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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 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

MEMORANDUM CONTRA VECTREN AND OPAE'S JOINT INTERLOCUTORY APPEAL OF THE ATTORNEY EXAMINER'S ENTRY DATED DECEMBER 29, 2006 BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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January 8, 2007

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I. INTRODUCTION

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 the Interlocutory Appeal that Vectren and OPAE[1] filed with regard to the Attorney Examiner's Entry dated December 29, 2006 ("Entry"). This OCC pleading represents the second part of OCC's bifurcated response to Vectren's Joint Motion for

[1] OPAE is the Ohio Partners for Affordable Energy, a corporation with members that operate low-income assistance programs.

Certification and will address solely the merits of Vectren's appeal, in the event the appeal is certified.[2]

Pursuant to PUCO rules including Ohio Adm. Code 4901-1-15(D), this Memorandum Contra is due on January 8, 2007, if calculated from the filing date of the original Vectren/OPAE appeal that is noncompliant with Rule 4901-1-15(C), or is due on January 9, 2007, if calculated from the filing date of the "corrected" Vectren/OPAE appeal. OCC has used this bifurcated approach for its Memorandum Contra in order to expeditiously advocate on the certification request in the Vectren/OPAE appeal, which is a precursor to any possible consideration of the appeal by the Commission. As part of filing its January 5th Memorandum Contra solely on the certification issue, OCC reserved its right to timely file the remainder of its arguments on the merits of Vectren's appeal in a separate filing.

In this pleading OCC will explain why the Commission should affirm the Entry of the Attorney Examiner, as it relates to issues raised in Vectren's Interlocutory Appeal, in the event the appeal is certified to the Commission. Specifically, the Commission should affirm the Entry including the conclusions that: (1) The April Stipulation should be considered terminated, based on OCC's unopposed Notice of Termination and Withdrawal; (2) The Revised Stipulation should not be approved; and, (3) A hearing should be held, and a pre-hearing conference should be scheduled for January 22, 2007 to discuss the procedural schedule.

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[2] OCC filed on January 5, 2007, its Memorandum Contra Vectren's Joint Motion for Certification and argued against certification based on Vectren's failure to meet the requirements of Ohio Adm. Code 4901-1-15(B)(2). That OCC Memorandum Contra was also combined with a Motion to Strike Vectren/OPAE's Joint Motion on the basis that Vectren did not timely file a pleading in compliance with Ohio Adm. Code 4901-1-15(C). This pleading is applicable if the Attorney Examiner certifies to the Commission the appeal by Vectren and OPAE.

Additionally, the Commission should approve and confirm, pursuant to Rev. Code 4901.18, the Attorney Examiner rulings that: (1) The Commission cannot approve a stipulation that by its own provisions has been terminated; and, (2) The rider that was filed in accordance with that stipulation is no longer in effect. Finally, consistent with OCC's Interlocutory Appeal filed on January 3rd, the Commission should reverse or modify the Attorney Examiner's Entry consistent with the following conclusions: (1) A hearing should be held in this proceeding, pursuant to the terms of the stipulation for the process after termination of the stipulation, and not pursuant to the alternative regulation statutes, including Revised Code 4929.05; and (2) The Revised Stipulation should not be treated as a request to "reopen" as doing so may facilitate inappropriate arguments by other parties to wrongly limit the scope of the hearing in a manner that is inconsistent with the original stipulation and Commission precedent.

II. ARGUMENT

OCC will refute each of the arguments in the Vectren/OPAE interlocutory appeal. Before addressing each argument, OCC will speak to general matters for the Commission to consider with respect to this interlocutory appeal and in a broader sense with respect to the prospects for the integrity of the PUCO's settlement process that is implicated by the interlocutory appeal.

The Joint Motion filed by Vectren and OPAE, and the behavior exhibited by OPAE and Vectren following the Commission's Opinion and Order[3], can be characterized as a short-sighted, ill-advised approach that strikes at the very heart of the good faith and trust necessary to enter and honor the stipulations that are allowed by rule of the Commission in Ohio Adm. Code 4901-1-30. Vectren and OPAE's arguments seek to render meaningless provisions of an agreed upon Stipulation. Moreover, at various points in the Joint Motion, OPAE and Vectren disregard commitments made in the stipulation that preserved the rights of parties to go forward in the event the Commission materially modified the Stipulation. Instead, OPAE and Vectren want to rewrite the Stipulation to artificially limit the scope of a stipulating party's rights to pursue legal options.[4]

OPAE's and Vectren's scheme has had and will continue to have a chilling effect upon OCC's and other parties' willingness to enter into a Stipulation. Parties will begin

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[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 information to attempt support for the need for weatherization services. The Commission's Order was devoid of such evidence, as pointed out by OCC in its Application for Rehearing. OCC's Motion to Strike "Vectren's Memorandum in Response," filed on November 6, 2006, should be incorporated herein by reference as it details the bad faith arguments that are germane here.

[4] Vectren clearly violates the parole evidence rule by attempting to define the stipulation terms, which are not unclear, by reference to Civil Rule 60(B). The parole evidence rule provides that in a written contract the terms of the contract speak for themselves. Absent an ambiguity in the contract, the contract can not be explained by reference to extraneous matters. The language on the scope of the hearing is clearly not so ambiguous to permit such extraneous arguments. See *Stony's Trucking Co. v. Pub. Util. Comm.*, 32 Ohio St.2d 139 (discussing the applicability of the rule and its meaning in a PUCO proceeding). Additionally, Vectren fails to recognize that prevailing law in Ohio is that a contract should be construed strictly against the drafter of the contract. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 314 (1996). Vectren here drafted the document. Another principle of contract construction applies here -- "expression unius est exclusion alterius." This principle is the expression in contract of one or more things implies the exclusion of all others not expressed. *Uram v.Uram*, 65 Ohio App.3d 96, 98 (1989). The scope of the hearing was defined without reference to Civil Rule 60(B) and by that fact alone, it is inapplicable.

to take notice of what a Stipulation between parties at the PUCO really means or does not mean or can be contrived to mean -- regardless of what is on paper and ink. The lessons learned in this case are many and not necessarily pleasant. A Stipulation agreement between parties really only is valid until they perceive the opportunity for a better deal. Parties may improvise a suspension of the duty to act in good faith to support the original stipulation they signed, should the Commission modify it. Parties may in fact actually take efforts to oppose the upholding of the original stipulation with their signature on it. Neither will the Commission take actions to quash bad faith behavior by the stipulating parties. Parties may totally ignore language contained in the stipulation which grants, subject to meeting prerequisite conditions, a stipulating party's right to a full hearing and instead argue for an extremely narrow scope of review based on a Civil Rule that is obscure to PUCO practice. If the stipulating party acts in good faith to facilitate the underlying Opinion and Order, it will be argued that its efforts in so doing have compromised its rights to simultaneously pursue other remedies under the Stipulation and the Revised Code.[5]

This Commission has long recognized and promoted the value of stipulations between parties in a contested proceeding, and devotes a rule (Ohio Adm. Code 4901-1-30) to allowing for settlements. Stipulations can advance the public interest by resolving "issues raised in a proceeding without incurring the time and expense of extensive

[5] Vectren and OPAE, in setting forth the scope of the hearing, urge the Commission to require OCC to prove, among other things, that OCC "did not waive whatever further protest rights it may have by simultaneously protesting the Commission's September 13 Opinion and Order and supporting, through the collaborative, plans to implement the authority provided by the Commission's September 13 Opinion and Order." Joint Motion at 18.

litigation."[6] The Chief Justice of the Supreme Court of Ohio has addressed the value of the stipulation process.[7] It is against this background that the Commission should consider Vectren's arguments.

A. The Commission Should Deny the Interlocutory Appellants' Claim that the Attorney Examiner cannot modify a Commission Order or Render it Moot by Approving and Confirming It.

Vectren and OPAE argue that the Attorney Examiner has undermined the finality of Commission decisions by effectively nullifying a final commission order in a contested proceeding. This argument must fail here because the Attorney Examiner's Entry was well within his scope of authority under the Ohio Revised Code and the Ohio Administrative Code.

Even assuming arguendo that Vectren's arguments are valid, this Commission can cure any alleged defect by approving and confirming the Entry of the Attorney Examiner, pursuant to Ohio Rev. Code 4901.18. Under 4901.18 "[a]ny such findings made or order recommended by any such examiner, which are approved and confirmed, or modified, by the commission and filed in its office, are the findings and order of the commission."

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[6] See for example, In the Matter of the Application of Utility Operators Corporation of an Increase in Rates and Charges, Case No. 00-1514-ST-AIR Opinion and Order at 3 (July 26, 2001).

[7] In his address to the Joint Convention of the 118th Ohio General Committee the Chief Justice stated: "There is no system of justice in the world that is more accessible than the American judicial system * * *. The institution is viable because it enjoys the confidence of the people it serves. But if we ask ourselves whether the system functions as effectively as it can, the answer is no. Too many people are frustrated with the delay and the cost associated with resolving civil disputes. Too many cases are filed that should not be filed; too many cases languish on court dockets only to be settled after considerable delay and expense * * *. The time to consider alternative means of dispute resolution is here * * *. Committee on Dispute Resolution – A History: 1989 to present, at http://sconet.state.oh.us/Dispute_Resolution/overview/profile.asp (Third Supp. 000045).

Thus, the Entry would become the Order of the Commission and Vectren/OPAE's arguments attacking an "Attorney Examiner" ruling would be rendered moot.

B. The Commission Should Deny the Interlocutory Appellants' Claim that OCC's Notice Cannot Suspend or Invalidate a Commission Order.

Vectren/OPAE argue that if OCC's Notice of Withdrawal and Termination is accepted and causes the demise of the Commission's Opinion and Order, then that allows one party in a contested proceeding to veto a final Commission order. Vectren seems to argue that the Order in this case was independent of the Stipulation and therefore, OCC's Notice of Withdrawal and Termination should have no effect on the Commission's Order.

OCC does not concede that its Notice of Withdrawal was tantamount to a veto of a final Commission order. The Commission order was undone not by OCC's Notice of Withdrawal, but due to the fact that the Commission materially modified a stipulation, while being well aware of the implications for doing so. See discussion *infra.* OCC's Notice was merely an agreed upon (by Vectren and OPAE) means for OCC to preserve its rights to challenge a material modification of a carefully crafted and well balanced stipulation.[8]

If Vectren's arguments are accepted, then essentially the language in the Stipulation related to a party's right to withdraw from a stipulation is rendered

[8]Moreover, it appears to be ironic that if in fact the Notice enabled OCC to undo a Commission order, it was made possible by a stipulation provision agreed to by both Vectren and OPAE.

meaningless.[9] OCC would have a right to withdraw from a stipulation and its withdrawal would mean nothing and have no effect on a Commission order that is inherently based on the underlying stipulation. To construe language to give no effect to its meaning violates the plain rule of construction that requires that every provision of a contract be given effect if possible. *See Farmers National Bank v. Delaware Insurance Company,* 83 Ohio St. 309, 337 (1911).

C. The Commission Should Deny the Interlocutory Appellants' Claim that the Revised Stipulation Should be Approved on a Streamlined Basis Without An Evidentiary Hearing.

Vectren/OPAE argue that their Revised Stipulation should be automatically approved, without any evidence of or determination on whether the Revised Stipulation meets the well-established standard of review for stipulations. The Revised Stipulation is simply improvised reverse engineering by the Interlocutory Appellants to develop an after-the-fact case position that recreates the PUCO decision that they prefer over their original settlement with OCC. The Attorney Examiner was quite correct in denying it.

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[9] There can be no doubt that the Stipulation Agreement filed with the Commission is a contract between OCC, Vectren, and OPAE, the Signatory Parties. Under the terms of the contract Vectren agreed to offer a significant portfolio of DSM programs to its commercial and residential customers. In exchange for the offering of such programs, Vectren was to receive favorable treatment, via a decoupling mechanism, that was to protect it from reduced revenues associated with the DSM programs. Customers were to fund the majority of the programs and the decoupling mechanism, with the Company also agreeing to invest capital and human resources.

When the Commission reviews a stipulation for reasonableness three criteria must be met:

> (1) It must be a product of serious bargaining among capable, knowledgeable parties;
>
> (2) It must, as a package, benefit ratepayers and the public interest; and
>
> (3) It must not violate any important regulatory principle or practice.

See *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126, 1992 Ohio 122 and *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St.3d 81, 82-83, 2002 Ohio 1735. The Revised Stipulation between OPAE, Staff, and Vectren fails the Commission's reasonableness criteria.

The Commission did not apply the reasonableness test to the Revised Stipulation, although by virtue of the Attorney Examiner's Entry dated December 29, 2006, Vectren, Staff, and OPAE are required to make filings with regard to the Revised Stipulation. "The signatory parties, for clarity of record, should file within ten business days, a document that sets out all the terms of the stipulation."[10] Regardless of what is filed by OPAE, Staff, and Vectren in response to the Attorney Examiner's ruling, the Commission has not determined that the stipulation is reasonable as set forth in the *Consumers' Counsel* and *AK Steel* cases cited above. The Attorney Examiner must make a determination that the Revised Stipulation satisfies the three-pronged reasonableness

[10] *Entry* at paragraph 6 (December 29, 2006).

test. It has not done so here. The Revised Stipulation cannot be adopted absent such an analysis.

If the Attorney Examiner were to undertake a review of the Revised Stipulation, the Revised Stipulation would fail to satisfy all three prongs. Regarding the first prong of the test, stipulations presented to the Commission where all customer interests are represented and there is genuine bargaining by capable parties, satisfy the Commission's standards. The original Stipulation among OCC, OPAE, and Vectren, filed in April 2006, satisfied this prong of the test. This specific prong of the test cannot be satisfied by the Revised Stipulation between Vectren, Staff, and OPAE. The rationale behind the test is that when parties with discrete and conflicting interests reach agreement as to the disposition of a case, a balancing of competing interests is achieved. This balance, represented by the stipulation, will be accorded "substantial weight." *Consumers' Counsel v. Pub. Util. Comm., supra, citing Akron v. Public Utilities Commission,* 55 Ohio State 2d 155 (1978). Unless the stipulation violates the second or third prong of the test, to wit: fails to benefit ratepayers and is not public interest; or violates an important regulatory principle or practice, the Commission may choose to approve it.

Neither Vectren, Staff, or OPAE represent the interests of the 300,000 residential natural gas customers. OPAE is a corporation with members that operate low-income assistance programs. PUCO Staff "serve at the pleasure of the Commission."[11] The

[11] Revised Code 4901.19.

Commission is the regulator of public utilities[12] and does not represent the interests of any customer group.

OCC is an agency with the statutory responsibility to represent Ohio consumers, as granted by Revised Code Chapter 4911. The Supreme Court in *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio,* 109 Ohio St.3d 328 (2006) noted that the OPAE was not the representative of customer groups. OPAE supported the stipulation while OCC did not -- "...the customer groups here did not agree...., and most customer groups, including the OCC, which represents all residential customers, opposed them." *Id.* at paragraph 19. For this reason, this Revised Stipulation between Vectren, Staff, and OPAE, without participation by OCC, cannot satisfy the Commission's reasonableness test for the approval of stipulations.

Additionally, OCC was excluded from any and all negotiations leading up to this Revised Stipulation. Stipulations that result from exclusionary negotiations are disfavored. The Supreme Court in *Time Warner AxS v. Public Utilities Commission of Ohio,* 75 Ohio St.3d 229 (1996) declared: "We have grave concerns regarding the commission's adoption of a partial stipulation which arose from the exclusionary settlement proceedings." In *Time Warner*:

> The partial stipulation arose from settlement talks from which an entire customer class was intentionally excluded. This was contrary to the commission's negotiation standard in *In re Application of Ohio Edison to Change Filed Schedules for Electric Service,* Case No. 87-689-EL-AIR (Jan. 26, 1988) at 7, and the partial settlement standard endorsed in *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St. 3d 123, 125-126....Ameritech managed

[12] *Pennsylvania Company v. Pub. Serv. Comm.*, 14 NP (NS) 262 (1913).

> to either settle its competitive issues or defer them until a later date, all without having its competitors at the settlement table.

Id. at Footnote 2. In *Constellation,* the Court affirmed that settlement negotiations excluding "an entire customer class" (*Id* at paragraph 22) were subject to the Court's admonition in *Time Warner.* Given the facts of the instant case, the exclusion of OCC from the negotiations resulting in the Revised Stipulation was the exclusion of an "entire customer class," and makes the stipulation itself incurable.

Regarding the second prong of the Commission's settlement test, Vectren and OPAE have failed to show that the Revised Stipulation benefits ratepayers and the public interest. Only a small sector of consumers, "low income" consumers, receiving weatherization services, are provided with any direct benefit and the benefit in the original settlement for all consumers has been denied. Any indirect overall benefit to all consumers will be *de minimus* due to the diminutive scope of the $2 million program spread across two years.[13] All consumers will then be subjected to an increase in rates, passed through the Company's SRR rider, which will be instituted in Fall 2007.[14] Under the SRR, if customer usage of gas is lower than the usage factored into the previous rate case, Vectren can recover the differential from its customers. According to the uncontroverted testimony of Vectren Witness Ulrey, the SRR will, at a minimum,

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[13] In the original stipulation between Vectren, OPAE, and OCC, due to the comprehensive nature of the DSM portfolio, more customers stood to benefit both directly and indirectly.

[14] In the original stipulation between Vectren, OPAE and OCC, due to the comprehensive nature of the DSM portfolio, customers were likely to see net reductions in their bills. Direct Testimony of Vectren Witness Ulrey at 12, JLU-4. Moreover, the original stipulation gave customers tools to reduce rates. The Revised Stipulation provides no such tools, except to low income customers whose homes have been weatherized under the limited incremental funding.

increase rates to residential customers by approximately $3.6 per year, and increase rates to commercial customers by $.2 million per year.[15]

It is hard to imagine how this deal[16] for Vectren benefits consumers and is in the public interest.[17] There was an opportunity to benefit all consumers, including low-income consumers, which should have been adopted in the original settlement. Now OPAE and Vectren are unabashedly standing before this Commission asking the Commission to seal their new deal quickly without further delay or inquiry.[18] Plain and simple, this deal does not adequately benefit ratepayers and is not in the public interest. It permits automatic rate increases to customers and yet fails to provide customers with tools to reduce their rates. It narrows the scope of energy efficiency programs such that very few customers will benefit from the proposed program. It fails to provide a net economic benefit to customers due to the limited scope of the programs offered.

Regarding the third prong of the Commission's settlement test, Vectren, OPAE, and the Staff have failed to show that the Revised Stipulation does not violate any important regulatory principle or practice. The Revised Stipulation allows Vectren to use

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[15] See Rebuttal Testimony of Vectren Witness Ulrey at 4, Company Ex. 2a.

[16] Vectren invests $2 million in low income DSM, and then collects $7.6 million ($3.8 million times two) in increased rates from customers, without being subject to rate case scrutiny. Moreover, the investment may be offset by the tax benefits gained by directing the contribution though an eligible 501c3 corporation, thus in actuality equating to a Vectren investment of $1 million.

[17] In contrast, the original Stipulation between OCC, Vectren, and OPAE established a quid pro quo for the favorable decoupling mechanism. Under the original stipulation, though the Company investment was less than the $2 million in the Revised Stipulation, there was a true commitment by the company to encourage, promote and develop a substantial conservation portfolio over an extended period of time. Conservation efforts can not be short term projects, but must be sustained and significant to produce a net economic benefit. In the Revised Stipulation there is no commitment to conservation that is either significant or sustained.

[18] The Staff, who has also signed onto the deal, appears to view the Revised Stipulation as a way to minimize the risks of an appeal(s) on the Commission's September 13, 2006 Opinion and Order.

the cloak of alternative regulation to clothe itself, while it remains subject to rate of return regulation. This duality of regulation is not permissible under regulatory practices and principles which underlie the Revised Code, in particular Revised Code 4929.01(A) *et seq.* "Alternative regulation" means just that -- "a method alternate to the method of section 4909.15 of the Revised Code for establishing rates and charges."[19] The components of an alternative rate plan can include, among other things "automatic adjustments based on a specified index or changes in a specified costs," and "methods" "that minimize the time and cost expended in the regulatory process" and "reward efficiency, quality of service, or cost containment."[20] These principles are much different than those associated with traditional regulation under Revised Code Chapter 4909.

Although regulation under Revised Code Chapter 4909 provides an opportunity to earn a fair and reasonable rate of return, there are no guarantees that a utility will in fact do so -- the Company bears this risk. Nor are there incentives written into Chapter 4909. Automatic adjustment clauses are eschewed in favor of a detailed formulas, investigations, and detailed proceedings providing parties with the opportunity to challenge rate increases requested. The public too is given notice of filings and most importantly, the opportunity to be heard.

What the Revised Stipulation would now allow is for Vectren to benefit from an automatic revenue adjustment (the SRR), while still receiving a rate of return that was set based on vastly different assumptions about revenue recovery. The risk of revenue recovery caused by reduced sales for Vectren now shifts away from the Company to its

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[19] Revised Code 4929.01(A).

[20] *Id.*

customers, for one discrete piece of the traditional ratemaking formula. Yet no other adjustment is made to other portions of the ratemaking formula, such as the rate of return. Such a hybrid approach to regulation allows for manipulation and flies in the face of law and an orderly and open process for setting just and reasonable rates, as is set forth under Chapter 4909.

Additionally, under the Revised Stipulation, Vectren seeks to bypass the extensive application procedures envisioned under Revised Code 4929.04. That application procedure includes numerous conditions and requires findings that there exists effective competition or reasonably available alternatives. The statute also requires a hearing and public opportunity for comment. The Revised Stipulation never addresses the 4929.04 preconditions. Nor does the Revised Stipulation, as proposed by Vectren, OPAE, and the Staff, allow for hearing and public comment.

The regulatory principles found in the alternative regulations statutes for natural gas companies are not consistent with the Revised Stipulation. Per Revised Code 4929.05, an alternative regulation plan may only be considered as part of an application filed under Revised Code 4909.18. The Revised Stipulation ignores the mandatory 4909.18 process and seeks to replace it with a process to ensure streamlined approval of the Revised Stipulation. This is directly violative of Revised Code 4929.05.

The terms of the Revised Stipulation require expedited approval of the stipulation, without a hearing. These terms seek to protect the Revised Stipulation from undergoing regulatory scrutiny, which is inherent in the regulatory principles and practices under Revised Code Chapter 4909 and 4929.05. Thus, the Stipulation violates these regulatory principles and practices.

OCC would be severely prejudiced by the actions of Vectren, OPAE and the Commission if full evidentiary hearings are not held or a Vectren/OPAE/Staff stipulation is adopted by the Commission. *Cincinnati v. Pub. Util. Comm.* (1949), 151 Ohio St. 353; *Ohio Edison Co. v. Pub. Util. Comm.* (1962), 173 Ohio St. 478 (paragraph ten of the syllabus); *Akron v. Pub. Util. Comm.* (1978),55 Ohio St.2d 155, 161; *Holladay Corp. v. Pub. Util. Comm.* (1980), 61 Ohio St.2d 335, syllabus. The Attorney Examiner Entry should be affirmed in this respect.

D. The Commission Should Deny the Interlocutory Appellants' Claim that if the Commission grants a new hearing, then the scope of the hearing should be defined narrowly by Civil Rule 60(B).

Vectren/OPAE argue alternatively that if a new hearing is to be held, then the pleadings and actions of OCC should be treated as a motion to reopen and should be subject to Civil Rule 60(B) provisions. Interestingly enough, the Attorney Examiner found that the Company's Revised Stipulation, **not OCC's actions**, should be treated as **a request to reopen by the signatory parties** to the proceeding. Are the Interlocutory Appellants then suggesting that their presentation of evidence be severely narrowed to the scope of 60(B)?

Vectren/OPAE offer no precedent to support the use of 60(B) in a Commission hearing. All they can say is that 60(B) is found in Rules of Civil Procedure, "is an appropriate vehicle to ensure OCC is treated fairly," [21] and will not affect "the final Commission judgment or suspend its operation." Additionally Vectren offers to further define the scope of proof that it believes OCC must adhere to: (1) OCC must explain why it is entitled to withdraw from the Stipulation, (2) OCC must demonstrate that it

[21] What Vectren thinks is "fair" to OCC is subject to much debate.

worked in good faith to respond to the intent of the Commission's September 13 Order; (3) OCC must show that did not waive whatever further protest rights it may have by simultaneously protesting the Commission's Order and supporting, through the collaborative, plans to implement the authority provided by the Order; and (4) show that OCC's reliance on a contested Stipulation "fundamentally prejudiced" OCC in such a way that OCC is entitled to prospective relief from the final judgment of the Commission.[22]

Civil Rule 60(B) describes a process whereby a party, may upon motion, seek relief from judgment if specific circumstances warrant relief. The party seeking relief must show: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; (3) fraud, misrepresentation or other misconduct of an adverse party[23]; (4) the judgment has been satisfied, released or discharged, 5) or any other reason. A Rule 60(B) motion does not pertain to a trial,[24] though Vectren would use Rule 60(B) here to constrain the scope of a hearing.

Rule 60(B) is just not applicable and appropriate to use to define the scope of a hearing before the PUCO. It pertains to what information a party must provide in a

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[22] Vectren/OPAE Motion at 18-19. Even if the Commission determined Rule 60(B) could be used, Vectren's delineation of proof arguments should be rejected. Issues (1) and (2) have been determined by the Attorney Examiner's Entry. Entry at 2. Vectren/OPAE's non-opposition to OCC's Notice of Termination and Withdrawal should properly be construed as a waiver. That they "saw no reason to engage OCC on this point" because they were focused on other things, and "judged the question to be academic" does not create a legal excuse negating a waiver. Perhaps Vectren/OPAE should have "managed the risks presented by OCC's actions" a little better? Their Proof argument three, discussed *supra*, makes no sense. Proof argument four has no place in the procedural processes of the Commission.

[23] Clearly OCC could meet this standard given the actions of Vectren and OPAE in this case.

[24] *Brown v. Coffman*, 13 Ohio App. 3d 168 (1983).

motion to obtain relief from judgment. OCC has not filed a motion to obtain relief from judgment. The PUCO proceedings are governed by the provisions of the Revised Code Chapter 49 *et seq.* and the Ohio Adm. Code. This is an entirely different process than that described by Civil Rule 60(B). OCC has adhered faithfully to that process by filing an Application for Rehearing on the Opinion and Order. OCC is seeking further relief from the Opinion and Order by pursing an appeal to the Ohio Supreme Court. Very importantly, Civil Rule 60(B) does not apply to administrative appeals.[25]

And most importantly, Vectren and OPAE signed a Stipulation with OCC that did **not** incorporate Civil Rule 60(B), that did **not** include the words from Rule 60(B) (even if the Rule itself wasn't cited) and that did **not** by any stretch of even the most vivid imagination impliedly adopt Rule 60(B). The Stipulation that was real existed in words signed with ink on paper. Vectren and OPAE would have this Commission instead fashion an agreement that never was, out of whole cloth.

OCC urges the Commission instead to set the scope of the hearing consistent with OCC's rights, rights that were not modified under the Stipulation that was approved by the Commission in its Order and Entry on Rehearing. "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

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[25] *Buchler v. Ohio Dept. of Commerce, Div. Of Real Estate*, 110 Ohio App.3d 20, 673 N.E. 611 (1996) (decided under former analogous section R.C. 119.12).

decided based upon the record and briefs **as if this Stipulation had never been executed**."[26]

"If the Stipulation had never been executed," the scope of the hearing would logically relate back to the November 28, 2005 Application of Vectren. Thus OCC should be permitted to present a full case on Vectren's application. Although parties may argue that OCC will be given two bites at the apple[27], this is merely the well understood consequence of the Commission tinkering with stipulations. Each time a stipulation is presented for Commission approval, the Commission may adopt the stipulation as it stands, or may modify the provisions. When the Commission modifies the provisions, as it did so here, it runs the risk that parties may no longer agree or support the stipulation. The Stipulation provisions clearly convey the risk:

> 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 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

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[26] Stipulation at para. 13 (April 21, 2006).

[27] OPAE makes this argument in its "Memorandum Contra" OCC's Application for Review and Interlocutory Appeal. See OPAE Memorandum Contra at 5 (January 5, 2007).

> to this provision, the Parties agree to convene immediatedly 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.**

This common wording is found in the majority of stipulations that come before the Commission for approval. Moreover, in the past, this Commission has acknowledged this risk exists when it modifies stipulations. *See for example, In the Matter of the Application of Columbia Gas of Ohio Inc. for Authority to Amend Filed Tariffs to Increase the Rates and charges for Gas Service,* Case No. 94-987-GA-AIR *Entry* at 39-40 (March 11, 2004) "as a result of the conclusions and modifications we have made today, we recognize that this provision [rejection, modification or imposition of additional requirements allows notice of termination] of the 2003 stipulation is affected."

Rarely have stipulating parties in Commission proceedings gotten to the point of exercising a Notice of Termination and Withdrawal.[28] But rarely have stipulating parties so quickly and with such little concern for what is right and honorable turned their backs on the stipulations they entered into with other parties. In the instant proceeding, OCC deemed the modifications to the Stipulation to be material and unacceptable. OCC proceeded to exercise its rights under the Stipulation, rights which were established by

[28] But see Joint Notice of Termination and Withdrawal in Case No. 97-219-GA-GCR, *In the Matter of the Regulation of the Purchased Gas Adjustment Contained Within the Rate Schedules of the East Ohio Gas company and Related Matters (*December 4, 1998)(*East Ohio Gas* case).

Vectren, who was the primary drafter of the stipulation, and rights which were agreed to by Vectren, OPAE, and OCC.[29] Clearly, OCC is justified in exercising such rights.

In determining the appropriate scope of the hearing established under the Stipulation, the Commission should follow the precedent established in a strikingly similar case, the *East Ohio Gas* Case.[30] In the *East Ohio Gas* case, the Commission was faced with a situation directly analogous to the situation presented here.

The case was initiated, as occurred here, by the filing of the Company's application.[31] Written testimony was filed by various parties, as occurred here. Like the instant proceeding, prior to the evidentiary hearing, a Stipulation[32] was reached and filed on the record. As part of the Stipulation, the parties agreed to waive their rights of cross-examination of witnesses on the condition that the Stipulation be approved without alteration or addition. Parties here also agreed to waive cross examination rights, though this was an agreement reached outside of the stipulation and was not a contingent agreement.

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[29] In fact, in the Revised Stipulation that Vectren, OPAE, and Staff signed, there is the same exact provision.

[30] *In the Matter of the Regulation of the Purchased Gas Adjustment Contained Within the Rate Schedules of the East Ohio Gas company and Related Matters,* Case No. 97-219-GA-GCR.

[31] *In the Matter of the Regulation of the Purchased Gas Adjustment Contained Within the Rate Schedules of the East Ohio Gas company and Related Matters*, Application (February 25, 1997)

[32] *In the Matter of the Regulation of the Purchased Gas Adjustment Contained Within the Rate Schedules of the East Ohio Gas company and Related Matters*, Stipulation (October 22, 1998). The Stipulation was unanimous, unlike the Stipulation in the present case.

The Commission in the *East Ohio Gas* case subsequently issued an order approving the Stipulation.[33] In the instant proceeding, the Commission likewise approved the Stipulation. A Joint Notice of Withdrawal was filed by East Ohio Gas and OCC, claiming that the Commission added to the stipulation, thereby "fundamentally and unacceptably altering it."[34] In the instant proceeding OCC filed such a Notice. A second Stipulation was filed by the *East Ohio Gas* Case parties on the same day as the Notice of Withdrawal. The *East Ohio Gas* Case parties again agreed to waive an evidentiary hearing and cross examination if the stipulation was accepted in total. In the case at hand a second stipulation (Revised Stipulation), though not with the same parties, was filed. Parties to the stipulation argued, for different reasons, that an evidentiary hearing need not occur.

On January 14, 1999 in its *Supplemental Opinion and Order* in the *East Ohio* case, the Commission ruled that the request to withdraw the initial stipulation was accepted,[35] just as the Attorney Examiner here ruled that OCC had properly filed its Notice of Termination and Withdrawal. Additionally, in its *Supplemental Opinion and Order* the Commission held in abeyance a ruling upon the second stipulation, and scheduled the matter for hearing.[36] The Commission then broadly set the scope of the

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[33] *In the Matter of the Regulation of the Purchased Gas Adjustment Contained Within the Rate Schedules of the East Ohio Gas company and Related Matters,* Case No. 97-219-GA-GCR, *Opinion & Order* (November 15, 1998).

[34] *In the Matter of the Regulation of the Purchased Gas Adjustment Contained Within the Rate Schedules of the East Ohio Gas company and Related Matters,* Case No. 97-219-GA-GCR, Joint Notice of Withdrawal of Stipulation at 1 (December 4, 1998).

[35] *In the Matter of the Regulation of the Purchased Gas Adjustment Contained Within the Rate Schedules of the East Ohio Gas Company and Related Matters,* Case No. 97-219-GA-GCR Supplemental Opinion & Order (January 14, 1999).

[36] *Id.* at 3.

hearing to "all issues in both above captioned dockets"[37] including 'the reasonableness of the combination of the GCR rates of East Ohio and the former West Ohio Gas company as a result of the merger."[38] Both East Ohio and OCC were permitted to file supplemental testimony. An evidentiary hearing was held consistent with the scope of the Commission's *Supplemental Opinion and Order*. A *Second Supplemental Opinion and Order* was issued adopting the second stipulation.

This Commission should adopt the approach it took in the *East Ohio Gas* Case when establishing the scope of the evidentiary hearing in the instant proceeding. By doing so the Commission is following its own precedent[39], preserving the integrity of the Stipulation process, and treating OCC in a deservedly fair manner, all while doing no violence to the finality of Commission orders.

III. CONCLUSION

Vectren and OPAE's Joint Motion for Certification of an Interlocutory Appeal should not be granted as argued in the first part of OCC's bifurcated Memorandum Contra, filed with the Commission on January 5, 2007. If certification is granted, then the Commission should affirm the Examiner's Entry consistent with the arguments contained herein and in OCC's Application for Review and Interlocutory Appeal. The

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[37] Lest there be confusion about "all issues," the Commission in its Second Supplemental Opinion and Order noted the fact that '" OCC did not present any witness or evidence on any issue impacting East Ohio's GCR rate under review in this case." *East Ohio Gas Company* Case, *Second Supplemental Opinion and Order* at 3 (February 4, 1999).

[38] *Id.*

[39] *See Cleveland Electric Illum. Co. V. Pub. Util. Comm.*, 42 Ohio St. 2d 403, 431 (1975)(holding that the commission should "respect its own precedents in its decisions to assure predictability which is essential in all areas of the law, including administrative law.")

Stipulation that Vectren and OPAE entered with OCC existed for real in words signed by counsel with ink on paper. Vectren and OPAE instead would have this honorable Commission now fashion an agreement that never was, out of whole cloth. The Commission should approve and confirm the ruling of the Attorney Examiner.

Respectfully submitted,

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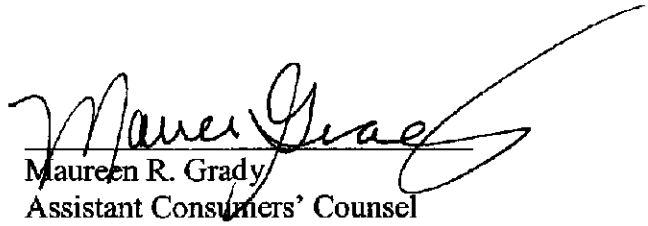
CERTIFICATE OF SERVICE

I hereby certify that a copy of the Memorandum Contra Vectren and OPAE's Joint Interlocutory Appeal Office of the Ohio Consumers' Counsel was provided to the persons listed below by first class United States Mail, postage prepaid, this 8th day of January 2007.



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