Revised Stipulation may be considered a request to reopen the proceeding.

As OCC will discuss herein, OCC’s issues for appeal meet the standards in Ohio Adm. Code 4901-1-15. The Commission should review the Entry and

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<sup>7</sup> Entry at 2.

<sup>8</sup> *Id.*



reverse or modify the rulings as discussed below, pursuant to Ohio Adm. Code 4901-1-15(E)(1).

## **II. STANDARD OF REVIEW**

Ohio Adm. Code 4901-1-15 provides, in relevant part:

(A) Any party who is adversely affected thereby may take an immediate interlocutory appeal to the commission from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference which:

...

(2) Denies a motion to intervene, terminates a party's right to participate in a proceeding, or requires intervenors to consolidate their examination of witnesses or presentation of testimony;

...

(B) Except as provided in paragraph (A) of this rule, no party may take an interlocutory appeal from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference unless the appeal is certified to the commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer. The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless he or she finds that:

(1) The appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent; and

(2) An immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

(C) Any party wishing to take an interlocutory appeal from any ruling must file an application for review with the commission within five days after the ruling is issued. An extension of time for the filing of an interlocutory appeal may be granted only under

extraordinary circumstances. The application for review shall set forth the basis of the appeal and citations of any authorities relied upon. A copy of the ruling or the portion of the record which contains the ruling shall be attached to the application for review. If the record is unavailable, the application for review must set forth the date the ruling was issued and must describe the ruling with reasonable particularity.

...

(E) Upon consideration of an interlocutory appeal, the commission may, in its discretion:

(1) Affirm, reverse, or modify the ruling of the legal director, the deputy legal director, attorney examiner, or presiding hearing officer; or

(2) Dismiss the appeal....

Under these standards, OCC's interlocutory appeal should be certified and the December 29, 2006 Entry should be reversed or modified as discussed herein.

### **III. APPLICATION FOR REVIEW AND INTERLOCUTORY APPEAL**

OCC's appeal regarding the reopening issue should be heard by the Commission without the need for Examiner certification, under Ohio Adm. Code 4901-1-15(A)(2). The Entry potentially limits the scope of the hearing which effectively terminates OCC's rights to participate in the proceeding. In fact, Vectren and OP&A already are advocating that there should not be a hearing -- and the Entry may invite further such arguments.

Furthermore, pursuant to Ohio Adm. Code 4901-1-15(B), certification of this Interlocutory Appeal to the full Commission should be granted with respect to OCC's four issues because this appeal "presents a new or novel question of interpretation, law, or policy." In this regard, the Entry presents a case of near first impression interpreting the rules for proceeding when a Notice of Withdrawal and Termination has been filed, terminating a Stipulation that has been adopted by the Commission.

And, pursuant to Ohio Adm. Code 4901-1-15(B), certification should be granted because “[a]n immediate determination by the commission is needed to prevent the likelihood of undue prejudice.” OCC, and the residential consumers it serves, will be prejudiced if the scope of the hearing is restricted to deny OCC the right to present evidence. Given that OCC is preparing for the evidentiary hearing, an immediate ruling is needed to prevent OCC from expending time and resources and being prejudiced on areas that may be affected by the Attorney Examiner’s ruling.

The proper case approach now is a full evidentiary hearing, accompanied with the opportunity to: present evidence through witnesses, to cross examine all witnesses, to present rebuttal testimony, and to brief all issues which shall be decided based upon the record and briefs as if the April 21, 2006 Stipulation had never been executed. The provisions of the April 21, 2006 Stipulation, adopted by the Commission in its Order and Entry on Rehearing, establish this procedural process, which was triggered by OCC’s Notice of Termination and Withdrawal. The Attorney Examiner’s Entry instead allows Vectren and OPAE to argue under the reopening rule, Ohio Adm. Code 4901-1-34, that the scope of evidence to be taken should be limited.

First, the Attorney Examiner’s Entry adopts R.C. 4929.05 as the authority for the evidentiary hearing. The Attorney Examiner’s Entry contravenes the alternative regulatory scheme established under Chapter 4929 of the Revised Code. Revised Code 4929.01(A) *et seq.* permits natural gas companies to file a “method, alternate to the method of section 4909.15 of the Revised Code, for establishing rates and charges.”<sup>9</sup> A double regulatory scheme where utilities are allowed the opportunity for their profit

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<sup>9</sup> Revised Code 4929.01 (A).

under Revised Code 4909.15 as well as allowed other opportunities for collecting charges from customers under Chapter 4929, is clearly not contemplated by the Ohio General Assembly. The law allows one scheme for collecting charges from customers or the other, not both.

Second, even if one (not two) regulatory schemes are pursued, the natural gas companies must undergo an extensive application procedure that affords the public an opportunity for comment. Also, for a company the size of Vectren, a hearing must be held. Revised Code 4929.04(A). The Commission must make several findings including the existence of effective competition or reasonably available alternatives to consumers. *Id.* These requirements of law are not met by in this case.

Third, the Entry violates the law by treating the Vectren/OPAE/Staff Revised Stipulation as an alternative rate plan, without requiring the Company to file its application pursuant to Revised Code 4909.18. Revised Code 4929.05 requires filing under Revised Code 4909.18.

Fourth, the Entry further contravenes the provisions of the Ohio Adm. Code that prescribe the reopening of proceedings. Ohio Adm. Code 4901-1-34 permits a proceeding to be reopened prior to the issuance of a final order. Ohio Adm. Code 4901-1-34(B) restricts the presentation of evidence associated with a reopened proceeding to evidence that could not have, with reasonable diligence, been presented earlier in the proceeding.

There was an order in this case on September 13, 2006, with an Entry on Rehearing on November 8, 2006. By treating the Revised Stipulation as a Motion to Reopen, parties could argue that the Attorney Examiner is limiting the scope of the

hearing to evidence that could not have, with reasonable diligence, been presented earlier in the proceeding. Such a restriction, imposed solely due to the characterization of the Revised Stipulation as a Motion to Reopen, is unreasonable and conflicts with the scope of the hearing required in OCC's Notice of Termination and Withdrawal under the original stipulation that controlled this hearing post-termination of settlement.

In sum, the scope of the upcoming hearing required under OCC's Notice of Termination and Withdrawal should not be subject to either the alternative regulation statutes or reopening under Ohio Adm. Code 4901-1-34. To do so both unlawfully and unreasonably subjects consumers to paying for two kinds of regulation, rate of return and alternative, and subjects OCC to potential arguments that it's right to present evidence at the evidentiary hearing is abridged.

#### **IV. CONCLUSION**

The Entry of December 29, 2006 addresses new and novel issues<sup>10</sup> -- of significant import to all residential consumers -- in ways that should be conformed to law and rule through Commission reversal and modification of the Entry.<sup>11</sup> These issues include the unlawful<sup>12</sup> mixing of rate of return regulation with alternative regulation, as never contemplated by the Ohio General Assembly and in ways that multiply the jeopardy to consumers' rates. These issues of alternative regulation further contravene

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<sup>10</sup> Ohio Adm. Code 4901-1-15(B).

<sup>11</sup> Ohio Adm. Code 4901-1-15(E)(1).

<sup>12</sup> Revised Code 4929.01(A) *et seq.*

the statutory scheme<sup>13</sup> that controls the manner in which the Commission can even hear an alternative regulation plan. OCC will be prejudiced in the absence of an interlocutory ruling.<sup>14</sup>

Moreover, the Entry provides parties with the opportunity to argue for termination of OCC's rights to participate<sup>15</sup> in a hearing by characterizing the hearing as a reopening. Under the reopening rule of Ohio Adm. Code 4901-1-34(B) parties could bolster their arguments that evidence should be limited, or that a hearing could be precluded. In this regard, Vectren and OPAE already have twice tried to eliminate any hearing at all from occurring, by filing their improvised "Revised Stipulation" and an interlocutory appeal.

The Commission has the opportunity, once lost in the rejection of the original OCC settlement with Vectren, to regain for Ohioans the movement towards benefits of energy efficiency that include greater customer control over energy bills, reductions in the demand and price for energy, and greater independence of Ohio and America from offshore sources of energy. OCC's interlocutory appeal should be granted.

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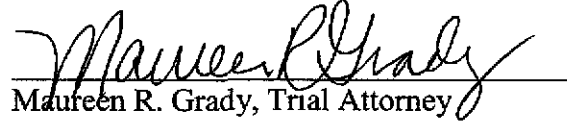
<sup>13</sup> Revised Code 4929.04; Revised Code 4929.05; and Revised Code 4909.18.

<sup>14</sup> Ohio Adm. Code 4901-1-15(B).

<sup>15</sup> Ohio Adm. Code 4901-1-15(A)(2).

Respectfully submitted,

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CONSUMERS' COUNSEL



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Application for Review and Interlocutory Appeal by the Office of the Ohio Consumers' Counsel was provided to the persons listed below electronically this 3<sup>rd</sup> day of January 2007.



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## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Vectren )  
Energy Delivery of Ohio, Inc. for Approval, )  
pursuant to Section 4929.11, Revised Code, of )  
a Tariff to Recover Conservation Expenses )  
and Decoupling Revenues Pursuant to Auto- ) Case No. 05-1444-GA-UNC  
matic Adjustment Mechanisms and for such )  
Accounting Authority as May Be Required to )  
Defer Such Expenses and Revenues for Future )  
Recovery Through such Adjustment Mecha- )  
nisms. )

ENTRY

The attorney examiner finds:

- (1) On November 28, 2005, Vectren Energy Delivery of Ohio, Inc. (Vectren) filed an application for approval, pursuant to Section 4929.11, Revised Code, of a tariff to recover conservation expenses and decoupling revenues pursuant to automatic adjustment mechanisms and for such accounting authority as may be required to defer such expenses and revenues for future recovery through such adjustment mechanisms. Vectren's conservation rider would consist of a conservation funding component and a decoupled sales component. On February 7, 2006, the attorney examiner found that the application must be considered a request for an alternate rate plan as described in Section 4929.01(A), Revised Code, and thus the process would be controlled by Section 4929.05, Revised Code.
- (2) On April 10, 2006, Vectren, Ohio Partners for Affordable Energy (OPAE) and the Ohio Consumers' Counsel (OCC) filed a Stipulation and Recommendation (April Stipulation) for the purpose of resolving the issues in this proceeding. The staff of the Commission (Staff) opposed the April Stipulation through testimony and post-hearing brief.
- (3) On September 13, 2006, the Commission issued an opinion and order (Order) in this case that approved the April Stipulation as modified by the Order. On November 8, 2006, the Commission denied the application for rehearing filed by OCC.

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- (4) On December 8, 2006, OCC filed a Notice of Termination and Withdrawal from Stipulation. OCC states that the filing was made pursuant to the April Stipulation provision that included the right of a signatory party to terminate and withdraw from the April stipulation by filing notice within thirty days of the entry on rehearing, if the Commission did not adopt the April Stipulation in its entirety without material modification. OCC offers that in accordance with the April Stipulation, a hearing should be conducted.
- (5) On December 21, 2006, a Stipulation and Recommendation was filed, with as signatory parties, Vectren, OPAE and Staff (signatory parties). The signatory parties request that the Commission affirm the Order that adopted and modified the April Stipulation, based on the existing record, without further hearing. It is further requested by the signatory parties that the Sales Reconciliation Rider and deferral mechanism adopted in the Order, continue to be effective, as of the date of the Order.
- (6) In accordance with the provisions of the April Stipulation, OCC filed notice of termination and withdrawal from the stipulation. The signatory parties have not argued that OCC did not have the right to terminate and withdraw based on the Order. Therefore, the April Stipulation should be considered terminated. Thereby, the Commission cannot approve a stipulation that by its own provisions has been terminated. The rider that was filed in accordance with that stipulation is also no longer in effect. The stipulation may be considered a request by the signatory parties to reopen the proceeding. In accordance with Section 4929.05, Revised Code, a hearing is required for consideration of the alternative rate plan. The signatory parties, for clarity of record, should file within ten business days, a document that sets out all the terms of the stipulation. A prehearing conference should be held at on January 22, 2007, to discuss a procedural schedule.


It is, therefore,

ORDERED, That the signatory parties' request for approval of the stipulation filed December 21, 2006, is denied. It is, further,

ORDERED, That a prehearing be held on this matter at 10:00 a.m., on January 22, 2007, in Hearing Room 11-C, at the offices of the Commission. It is, further,

ORDERED, That a copy of this entry be served on all parties of record.

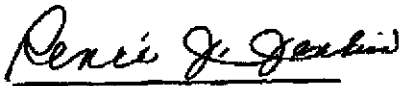
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
By: Steven Lesser  
Attorney Examiner

/geb PSD

Entered in the Journal

DEC 29 2006

  
Renee J. Jenkins  
Secretary