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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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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.)

**MEMORANDUM CONTRA VECTREN ENERGY DELIVERY OF OHIO'S
JOINT MOTION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL
OF THE ATTORNEY EXAMINER'S ENTRY DATED DECEMBER 29, 2006
AND MOTION TO STRIKE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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January 8, 2007

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**BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Pursuant to Ohio Adm. Code 4901-1-15 (D), the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the 290,800 residential gas consumers of Vectren Energy Delivery of Ohio, Inc. ("Vectren" or the "Company"), hereby submits this Memorandum Contra Vectren's Joint Motion For Certification of an Interlocutory Appeal of the Attorney Examiner's Entry dated December 29, 2006 ("Entry"). OCC submits its Memorandum Contra in a bifurcated manner, with arguments addressing Vectren's Motion for certification contained herein, and the remaining arguments on the merits of Vectren's appeal to be addressed separately. OCC has used this bifurcated approach based on premise that the Commission may rule on the matter of certification in the upcoming signing session. This bifurcated approach should assure that the Commission

understands OCC's position on Vectren's Motion for Certification, prior to ruling upon the certification at the upcoming signing session. By filing this Memorandum Contra here, solely on the certification issue, OCC is reserving its right to timely file the remainder of its arguments on the merits of Vectren's appeal in a separate filing.

OCC respectfully submits that the Vectren appeal may not be taken to the Public Utilities Commission of Ohio ("PUCO" or "Commission") because it does not qualify under Ohio Adm. Code 4901-1-15(A) for an "immediate" interlocutory appeal and does not qualify under Ohio Adm. Code 4901-1-15(B) for an appeal that can be certified by the legal director, deputy legal director, attorney examiner or presiding hearing officer.

Ohio Adm. Code 4901-1-15(A) provides four specific grounds for an immediate appeal—involving rulings that (1) grant motions to compel or deny protection; (2) that constrain participation in a case; (3) that refuse to quash subpoenas; and (4) that require production of documents or testimony over an objection of privilege. None of these criteria are invoked by the interlocutory appeal. There can be no immediate appeal.

Concomitantly, Ohio Adm. Code 4901-1-15(B) provides a requirement that two criteria -- involving new and novel questions and the avoidance of undue prejudice and expense -- must be met for the appeal to be certified to the Commission. The Attorney Examiner should not certify Vectren's appeal to the full Commission since an immediate determination by the Commission is not 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.¹

¹ Ohio Adm. Code 4901-1-15(B).

Additionally, OCC moves to strike Vectren's Joint Motion for Certification for failure to timely comply with the provisions of the Ohio Adm. Code 4901-1-15(C). Under Ohio Adm. Code 4901-1-15 (C), "a 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." Ohio Adm. Code 4901-1-15(C) requires that "a copy of the ruling or the portion of the record which contains the ruling shall be attached to the application for review." The Entry that is the subject of Vectren's Joint Motion was issued on December 29, 2006. Thus, applications for interlocutory appeals on the Entry were due to be filed on or before January 3, 2007. On January 2, 2007, Vectren filed a Joint Motion for Certification that was deficient in that it did not contain a copy of the Entry complained of. Two days later, on January 4, 2007, Vectren filed to correct its deficiency. Notably Vectren did not seek an extension of time to cure the deficiency, nor did Vectren explain any extraordinary circumstances that prevented it from complying with the rule.

The Commission should not accept Vectren's attempt at correcting its filing deficiency. Vectren's attempt at correcting the deficiency was filed outside the five day period. Vectren failed to file a motion for extension. Vectren failed to establish extraordinary circumstances to justify its late filing. Thus, it is appropriate to find Vectren in non-compliance with the Ohio Adm. Code 4901-1-15. Vectren's disregard of the rules should not be tolerated. The Commission should uphold the integrity of its rules here and strike Vectren's Joint Motion for non-compliance with Ohio Adm. Code 4901-1-15(C).

In the event that the Commission fails to strike Vectren's Joint Motion, OCC requests that the time period for responding to remainder of Vectren's Joint Motion run from the "cure" of the deficiency on January 4, 2007. Thus, OCC's Memorandum Contra, on the merits of the appeal, would be due no sooner than January 9, 2007.

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, 2006.²

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

² 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).

modification of the settlement and indeed commenced to work toward the disembodiment of the settlement signed with OCC.³

On December 8, 2006, OCC filed its Notice of Termination and Withdrawal (“Notice”) from the Stipulation and Recommendation (“Stipulation”). OCC filed its Notice pursuant to its rights as a signatory party⁴ under Stipulation paragraph thirteen that was adopted by the Commission in its *Opinion and Order*⁵ and affirmed by *Entry on Rehearing*.⁶ Paragraph 13 provides as follows:

The Stipulation is a compromise involving a balance of competing positions, and it does not necessarily reflect the position that one or more of the Parties would have taken if these issues had been fully litigated. The Parties believe that the Stipulation represents a reasonable compromise of varying interests. **This Stipulation is expressly conditioned upon adoption in its entirety by the Commission without material modification by the Commission.** Should the Commission reject or materially modify all or any part of this Stipulation, the Parties shall have the right, within thirty (30) days of the issuance of the Commission’s order, to file an application for rehearing. Upon the Commission’s issuance of an entry on rehearing

³ 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.

⁴ The other signatory parties are Vectren and the Ohio Partners for Affordable Energy (“OPAE”).

⁵ *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval, pursuant to Revised Code Section 4929.11 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*, Case No. 05-1444-GA-UNC, Opinion and Order (September 13, 2006).

⁶ *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval, pursuant to Revised Code Section 4929.11 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*, Case No. 05-1444-GA-UNC Entry on Rehearing (November 8, 2006).

that does not adopt the Stipulation in its entirety without material modification; any Party may terminate and withdraw from the Stipulation by filing a notice with the Commission within thirty (30) days of the Commission's entry on rehearing. Prior to any Party seeking rehearing or terminating and withdrawing from this Stipulation pursuant to this provision, the Parties agree to convene immediately to work in good faith to achieve an outcome that substantially satisfies the intent of the Commission or proposes a reasonable equivalent thereto to be submitted to the Commission for its consideration. **Upon notice of termination or withdrawal by any Party, pursuant to the above provisions, the Stipulation shall immediately become null and void. In such event, a hearing shall go forward and the Parties will be afforded 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.**

On December 21, 2006, Vectren, OPAE, and the Staff of the PUCO filed a Stipulation and Recommendation (Revised Stipulation). The purported purpose of the Revised Stipulation is to address "OCC's actions" which "may create uncertainty or raise questions about the desire of other parties to move forward" based on the September 13, 2006 Opinion and Order issued by the Commission.⁷ The Revised Stipulation provides for the same result as that envisioned by the Commission's September 12, 2006 Order and November 8, 2006 Entry on Rehearing.⁸ The terms of the Revised Stipulation include that the Commission affirm its Order and Entry; and that the Stipulation be

⁷Revised Stipulation at 3.

⁸ Revised Stipulation at Para. 1, 3.

approved without a hearing. OCC is not a party to the Revised Stipulation, nor was it invited to attend negotiations associated with developing the Revised Stipulation.⁹

The Attorney Examiner issued an Entry dated December 29, 2006 to address OCC's Notice of Termination and Withdrawal and the filing of the Revised Stipulation. As noted by OCC in its Application for Review and Interlocutory Appeal, the Attorney Examiner 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 file "a document" that sets out all the terms of the Revised Stipulation, filed by Vectren and OPAE on December 21, 2006.

On January 3, 2007, Vectren (in conjunction with OPAE) filed a "joint motion" for certification and "for expedited relief".¹⁰ On January 4, 2007, OCC filed its Application for Review and Interlocutory Appeal.

⁹ All that can be said is that on or around December 20, 2006, Counsel for Vectren called OCC and inquired whether OCC would be willing to reinstitute the original opinion and order. OCC's response was no, that was not agreeable to OCC. However, OCC advised Counsel for Vectren that it continues to support the low income program ordered by the Commission as part of the Opinion and Order.

¹⁰ In addition to the deficiency that is the subject to OCC's Motion to Strike, Vectren's pleading is technically deficient in a number of other respects. First, Ohio Adm. Code 4901-1-15 provides for an "application" not a "motion" for certification. Second, Vectren asks for an expedited ruling, which does not apply to interlocutory appeals. Expedited rulings are governed by Ohio Adm. Code 4901-1-12(C) and provide for a response time that conflicts with the five day response provision associated with Interlocutory appeals under 4901-1-15(D).

II. STANDARD OF REVIEW

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

(B) Except as provided in paragraph (A) of this rule,¹¹ 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

¹¹ Vectren has not argued that its interlocutory appeal should be taken immediately to the Commission under Ohio Adm. Code 4901-1-15 (A). Thus, OCC has not addressed that portion of the rule here.

(2) Dismiss the appeal....

Vectren claims that its appeal should be certified because it presents a new and novel question of interpretation -- whether an Attorney Examiner's Entry can overturn a final order issued by the Commission in a contested proceeding. Additionally, Vectren appears to claim that it has suffered prejudice and expense as a result of the Attorney Examiner Entry.

While Vectren may be correct in claiming that the appeal presents a new and novel question of interpretation, its claims of prejudice and expense do not suffice to meet the requirements of Ohio Adm. Code 4901-1-15 (B)(2). A motion for certification made under Ohio Adm. Code 4901-1-15(B) requires that the appeal must not only present a new or novel question of interpretation, but must also show that "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."

Vectren appears to argue that it meets the second prong of the certification test by claiming that the implementation of the low income programs has been disrupted, and uncertainty has been created.¹² Vectren advises that the "parties" have suspended implementation efforts related to the low income programs.¹³ Vectren further notes that it has relied on the Commission's September 13, 2006 Order and has already commenced

¹² Vectren Motion at 13.

¹³ Vectren Motion at 4, 14. OCC received no notification of this program suspension, even though OCC is an active member of the collaborative and has attended every collaborative meeting to date. Certainly, suspension of programs was an issue that should have been brought before the full collaborative group, including OCC. Instead it appears to have been a unilateral decision by Vectren and OPAC. This would appear to violate the original Order of the Commission setting up a collaborative process.

on October 1, 2006, “the deferral accounting necessary to support the operation of the SRR.”¹⁴ Moreover, Vectren notes that OPAE has expended resources¹⁵ to prepare for implementing the low-income programs. Vectren concedes as well that it has not “commenced the incremental funding” or “begun to deploy additional conservation programs.”¹⁶

Vectren’s actions post-Opinion and Order were those made voluntarily by Vectren, with complete knowledge and awareness of OCC’s litigation position. It took steps to implement the Order of the Commission that it now has deemed “imprudent” to continue. Disruption of its efforts is the result of decisions Vectren made to go forward with implementation, not from actions taken by OCC.

Nonetheless, from OCC’s perspective, there is no reason now why the low income programs should be disrupted. OCC supports the commencement of incremental funding and the deployment of additional conservation programs. Indeed it was Mr. Puican of the PUCO Staff who suggested, on the record of the hearing, that VEDO should itself carry all of the conservation-related costs during the two year period established by the Stipulation. See Staff Exhibit 1 at 8.¹⁷ To boldly state as do Vectren and OPAE that “OCC wants to rescind programs approved by the Commission to provide

¹⁴ Vectren Motion at 4.

¹⁵ No estimate of the time and resources has been provided so that one could determine whether the expense is “undue” under Ohio Adm. Code 4901-1-15(B)(2). Vectren has failed to sustain its burden of proof here.

¹⁶ Vectren Motion at 13.

¹⁷ Ironically, OPAE and Vectren’s response to that, as contained in their joint post hearing brief was that this approach “effectively urges the Commission to ignore the funding balance struck in the Stipulation and turn back a solid and thoughtful initiative to enable a robust conservation response so that customers can better manage bill level and bill volatility risks.” Vectren/OPAE Joint Brief at 15-16 (May 8, 2006).

needed assistance to low-income customers” is a bald faced falsity. Time and time again, OCC has made its position known to Vectren, OPAE, PUCO Staff, and the Commission that it strongly supports the implementation of low-income programs that resulted from the September 13 Opinion and Order. It is the decoupling piece and the implications of automatic rate increases for nearly 300,000 customers that OCC cannot support.

The “deferral accounting” which Vectren parades before the Commission as a prejudicial consequence is in reality a mere tracking of differences between actual base revenues and adjusted order granted rate revenues. The accumulated monthly differences will be divided by projected sales volumes to determine the applicable SRR that is to be instituted in the fourth quarter of 2007. The true deferral accounting that will occur is not set to go forward until implementation of the SRR (fourth quarter 2007) where the monthly SRR amount will be deferred for subsequent collection from customers in the following twelve month period. There is no financial consequence to the current tracking, nor a need to approve the tracking from a regulatory or financial accounting perspective. That issue will only arise when actual deferral accounting takes place beginning 4th quarter 2007.

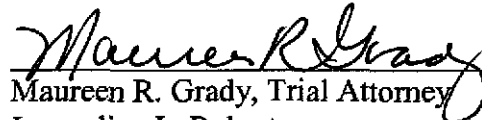
Even assuming arguendo that the factors claimed by Vectren amount to undue prejudice or expense, Vectren’s arguments are nonetheless doomed to fail. A close look at the wording of the applicable provision, Ohio Adm. Code 4901-1-15(B)(2) joins the undue prejudice and expense to the **Commission reversal of the ruling in question** . The provision states: “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.” In other words, the undue

prejudice must flow from commission reversal of the ruling. Here, the undue prejudice and expense alleged by Vectren would only come to pass if the commission affirmed, not reversed, the Attorney Examiner's ruling.

OCC reserves its rights under Ohio Adm. Code 4901-1-15, to file on or before January 8, 2007, the remainder of its arguments on the merits of Vectren's appeal.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

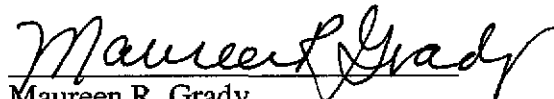
A handwritten signature in cursive script, reading "Maureen R. Grady", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra Vectren's Application for Review and Motion to Strike by the Office of the Ohio Consumers' Counsel was provided to the persons listed below by U.S. first class mail, postage pre-paid, this 5th day of January 2007.


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