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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 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

VECTREN ENERGY DELIVERY OF OHIO, INC.'S MEMORANDUM CONTRA
APPLICATION FOR REVIEW AND INTERLOCUTORY APPEAL
BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Samuel C. Randazzo
Gretchen J. Hummel
Lisa G. McAlister
Daniel J. Neilsen
McNees Wallace & Nurick, LLC
21 East State Street, 17th Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Fax: (614) 469-4653
sam@mwncmh.com
ghummel@mwncmh.com
lmcAlister@mwncmh.com
dneilsen@mwncmh.com

February 5, 2007

Attorneys for Vectren Energy
Delivery of Ohio, Inc.

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Pursuant to Ohio Administrative Code ("O.A.C.") 4901-1-15(D), Vectren Energy Delivery of Ohio, Inc. ("VEDO") hereby submits this Memorandum Contra Application for Review and Interlocutory Appeal by the Office of the Ohio Consumers' Counsel ("OCC") filed on January 29, 2007, and requests that the Public Utilities Commission of Ohio ("Commission") deny OCC's application for the reasons discussed below.

I. BACKGROUND

On December 29, 2006 and January 10, 2007, the Attorney Examiner issued Entries, in which he determined that a hearing would be held on the Stipulation and Recommendation filed on December 21, 2006 ("*December 21 Stipulation*") and the Amended Stipulation and Recommendation filed on January 12, 2007 ("*Amended*

Stipulation" or *January 12 Stipulation*")¹ and a pre-hearing conference would be held on January 22, 2007, at which a procedural schedule and the scope of the hearing would be discussed.² The scope of the hearing and the procedural process were indeed discussed at the January 22, 2007 pre-hearing conference. As a result of that discussion, VEDO believed that the scope of the proceeding going forward would be limited to new issues raised by the *December 21 Stipulation* (and *Amended Stipulation*) not already contemplated in the *September 13 Opinion and Order* and the Entry on Rehearing issued November 8, 2006 ("*November 8 Rehearing Entry*").

On January 23, 2007, the Attorney Examiner issued an Entry ("*January 23 Entry*") establishing not only a date for an evidentiary hearing, but dates for new discovery and the filing of testimony, as well. The *January 23 Entry* was silent on the scope of the hearing, as well as the scope of the newly permitted discovery and testimony.

On January 29, 2007, VEDO and OPAE filed a Joint Motion for Certification of an Interlocutory Appeal and OCC filed an Application for Review and Interlocutory Appeal ("*Appeal*") of the *January 23 Entry*. This is VEDO's response to OCC's *Appeal*.

OCC's *Appeal* asserts that: 1) "[t]he Commission cannot approve the January 12, alternative regulation plan under R.C. 4929.05; 2) if Section 4949.05, Revised Code, is applied, OCC is entitled to a number of procedural requirements spelled out in OCC's

¹ The contents of the *December 21 Stipulation* and the *Amended Stipulation* are the same, and are identical to the content of the Commission's Opinion and Order issued on September 13, 2006 ("*September 13 Opinion and Order*").

² The procedural background prior to this is set out in the Joint Motion for Certification of An Interlocutory Appeal (at pages 8-14) filed by VEDO and OPAE and is fully incorporated herein by reference.

Appeal; 3) an increase in the scope of the hearing requires a greater time frame for preparation.

II. ARGUMENT

OCC's claim that its *Appeal* should be heard without certification required by the Attorney Examiner required by Rule 4901-1-15(A)(2), O.A.C., because it "terminates OCC's rights to participate in the proceeding" is without merit. Since the day VEDO's Application ("*Conservation Application*") was filed on November 28, 2005, including the day the Attorney Examiner announced the decision to consider VEDO's *Conservation Application* as an alternative regulation plan controlled by Section 4929.05, Revised Code, OCC has had the choice to exercise all the rights and responsibilities of a full party to this proceeding, even before its intervention was approved on January 30, 2006. OCC now seeks to expand the scope of this proceeding to allow it to start over as if it had no opportunity to conduct discovery, present testimony, enter into a stipulation, and participate in a hearing on that stipulation. OCC has already been heard on its challenge to the alternative regulation plan approved by the Commission in the *September 13 Opinion and Order* by virtue of its Application for Rehearing and the Commission's *November 8 Rehearing Entry*.³ Yet, even the scope of this proceeding going forward suggested by VEDO and OPAE in their Joint Motion for Certification of Interlocutory Appeal would expand the rights to which OCC is entitled in this proceeding

³ OCC asserts, following its Notice of Termination and Withdrawal from Stipulation ("*Notice of Termination*"), filed December 8, 2006, that it was entitled to a hearing on the merits of that Stipulation. OCC's *Appeal* at 3. To the contrary, the *April 10 Stipulation* provides that, in the event of a party's withdrawal, the Stipulation becomes null and void. In fact, the OCC already had a hearing on the merits of the *April 10 Stipulation* on April 24, 2006, the Commission consideration of which resulted in the *September 13 Opinion and Order* and the *November 8 Rehearing Entry*.

by suggesting a procedure on an alternative regulation plan the Commission has already approved as lawful and supported by the record in its *September 13 Opinion and Order* and *November 8 Rehearing Entry*.⁴ OCC's claim that its rights to participate in this proceeding are being terminated is specious.

OCC's assertion that certification of its *Appeal* should be granted to prevent the likelihood of undue prejudice is likewise without merit. The only prejudice or harm resulting from the continuation of this proceeding is that resulting from the delay of assistance to low-income customers during this winter heating season caused by OCC's pursuit of continued litigation.⁵

A. OCC's challenge to the Commission's authority to consider VEDO's Conservation Application⁶ pursuant to Section 4929.05, Revised Code is untimely.

There is nothing new or novel about OCC's argument that the Commission cannot consider VEDO's *Conservation Application* pursuant to Section 4929.05, Revised Code.

OCC filed no interlocutory appeal from the Attorney Examiner's February 7, 2006, decision that VEDO's application would be considered by the Commission as an alternative regulation plan controlled by Section 4929.05, Revised Code. Subsequently,

⁴ See VEDO and OPAE Joint Motion for Certification of Interlocutory Appeal at 21 (January 29, 2007).

⁵ As previously indicated to the Commission, VEDO and OPAE have concluded that the risks associated with OCC's *Notice of Termination* and the ensuing discussion of procedures require a delay of the provision of the assistance programs for low-income customers originally planned to be available effective January 1, 2007.

⁶ OCC's representation that the *January 23 Entry* treats the *Amended Stipulation* as an alternative regulation plan is puzzling. *OCC Appeal* at 9. The *Amended Stipulation* is simply one of several notices to the Commission that VEDO, OPAE, and Staff intend to implement the alternative regulation plan approved in the Commission's *September 13 Opinion and Order* and confirmed in its *November 8 Rehearing Entry*.

OCC indicated that it had no objection to the incorporation of certain of the standard filing requirements ("SFRs") from VEDO's recent rate case, Case No. 04-571-GA-AIR, in the record herein or the waiver of Rules 4901:1-19-05 and 4901:1-10-03(B), O.A.C., as approved by Entries dated March 16, 2006 and April 5, 2006, respectively.

On March 20, 2006 and prior to the filing of the *April 10 Stipulation*, OCC filed the testimony of Wilson Gonzalez, in which OCC itself relies on an alternative regulation statute to argue in favor of its position in this case. At page 20 of his prepared testimony, Mr. Gonzalez, acting on advice of counsel, referenced Section 4929.02(A), Revised Code (part of the alternative regulation Chapter) as providing a statutory or regulatory mandate in favor of conservation programs. At page 27 of his prepared testimony, Mr. Gonzalez stated that "[t]he OCC believes that the SRC [now the SRR] should only be adopted if the Company is willing to make a substantial multi-year commitment to energy efficiency." Of course, VEDO has now notified the Commission that it is willing to implement an alternative regulation plan that includes a commitment by VEDO – not its customers – to provide \$2,000,000 to fund energy efficiency programs. This testimony sponsored by OCC is part of the record evidence which the Commission had before it when it issued its *September 13 Opinion and Order* in this contested proceeding.

Regardless, OCC first objected to the Commission's consideration of VEDO's *Conservation Application* pursuant to Section 4929.05, Revised Code, in its October 13, 2006 Application for Rehearing and its January 3, 2007 Application for Certification and Interlocutory Appeal. In its *November 8 Rehearing Entry*, the Commission denied OCC's objection because of OCC's failure to appeal the February 7, 2006 Entry. In his

January 10 Entry, the Attorney Examiner denied OCC's challenge on the basis that it was, once again, untimely, indicating that OCC's *Notice of Termination* did not provide it a new opportunity to raise the issue of the Commission's choice of authority in this proceeding. January 10 Entry at 5-6.

As VEDO has previously indicated, the significance is whether there exists any authority for the Commission's consideration and determination of VEDO's *Conservation Application* in this proceeding. VEDO has previously supported the Commission's decision to consider its *Conservation Application* and the *April 10 Stipulation* pursuant to Section 4929.05, Revised Code, consistent with the record incorporated from VEDO's most recent rate case, as being appropriate and lawful. VEDO has also submitted that authority to approve the Sales Reconciliation Rider ("SRR") is supported not only by Section 4929.11, Revised Code (as filed by VEDO and asserted by OCC), but also by Section 4909.18, Revised Code, pursuant to which it can be considered either as the Section 4908.18 application contemplated by Section 4929.05, Revised Code, or as a stand-alone application. If considered as a stand-alone application **not** for an increase in rates, the Commission may approve it without hearing. Finally, the Commission could have exercised its authority in Sections 4906.26 and 4905.37, Revised Code, to consider and remedy the adequacy of the utility's opportunity to realize its revenue requirements.

B. The Commission's consideration of VEDO's *Conservation Application* is in compliance with the statutory procedural requirements of Section 4929.05, Revised Code.

As noted above, OCC's arguments are based on its characterization of the *December 21 Stipulation* (and the substantively identical *Amended Stipulation*) as a

proposed alternative regulation plan. Both of these documents are nothing more than the notification of VEDO, OPAE, and Staff that they intend to implement the alternative regulation plan approved by the Commission in its *September 13 Opinion and Order* and *November 8 Rehearing Entry*. The Commission made it clear twice that the plan it approved was supported by the record in this proceeding, a record that included the original *Conservation Application*, multiple testimony filings, a stipulation, an evidentiary hearing, and a lawfully issued Commission order. Form aside, the issue before the Commission now, raised by OCC's *Notice of Termination* and the subsequently filed *December 21 Stipulation* and the *Amended Stipulation*, is the lawfulness of the *September 13 Opinion and Order* as confirmed by the *November 8 Rehearing Entry*.

OCC would restart the process as if VEDO's acceptance of the Commission's decision were a new application. OCC claims that its *Notice of Termination*⁷ and

⁷ OCC's reliance on an East Ohio Gas Company case to support its arguments related to the scope of hearing to which it is entitled is misplaced. The law, facts and circumstances that the Commission considered in *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* are very different from those presented in this case. OCC had appealed to the Ohio Supreme Court a Commission decision in the 1996 gas cost recovery ("GCR") and long term forecast report ("LTFR") cases ("96 GCR Appeal") based upon the claim that the Commission failed to take into account the effect of the merger of East Ohio Gas Company ("EOG") and West Ohio Gas Company on the resulting GCR rate of EOG. OCC claimed that the Commission had deferred the specific issue from a prior case to the 96 GCR case and that the Commission subsequently erred by finding (in the 96 GCR case) that the merger issue had been previously decided. While the 96 GCR Appeal was pending, the 1997 GCR and LTFR cases for EOG were proceeding and were consolidated by the Commission. OCC, the Commission's Staff and EOG submitted a stipulation that purported to resolve all of the issues in the 1997 GCR/LTFR proceeding but included a paragraph that said "Unless the Ohio Supreme Court reverses and remands... the issue of the combination of the GCR rates, this agreement ...settles all outstanding issues... regarding the reasonableness of the combination of the GCR rates...." *Id.*, Stipulation at 4 (October 27, 1998). The PUCO adopted the stipulation but ruled that OCC could make its case as to the merger-impact issue or any other issue impacting in the 1997 GCR/LTFR proceeding. The Commission made the ruling because OCC had argued extensively that the Commission had denied OCC a hearing on the merger issue. However, as a result of the Commission's ruling, OCC and EOG jointly withdrew from the stipulation and filed a new stipulation that included the following, "With the exception of the issue reserved for consideration and/or litigation in paragraph seven of this stipulation...." *Id.*, Stipulation at 6 (December 4, 1998). Paragraph seven was a restatement of the exception for a remand from the Supreme Court. In response to the second stipulation, the Commission issued a supplemental order that held in abeyance its ruling on the stipulation and directed a hearing to be held in an effort to provide OCC with the hearing it claimed it was denied. The PUCO noted that the scope of the hearing did not change -- at issue would

Commission consideration of the *December 21 Stipulation* and *Amended Stipulation* require compliance with all the procedural requirements associated with an application for an alternative regulation plan.⁸ *OCC Appeal* at 10-19. Since both of these stipulations simply indicate the signatory parties' intention to implement the alternative regulation plan approved by the Commission, this, of course, would subject VEDO to burden of proof standards and procedural requirements in support of a Commission decision which is not consistent with either its original *Conservation Application* or its settlement position, a consequence which is, of course, absurd. The issues facing the Commission at present are no different than that it faced when considering OCC's *Application for Rehearing*.

Contrary to OCC's argument of deficiency of process, all of the following things have occurred in this proceeding:

1. With OCC's concurrence, the SFRs from Case No 04-471-GA-AIR were incorporated into this record, and the remaining filing and notice requirements of Rule 4901:1-19-05 and 4901:1-10-03(B) were waived, pursuant to entries dated March 16, 2006 and April 5, 2006, respectively.
2. A procedural schedule was established by Entry dated February 27, 2006, affording all parties the opportunity to file testimony addressing VEDO's

be all issues in the 1997 GCR/LTFR case including the reasonableness of the combination of the GCR rates of East Ohio and the former West Ohio Gas Company. At the hearing, there was testimony presented by one witness in support of the second stipulation. OCC did not present any witnesses or evidence, but did reserve its right to present evidence if the Supreme Court remanded the case back to the Commission. Ultimately, the Commission issued a Second Supplemental Order adopting the stipulation.

⁸ OCC abandons this argument on page 20 of its *Appeal* when it asserts that the terms of the *April 10 Stipulation* guarantee it the opportunity to fully litigate VEDO's *Conservation Application* in this case. This argument ignores the fact that the issues in this case were fully litigated through the filing of testimony and the hearing held in this case on April 24, 2006.

Conservation Application. OCC and Staff⁹ filed testimony in response to VEDO's *Conservation Application* on March 20, 2006.

3. Following the filing of the *April 10 Stipulation*, to which OCC was a signatory party, OCC was permitted to file additional testimony, which it did on April 19, 2006.
4. On April 21, 2006, the Staff filed Surrebuttal Testimony opposing the *April 10 Stipulation*.
5. A hearing was held on April 24, 2006, at which all parties, including Staff, waived cross-examination of all witnesses and agreed to the admission of all of the pre-filed testimony as record evidence. The record was then

⁹ The Prefiled Testimony of Staff informed the parties of the Staff's position following its review and consideration of VEDO's *Conservation Application*. Prefiled Testimony of Stephen E. Puican (March 20, 2006) This testimony, along with the Surrebuttal Testimony filed by Staff on April 21, 2006, established substantial compliance with any requirement for a Staff report pursuant to Rule 4901:1-19-07, O.A.C. This rule provides for a report by Staff which addresses, at a minimum, the reasonableness of current rates pursuant to Section 4909.15, Revised Code, for application filed pursuant to Section 4929.05, Revised Code. In his testimony, Mr. Puican discusses aspects of VEDO's recent rate case (Case No. 04-571-GA-AIR) and acknowledges that the decoupling mechanism (SRR) proposed in the *Conservation Application* was designed to provide VEDO with a better opportunity to collect the return authorized in that rate case, an acknowledgement implicit in which is the reasonableness of the of the current rates authorized only a few months prior to the application in this case. In his testimony, Mr. Puican reported that Staff did not necessarily oppose a decoupling mechanism that is designed to recognize the effect of declining use per customer on the authorized return. OCC, was fully informed of the Staff's position on the issues presented in this proceeding (including the assumption of the reasonableness of the rates established in Case No. 04-571-GA-AIR) and had and exercised the right to file objections to the *Conservation Application* by filing testimony of March 29, 2006. Therefore, OCC cannot claim prejudice for lack of a separate writing entitled "report."

Parenthetically, it must be noted that Section 4929.01(A) speaks to the use of a method different to that prescribed in Section 4909.15, Revised Code, for establishing rates and provides that an alternative rate plan may include other provisions that promote rate stability, that tend to assess costs to the entity which causes the incurrence of the cost, that promote and reward efficiency. Alternative rate plan may also include automatic adjustments based on a specified index or changes in specific costs. In its *Conservation Application*, VEDO has not proposed to establish rates by a method different from that in Section 4909.15, Revised Code, but has assumed that method as applied in Case No. 04-571-GA-AIR. VEDO has proposed a mechanism designed to promote efficiency and better assign fixed costs to the cost causer. Because there is no proposal to establish rates different from the method Section 4909.15, Revised Code, it makes no sense to require a report from Staff specifically on the reasonableness of VEDO's current rates (which are presumptively reasonable, in any event.

closed, and submitted for Commission decision based on the evidence of record.

6. The Commission issued its Opinion and Order on September 13, 2006, in which it approved an alternative regulation plan it found to be supported by the evidence presented to it in the record. Also, in the *September 13 Opinion and Order*, in response to a specific challenge by Staff, the Commission has already found that VEDO met the burden of proof, under Section 4929.05, Revised Code, for an alternative regulation plan that is in compliance with the requirements of Sections 4905.25 and 4929.02, Revised Code. Following OCC's October 13, 2006 Application for Rehearing, the Commission confirmed its *September 13 Opinion and Order* in its *November 8 Rehearing Entry* in which it found that its "...conclusions are supported by the evidence of record and are not a mistake." *November 8 Rehearing Entry* at 3-4.
7. In accordance with the provisions of Section 4929.07, Revised Code, VEDO has made multiple notifications to the Commission of its intention to implement the alternative plan approved by the Commission. Subsequent to the *September 13 Opinion and Order*, VEDO has provided multiple public notices of its acceptance of and intent to implement the plan approved by the Commission several times. On September 14, VEDO made a Form 8-K Filing with the Securities and Exchange Commission indicating this intent. On September 28, 2006, fifteen days after the *September 13 Opinion and Order*, VEDO filed Tariff Sheet No. 43

approved therein along with a cover letter indicating its intent to implement the order as approved. On October 23, 2006, VEDO filed a Response to OCC's Application for Rehearing in which it again asserted its intent to implement the Commission's order.¹⁰ Finally, when OCC filed its *Notice of Termination* from the *April 10 Stipulation*, VEDO, along with OPAE and Staff, submitted two additional stipulations notifying the Commission of its intent to proceed with the plan approved by the Commission in its *September 13 Opinion and Order*.

All statutory process requirements resulting from the Commission's decision to transform VEDO's application into an alternative regulation plan application have been satisfied except that required by Section 4929.07, Revised Code, and OCC has had the opportunity to make its case with respect to the original *Conservation Application*, the *April 10 Stipulation*, and the *September 13 Opinion and Order* in this case.

The strangest argument made by OCC is that the Commission must "... determine whether the January 12 [Amended] Stipulation is reasonable." *OCC Appeal* at 24. Furthermore, OCC argues that the Commission must apply its traditional three part standard of review to the *Amended Stipulation*. As VEDO has repeatedly reminded OCC, the *Amended Stipulation* is no more than a notification by VEDO, OPAE, and Staff to the Commission that they intend to implement the plan ordered by the Commission on September 13, 2006 and confirmed on November 8, 2006. OCC's

¹⁰ The Commission actually acknowledged this notice of intention in its *November 8 Rehearing Entry* when it observed that VEDO stated in its Response to OCC's Application for Rehearing that VEDO "... did not oppose the modifications" and VEDO viewed the Commission's order as "... an important step for use of conservation as an agent for mitigation of price volatility." *November 8 Rehearing Entry* at 3. Further, the Commission indicated that it considered VEDO's Response to OCC's Application for Rehearing as responsive to the duty of the parties to "... state their position as to the legality, policy and feasibility of the implementation of the modifications." *Id.* at 2.

claim that it fails to meet the three-part standard for review of stipulations is merely another attempt to apply for rehearing of the Commission's *September 13 Opinion and Order*. OCC has already made that application for rehearing, and it has already been rejected.

As previously discussed and previously decided by the Commission, all but one of the statutory procedural requirements of Commission consideration of VEDO's *Conservation Application* as an alternative regulation plan has been satisfied. As set out in VEDO's and OPAE's Joint Motion for Certification and Interlocutory Appeal, the remaining requirement is that the Commission must approve the tariff sheets filed by VEDO on September 28, 2006, and permit the implementation of the alternative regulation plan as approved.

C. Prompt disposition of the issues in this proceeding is necessary to permit the delivery of the assistance programs designed by the collaborative.

VEDO's conduct subsequent to the *September 13 Opinion and Order* has been focused on achieving timely implementation of the order and, at the same time exhibiting respect and cooperation with the Commission's plan for addressing the procedural novelty of this case. All actions taken by VEDO since the issuance of the *September 13 Opinion and Order* have been taken to maximize the potential for the delivery of assistance programs to VEDO's low-income customers effective January 1, 2007. As evidenced by the *December 21 Stipulation* and the *Amended Stipulation*, this intent has been shared by OPAE and Staff.

At this point, the real harm resulting from the continuing litigation in this proceeding is to VEDO's low-income customers. As previously indicated, the

incremental funding for programs benefiting low-income customers was scheduled to commence on or about January 1, 2007.¹¹ VEDO believes that it would be imprudent to commence the incremental funding or begin to deploy additional conservation programs in view of the potential confusion caused by OCC's *Notice of Termination* and the regulatory responses resulting therefrom. Accordingly, VEDO and OPAE have reluctantly agreed that these efforts must be suspended pending the Commission's response to the relief requested herein. A prompt ruling is needed to make the suspension as brief as possible. To the extent the Commission believes that the risks presented by OCC's litigation position may be best managed by an additional order, VEDO requests that the Commission satisfy the requirements of Section 4929.07, Revised Code, as set out below.

As advocated in its Joint Motion for Certification of an Interlocutory Appeal, VEDO submits that, to the extent that OCC is provided any additional opportunity to be heard in this proceeding, the Commission should: (1) require OCC to withdraw the notice of appeal which was filed in this proceeding; (2) direct that any further opportunity for OCC to be heard shall be limited to any new issues specifically and directly raised by the *December 21 Stipulation* and the *Amended Stipulation*; (3) strictly limit OCC's opportunity to conduct discovery to the subject of any new issues raised by the *December 21 Stipulation* and the *Amended Stipulation*; (4) direct OCC to submit prefiled testimony identifying OCC's position on any new issues raised by the *December 21 Stipulation* and the *Amended Stipulation*, including an explanation as to why the issues

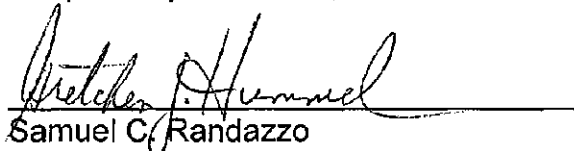
¹¹ OPAE and its member agencies expended resources to prepare for implementing the low-income customer programs targeted by the Commission's *September 13 Opinion and Order* by hiring additional staff, purchasing or readying equipment and initiating local outreach efforts. Because OCC has been an active participant in the collaborative process, OCC was aware of OPAE's efforts.

were not raised previously by OCC; and, (5) provide the other parties with the opportunity to file responsive testimony following the filing of testimony by OCC.

III. CONCLUSION

VEDO has previously supported the Commission's application of Section 4929.05, Revised Code, to consider its application in this case. The statutory procedural requirements of Section 4929.05, Revised Code, have been met. VEDO has notified the Commission on multiple occasions of its intention to implement the alternative regulation plan approved by the Commission in its *September 13 Opinion and Order* and its *November 8 Rehearing Entry*. The Commission should deny OCC's Application for Review and Interlocutory Appeal and proceed pursuant to the provisions of Section 4929.07, Revised Code.

Respectfully submitted,



Samuel C. Randazzo

Gretchen J. Hummel

Lisa G. McAlister

Daniel J. Neilsen

McNees Wallace & Nurick, LLC

21 East State Street, 17th Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Fax: (614) 469-4653

sam@mwncmh.com

ghummel@mwncmh.com

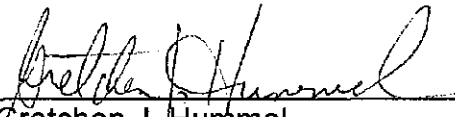
lmcaster@mwncmh.com

dneilsen@mwncmh.com

**Attorneys for Vectren Energy Delivery of
Ohio, Inc.**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum Contra Application for Review and Interlocutory Appeal by the Office of the Ohio Consumers' Counsel* has been hand-delivered, sent electronically or served via ordinary U.S. Mail, postage prepaid, this 5th day of February, 2007 to the following parties of record.


Gretchen J. Hummel

Maureen Grady
Office of the Ohio Consumers' Counsel
10 West Broad Street, 18th Floor
Columbus, OH 43215

Anne L. Hammerstein
Public Utilities Commission of Ohio
Attorney General's Section
180 East Broad Street, 9th Floor
Columbus, OH 43215

Joseph P. Meissner
Attorney at Law
Legal Aid Society of Cleveland
1223 West Sixth Street
Cleveland, OH 44113

David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lima Street
PO Box 1793
Findlay, OH 45840