

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of)
Vectren Energy Delivery of Ohio, Inc. for)
Approval, Pursuant to Revised Code)
Section 4929.11, of 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
MOTION FOR CONTINUANCE AND REQUEST FOR EXPEDITED RULING
BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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February 23, 2007

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Pursuant to Ohio Administrative Code ("O.A.C.") 4901-1-12(B), Vectren Energy Delivery of Ohio, Inc. ("VEDO") hereby submits this Memorandum Contra Motion for Continuance and Request for Expedited Ruling ("*Motion for Continuance*") by the Office of the Ohio Consumers' Counsel ("OCC") filed on February 16, 2007, and requests that the Public Utilities Commission of Ohio ("Commission") deny OCC's *Motion for Continuance* for the reasons discussed below.

I. BACKGROUND

VEDO has recited the procedural background of this case in multiple filings, most recently in its Joint Motion for Certification of An Interlocutory Appeal (at pages 8-14) filed by VEDO and Ohio Partners for Affordable Energy ("OPAE") on January 29, 2007, the Memorandum Contra OCC's Request for Review and Interlocutory Appeal (at pages 1-2) filed on February 5, 2007, and in VEDO's Motion for Protective Order and Motion in

Limine (at pages 3-5) filed on February 15, 2007 ("*Motion for Protective Order*"), which recitations are fully incorporated herein by reference. Nonetheless, several facts are worth highlighting.

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*")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. 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.

In his February 12, 2007 Entry ("*February 12 Entry*") in response to interlocutory appeals filed by VEDO, OPAE, and OCC from the *January 23 Entry*, the Attorney Examiner indicated that "...it must be assumed that OCC had conducted adequate discovery to enter into a stipulation in this case, including the provision for a Sales Reconciliation Rider." *February 12 Entry* at 9. Further, the Attorney Examiner indicated that any additional hearing will focus on the *Amended Stipulation*, which jointly

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*"). The review of the alternative rate plan approved by the Commission in its *September 13 Opinion and Order* and accepted by the *December 21 Stipulation* and *Amended Stipulation* was the result of the application of the Commission's three-part test for consideration of stipulations and has already been found twice to be supported by the record evidence in this case.

expresses VEDO's, OPAE's and the Staff's acceptance of the plan adopted by the Commission on September 13, 2006. *Id.*

The Attorney Examiner also pointed out OCC's ample due process and opportunities to make its case regarding the *Amended Stipulation*:

OCC has the opportunity to conduct discovery regarding the January Stipulation prior to that hearing. OCC will have the opportunity to present supplemental and rebuttal testimony at the hearing regarding the January Stipulation. OCC will have the opportunity to cross-examine any witnesses called at the hearing to support the January Stipulation. OCC will have the opportunity to file briefs to address all issues raised by VEDO's application and by the January Stipulation. All of these procedural rights are consistent with the express terms of the April Stipulation, of which OCC was a signatory party. Thus, OCC cannot demonstrate any undue prejudice or expense resulting from the January 23 Entry, which simply sets forth the procedural schedule related to the new evidentiary hearing.

Further, contrary to the claims made by OCC, the procedural schedule established by the January 23 Entry does not prejudice OCC or any other party. This hearing will be held nearly fifteen months after the filing of the application in this proceeding, over eleven weeks after OCC filed its notice of termination of the April Stipulation, and over six weeks after the filing of the January Stipulation. Therefore, the attorney examiner finds that all parties have been provided ample time for preparation for the evidentiary hearing.

Id. at 9-10.

Despite this clear signal that the Attorney Examiner intended to move forward with the hearing as scheduled, on February 16, 2007, OCC filed the *Motion for Continuance* requesting that the Commission continue the hearing from February 28, 2007 until April 11, 2007 (six weeks) and requests that discovery be extended until April 4, 2007. OCC also indicates that the Attorney Examiner should issue an expedited ruling on his own motion pursuant to Rule 4901-1-12(F), O.A.C., or issue an expedited ruling pursuant to Rule 4901-1-12(C), O.A.C., despite the lack of agreement by other

parties to an expedited ruling. For the reasons discussed below, VEDO respectfully requests that the Commission deny OCC's *Motion for Continuance*.

II. ARGUMENT

OCC sets forth three arguments for why it should be granted a six week continuance despite the hearing being scheduled nearly three months after OCC filed its Notice of Withdrawal from the Stipulation and Recommendation filed on April 10, 2006 and despite the fact that the *Amended Stipulation* raises no new issues: 1) VEDO has not responded to its discovery requests on an expedited basis; 2) VEDO has responded to OCC's discovery requests with objections or "non-responsive answers"; and, 3) VEDO sought a ruling on the scope of the proceeding and a protective order from OCC's attempts to depose non-witnesses and other VEDO personnel. OCC asserts that its filed testimony will not be complete because of its lack of information.² The Commission should not further indulge OCC's disingenuous attempt to cause delay in this proceeding.³

In his February 12, 2007 Entry ("*February 12 Entry*"), the Attorney Examiner indicated that "...it must be assumed that OCC had conducted adequate discovery to

² A review of the testimony filed by OCC on February 21, 2007, contradicts OCC's claim that it needs more time to complete its review or that its testimony was negatively affected as a result of VEDO's discovery response. OCC's testimony is largely cumulative of the testimony filed previously in this proceeding in support of the Stipulation and Recommendation filed on April 10, 2006. As VEDO Witness Ulrey indicated in his testimony filed on the same day, his opinion of the April 10, 2006 Stipulation has not changed. VEDO has simply tried (many times) to indicate its intent to implement the alternative regulation plan approved by the Commission after it reviewed the record in this proceeding. OCC's position going forward continues to seek a second rehearing of the issues already decided in the Commission's *September 13 Opinion and Order* and November 8 Entry on Rehearing. VEDO is unclear what controversy OCC thinks it has with VEDO. Having signed the April 10, 2006 Stipulation and Recommendation, VEDO would be satisfied with either result.

³ OCC continues to disregard the fact that, as a result of the *September 13 Opinion and Order* (mirrored by the *Amended Stipulation*) the parties, including OCC, collaboratively designed conservation programs for which 60% of VEDO's residential customers would be eligible. Nonetheless, it appears that OCC is more determined to prevail on principle than to cooperate to achieve benefits for customers.

enter into a stipulation in this case, including the provision for a Sales Reconciliation Rider.” *February 12 Entry* at 9. Further, the Attorney Examiner indicated that any additional hearing will focus on the *Amended Stipulation*,⁴ which jointly expresses VEDO’s, OPAE’s and the Staff’s acceptance of the plan adopted by the Commission on September 13, 2006. *Id.* As VEDO has previously indicated, it is VEDO’s position that this limits the scope and subject of the balance of any process in this proceeding to any new issues raised by the *Amended Stipulation* not already contemplated by the *September 13 Opinion and Order* and the *November 8 Rehearing Entry*. Since the *Amended Stipulation* introduces no new issues in this proceeding, it should not give rise to a new opportunity for OCC to conduct discovery. Nonetheless, the Commission has generously given OCC ample opportunity to make its case against the *Amended Stipulation*. Apparently, this has encouraged OCC to seek wide latitude to continue pursuit of positions for which it previously sought rehearing, which the Commission has already denied in its *November 8 Rehearing Entry*.

As noted in VEDO’s Motion for Protective Order, since January 18, 2007, OCC has served VEDO with three sets of discovery totaling seventy-two interrogatories, forty-six Requests for Production of Documents, and forty Requests for Admission, most of which exceed the scope discussed at the January 22, 2007 pre-hearing conference and

⁴ As VEDO has previously explained, and these documents indicate, the contents of the *December 21 Stipulation*, the *Amended Stipulation*, and the Commission’s *September 13 Opinion and Order* are identical. The review of the alternative rate plan approved by the Commission in its *September 13 Opinion and Order* and accepted by the *December 21 Stipulation* and *Amended Stipulation* was the result of the application of the Commission’s three-part test for consideration of stipulations and has already been found twice to be supported by the record evidence in this case.

in the *February 12 Entry*.⁵ In addition to the discovery served on VEDO, OCC has filed two interlocutory appeals, a notice to take depositions, and an application for rehearing since it filed its Notice of Withdrawal, in response to which VEDO has had to expend significant time and effort. Much of OCC's discovery seeks, not factual data, but rather VEDO support for the Attorney Examiner's February 7, 2006 decision to consider its application pursuant to Section 4929.05, Revised Code, and related alternative regulation requirements, all of which had been addressed multiple times in previous Commission and Attorney Examiner rulings and about which OCC's challenge had already been ruled untimely. *November 8 Rehearing Entry* at 2, January 10, 2007 Attorney Examiner Entry at 5-6. In fact, OCC's Second Set of Discovery of eleven Interrogatories and five Requests for Production of Documents is exclusively related to the consideration of VEDO's application pursuant to alternative regulation criteria. Even less relevant, OCC's entire Third Set of Discovery of twenty-six Interrogatories and seven Requests for Production of Documents, is devoted to inquiries related to the programs chosen by the Collaborative to implement the Commission's *September 13 Opinion and Order* and *November 8 Rehearing Entry* as memorialized in the January 12 *Amended Stipulation*, a matter clearly beyond the scope of this proceeding going forward. It must be noted that OCC participated in every Collaborative meeting in which, by unanimous consensus, the programs defined by the Commission's *September 13 Opinion and Order* were designed and the timing for their delivery was originally scheduled.

⁵ Regardless of the sweeping scope of OCC's discovery to date, VEDO, in the interest of good faith, has provided a significant amount of information, whether relevant or not and continues working with OCC to informally resolve issues.

In spite of the workload imposed by OCC's pleadings and notwithstanding the fact that a majority of OCC's discovery exceeds the scope of this proceeding as set forth in the *February 12 Entry*, VEDO has made every effort to respond to OCC's discovery to the extent it is relevant and seeks matters not privileged or otherwise not discoverable and, in some instances beyond. In fact, OCC states that VEDO has worked with OCC to informally resolve issues regarding discovery. *Motion for Continuance* at 2. OCC also acknowledges that VEDO's discovery responses have been timely, pursuant to the rules. *Id.* at 3.

The issues facing the Commission at present are no different from those it faced when considering OCC's Application for Rehearing. Regardless of the guidance provided by the Attorney Examiner limiting the scope of this proceeding going forward, the scope of most of OCC's discovery to date assumes that it may begin at the beginning. As it is within its rights to do, VEDO has objected to OCC's discovery requests that seek irrelevant information outside the bounds of Rule 4901-1-16(B), O.A.C. VEDO has filed a *Motion for Protective Order* to protect itself from OCC's attempts to expand the scope of this proceeding through discovery. OCC's complaints that VEDO has not responded to OCC's unreasonable discovery should not warrant any further delay in resolving this case.

Similarly, OCC complains that VEDO filed the *Motion for Protective Order* without seeking an expedited ruling, making OCC's memorandum contra due two days after the hearing is scheduled to go forward. OCC neglects to recognize that OCC can file its memorandum contra at any point prior to the last day permitted by rule regardless of

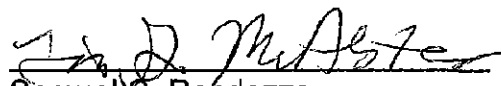
whether VEDO sought an expedited ruling. This is, at best, a disingenuous attempt to cite a deadline after the hearing date to create some procedural injustice.

Nothing in OCC's *Motion for Continuance* demonstrates good cause for an extension of any deadline. OCC has had ample time and opportunity to make its case, particularly when no new issues were raised by the *Amended Stipulation*. As the Attorney Examiner noted, the hearing is nearly 15 months after VEDO filed its application. In spite of the suggestion of Consumers for Fair Utility Rates and the Neighborhood Environmental Coalition that there is "no reason to rush this case" and that customers cannot receive any benefits yet this winter, the sooner VEDO is permitted to implement the collaboratively designed conservation programs, the more customers can be assisted this winter heating season and the next. There should be no further delays in this proceeding.

III. CONCLUSION

For the foregoing reasons, VEDO respectfully requests that the Commission deny OCC's *Motion for Continuance*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum Contra Motion for Continuance and Request for Expedited Ruling by the Office of the Ohio Consumers' Counsel* has been hand-delivered, sent electronically or served *via* ordinary U.S. Mail, postage prepaid, this 23rd day of February, 2007 to the following parties of record.



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