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 MOTION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL OF THE ATTORNEY EXAMINER'S ENTRY DATED JANUARY 23, 2007 BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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February 5, 2007

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I. INTRODUCTION

Pursuant to Ohio Adm. Code 4901-1-15 (D), the Office of the Ohio Consumers' Counsel ("OCC"), hereby submits this Memorandum Contra to the Joint Motion For Certification of an Interlocutory Appeal filed by Vectren Energy Delivery of Ohio, Inc. ("Vectren" or the "Company") and OPAE[1] ("Joint Appeal") with regard to the Attorney Examiner's *Entry* dated January 23, 2007 ("*Entry*"). OCC is the representative of the 293,000 residential gas consumers of Vectren, pursuant to R.C Chapter 4911.

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

In the *Entry*, the Attorney Examiner adopted a procedural schedule for consideration of the January stipulation: discovery requests, except for depositions must be served by February 7, 2007; testimony should be filed by February 21, 2007; and the evidentiary hearing, established by prior *Entry*, should commence on February 28, 2007. The *Entry* gave rise to two interlocutory appeals, one by OCC (filed on January 29, 2006) and the joint appeal by Vectren and OPAE (filed on January 29, 2006).

In essence, the joint appellants claim that the Attorney Examiner may not hold a hearing at this time because R.C. 4929.07 precludes the Commission from doing so in response to Vectren's alleged "notice of intent" to implement the alternative regulation plan approved by the Commission in its September 13, 2006 *Opinion and Order*. OCC respectfully submits that, under the rules of the PUCO, the Joint Appeal may not be taken to the Public Utilities Commission of Ohio ("PUCO" or "Commission") for a number of reasons that will be explained herein.

Notably, joint applicants have failed to show how an immediate determination by the Commission is needed to prevent undue prejudice or expense to them. In fact, it would appear that joint applicants have taken operational and legal steps to mitigate the potential prejudice and further expense. On the other hand, OCC will note that the prejudice to residential consumers from facilitating Vectren's claims would be profound. Vectren has "settled" with the PUCO Staff and OPAE for a license to print automatic rate increases into its bills to 293,000 consumers. What Vectren seeks the PUCO to do (or re-do) via the automatic rate increase mechanism of decoupling (with no corresponding benefit of DSM) is unprecedented in Ohio regulation and not contemplated in Ohio law.

II. BACKGROUND

Vectren is a natural gas distribution company serving 293,000 customers in the Dayton area. Vectren filed this case in 2005, pursuant to R.C. 4929.11 (and not pursuant to R.C. 4929.05), 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 statutory advocate for residential customers that signed the settlement dated April 19, 2006 ("April Settlement").

The April Settlement was negotiated between parties to the proceeding that represented disparate and conflicting interests, including the interest of Ohio's residential consumers by OCC's representation. The April Settlement resolved all issues in this case and represented a fair balance between adverse parties and included provisions that were favorable to consumers

In its *Opinion and Order* dated September 13, 2006, the PUCO materially modified the April Settlement by eliminating the broad-based energy efficiency programs for residential and commercial customers and replacing those with a much smaller program that benefits only a segment of, and not all, residential consumers. Vectren and OPAE, the other parties to the April Stipulation, each received substantial benefits from the modifications to the Stipulation: Vectren received one of the first-in-the-nation automatic rate increase decoupling mechanisms; and OPAE received $2 million for a low income weatherization program. With these PUCO modifications, the stipulated result no longer represented a balance of interests of all adverse parties.

Not all parties to the stipulation accepted the PUCO's modifications. On December 8, 2006, pursuant to its rights under paragraph 13 of the April Settlement, the OCC filed a Notice of Withdrawal and Termination from the April Stipulation. In its Notice of Withdrawal, OCC exercised its right to a hearing, consistent with the language in the April stipulation. On December 21, 2006, a revised Stipulation and Recommendation was filed by VEDO, OPAE, and the Staff ("Signatory Parties") which requested the Commission to affirm the September 13, 2006 *Opinion and Order*. The Signatory Parties to the December 21, 2006 Stipulation urged the Commission to approve the December 21 Stipulation based on the record in the proceeding and without further hearing. These Signatory Parties, without OCC, did not represent the interests of Ohio's residential consumers -- and so it was not especially surprising that they found it possible to "settle" for huge automatic rate increases (via decoupling) for 293,000 consumers in southwest Ohio.

On December 29, 2006, the Attorney Examiner issued an entry addressing the numerous issues raised by the outstanding pleadings. The December 29th *Entry* determined that the Stipulation of April 7, 2006 should be terminated, pursuant to OCC's Notice of Withdrawal and Termination. **Additionally, the Attorney Examiner ordered "[i]n accordance with Section 4929.05, Revised Code, a hearing is required for consideration of the alternative rate plan."**[2] The Attorney Examiner also determined that the Signatory Parties' request for approval of the December 21 Stipulation would not

[2]Attorney Examiner Entry at page 2, paragraph 6 (December 29, 2006).

be approved.[3] The Signatory Parties were ordered to file "a document" that sets out all the terms of the December 21 Stipulation.[4] Finally the December 29th *Entry* established that "[t]he stipulation may be considered a request by the signatory parties to reopen the proceeding."[5]

Interlocutory appeals of the December 29, 2006 Attorney Examiner *Entry* were filed by OCC and Vectren/OPAE. Notably, in the Joint Motion for Certification joint applicants argued that an additional hearing was unnecessary because a hearing had already been conducted and sufficient record evidence submitted.[6] Further, joint applicants suggested the scope of the hearing be limited to a Civil Rule 60(B) proceeding.[7] There was no argument presented by joint applicants that holding a hearing would be inconsistent with, and impermissible under, R.C. 4929.07.

On January 10, 2007, the Attorney Examiner issued an entry which held, *inter alia,* that the December 29 *Entry*, ordering that a hearing be held, did not qualify as a ruling from which direct appeal could be taken to the Commission under 4901-1-15(A).[8] The Attorney Examiner then concluded that whether a hearing should be held did not involve a new or novel question of law or policy under 4901:1-15 (B) Ohio Adm. Code

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[3] Attorney Examiner Entry (December 29, 2006).

[4] Attorney Examiner Entry at page 2, paragraph 6 (December 29, 2006).

[5] Id.

[6] See Joint Motion of Vectren/OPAE at 12, 15 (January 2, 2007).

[7] Id at 17.

[8] Attorney Examiner Entry at 4 (January 10, 2007).

because similar circumstances had been presented before in the East Ohio Gas case.[9] Consequently, it denied Vectren's request for certification on the issue of whether a hearing should be held and the issue never reached the Commission.[10] The January 10 Attorney Examiner *Entry* also clarified that the decision to reopen the proceeding was not made pursuant to Rule 4901-1-34 Ohio Adm. Code, and therefore the limitations contained in 4901-1-34(B) regarding evidence would not apply. The *Entry* set up a pre-hearing conference for January 22, 2007, to "reiterate the scope of the hearing."[11]

On January 12, 2007, VEDO, OPAE and the PUCO Staff filed an "Amended Stipulation," (without including OCC in the negotiations) apparently in response to the Attorney Examiner's directive to set out the terms of the December 21 Stipulation. As with their December 21st Stipulation, it was not especially surprising that the Signatory Parties (without OCC) found it possible to "settle" for huge automatic rate increases (via decoupling) for 293,000 consumers in southwest Ohio, considering that they do not represent the interests of Vectren's 293,000 residential consumers as does OCC.

On January 22, 2007, a pre-hearing conference was held. At no time during the pre-hearing conference did Vectren or OPAE raise any objection that going forward with a hearing was impermissible under R.C. 4929.07 as the joint appellants now claim in their joint appeal. Rather, their response was to generally state that OCC had no right to any hearing.

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[9] *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.

[10] The only issue that reached the Commission for consideration was the limited issue of whether the Company should be permitted to continue the accounting treatment authorized by the Commission in the September 13, 2006 Opinion and Order, Attorney Examiner Entry at 5 (January 10, 2007).

[11] *Id.*

At the pre-hearing, OCC presented a proposed procedural schedule. The Signatory Parties indicated their objections to the proposed procedural schedule. OCC also requested that the Attorney Examiner order expedited responses to discovery. The Company did not object to this request, but indicated that the scope of the discovery would need to be agreed upon. Some discussion occurred on what the appropriate scope of the proceeding should encompass. It became clear from such discussion that parties had widely divergent perspectives on the permissible scope of the upcoming evidentiary hearing. The Attorney Examiner indicated the PUCO would issue an entry in the near term to address the scheduling of the hearing and the scope of the proceeding.

On January 23, 2007, the Attorney Examiner issued the *Entry* setting forth the schedule for the proceeding and the scope of the hearing. Both OCC and Vectren/OPAE filed for interlocutory review of this *Entry*.

III. ARGUMENT

A. Joint applicants' interlocutory appeal fails to satisfy 4901-1-15(B)(1) and (2) and should not be certified.

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

> (B) Except as provided in paragraph (A) of this rule,[12] 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

[12] 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.

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....

Joint applicants claim that their appeal should be certified because it presents a new and novel question of interpretation -- whether a hearing can be had where the Company has noticed an intent to implement an alternative regulation proceeding. Additionally, joint applicants appear to claim that they have suffered prejudice and expense as a result of the Attorney Examiner *Entry*. Joint applicants indicated that they are concerned that timely assistance to low income customers is being delayed as a result

of the ensuing legal proceedings associated with OCC's Notice of Termination and Withdrawal.[13]

Joint applicants' claims of a new and novel question of interpretation being presented fall short of satisfying the requirements under Ohio Adm. Code 4901-1-15(B)(1). While the alternative regulation provisions of R.C. 4929 et seq. have been relatively unused, this Commission has overseen R.C. 4929 exemption cases.[14] Moreover, the Commission has presided over many alternative regulation proceedings in the telephone industry that are circumscribed by a statutory scheme analogous to R.C. 4929.[15]

Furthermore, there is no question to interpret, as explained in the following sections where OCC describes why the appeal should be dismissed. As OCC explains, Vectren did not file the required notice to implement the alternative plan and, in any event, waived it's opportunity to file such as notice when it signed the settlement containing paragraph 13 that allowed OCC to terminate the settlement and go to hearing. The joint applicants' appeal is a moot issue.

Nor does the prejudice and expense alleged by joint applicants 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

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[13] Joint Motion for Certification of an Interlocutory Appeal of the Attorney Examiner's Entry Dated January 23, 2007 at 15 (January 29, 2007) ("Joint Motion for Certification").

[14] *See* for example, *In the matter of the Application of The East Ohio Gas Company dba Dominion East Ohio for the Approval of a Plan to Restructure its Commodity Service Function*, Case No. 05-474-GA-ATA.

[15] *In the matter of the application of Cincinnati Bell Tele- phone Company for approval of an alternative form of regulation and for a threshold increase in rates*, Case No. 93-0432-TP-ALT; *In the matter of the application of The Western Reserve Telephone Company for approval of an alternative form of regulation.*

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."

Joint applicants have failed to show how an immediate determination by the Commission is needed to prevent undue prejudice or expense to the parties. In fact it would appear that joint applicants have taken operational steps to mitigate the potential prejudice and further expense. The new low income program has been suspended.[16] Incremental funding by Vectren has not been deployed.[17] Additional conservation programs have not been initiated.[18] Collaborative meetings have ceased.[19] Moreover on the legal side of things, Vectren has obtained Commission authority to continue its "deferral accounting" which would facilitate the implementation of a decoupling rider in fourth quarter 2007 (if the PUCO allows such rate increases over OCC's objection).[20] Surely, any claims of undue prejudice and expense to joint applicants are exaggerated and not well founded.

On the other hand, OCC will note that the prejudice to residential consumers from facilitating Vectren's claims would be profound. Vectren has "settled" with the PUCO

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[16] There are current weatherization programs being provided to Vectren's low income customers. These programs include the federally funded HWAP programs and Vectren funded low income conservation programs pursuant to the stipulation approved in the last Vectren rate case.

[17] Joint Motion for Certification of an Interlocutory Appeal of the Attorney Examiner's Entry Dated January 23, 2007 at 15 (January 29, 2007) ("Joint Motion for Certification").

[18] Id.

[19] Id at 20.

[20] Order of the Commission, (January 10, 2007).

Staff and OPAE for a license to print automatic rate increases into its bills to 293,000 consumers. What Vectren seeks the PUCO to do (or re-do) via the automatic rate increase mechanism of decoupling (with no corresponding benefit of DSM) is unprecedented in Ohio regulation and not contemplated in Ohio law.

B. If the appeal is certified, then it should be dismissed because the joint applicants failed to file with the PUCO the notice required by R.C. 4929.07(A)(1) and therefore their claims are "moot" and they "lack the requisite standing to raise the issues presented," under Ohio Adm. Code 4901-1-15(E)(2).

The Joint Applicants claim that there cannot be a "procedural process," such as a hearing, after the PUCO's "approval of an alternative regulation plan...." Joint Appeal at 15. The linchpin of the Joint Applicants' interlocutory appeal is their claim that Vectren sealed the deal on the alternative plan by supposedly giving notice of acceptance of the plan[21], pursuant to R.C. 4929.07(A)(1). Joint Appeal at 13. The Joint Applicants theorize that the notice was given by a Vectren Form 8-K filing with the Securities and Exchange Commission ("SEC") or by Vectren's filing of tariffs at the PUCO or by a "Response" to OCC's Application for Rehearing or by two later settlements that were signed without OCC and that reflect further efforts by the stipulators including Vectren and OPAE to collect lots of money from 293,000 Ohio consumers via automatic rate increases.

R.C. 4929.07(A)(1) is a key component of the General Assembly's statutory scheme for alternative regulation. The statute requires that, after a PUCO order arranging for an alternative regulation plan, the natural gas utility must take, among other things,

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[21] Elsewhere in this Memorandum OCC explains why Vectren waived the right it otherwise may have had to file this notice.

two actions to implement the plan. The statute requires the utility to file at the PUCO (1) a "notice of intent to implement..." the plan and (2) a "copy" of its revised tariffs. Vectren addressed step number two, filing a revised tariff.[22] Not so with step number one. Vectren never filed the notice required by law.

That Vectren never filed the notice required by law is obvious. A quick review of the docket card on the PUCO's website shows there is no notice docketed. Of the filings listed above that Vectren references, none is the notice. Indeed, it's revealing of an attempt to fashion a notice out of non-notice filings that Vectren would perceive the need to list five filings as the supposed statutory notice.

The SEC filing at which Vectren grasps is not the statutory notice. It is a securities-related filing at the SEC, whereas R.C. 4929.07(A)(1) requires a notice filing that is specific to implementation in the alternative plan case at the PUCO.

Next, the tariff filing that Vectren claims is notice is not notice. It is one of the two steps under the statute for implementing a plan. As referenced in R.C. 1.42, the law means what it says and the law says that the tariff filing is separate from the notice filing. As referenced in R.C. 1.47(B), the entire statute is intended to be effective -- so that both notice and tariffs are requirements. Tariffs do not equal notice.

Vectren's Response to OCC's Application for Rehearing likewise is not notice. It is not titled as notice such that members of the public or others would understand that it is the notice to implement the plan that will cost consumers automatic rate increases. It contains no specific designation of notice. It is a response designed to deflect the Application for Rehearing that was filed by OCC to obtain the benefit of the bargain that

[22] OCC does not concede that the filed tariff constitutes all tariff language that should be filed.

Vectren and OCC signed. Even if it were a notice, it would be an untimely notice under R.C. 4929.07(A)(1). Under the law, there are only thirty days after an order to file the notice. Vectren's Response was filed about forty days after the Order, ten days too late under law.

For similar reasons, the two later stipulations that Vectren signed without OCC and that Vectren would now fashion as notices are not notices. They are not anything other than what they purport to be -- stipulations -- and they certainly are not notices as contemplated in the law. Similar to the above Response, Vectren also had timing challenges with its supposed notice by way of the two later stipulations. R.C. 4929.07(A)(1) only allows twenty days to file the statutory notice after a rehearing entry. Vectren's claimed notices by way of the stipulations were more than forty and sixty days after the Entry on Rehearing, meaning more than twenty and forty days late, respectively. These late filings for the alleged notices by stipulation and the response just underscore the improvised nature of Vectren's claim that it filed any notice.

The appeal should be dismissed.

C. If the appeal is certified, then the commission should affirm the Attorney Examiner's Entry, under Ohio Adm. Code 4901:1-15(E)(1) because the joint applicants' notice to implement, even if perfected, related to a plan of alternative regulation that is subject to OCC's rights, inter alia, to a hearing.

Assuming *arguendo* that Vectren has somehow complied with the provisions of R.C. 4927.01(A) and constructively filed a notice of intent to implement an alternative rate plan, joint applicants' appeal should still fail. As discussed below, the Commission should affirm, pursuant to Ohio Adm. Code 4901:1-15(E)(1), the Attorney Examiner's *Entry* permitting discovery, testimony, and a prior approved hearing to go forward. The

Entry facilitating the February 28 hearing is consistent with the implementation of the alternative regulation plan adopted by the Commission in its September 13, 2006 *Opinion and Order.* That *Opinion and Order* approved an alternative regulation plan subject to OCC's right to pursue a hearing, prior to the materially modified plan's implementation.

In approving the Company's alternative regulation plan, the Commission specifically adopted the April Stipulation reached between OCC, OPAE, and Vectren. Part of the April Stipulation, paragraph 13, established rights of parties to withdraw from the stipulation if the Commission materially modified the Stipulation. Additionally, paragraph 13 of the Stipulation established rights, following a notice of withdrawal, to proceed to a hearing, "as if the Stipulation had never been reached." Notably, the Commission did not amend or modify the April Stipulation as it pertained to paragraph 13. OCC, based on other modifications by the Commission, withdrew from the Stipulation and pursued a hearing, consistent with its paragraph 13 rights. In the December 29, 2006 *Entry,* the Attorney Examiner found OCC's withdrawal to be justified, and determined that the stipulation constituting the alternative rate plan was terminated.[23] Further the Attorney Examiner found that the "Commission cannot approve a stipulation that by its own provisions has been terminated."[24] With the alternative rate plan no longer in effect, by virtue of the terminated stipulation, the Attorney Examiner treated the December 21 partial stipulation as an alternative rate plan proposal, and ordered a hearing to consider that alternative rate plan.

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[23] Attorney Examiner Entry at page 2, paragraph 6 (December 29, 2006).

[24] Id.

Any notice of intent that would have been filed by Vectren[25] would of necessity be notice of the alternative rate plan adopted by the Commission in its *Opinion and Order.* That alternative regulation plan contained a provision permitting a hearing if material modifications to the plan were made. The alleged notice of intent to implement the plan -- the 8K filing, the tariff sheets, the "Response" to OCC's Application for Rehearing, and the two stipulations -- all pertained to the alternative regulation plan that was later suspended by Attorney Examiner *Entry*, based upon the Commission's material modifications and OCC's exercise of it right to withdraw. That alternative regulation plan, allegedly noticed for implementation, preserves OCC's right to pursue a hearing prior to its implementation.

Hence, upholding the Attorney Examiner *Entry* here recognizes that the alternative rate plan approved in the September 13 *Opinion and Order,* even if it were properly noticed for implementation, is undeniably subject to OCC's right to a hearing prior to its implementation. Moreover, affirming the *Entry* here, is consistent with the Attorney Examiner's earlier conclusions in its December 29, 2006 *Entry,* conclusions that withstood the joint applicants' January 2 interlocutory appeal. For these reasons, the Commission should affirm the Attorney Examiner *Entry*, pursuant to Ohio Adm. Code 4901:1-15(E)(1).

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[25] OCC is not conceding that the notice of intent to implement the alternative rate plan was indeed perfected. See discussion supra.

D. If the appeal is certified, then it should be dismissed because the joint applicants have waived their rights to raise statutory arguments against the hearing and therefore "lack the requisite standing to raise the issues presented," under Ohio Adm. Code 4901-1-15(E)(2)(b).

The gravamen of joint applicants' arguments is centered on R.C. 4929.07. Joint applicants claim that the commission approved the alternative regulation plan by their September 13, 2006 *Opinion and Order*. Joint applicants then argue that subsequent to the *Opinion and Order*, Vectren made a number of filings, including its rider schedules, that could be construed as conveying its notice of intent to implement the alternative regulation plan (which is a key component for compliance with R.C. 4929.07(A)(1) to have an alternative regulation plan in effect).

Joint applicants allege that, once its purported notice of intent to implement the plan had been filed, under R.C. 4929.07, the Commission has only two options: to either a) approve the filings as consistent with the approved alternative regulation plan or b) disapprove the tariff but only if it was materially different from the approved plan. Joint applicants propose that holding a hearing is not a permissible response to Vectren's notice of intent to implement. The claims made by joint applicants suffer from at least two obvious and fatal defects.

First, the joint applicants fail to explain how the language in the stipulation, allowing OCC to withdraw and pursue a hearing, can square with claims that Vectren could and allegedly did file its notice of intent to implement the alternative regulation plan. Paragraph 13 of Vectren's stipulation with OCC must be read to the effect that Vectren waived its rights to implement the alternative rate plan in the event that a party withdrew from and terminated the stipulation and asserted its right to a full evidentiary

hearing. Otherwise, Vectren's unilateral action (filing of a notice of intent) could circumvent and render meaningless the provisions in the stipulation. The Signatory Parties, including OCC, would never have agreed to or intended such an arbitrary result -- and the PUCO never adopted such a result in its Order.

Second, Vectren's claim that a hearing is inconsistent with R.C. 4929.07 could have and should have been raised by joint applicants in early December when the issue of a hearing was first raised. This issue was first addressed in OCC's December 8, 2006 Notice of Withdrawal and Termination, where OCC asserted its right to a hearing under the terms of the stipulation. Remarkably, joint applicants filed no response to OCC's December 8, 2006 pleading and never suggested that the alleged "notice" by Vectren trumped their own signatures on the stipulation with OCC.

Then, further opportunities arose for joint applicants to assert statutory arguments when, on December 21, 2006, joint applicants filed a new Stipulation and Recommendation in this proceeding. That document explicitly addressed procedural process, including whether a hearing should be held. The December 21 Stipulation stated that no hearing was needed and that the Commission should merely approve the December 21 Stipulation on a streamlined basis.[26] Again, there was an opportunity to make arguments against a hearing based on the alleged R.C. 4929.07 grounds, yet no such arguments were made.

On December 29, 2006, the *Entry* issued by the Attorney Examiner determined, *inter alia*, that a hearing would be had. Although joint applicants did file an Interlocutory Appeal of that *Entry*, and argued against holding a hearing, they failed to present R.C.

[26] Revised Stipulation at 3,5 (December 21, 2006).

4929.07 arguments against the hearing. On January 10, 2007, joint applicants filed, in response to the December 29, 2006 *Entry*, a Revised Stipulation which again maintained that the Commission should streamline the approval of the Stipulation. No mention was made of R.C. 4929.07. On January 22, 2006 a pre-hearing conference was held to "reiterate the scope of the hearing." At the pre-hearing, although joint applicants asserted OCC had no right to a hearing, joint applicants raised no objections to the hearing based on R.C. 4929.07.

Now, almost two months after the issue of a hearing was first raised, joint applicants belatedly claim that a hearing is not permissible under R.C. 4929.07. Joint applicants have clearly missed the train pulling out of the station, not once, not twice, but four times. The failure to object to a hearing on R.C. 4929.07 grounds, in a timely manner constitutes waiver of that issue by joint applicants.

The doctrine of constructive waiver of issues is based upon the doctrine that courts should be provided an opportunity to act while errors can be avoided or corrected. *Taqwiin v. Johnson*, 2000 U, S, App. Lexis 22254 (6th Cir. C.A 2000). Issues not pleaded nor adequately raised or preserved are deemed waived. *Borgmann v. Anderson*, 1999 U.S. App. Lexis 8784 (6th Cir. C.A. 1999). These doctrines have long been recognized by the Public Utilities Commission: ''....[this] issue is not an issue properly before the Commission in this case. *The reason is because it was not timely raised. The complainant had an opportunity to, but did not.... "Mraovich v. Tomahawk Utilities, Inc.*, Ohio PUC Lexis 31 (1991) (Emphasis supplied).

Vectren and OPAE had numerous opportunities to challenge whether it is appropriate to hold a hearing in this case. Because they did not raise their R.C. 4929.07

objection in a timely manner it is deemed waived by operation of law. It is just too late now to raise issues of the propriety of the hearing and set parties scurrying back to square one.

In sum and pursuant to Ohio Adm. Code 4901-1-15(E)(2)(b), this Commission should dismiss the appeal because Vectren lacks the requisite standing to raise the issues presented. First, Vectren waived any right in the circumstances of this case to implement the plan that resulted from its settlement with OCC and prevent a hearing, when it agreed that any party could terminate the settlement under paragraph 13 and OCC so terminated. Second, joint applicants' eleventh hour discovery of R.C. 4929.07 cannot overcome months of neglect of that statute and the waiver of purported rights thereunder. To now permit joint applicants to use a statute they repeatedly did not raise to undo the finding of the Attorney Examiner in an earlier Entry--that a hearing is to be held--would be unreasonable and inconsistent with law and precedent. Joint applicants' appeal should be dismissed.

IV. CONCLUSION

Joint applicants' motion for certification fails to meet the criteria for immediate appeal to the Commission. Joint applicants also fail to meet the criteria for certification because the issue presented is not new or novel and Vectren will not experience undue prejudice or expense if the Attorney Examiner's *Entry* is reversed. In fact it would appear that joint applicants have taken operational and legal steps to mitigate the potential prejudice and further expense.

Also, joint applicants have waived their right to raise objections at actions (or failures to act) by Vectren: this time to the holding of a hearing. This waiver is based on two premises: first that Vectren waived its right to object to object to the hearing based on the language in the April stipulation; and second, that Vectren's objections on R.C. 4929.07 grounds were not timely. In addition, Vectren never filed the notice under R.C. 4929.07(A)(1) that is the basis for its claim that the alternative rate plan is in effect. Moreover, even if it is determined that Vectren constructively filed its notice of intention to implement the alternative regulation plan, that notice was one relating to an alternative regulation plan incorporating the April Stipulation and the paragraph 13 rights of parties to withdraw and proceed to hearing. Consequently, the joint applicants' appeal should be dismissed and the Attorney Examiner's *Entry* affirmed.

With the material modification of the April stipulation by the Commission, all bets were off and Vectren's filing could be litigated on the merits for the plain reason that it, and the position of Staff, raised disputed, genuine issues of material fact. OCC exercised its rights to withdraw from the stipulation and pursue issues "as if the stipulation had never been reached." One of the rights preserved by the April Stipulation was the right to a hearing, a right that Vectren, OPAE, and OCC agreed to, and the Commission approved. It is this right to a hearing that joint applicants once again oppose in their interlocutory appeal. It is, unfortunately, a sad day for settlements before the PUCO when those that signed the settlement do not honor its plain meaning and there is continued litigation against the plain meaning that the PUCO will hold a hearing.

There will be great harm to Vectren's 293,000 customers if the alternative regulation plan approved by the Commission in its Opinion and Order, and recast as the

December 21 Stipulation, is permitted to stand as Vectren and OPAE seek. Vectren has "settled" with OPAE for a license to print automatic rate increases into its bills to 293,000 consumers. What Vectren seeks the PUCO to do (or re-do) via the automatic rate increase mechanism of decoupling (with no corresponding benefit of DSM) is unprecedented in Ohio regulation and not contemplated in Ohio law. The appeal should be denied.

Respectfully submitted,

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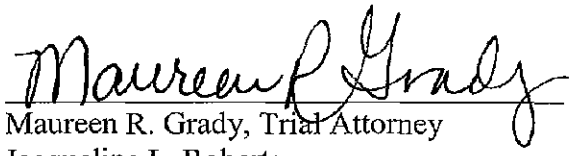
CONSUMERS' COUNSEL



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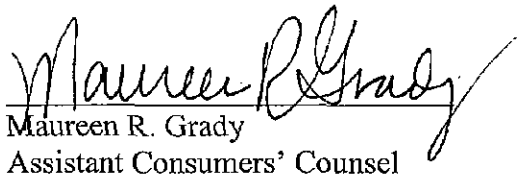
CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memorandum Contra Vectren and OPEA's Joint Motion for Certification of an Interlocutory Appeal of the Attorney Examiner's Entry dated January 23, 2007 by the Office of the Ohio Consumers' Counsel* was provided to the persons listed below electronically this 5th day of February 2007.



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