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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

MEMORANDUM CONTRA VECTREN'S MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. SUMMARY

On February 15, 2007, Vectren Energy Delivery of Ohio, Inc. ("Vectren" or "Company") filed a Motion for Protective Order, Motion in *Limine* and Memorandum in Support.[1] Vectren's motion for protection requests that the Public Utilities Commission of Ohio ("Commission" or "PUCO") issue a protective order to prohibit the Office of the Ohio Consumers' Counsel ("OCC") from taking the depositions of Vectren

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[1] Motion for Protective Order, motion in *Limine*, and Memorandum in Support of Vectren Energy Delivery of Ohio, Inc., Case No. 05-1444-GA-UNC ("Vectren Motion for Protection") (February 15, 2007). Vectren did not request an expedited ruling on its motion, despite the upcoming hearing, and the need for the Commission to address these matters prior to the evidentiary hearing.

employees[2], pursuant to OCC's Notice of Deposition filed February 7, 2007.[3] OCC is the representative of the 300,000 Ohio consumers from whom Vectren seeks to collect $11 million over two years.

Vectren argues that the depositions noticed are "beyond the scope and subject of the remainder of this proceeding, and thus, irrelevant."[4] Vectren would have the scope of the proceeding defined as "new issues raised by the Amended Stipulation and not already contemplated by the September 13, *Opinion and Order* and the November 8 *Rehearing Entry*."[5] According to Vectren, "the Amended Stipulation introduces no new issues in this proceeding, it does not give rise to a new opportunity for OCC to conduct discovery including any discovery that may be had by way of OCC's Notice of Depositions."[6] Vectren's claims are premised upon its interpretation that the February 12, 2007 *Entry* issued by the Attorney Examiner has limited the scope of the remaining proceeding to these "new issues."

In its motion in l*imine* Vectren seeks to "generally limit the scope of all other aspects of the balance of this proceeding to new issues raised by the Amended Stipulation not already contemplated in the September 13 *Opinion and Order* and November 8

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[2] Much of Vectren's pleading is devoted to discussing OCC's three discovery sets, which Vectren is not requesting a protective order from. *See* Vectren Motion for Protection at 6-8. Vectren's non-responses to OCC's First Set of Discovery was the subject of OCC's February 22, 2007 Motion to Compel. Moreover, a second motion to compel will be filed by OCC prior to the discovery conference. Since the third set of discovery remains outstanding, with responses due on or before February 27, 2007, it would seem likely that, given the Company's view of the scope of the proceeding, the responses will be followed up by a third OCC motion to compel.

[3] Vectren Motion for Protection at 9.

[4] *Id.*

[5] *Id.* at 6.

[6] *Id.*

Rehearing Entry."[7] Vectren posits that a ruling on its motion in *limine* would "avoid the injection of matters that are irrelevant, inadmissible and prejudicial and would serve judicial economy."[8] Again Vectren's claims are based on its belief that the February 12, 2007 *Entry* issued by the Attorney Examiner has limited the scope of the remaining proceeding to new issues introduced by the Amended Stipulation.

For the reasons discussed in detail below, the Commission should deny Vectren's motion for protection. First, and foremost, the Attorney Examiner *Entry* did not limit the scope of the proceeding to new issues introduced by the Amended Stipulation, as Vectren proclaims. Rather, the Attorney Examiner has structured the focus of the remaining proceeding on the Amended Stipulation.[9] Second, under Ohio Adm. Code 4901-1-21, OCC may take the testimony of any party or person by deposition on oral examination "with respect to any matter within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code." OCC's discovery efforts are reasonably calculated to lead to the discovery of admissible evidence, the prevailing standard under Ohio Adm. Code 4901-1-16. OCC's depositions, in large part, are directed to the Amended Stipulation and whether the Amended Stipulation meets the Commission's three prong standard. Additionally, OCC's depositions address whether the Amended Stipulation complies with the statutes and rules that govern gas alternative rate regulation plans, R.C. 4929.05 *et seq.* and Ohio Adm. Code 4901:1-19 *et seq.*

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[7] *Id.* at 9.

[8] *Id.* at 10.

[9] While OCC believes the scope of the proceeding should be much wider and should include going back to the original application of the company based on the broad language of the original stipulation paragraph 13, and the *East Ohio Gas* precedent, OCC has attempted to tailor its discovery efforts consistent with the Attorney Examiner's directive.

Because the depositions are structured to lead to the discovery of admissible evidence, they are permissible and allowed under Ohio Adm. Code 4901-1-16 and 4901-1-21. Thus, any claim by Vectren that depositions should not be conducted to protect it from "annoyance, embarrassment, oppression or undue burden or expense" must fail.

Additionally, the commission should deny the motion in *limine* because such motions have virtually no meaning or value in commission proceedings. The motion will accomplish little because it does not function as a ruling on admissibility. It does not promote judicial economy as Vectren alleges because it is not a ruling on admissibility. Rather, the appropriate time to make rulings on admissibility of testimony, exhibits, and the scope of cross examination is at the hearing when the proceeding is underway and the evidence sought to be procured, introduced, or raised in cross-examination, is known and identifiable.

II. ARGUMENT

A. The scope of the proceeding has not been limited to "new issues" related to the Amended Stipulation; thus, the underlying premise of Vectren's motions are flawed.

Vectren's motion for protection and motion in *limine* are based upon the notion that the February 12 *Entry* of the Attorney Examiner limits the scope and subject of the balance of any process in this proceeding to "any new issues raised by the Amended Stipulation and not already contemplated by the September 13, *Opinion and Order* and the November 8, *Rehearing Entry.*"[10] Vectren argues that there are no new issues raised by the Amended Stipulation that have not already been contemplated by the Commission

[10] Vectren Motion for Protection at 6 (February 15, 2007).

Order and *Entry on Rehearing*.[11] Thus, Vectren alleges that OCC should have no future rights in this proceeding, irregardless of the paragraph 13 stipulation language, and irregardless of the Attorney Examiner's ruling in the February 12 *Entry* providing that OCC is entitled to, *inter alia*, conduct pre-hearing discovery, present supplemental and rebuttal testimony, and cross examine witnesses called to support the Stipulation.[12]

A review of the Attorney Examiner *Entry* may be helpful here. Nowhere does the Attorney Examiner proscribe OCC's procedural rights as relating to "new issues" raised by the amended stipulation. In fact, the Attorney Examiner specifically rejected this limitation by its January 10, 2007 *Entry* when it ruled that the proceeding would not be governed by Rule 4901-1-34 -- "the decision to reopen the proceeding was not made pursuant to Rule 4901-1-34. Therefore, the limitations contained in Rule 4901-1-34(B) O.A.C., regarding evidence to be presented at hearing do not apply." Under Rule 4901-1-34(B) presentation of additional evidence is limited and the party must show why the evidence could not, with reasonable diligence, have been presented earlier. Essentially this amounts to a showing that the evidence is "new" or "newly discovered."

The February 12 *Entry* did make some rulings based on arguments raised in OCC's January 29, 2007 interlocutory appeal. It ruled that OCC's arguments requesting a ruling that the scope of the proceeding should include the reasonableness of rates was premature.[13] The *Entry* ruled that OCC's arguments that the waivers of the standard

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[11] *Id.*

[12] *Entry* at 9-10 (January 10, 2007).

[13] *Id.* at 8.

filing requirements should be revoked was not timely.[14] It did not rule that the information provided under the standard filing requirements was not relevant or discoverable.[15] In finding that OCC had not suffered any undue prejudice and expense, a prerequisite to certifying OCC's interlocutory appeal, the Attorney Examiner discussed the prior discovery rights of OCC as well as its opportunities to file testimony.[16] This should not be interpreted to mean that OCC should be limited in future discovery to "new issues." Earlier rights that OCC had when it was engaged in productive negotiations with Vectren should have no effect on this phase of the proceeding, where an entirely different stipulation and process is being pursued, as a result of massive modifications made by the Commission to the original stipulation.

The scope of the hearing, as noted by the Attorney Examiner in the February 12 *Entry* is "the January stipulation, which will be considered according to the Commission's three part test for consideration of stipulations." There was no mention of "new issues" raised by the January stipulation. The Attorney Examiner should not accept this modification of its pronouncement. It would be reversing itself without good cause. Furthermore, if Vectren's defined scope is accepted, OCC would effectively lose the

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[14] *Id.* at 8-9.

[15] This is a distinction discussed in detail in OCC's Second Motion to Compel. Past commission precedent establishes that even if a waiver of the standard filing requirements has been obtained, the information related to the SFR's is still subject to discovery. *See In the Matter of the Application the Cincinnati Gas and Electric Company for an Increase in its Gas Rates and for Approval of an Alternative Regulation Plan for its Gas Distribution Service,* Case Nos. 01-1228-GA-AIR and 01-1478-GA-ALT *Entry* at 2 (July 26, 2001).

[16] At the time of the filing of Vectren's application, OCC was not engaged in aggressive litigation with Vectren. Discovery that was occurring was informal and limited in large respect to what Vectren was willing to provide to OCC to engage OCC in further negotiations. In hindsight, a more aggressive approach to discovery could have been pursued, but in practice it would have been largely antithetical to pursuing good faith negotiations.

rights it has under the original stipulation, rights that the Attorney Examiner has confirmed again and again[17] throughout this phase of the hearing.

Vectren's flawed definition of the scope of the hearing is the basis for its motion in *limine* and its motion for protection. Thus, if the Attorney Examiner wishes to dispose of Vectren's motions, without further analysis, it may do so by merely reinforcing that the scope of the hearing is the Amended Stipulation and not just "new issues" under the Amended Stipulation. Such a ruling would render Vectren's motions moot, and would tidily dispose of the matters raised by Vectren.

B. Vectren's motion for protection should be denied because OCC's deposition notice is reasonably calculated to lead to the discovery of admissible evidence in this proceeding.

While OCC continues to assert that the scope of the proceeding should reach back to the original application of the company based on the explicit language of the original Stipulation, paragraph 13, and the *East Ohio Gas* precedent, OCC has attempted to tailor its discovery efforts and testimony consistent with a more narrow approach focusing on the Amended Stipulation. In its Notice of Deposition OCC seeks to exercise its rights, under Ohio Adm. Code 4901-1-21, to take pre-hearing oral depositions of three named Vectren employees: Messrs. Ulrey and Petitt, who have previously submitted testimony, and Niel Ellerbrook,[18] the CEO of Vectren Corporation. Additionally, OCC seeks pre-hearing depositions of unnamed deponents, to be identified by Vectren on specific areas:

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[17] *See Entry* (December 29, 2006); *Entry* (January 10, 2007); *Entry* (February 12, 2007).

[18] Aware of the potential sensitivity to OCC deposing Mr. Ellerbrook, OCC offered to hold his deposition in abeyance, while going forward with all the others. OCC offered to then reassess, after the conclusion of the other depositions, the need to go forward with Mr. Ellerbrook's deposition. Vectren's response to this offer was to file a Motion for Protection.

(1) persons who will present testimony at the upcoming evidentiary hearing,[19] (2) person(s) who will testify to the terms of both the December 21 stipulation and the January 12, 2007 Stipulation, and, (3) persons responsible for answering OCC's discovery requests.

Although OCC indicated that it may inquire into facts and data known or opinions held by the deponents that are relevant to, *inter alia*, the application before the commission, this is certainly not the primary focus of the depositions. Moreover, the discovery standard does not require that discovery be directed solely at admissible information. Rather, the scope of discovery that pertains to Rule 4901-1-21 depositions is that defined by Ohio Adm. Code Rule 4901-1-16(B) -- "reasonably calculated to lead to the discovery of admissible evidence." Indeed Ohio Adm. Code 4901-1-16(B) provides that "[i]t is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

The bulk of the depositions will be related instead to "the stipulation and Recommendation filed on December 21, 2006, the Amended Stipulation and Recommendation filed on January 12, 2007, and the criteria used by the Commission in considering the reasonableness a stipulation."[20] Indeed there is no mention made in the

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[19] At this time, Vectren has proposed the testimony of Messr. Ulrey to support the stipulation. Future Vectren witnesses have not been identified.

[20] Notice to Take Depositions Upon Oral Examination and Request for Production of Documents (February 7, 2007).

duces tecum portion of the notice to documents related to or supporting the original application.[21]

The oral examination that OCC seeks is reasonably calculated to lead to the discovery of admissible evidence. Both Mr. Ulrey[22] and Mr. Petitt submitted testimony in the first phase of this proceeding on issues that are also germane to the January 12 Stipulation. Mr. Ulrey presented testimony on a number of issues including the decoupling mechanism, the reduced volumetric usage by residential and commercial customers, which signifies the amount of increased costs to be recovered from residential ratepayers, compliance with R.C. 4929.02 and 4905.35, and the benefit to the company of the decoupling. The testimony of Mr. Petitt included issues such as the change in rate design associated with decoupling, and the benefits to the company of decoupling. These issues are relevant to the Commission's determination of whether the January 12 Stipulation as a package benefits customers and is in the public interest. Additionally, these witnesses are proper witnesses for cross-examining on whether the alternative rate plan being considered under the January 12 Stipulation complies with the alternative regulation requirements of R.C. 4929.05.

Mr. Ellerbrook is the CEO of Vectren and has made numerous statements on behalf of Vectren related to the financial impact of the Ohio decoupling on the Company, and the break from traditional ratemaking that the September 13 Ohio *Opinion and Order* represents. Both of these issues have a direct bearing upon whether the January 12

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[21] *Id.* at 3.

[22] Vectren also submitted additional Ulrey testimony on February 21, 2007 that addresses the stipulation.

Stipulation can meet both the second and third criterion for measuring the reasonableness of a stipulation.

OCC's deposition notice is also directed at orally examining a Vectren designated person(s) who will be able to testify on the terms of the January 12 Stipulation and seeks those persons responsible for responding to OCC's discovery. These corporate deponents are crucial to the presentation of OCC's case.

The terms of the stipulation and what they mean to the signatory parties are relevant to the Commission's consideration of the stipulation. In order to judge the reasonableness of the stipulation, it is important to understand what the terms mean to the signatory parties who drafted the stipulation and what the implications are of adopting the stipulation. OCC has a right to discover from Vectren exactly what Vectren believes it is agreeing to in the January 12, 2007 Stipulation.

In fact, the commission is presently embroiled in a proceeding in a natural gas case that centers upon the meaning of a prior stipulation. In the current *Columbia Gas of Ohio* GCR proceeding, Case No. 05-221-GA-GCR, the signatory parties to a 2003 stipulation are disputing the meaning of the underlying terms of the stipulation and the implementation of the stipulation. Here OCC seeks to depose Vectren employees to uncover the meaning of the stipulation from one of the signatory parties, Vectren. A clear understanding now of what the parties intend by the stipulation language is critical and hopefully will minimize future case debate over what was or wasn't intended by stipulation language, should the Commission deem it appropriate to adopt the stipulation or some version of the stipulation.

Written follow up discovery was severely limited in this proceeding by the unexpedited responses by Vectren and the compressed discovery time frame. Depositions of persons responsible for answering OCC's discovery will allow OCC to do some of such follow up.

The depositions sought are aimed at producing testimony that is calculated to lead to the discovery of admissible matters that are related to the subject matter of this proceeding, and is not privileged. This is the permissible scope of discovery in commission proceedings. It is set forth in Ohio Adm. Code 4901-1-16, and is the standard applicable to depositions, under Ohio Adm. Code 4901-1-21. The depositions will be used as a pre-hearing discovery tool which will facilitate, consistent with Ohio Adm. Code 4901-1-16(A), "thorough and adequate preparation for participation in commission proceedings." This will assist OCC in developing a full and complete record upon which the Commission can base its decision.

Allowing pre-hearing depositions to be taken will assure that OCC is accorded the ample rights of discovery it is entitled to under R.C. 4903.082. The attendance of these Vectren employees at a pre-hearing deposition is reasonable and necessary. The pre-hearing depositions will permit OCC to exercise the rights it has, under the April Stipulation to "present evidence through witnesses, to cross examine all witnesses, to present rebuttal testimony, and to brief all issues which shall be decided based upon the record and briefs as if this Stipulation had never been executed." Moreover, permitting

OCC to conduct the pre-hearing depositions is consistent with the statutes and rules governing PUCO proceedings.[23]

There is nothing oppressive or burdensome about these depositions. A Commission order prohibiting the taking of the depositions is an extraordinary measure and is not warranted here. The fact that Vectren erroneously considers the information being sought "irrelevant:" does not give rise to a reason under Rule 4901-1-24 to issue a blanket ruling prohibiting OCC from taking any of these depositions.

Instead, the Commission rules establish a clear preference for permitting parties wide discretion in taking depositions, with parties' objections on the taking of evidence being handled on an issue by issue basis **during the taking of the deposition.** For instance, relevancy objections can be made during the taking of the deposition. Indeed, under Rule 4901-1-21(I) objections are to be noted, and evidence is to be taken subject to the objections.

For all of these reasons, the Commission should deny Vectren's motion for protection, and should permit OCC to go forward with the taking of the pre-hearing depositions.

C. Vectren's motion in *limine* has virtually no meaning in a proceeding before the PUCO, and should be denied.

While a motion in *limine* may be a useful device "it is frequently misused and misunderstood."[24] The classical motion in *limine*, referenced in Vectren's pleading, has

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[23] R.C. 4903.082, R.C. 4903.06, Ohio Adm. Code 4901-1-16 *et seq.*

[24] *Riverside Methodist Hospital Assn. v. Guthrie*, 3 Ohio App. 3d 308, 309-310 (C.A. Franklin 1982).

been aptly described by the Ohio Supreme Court:

> Our inquiry commences with an examination of the purpose and effect of a motion *in limine*. A "motion *in limine*" is defined in Black's Law Dictionary . . . as "[a] written motion which is usually made before or after the beginning of a *jury trial* for a protective order against prejudicial questions and statements * * * to avoid injection into trial of matters which are irrelevant, inadmissible and prejudicial . . . ."[25]

The Court's emphasis on prejudice before a *jury* continued:

> The function of the motion as a precautionary instruction to avoid error, prejudice, and possibly a mistrial by prohibiting opposing counsel from raising or making reference to an evidentiary issue until the trial court is better able to rule upon its admissibility *outside the presence of a jury* once the trial has commenced.[26]

The Commission itself has recognized that motions in *limine* are seldom appropriate[27] in a PUCO proceeding due to the underlying difference between a PUCO proceeding and a jury proceeding. For instance, this issue was addressed by an Attorney Examiner *Entry* in a 1988 complaint case, where Cleveland Electric Illuminating Company (CEI) sought a motion in *limine* to prohibit the respondents from offering evidence on issues CEI deemed to be irrelevant to claims in the case. The attorney examiner provided the following analysis:

> As the respondents and intervenors assert, the primary reason for imposing a blanket, prehearing exclusion of evidence and arguments is to ensure that a jury is shielded from potentially prejudicial information that is ultimately

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[25] *State of Ohio v. Grubb*, 28 Ohio St. 3d 199, 200 (1986) (citations omitted, emphasis on "jury trial" added).

[26] *Id.* at 201, quoting *State v. Spahr*, 47 Ohio App.2d 221, syllabus ¶1 (C.A. Shelby 1976) (emphasis added).

[27] *See* for example, *In the Matter of the Establishment of a Permanent Rate for the Sale of Energy from Montgomery County's Energy – From-Waste Facility to the Dayton Power and Light Company*, Case No. 88-359-El-UNC, *Entry* (July 6, 1988); *In the Matter of the Application of Columbia Gas of Ohio, Inc. for an Increase in the Rates to be Charged and collected for Gas Service in the Municipalities of Bay View, Castalia, Huron and Port Clinton, Ohio*, Case No. 83-584-GA-AIR, *Entry* (May 15, 1984).

> determined not to be relevant to the case. In this proceeding, there is no such concern because a jury is not involved in this administrative hearing/decision process. Therefore, no valid reason exists for making an exclusionary ruling. * * * Motions to strike testimony and objections to cross-examination questions will be addressed on a case-by-case basis.[28]

When considering the nature of the PUCO proceedings, it is clear that there is very little if any justification for using a motion in *limine* in the way Vectren seeks. These proceedings do not involve a jury, and therefore the purpose for a motion in *limine* is not served. In Commission proceedings, the trier of fact is the same entity that will rule on the relevance of the evidence, thus, the purpose of the motion disappears. Moreover, the presiding Attorney Examiner, and ultimately the Commission, are more than capable of disregarding irrelevant evidence and argument without being prejudiced by having heard such matters. The Commission should not make such an exclusionary ruling before the hearing because such a ruling has no logical place in Commission proceedings. The motion in *limine* filed by Vectren should be denied on this ground alone.

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[28] *In the Matter of the Complaint of The Cleveland Electric Illuminating Company (vs) Medical Center Company, American Electric Power Company, Inc., American Electric Power Service Corp., Appalachian Power Co., Columbus Southern Power Co., Indiana Michigan Power Co., Kentucky Power Co., and Ohio Power Co. Relative to a Violation of the Certified Territory Act*, Case No. 95-458-EL-UNC, *Entry* at 2 (August 31, 1999).

D. The Commission should deny Vectren's motion in *limine* because it seeks a blanket ruling on admissibility when none can be had and thus will not promote judicial economy.

Vectren suggests that the ruling upon Vectren's motion in *limine* would serve "judicial economy" by avoiding the "injection of matters that are irrelevant, inadmissible, and prejudicial."[29] Here Vectren seems to be using the motion in *limine* as the equivalent of a motion to suppress evidence which it believes is improper because it is not relevant.[30] Vectren ignores the plain fact that the Ohio Supreme Court,[31] along with numerous lower Ohio courts,[32] has held, in a long line of cases, that a motion in *limine* cannot be used to determine the admissibility of evidence. Rather "it is only a preliminary interlocutory order precluding questions being asked in a certain area until the court can determine from the totality of the circumstances in the case whether the evidence would be admissible."[33] Even if a motion in *limine* is granted, the trial court is at liberty to change its ruling on the disputed evidence in its actual context at trial.[34]

Thus, even if the Commission were to grant Vectren's motion in *limine,* such a ruling does not determine the admissibility of matters related to the hearing—cross-

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[29] Vectren Motion for Protection at 10.

[30] According to the court in *Riverside Methodist Hospital Assn.*, "this should be the rare use of the motion in limine." *Riverside Methodist Hospital* at 309. *Accord, State v. Spahr,* 47 Ohio App. 2d 221, 225 (holding a "liminal motion is rare and is reserved for serious problems of admissibility that relate to subjects so highly prejudicial that they could not be removed by an instruction to disregard.")

[31] *State v. Grubb*, 28 Ohio St. 3d 199, 201-202 (1986): *Gable v. Village of Gates Mills, Daimler Chrysler Corp.* 103 Ohio St. 3d 449, 456 (2004); *State v. Edward*, 107 Ohio St. 3d 169, 175 (2005), citing *Defiance v. Krets,* 60 Ohio St. 3d 1 at 4 (1991).

[32] *State v. Spahr*, 47 Ohio App. 2d 221 (C.A. Shelby 1976); *State v. Riverside Methodist Hospital Assn. of Ohio v. Guthrie*, 3 Ohio App. 3d 308, 309-310 (C.A. Franklin 1982).

[33] *Riverside Methodist Hospital Assn. of Ohio v. Guthrie*, 3 Ohio App. 3d 308, 309-310 (C.A. Franklin 1982).

[34] *State of Ohio v. Edwards*, 107 Ohio St. 3d at 175.

examination, evidence, testimony, etc. OCC would still have the opportunity at the evidentiary hearing to conduct cross examination, present evidence, and elicit testimony on matters it deems to be relevant. The motion in *limine* would not prevent OCC from doing such. The Attorney Examiner would still need to rule upon each objection as the evidentiary hearing progresses. So then, what is the purpose of Vectren's motion in *limine*? There can be no valid purpose served by making a ruling on Vectren's motion in *limine* when such a ruling can have no effect on the admissibility of future evidence. For this reason, the Commission should not engage in a futile act—granting a motion which will have no impact on admissibility. Vectren's motion in *limine* should fail.

E. Instead of ruling upon Vectren's motion in *limine*, the Commission should rule on the admissibility of testimony, exhibits, and the scope of cross-examination during the normal course of the hearing.

By its very nature, a motion in *limine* cannot be made until counsel becomes aware of the objectionable material sought to be introduced. That is one of the underlying problems associated with Vectren's motion. Here, Vectren can only speculate as to what specific evidence OCC will produce or seek to cover, in its cross-examination of witnesses. Vectren claims that "OCC's litigation efforts at this point evidence a purpose and intent to advance positions that the Commission has already found to be 'incongruous.'"[35]

No valid purpose would be served here by issuing a blanket ruling, based on a flawed standard of relevancy, arbitrarily limiting OCC in "all aspects of the remaining proceeding." What Vectren seeks is an extremely broad and vague ruling that OCC's

[35] Vectren Motion for Protection at 10.

"purpose and intent" is inappropriate. Taking Vectren's arguments to their logical conclusion, OCC would be precluded by Vectren's motion from "injecting" the "purpose and intent" into its own witness presentation and OCC's cross examination of witnesses. Further, Vectren would have the Attorney Examiner circumscribe the briefs submitted by OCC so that OCC's "purpose and intent" is precluded from being raised there as well. Such a ruling just does not make sense.

There is no valid reason for making such an exclusionary ruling here. Other than the timeliness or anticipatory nature of the ruling, Vectren's motion is not different than any other decision on an objection. As with so many evidentiary questions, a ruling depends upon other testimony and often cannot be made until the trial is in progress. Motions to strike testimony and objections to cross-examination should be addressed, in this proceeding, on a case by case basis as the issue arises during the course of the proceeding. This is the way Commission hearings are conducted, pursuant to Ohio Adm. Code 4901-1-27(B). This is way the Ohio Administrative Code provides for hearings to be conducted.[36] There is nothing special or so unusual here that merits a departure from well established Commission practice. Vectren's motion in *limine* should be denied.

III. CONCLUSION

In this case Vectren seeks to collect $11 million from Ohio consumers, via two years of automatic rate increases known as "decoupling." In the interest of advocating to the PUCO on behalf of these 300,000 consumers, OCC has attempted to conduct discovery of Vectren that is OCC's right under R.C. 4903.082 and Ohio Adm. Code

[36] Ohio Adm. Code 4901-1-27.

4901-1-16 et seq. Vectren has deterred OCC and interposed delay at every step.

In this current cycle of pleadings, the Commission is once again being asked to settle discovery disputes between OCC and Vectren because Vectren continues to deny the plain fact that OCC has discovery rights at this phase in the proceeding. These discovery rights were established by the Attorney Examiner in its January 23, 2007 *Entry*. Vectren filed an interlocutory appeal of that *Entry,* and it was denied February 12, 2007.

Vectren reargues that OCC has no discovery rights here in an indirect but nonetheless transparent way by seeking a determination that OCC should be precluded from all discovery except that related to "new issues" raised by the amended stipulation. It admits that there are no new issues – hence, there should be no discovery rights for OCC.

It is time to permit OCC to exercise the due process rights afforded to it by law and rule without further delay caused by meritless motions and arguments by Vectren. The 300,000 customers from whom Vectren seeks to collect $11 million over two years are entitled under law and rule to much better treatment from the PUCO than what Vectren proposes in this case. For the reasons discussed herein, the Commission should deny Vectren's motion in *limine* and motion for protection and permit OCC to conduct the depositions noticed, without the restrictions sought by Vectren, thereby enabling OCC to be thoroughly and adequately prepared to proceed to hearing.

Respectfully submitted,

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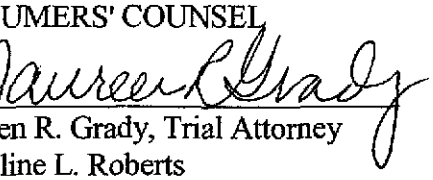

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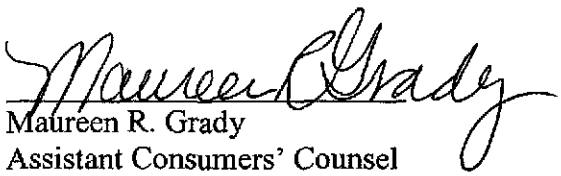
CERTIFICATE OF SERVICE

I hereby certify that a copy of the Memorandum Contra Vectren Energy Delivery of Ohio Inc Motion for Protective Order, Motion in *Limine* by the Office of the Ohio Consumers' Counsel was served electronically on the persons listed below this 27th day of February 2007.



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