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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval, Pursuant to Revised Code Section 4929.11 of Tariffs to Recover Conservation Expenses and Decoupling Revenues Pursuant to Automatic Adjustment Mechanisms and for Such Accounting Authority as May be Required to Defer Such Expenses and Revenues for Future Recovery through Such Adjustment Mechanisms.	)	Case No. 05-1444-GA-UNC

APPLICATION FOR REVIEW AND INTERLOCUTORY APPEAL BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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March 5, 2007

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APPLICATION FOR REVIEW AND INTERLOCUTORY APPEAL
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Pursuant to Ohio Adm. Code 4901-1-15, the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Vectren Energy Delivery of Ohio, Inc. ("Vectren," "VEDO" or "Company"), who will be subject to an $11 million rate increase as a result of this decoupling proceeding, hereby submits to the Public Utilities Commission of Ohio ("PUCO" or "Commission") this application for review and interlocutory appeal of the Attorney Examiners' rulings issued at the discovery conference in this proceeding on February 28, 2007.[1] OCC respectfully requests the legal director, deputy legal director, attorney examiner or presiding hearing officer to certify this appeal to the full Commission.[2] OCC also submits that the PUCO should hear this

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[1] As required by Ohio Adm. Code 4901-1-15(C), a copy of the transcript containing the rulings is attached as Attachment 1.

[2] Ohio Adm. Code 4901-1-15(B).

interlocutory appeal without the need for certification, pursuant to Ohio Adm. Code 4901-1-15(A)(2).[3]

As OCC will discuss herein, OCC's issues for appeal meet the standards in Ohio Adm. Code 4901-1-15. The Commission should review the rulings and reverse or modify the rulings as discussed below, pursuant to Ohio Adm. Code 4901-1-15(E)(1). The reasons for these arguments are more fully stated in the following memorandum.

Respectfully submitted,

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[3]With regard to Ohio Adm. Code 4901-1-15(A)(2), OCC believes that Ohio Supreme Court and federal court precedent exists, and will be discussed herein, that suggests that rulings prohibiting discovery, may, given the totality of the circumstances, *amount to undue prejudice* and affect the substantial rights of parties to trial preparation and the presentation of evidence.

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MEMORANDUM IN SUPPORT

I. *BACKGROUND*

OCC requests that the Commission hear this application for review without the need for certification, under Ohio Adm. Code 4901-1-15. Alternatively, the Attorney Examiner or others should certify this interlocutory appeal to the Commission. This interlocutory appeal and application for review are intended to obtain a reversal or modification of the rulings entered by the Attorney Examiners on February 28, 2007.

Vectren is a natural gas distribution company serving 300,000 customers in the Dayton area. Vectren filed this case in 2005, pursuant to O.R.C. 4929.11, ostensibly to propose a demand-side management (energy efficiency) program for the benefit of consumers. With the passage of time, it has become clear that this application was never really so much about demand side management as it was to obtain an extremely favorable ratemaking mechanism called "decoupling" for Vectren.

OCC engaged in good faith negotiations with the Company for a period of four to five months or more endeavoring to obtain a significant demand side management programs for residential customers. During that time frame, OCC engaged in informal discovery of sorts, receiving information from the Company on an as needed basis. OCC forewent opportunities in reliance upon Vectren entreaties. Under the stipulation, OCC was supposed to be made whole in the event the stipulation was rejected or materially modified by starting the case over again. However, Vectren now disavows that stipulation provision in favor of the decoupling.

The Commission took the stipulation and ripped out any meaningful demand side management program, with little regard for the careful balancing of consumer and utility interests in the stipulation and the considerable efforts and thought that went into it. The modified stipulation approved by the Commission was unrecognizable from OCC's perspective. Gone was the DSM portfolio, replaced by a paltry $2 million energy efficiency program directed solely to low income customers. The low income energy efficiency program instituted under the stipulation was adopted without a showing of net economic benefit (the purported reason the other DSM programs were rejected) and appeared to be merely a continuation of low income funding agreed to in the prior Vectren rate case.

Notably, the SRR, the *decoupling* mechanism freely awarded to Vectren for automatic rate increases, arose from the ashes, not as a tool to implement more DSM, but as an independent tool to address Vectren's declining sales (unrelated to DSM) since the last rate case. "We are approving this rider as a means of ending the link between gas

consumption and the recovery of fixed costs."[4] At that time, the Commission claimed its authority for approving the stipulation and the decoupling came from O.R.C. 4929.05, the gas alternative regulation statute. In a most recent Commission *Entry*,[5] the Commission now claims that the decoupling was approved outside of O.R.C. 4929.05. Instead, the Commission seizes upon heretofore unmentioned authority associated with the Commission's right to approve changes in accounting under O.R.C. 4905.13.

OCC filed for rehearing of the Commission's September 13, 2006 *Order*. This was rejected. OCC then timely and properly pursued its rights to withdraw from and terminate the stipulation. Under the language of the stipulation, the case was to start over -- "as if the stipulation had never been executed." In its Notice of Withdrawal OCC asserted that a hearing should be conducted, consistent with the language of paragraph 13 of the April stipulation. The Attorney Examiners in several entries confirmed OCC's right to a hearing,[6] and established discovery rights as well for OCC.[7]

The discovery rights granted to OCC emanate from the April Stipulation and compliment the familiar and established rights that any non-stipulating party would have to challenge a stipulation at hearing. Implicit in the right to go forward with a hearing "as if the stipulation had never been executed" is the right to adequately prepare for the hearing by conducting pre-hearing discovery -- "[m]utual knowledge of all the relevant

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[4] *Opinion and Order* at 16 (September 13, 2006).

[5] *Entry on Rehearing* (February 28, 2007).

[6] *Entry* at 2 (December 29, 2006).

[7] *Entry* at 2 (January 23, 2007).

facts gathered by both parties is essential to proper litigation."[8] Indeed the Commission's rules of discovery are formulated based on this very premise.[9]

Now, the Attorney Examiners seek to severely limit the discovery OCC may conduct by limiting OCC's inquiry to "new issues" despite the fact that before the Commission is a stipulation, like many others before it, which must pass the three prong standard of stipulations, irregardless of where the stipulation came from or what it represents. The result of the Attorney Examiners' rulings is that the Amended Stipulation cannot be truly tested under the three prong standard, but that only portions of the stipulation that are new (vis-à-vis changes made by the Commission to the April stipulation) should be subject to discovery and are relevant to the upcoming evidentiary hearing. These actions contravene the need to evaluate any stipulation, regardless of where it came from or what it represents, according to the three prong stipulation test. Moreover, the rulings displace the full and reasonable pre-trial discovery that is the right of parties in PUCO proceedings. In addition to the resulting prejudice in this case, this discovery constraint can have a chilling effect on the willingness of parties to put time and effort into good faith settlement negotiations in future cases.

II. STANDARD OF REVIEW

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

> (A) Any party who is adversely affected thereby may take an immediate interlocutory appeal to the commission from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral

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[8] *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

[9] Ohio Adm. Code 4901-1-16(A).

ruling issued during a public hearing or pre-hearing conference which:

...

(2)Denies a motion to intervene, terminates a party's right to participate in a proceeding, or requires intervenors to consolidate their examination of witnesses or presentation of testimony;

...

(B) Except as provided in paragraph (A) of this rule, 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 pre-hearing 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 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....

Under these standards, the Commission should reverse or modify the rulings of the Attorney Examiners at the February 28, 2007 discovery conference and permit OCC the pre-hearing discovery it is entitled to conduct, pursuant to O.R.C. 4903.082 and Ohio Adm. Code 4901-1-16(A) to adequately prepare for trial.

III. APPLICATION FOR REVIEW AND INTERLOCUTORY APPEAL

A. OCC's Rights to Participate in the Proceeding have been terminated by the Attorney Examiner's Rulings, taken as a whole, and therefore immediate certification is warranted under Ohio Adm. Code 4901-1-15(A)(2).

The rulings issued at the discovery conference were unlawful and unreasonable in a number of respects. All of the evidentiary rulings made at the discovery conference were premised upon an erroneous ruling that the scope of this phase of the proceeding should be limited to "new issues" associated with the Amended Stipulation. OCC will only be able to contest elements of the Amended Stipulation that are "new" vis-à-vis the original April Stipulation. This approach is contrary to the well established three prong test applied to virtually every stipulation brought before the Commission for review,

since the test was formulated back in 1985.[10] This is the same three part test that has also been expressly approved by the Supreme Court of Ohio.[11]

In adopting these unprecedented restrictions on all aspects of the case, on a going forward basis,[12] the Attorney Examiners have effectively terminated OCC's participation in this case. Written discovery has been severely restricted, depositions eliminated or constrained, and the presentation of evidence by OCC in this case has been unreasonably and unlawfully thwarted. The actions of the Attorney Examiners when viewed in the totality of the circumstances, amount to undue prejudice to OCC's trial preparation efforts, efforts which are statutorily preserved under O.R.C. 4903.082. The rulings are so pervasive and far reaching, potentially precluding presentation of evidence at the hearing, that OCC's fundamental due process rights have been affected here. The rulings, taken together, represent the effective termination of the "right to participate" that OCC has in PUCO proceedings,[13] with the result that the Commission can hear this appeal without certification.

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[10] *In the Matter of the Restatement of the Accounts and Records of the Cincinnati Gas & Electric company, the Dayton Power and Light Company, and Columbus & Southern Ohio Electric Company*, Case No. 84-1187-EL-UNC, *Opinion and Order* at 5-10.

[11] *See* for example, *Industrial Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St. 3d 559 (1994). OCC does not concede that the Amended Stipulation meets the three prong test. Further OCC does not concede that the first prong of the test is adequate for evaluating a stipulation that is not signed by a representative cross-section of the parties and where the signatory parties do not represent the customers that they conscript to pay $11 million.

[12] This occurs through the grant of the motion in *limine*, which was itself lacking precedent and totally inappropriate and meaningless in a Commission proceeding. OCC still does not understand what the effect of the ruling is, after reviewing the transcript of the hearing as well as Vectren's request for the motion in *limine*.

[13] *Ohio Consumers Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, ¶ 20.

For instance, under the Attorney Examiners' rulings, OCC will be precluded from discovery on the use of the decoupling mechanism, and its financial impact on Vectren.[14] This ruling ignores the plain fact that there are different parties to the Amended stipulation, and the underlying purpose of the stipulation is vastly different -- decoupling is used as a tool to address Vectren's declining sales, unrelated to DSM. The decoupling mechanism and the financial impact on Vectren are areas of inquiry that go directly to whether this stipulation meets the second prong of the stipulation test -- Does the stipulation as a package benefit ratepayers and the public interest? OCC is also precluded from seeking information related to the gas alternate regulation filing requirements of the Ohio Adm. Code that were waived at a different (and relatively harmonious) phase in the proceeding when settlement was at hand, and now appear highly relevant as to whether the stipulation can meet the second prong of the stipulation test.

A number of courts have found that denial of documents in the course of discovery may affect the substantial rights of a party and unduly prejudice trial preparation.[15] Appellate courts will reverse discovery orders "where the trial court has erroneously denied or limited discovery."[16] Where a trial court issued a discovery order permitting the ordering party to answer some limited interrogatories and refused to accept evidence relating to an aspect of the case, the reviewing court found that there was no

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[14] Tr. at 78-84. (February 28, 2007).

[15] *See* for example, *Wyant v. Marble*, 135 Ohio App. 3d 559 (C.A. Hamilton Cty. 1999); *Roebling v. Anderson*, 257 F. 2d 615, 621(C.A. D.C. 1958); *Goldman v. Checker Taxi Co.*, 325 F.2d 853, 856 (C.A. 7 Cir. 1963); *Rankin v. C.C.D.C.F.S.*, 2006 Ohio 6759, 2006 Ohio App. LEXIS 6674 (C.A. Cuyahoga Cty 2006) (holding that denial of pertinent discovery substantially affected appellant's rights and was an abuse of discretion).

[16] *Mauzy v Kelly Services, Inc.*, 75 Ohio St. 3d 578, 592 (1996), citing 8 Wright, Miller, & Marcus, Federal Practice & Procedure (2 ed. 1994), 92, Section 2006.

substantial and meaningful discovery.[17] Fundamental unfairness may also be found where the trial court failed to enforce discovery orders[18] or where the trial court's attitude in reaching a decision on discovery is unreasonable, arbitrary, or unconscionable.[19]

Thus, under the precedent set by courts, the totality of the rulings made by the Attorney Examiner is such that they substantially affect OCC's rights to conduct meaningful discovery and prepare for hearing. The effect of these rulings is that OCC's right to effectively participate is terminated. The rights of OCC to effectively participate in the hearing are affected by the unreasonable and unlawful evidentiary rulings. They result in a termination of OCC's participation in the proceeding, thus qualifying for an immediate ruling, under Ohio Adm. Code 4901-1-15(A)(2), without certification, by the Commission.

B. The Attorney Examiners should certify this appeal to the Commission under 4901-1-15(B) because it presents new questions of interpretation.

If the Attorney Examiners do not deem the interlocutory appeal to satisfy 4901-1-15(A)(2), they should nonetheless certify this appeal to the Commission, pursuant to 4901-1-15(B). The appeal represents several new or novel questions of interpretation, satisfying the first prong of certification. In this regard, the rulings present a case of first

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[17] *Rossman v. Rossman*, 47 Ohio App. 2d 103 (C.A. Cuyahoga Cty. 1975).

[18] *Voegeli v. Lewis*, 568 F. 2d 89 (8 Cir. 1977).

[19] *Reece v. Grange Guardian Ins. Co.*, 2004 Ohio App. LEXIS 5122 (C.A. Lucas Cty. 2004).

impression[20] interpreting the rules for evaluating an alternative gas regulation plan under O.R.C. 4929.05 *et seq.* No other alternative gas regulation plan has been evaluated by the Commission under the unique circumstances presented here -- where an original filing was made pursuant to another statute (O.R.C. 4929.11), and then, by Attorney Examiner fiat, the proceeding was turned into an alternative regulation proceeding, even though a contemporaneous O.R.C. 4909.18 application was not made. Nor has the Commission ever ruled upon the discovery rights of a signatory party that properly withdraws from a stipulation, after the Commission materially modifies it and adopts a new stipulation, which the Commission consequently rules is null and void. Indeed, as the Commission has duly noted this case involves an "unusual and convoluted procedural history"[21] unlike any seen before.

C. The interlocutory appeal also meets the second prong of the certification test -- requiring that an immediate determination by the Commission to prevent undue prejudice or expense.

Pursuant to Ohio Adm. Code 4901-1-15(B), certification should be granted because "[a]n immediate determination by the commission is needed to prevent the likelihood of undue prejudice." OCC, and the residential consumers it serves, will be prejudiced if the scope of the hearing is defined to deny OCC the right to present evidence, engage in meaningful discovery, and conduct cross examination on the full

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[20] There was only one other alternative gas regulation proceeding that was filed before this Commission. See *In the Matter of the Application of the Cincinnati Gas & Electric Company for Approval of an Alternative Rate Plan for its Gas Distribution Service*, Case No. 01-1478-GA-ALT ("CG&E AMRP"). There, unlike here, the alternative regulation plan was contemporaneously filed with an application to increase rates. In that case, there was notice, investigation (and a staff report issued), a determination of the reasonableness of rates requested, evidence of compliance with 4935.05 and 4929.02, and information filed in compliance with the standard filing requirements of Ohio Adm. Code.

[21] *Entry* at 5 (February 28, 2007).

range of issues that should be presented if this is to proceed under O.R.C. 4929.05 and if this stipulation is to be fully subjected to the three prong stipulation standard. Given that OCC is in the midst of preparing for an evidentiary hearing, an immediate ruling is needed to prevent OCC from expending unnecessary time and resources and being prejudiced if the Attorney Examiner's ruling is reversed.

D. The Commission should reverse or modify the Attorney Examiners' rulings pursuant to Ohio Adm. Code 4901-1-15(E).

1. The limitation of discovery to "new issues" is unreasonable and unlawful.

On the merits of the appeal, it is clear that the Attorney Examiners' rulings, when taken as a whole, were unreasonable and unlawful to such a degree to amount to prejudicial error and abuse of discretion resulting in a fundamental unfairness to OCC in derogation of its substantial due process rights. The limitation of discovery to new issues raised by the Amended Stipulations will prevent OCC from discovery and presentation of evidence related to whether the Amended Stipulation satisfies the Commission's three prong standard. There is no justifiable reason to suggest that this stipulation should be any different from any other stipulation that the Commission must pass on.

The Commission earlier was faced with a stipulation (the April stipulation) vastly different from the one presented now. The April stipulation was greatly modified and subsequently adopted by the Commission and is now null and void, by the filing of OCC's Notice of Termination and Withdrawal. Now the Amended Stipulation is before the Commission "as if the [original] stipulation had never been executed." It should be subjected in full to the three prong stipulation standard, regardless of where it came from or what it represents. The Attorney Examiners' approach severely limiting OCC's ability

to challenge the new stipulation, using the Commission's three prong test, is unwarranted and unprecedented.

The granting of ample rights of discovery, as OCC is entitled to under O.R.C. 4903.082, will not prejudice Vectren or OPAE. The real prejudice will come when Vectren customers are hit with the unlawful $11 million rate increase over the next two years. Given the significance of the rate increase, the Commission should err on the side of caution, and permit OCC to adequately prepare for the evidentiary hearing that its ratepayers deserve at this crucial fork in the road. "The exceptional case requires different treatment however, and the spirit of the rules does not require that completeness in the exposure of the issues in pretrial discovery proceedings to be sacrificed to speed in reaching the ultimate trial on the merits. Delay should be avoided to the extent that it is unnecessary or unreasonable but adequate time must be allowed for discovery of facts and assembly of the proof."[22]

Moreover, the artificial limitation of OCC's discovery rights punishes OCC for engaging in good faith negotiations with Vectren, and will have a chilling effect on OCC's and other parties willingness to engage in future settlements. Pursuing two separate tracks simultaneously -- a settlement track and a litigation track, is more time consuming and fraught with pitfalls then the Attorney Examiners can even surmise. In truth it is very difficult, if not impossible, to do so under the time constraints imposed in Commission proceedings. Parties, including OCC, have limited time and resources to devote and at times must choose one track or the other. OCC's early efforts in this case were geared toward settlement. If OCC had aggressively attempted to pursue discovery

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[22] *Freehill v. Lewis*, 355 F.2d 46, 48 (4 Cir. 1966).

at that point, and had OCC objected to Vectren's motions for waiver, the result would have practicably been that negotiations would have broken down. Moreover, OCC relied upon its rights, preserved in the stipulation, to start the case once again, if the Commission materially modified the stipulation. Now because OCC engaged in good faith settlement efforts, efforts the Commission and Supreme Court of Ohio have encouraged and lauded, OCC is being precluded from presenting evidence and conducting discovery related to how the new Amended Stipulation meets or fails to meet the three prong standard. This is not a battle that the Commission should choose to engage in.

2. The granting of the motion in *limine* is virtually unprecedented and is meritless in a proceeding before the PUCO, and represents a fundamental change in the conduct of proceedings before the PUCO.

As pointed out by OCC in its Memorandum Contra Vectren's Motion for Protection, a motion in limine has no real place in a PUCO proceeding. Because it can not function as a ruling on admissibility, it has no meaning at the PUCO. 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 have always been conducted. This is the way the Ohio Adm. Code provides for hearings to be conducted.[23] There is nothing special or so unusual here that merits a departure from well established Commission practice.

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

There is no precedent that supports the ruling the Attorney Examiners have made here. In fact these types of motions have been regularly denied by the Commission.[24] The Commission should overturn this erroneous evidentiary ruling.

3. The Attorney Examiners have misinterpreted and misapplied the recent Ohio Supreme Court case, *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 300, which ruled, *inter alia*, there is no federally recognized settlement privilege that should prevent the OCC from obtaining information on all aspects of the settlement discussions.

The Attorney Examiners denied discovery requests aimed at discovering the specifics of settlement talks and negotiations between the signatory parties.[25] Their ruling is a misinterpretation of the Ohio Supreme Court's ruling in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 300 (2006).

One of the issues raised in the recent *Consumers' Counsel* case was whether side agreements are discoverable or whether they are protected from discovery by privilege. The Commission argued that the Court's earlier pronouncement in *Constellation*[26] supported a holding that side agreements are not discoverable. The Supreme Court discussed *Constellation*, linking its holdings to the 6th Circuit's decision in *Goodyear Tire*

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[24] *See 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* at 2 (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. 83-854-GA-AIR *Opinion and Order* (July 17, 1984); *In the Matter of the Complaint of the Cleveland Electric Illuminating Company v. American Electric Power Company*, Case No. 95-454-EL:-UNC *Entry* (August 31, 1999).

[25] Tr. at 76-78 (February 28, 2007).

[26] *Constellation*, 104 Ohio St. 3d 530 (2004).

& Rubber Co, where the 6th circuit found an absolute privilege extends to the underlying discussion of the settlement negotiations themselves:[27]

> *Constellation* was this court's review of a case involving an application by the Dayton Power & Light Company for an extension of its market development period. (citation omitted). In that case the commission cited *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.* (C.A.6, 2003), 332 F.3d 976, as persuasive authority and held that side agreements, 'being information related to the negotiation of the proposed stipulation,' are privileged. In *Goodyear,* the Sixth Circuit recognized a 'settlement privilege' under federal law that protects statements made in furtherance of settlement from third-party discovery. Id. at 980-982.
>
> Although federal case law such as *Goodyear* is not binding on this court with regard to interpreting the Civil Rules, it can be instructive where, as here, Ohio's rule is similar to the federal rule. See *First Bank of Marietta v. Mascrete, Inc.* (1997), 79 Ohio St.3d 503, 508, 1997 Ohio 158, 684 N.E.2d 38. Fed.R.Civ.P. 26(b)(1) and Ohio Civ.R. 26(B)(1) are substantially similar. **We do not find Goodyear persuasive, however, and decline to recognize a settlement privilege applicable to Ohio discovery practice.**

Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St. 3d 300, 321-322 (emphasis added). The Court went on to criticize the holding of the 6th Circuit in *Goodyear*, noting that a number of problems pervaded the 6th circuit's holding. First, the Ohio Supreme Court found that while the court in *Goodyear* created a new settlement privilege under Fed.R.Evid. 501, there is no broad consensus of support, in federal courts or in other states, for such a privilege. In fact the Ohio Supreme Court characterized the 6th circuit as "the only circuit court of appeals to recognize such a privilege." Second, the Supreme Court further discounted the *Goodyear* holding, noting that although the settlement

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[27] *Goodyear,* 332 F.3d at 979.

privilege in *Goodyear* was based on federal law, since it was a diversity case, it should have been governed by the controlling state privilege law.

The Court went on to clarify that in Ohio privilege is "governed by statute or 'by principles of common law as interpreted by the courts of this state in the light of reason and experience.'" (citation omitted). The Court then commented upon the Commission's failure to cite any Ohio statute or case law that expressly creates a "settlement privilege" pertaining to information sought at the discovery stage. Finally the Court noted that Evid.R. 408 even provides that evidence of settlement may be used for several purposes at trial, making it clear that discovery of settlement terms and agreements are not always impermissible.

In the final paragraphs of the discussion the court concludes that **"even if we were to conclude that Goodyear was persuasive authority,"** which it did not, the Commission erred in misapplying the *Goodyear* holding. The Court then remanded the issue to the Commission and ordered that the Commission compel disclosure of the requested information.

It would appear that the Attorney Examiners are still clinging to the holding of *Goodyear* despite the clear pronouncement from the Ohio Supreme Court that *Goodyear* is not persuasive and is from the Supreme Court's perspective, an erroneous holding. Note that in the final concluding paragraphs the Court admonishes that even if it were to conclude that *Goodyear* is persuasive authority, **which it expressly did not,** the Commission had misapplied *Goodyear's* holdings.

Hence, the holdings of *Goodyear* that the absolute privilege applies to underlying discussions made during settlement should no longer represent authority for the

Commission to deny the rights of OCC access, through discovery, to all details of the settlement negotiations, including the underlying discussions of the settlement negotiations themselves. The Commission should reverse the Attorney Examiners' ruling here consistent with the Supreme Court's holding in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 300, 321-323.

IV. CONCLUSION

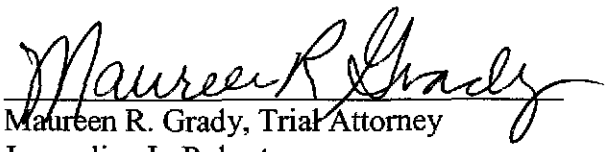
The evidentiary rulings made at the discovery conference are without Commission precedent, will severely prejudice OCC in its presentation of its case, and contravene discovery rights in Ohio law and rule. The rulings will preclude OCC from discovering and presenting evidence on whether the Amended Stipulation meets the three prong standard for judging the reasonableness of stipulations. OCC should not be precluded from delving into or discovering any information related to this stipulation, what the implications of the stipulation are for Vectren's customers, and whether the stipulation meets the three prong test for judging stipulations. The Attorney Examiners' rulings will preclude OCC from challenging all but the "new issues" associated with the stipulation.

Given the significant stakes at issue for consumers, i.e. an $11 million rate increase in exchange for a $2 million low income program, the Commission should permit OCC wide latitude in discovery, consistent with the permissible scope of discovery under the Commission's rules. There will be no undue harm to Vectren or others from permitting full and open discussion of the Amended Stipulation and what it truly means to Vectren's 300,000 residential customers. On the other hand Vectren's

customers will be greatly harmed when, over the next two years, they will be handing over to Vectren $11 million or more, without demand side management tools to minimize the bill impacts of the increase.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



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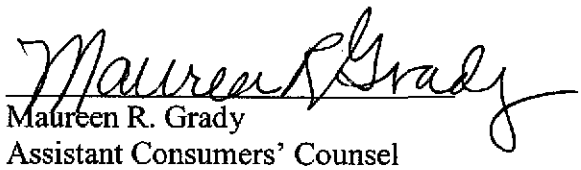
CERTIFICATE OF SERVICE

I hereby certify that a copy of the Application for Review and Interlocutory Appeal by the Office of the Ohio Consumers' Counsel was provided, as specifically agreed to by the persons listed below, electronically this 5th day of March 2007.



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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. For Approval Pursuant to Revised Code Section 4929.11 of Tariffs to Recover Conservation Expenses and Decoupling Revenues Pursuant to Automatic Adjustment Mechanisms and for Such Accounting Authority as May be Required to Defer Such Expenses and Revenues for Future Recovery Through Such Adjustment Mechanisms.	:	Case No. 05-1444-GA-UNC

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PROCEEDINGS

Before Steven D. Lesser and Gregory Price, Attorney Examiners, held at the offices of the Public Utilities Commission of Ohio, 180 East Broad Street, Hearing Room 11-F, Columbus, Ohio, on Wednesday, February 28, 2007, at 10:00 A.M.

- - -

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- - -

with you.

ATTORNEY EXAMINER LESSER: 1:00 o'clock? We will be ready at 1:00, but we can make it 1:15. 1:00 o'clock then.

(RECESS TAKEN)

ATTORNEY EXAMINER LESSER: I am going to begin with the motion in limine. And the motion in limine is granted to an extent. And that is modified. It will be granted that the scope of all future aspects of the proceeding to new issues raised by the January 12th, 2007 amended stipulation and recommendation not already contemplated or could have been contemplated in the company's application.

And with regard to the protective order, it is denied as to Mr. Ulrey. It is granted as to Mr. Petitt, it is granted as to Mr. Ellerbrook.

It is denied on, there is two No. 4s, but that is okay, it is denied as to the first 4, second 4, and the 5. And it is denied because of the phrase present testimony, will testify, will testify.

And No. 6 is also denied but subject to the rulings as to the motion to compel discovery.

MS. GRADY: Your Honor, if I might, I don't have that in front of me. Can I quickly get it in front of me?

ATTORNEY EXAMINER LESSER: Which one?

MS. GRADY: On my deposition notice because I wanted to find out exactly what you had granted versus what you denied.

ATTORNEY EXAMINER LESSER: Okay. It's attached to your motion.

MS. GRADY: Yes. While you are going over it I just wasn't quiet ready. I am sorry.

ATTORNEY EXAMINER LESSER: I am sorry. I will do it again for you.

MS. GRADY: Thank you.

ATTORNEY EXAMINER LESSER: Ulrey, the motion for protective order is denied. It's granted for Petitt, it's granted for Ellerbrook. Double 4, 5 and 6 are all denied. 6 is denied though to the extent that it will be subject to

the rulings in the motions to compel discovery though.

And what I said about double 4 and 5 is that they are denied because they say present testimony, will testify and will testify. We think that is a key phrase. But, that is your language. But they are denied.

So, do you want to go ahead with the --

MS. GRADY: Your Honor, if I may ask for a clarification. To the extent that we go through rounds of -- or we go to the evidentiary hearing and testimony is presented and if the company deems it necessary or appropriate to submit further testimony beyond that which it filed are you then making a ruling that OCC would be denied the right to depose --

ATTORNEY EXAMINER LESSER: I will not speculate. We will deal with all of that when or if we get to that point. It's difficult enough without going any further into the future.

MS. GRADY: I guess I was wondering when we have these rulings, I understand you are

saying to new issues raised with regard to not something that has not already been contemplated or could have been contemplated, that despite that ruling we may still have differences of opinion with regard to specific data requests and whether or not those are new issues. Is it your intention then to go through each one of those?

ATTORNEY EXAMINER LESSER: We are going through every one of the individual discovery matters that were in the first and second sets.

MS. GRADY: And the other question then I would have is on the third set of discovery which responses were filed yesterday, would it be --

ATTORNEY EXAMINER LESSER: We believe our rulings today will hopefully be interpretive and will give both sides guidance as to how we are viewing the case and the parties will act accordingly.

MS. GRADY: Thank you.

ATTORNEY EXAMINER LESSER: If necessary, we will be available for either an

informal or formal discovery conference. We hope that is not necessary. But, we have time.

ATTORNEY EXAMINER PRICE: Let's turn to the first set of motion to compel responses to the first set of discovery.

MS. GRADY: Your Honor, can you give me a moment? Thank you, Your Honor.

ATTORNEY EXAMINER PRICE: Sure. I am going to start actually with the attachment and just work my way through them so you can all follow along beginning on page 4 of the attachment beginning with interrogatory No. 1.

ATTORNEY EXAMINER LESSER: Off the record.

(DISCUSSION OFF THE RECORD)

ATTORNEY EXAMINER PRICE: Beginning with interrogatory 1, the motion to compel will be denied because this relates to seeking information related to settlement negotiations.

Interrogatory No. 2 the motion to compel will be denied for the same reason.

MS. GRADY: Your Honor, might I ask is that based upon some recognition of settlement privilege?

ATTORNEY EXAMINER PRICE: Yes. Frankly the scope of what you asked for was way beyond what the Supreme Court approved in terms of side agreements recently. You are not just asking for side agreements, you are asking for the details of settlement negotiations.

MS. GRADY: I don't know if this is the appropriate time to express this, but I have asked for identify the persons present. I mean, if in fact -- I am not sure how a person's presence or the contact --

ATTORNEY EXAMINER PRICE: Well, you said the persons present, the specific matters discussed and the documents generated and provided pursuant to any and all contact, Interrogatory 1.

ATTORNEY EXAMINER LESSER: We think there is a difference between what the Supreme Court said is allowed and what is being asked for in this question.

MS. GRADY: And not parts --

ATTORNEY EXAMINER PRICE: If you have more narrow discovery requests, you know, I would suggest that you make them.

MS. GRADY: The discovery cutoff has already occurred, Your Honor. It was February 7th. And by Vectren's it was, you know, 2006 April. So, I am not sure where that puts us. I mean, it seems like you could have them respond to individual pieces of this that wouldn't be objectable and would be consistent.

ATTORNEY EXAMINER LESSER: That is not our question.

ATTORNEY EXAMINER PRICE: That is not our question. We tried to do that in other instances, but you have asked a very broad question and the ruling you got is the ruling you got.

MS. GRADY: At what time would you like to hear the interlocutory appeals?

ATTORNEY EXAMINER LESSER: You can do them when we are done.

ATTORNEY EXAMINER PRICE: Moving ahead to interrogatory No. 9, subpart 8. Motion to compel is granted as to Ohio operations.

Interrogatory No. 9, subpart I, the motion to compel is granted. Subpart K the motion to compel is denied.

Skipping ahead to interrogatory No. 23, the motion to compel is granted. No. 24 the motion to compel is denied on the basis that the question is vague or overbroad.

Interrogatory No. 25, the motion is denied on the basis the question is vague and overbroad.

No. 26 the motion to compel is denied on the basis that the question is vague and overbroad.

No. 27, more specific question, the motion to compel is granted.

No. 28, the motion to compel is granted.

Request for production of documents. No. 1, the motion to compel is denied based upon it asked for information regarding settlement negotiations.

No. 6, the motion to compel is denied. This asks for discovery related to issues which could have been contemplated by the application of the company. As to those issues the discovery cutoff date was April 24th, 2006.

No. 9, the motion to compel is

denied. It asked a question that is not reasonably calculated to led to discoverable evidence. The stipulation was terminated by OCC's notice of termination.

No. 21, the motion to compel is granted. I am sorry. Denied. Yes, that is granted. I am sorry. The objection that underlies interrogatory No. 9 has already been overruled.

No. 24, the motion to compel is granted for the same reasons.

No. 27, the motion to compel is denied.

No. 28, the motion to compel is denied. It will not lead to -- reasonably calculated to lead to admissible evidence.

As to the request for admissions, request for admission No. 1, the motion to compel is denied. Interrogatory No. 2 was previously denied. And let me just point out on that one the fact that you made it contingent upon interrogatory No. 2 is what led us not to rule in your favor. If you made it simply a more broad statement and not tied it back to No.

2 you would of had a better opportunity.

Number 11, the request for admission, or motion to compel is denied. The discovery cutoff date for this issue was April 24th, 2006.

Number 13th, the motion to compel is granted. No. 14, the motion to compel will be denied. Discovery cutoff date for this issue has come and gone.

MR. RINEBOLT: Excuse me, Your Honor. What number was what?

ATTORNEY EXAMINER LESSER: 14.

MR. RINEBOLT: I am sorry.

ATTORNEY EXAMINER PRICE: I said 13 was granted. And 14 was denied.

MS. GRADY: May I ask a point of clarification? On the request for admit that are granted are you making the ruling that the company should respond to these?

ATTORNEY EXAMINER PRICE: The company should respond to these. We are overruling their objections.

MS. GRADY: Is there a deadline that they should respond?

ATTORNEY EXAMINER PRICE: Mr. Randazzo, when do you think you can reasonably respond to these?

MR. RANDAZZO: It is Wednesday presently, I would guess within five or six days we will have responses to -- once we see everything we need to respond to.

ATTORNEY EXAMINER LESSER: Calendar days?

MR. RANDAZZO: Yes. Calendar days. And if it's going to be longer than that -- the other thing, I don't know whether you want to do this off the record, once we get some clarity with regard to the scope of this there may be some things that we can resolve otherwise to streamline our ability to respond. So, subject to that, we will -- let's say by Wednesday, a week, we have responses back. In the event it looks like to us it is going to take longer on any one of them we will let everybody know.

And we will not hold up responses on the ones that we can respond to if we have problems on one or two of them.

ATTORNEY EXAMINER PRICE: Do you

have an objection to that process?

MS. GRADY: Well, Your Honor, the only thing I would say, the sooner these responses are given to us the quicker we can go forward with the deposition to the extent that we are permitted to. So, I think it expedites things if we can get things moving.

ATTORNEY EXAMINER PRICE: Thank you. Request for admission No. 16, the motion to compel is denied. Discovery cutoff for this issue was April 24th, 2006.

No. 18, the motion to compel is denied for the same reason.

20, the motion to compel is denied. Discovery cutoff for this issue has passed.

27, the motion to compel is denied. The discovery issue for this has passed.

28, the motion to compel is denied. The discovery cutoff for this issue has passed.

No. 29, the motion to compel will be denied. It seeks to discover information related to the September 13th, 2006 Opinion and Order which is not relevant to this proceeding at this point.

30, the motion to compel is denied for the same reason.

I believe that is all we have for the first set of interrogatories. Or first set of discovery.

MS. GRADY: Your Honor, is this the time to --

ATTORNEY EXAMINER LESSER: No. We did the protective order, motion in limine, the first. We will do the second set and that way you can do it all at the same time. If you need a few minutes just let us know.

ATTORNEY EXAMINER PRICE: Second set, interrogatory No. 29, the motion to compel will be granted.

Interrogatory No. 30, the motion to compel will be granted.

31, the motion to compel will be denied. The rules, requirements of 4901:1-19-05 have previously been waived by the Commission in this proceeding.

32, denied for the same reason.

33, denied for the same reason.

34, denied for the same reason.

35, denied for the same reason.

36, the motion to compel will be granted to the extent that it pertains to Vectren's amended stipulation and recommendation.

37 will be denied on the basis the Commission previously waived the provisions of 4901:1-19-05.

ATTORNEY EXAMINER LESSER: That is based on your description of where the degree of freedom came from.

ATTORNEY EXAMINER PRICE: No. 38, the motion to compel is granted.

39, the motion to compel will be granted.

40, the motion to compel will be granted.

41, the motion to compel will be granted.

43, the motion to compel will be granted.

44, the motion to compel will be granted.

On the request for production of

documents, the motion to compel, as to No. 34, the motion to compel will be denied. The Commission has previously waived that particular rule.

No. 35, the motion to compel will be denied. The Commission previously waived the provisions of that rule.

No. 36, the motion to compel will be denied for the same reasons.

No. 37, the motion to compel will be denied on the basis of the new stipulation is not a new alt reg plan, but is simply a resolution of the company's application for an alt reg plan.

No. 38, the motion to compel will he granted. That is it.

ATTORNEY EXAMINER LESSER: Do you want a couple minutes?

MS. GRADY: Sure.

(RECESS TAKEN)

ATTORNEY EXAMINER LESSER: Ms. Grady.

MS. GRADY: Your, Honor at this time I would make a request for an immediate appeal

of the adverse rulings to the Commission under 4901:1-15 A 2 as the rulings terminate our right to participate in this proceeding in a meaningful way.

ATTORNEY EXAMINER LESSER: Okay. Is that the only motion you are going to make?

MS. GRADY: No, Your Honor. And to the extent that the Attorney Examiners are not willing to make an immediate or allow an immediate appeal to the Commission we would request at this time that the appeal be certified to the Commission under 4901:1-15 B upon a finding that these are new or novel questions of interpretation given the very strange and convoluted process that this proceeding has taken and that an immediate determination is necessary in order to prevent undue prejudice to OCC in presenting and going forward with its case.

ATTORNEY EXAMINER LESSER: Okay. We are not going to rule on the record on that today. We will put out an entry.

ATTORNEY EXAMINER PRICE: I do have a question. On your first part of your appeal

in terms of meaningful participation, do you have any case where the Commission has previously ruled that a discovery ruling has in any sense cut off a party's ability to participate in a case?

MS. GRADY: No, Your Honor, I do not, but that doesn't mean I won't come up with one.

ATTORNEY EXAMINER PRICE: Thank you.

MR. RANDAZZO: Your Honor, in order to streamline the processing of this case we have no objections to this occurring orally. I think you can make a case that it might need to happen in handwriting, but we would like some guidance with regard to when you might make a ruling in case we would have anything in writing that we would like to say in response to the request for an interlocutory appeal.

ATTORNEY EXAMINER LESSER: Well, we will deal with it fairly quickly. I think by Monday.

MR. RANDAZZO: Okay. That is fine, Your Honor. I appreciate it. Thank you. If we have anything that we wish to indicate to Your

Honors we will do it in writing and it get to you by the end of the week.

ATTORNEY EXAMINER LESSER: Thank you. So, since we asked the question did you have a cite, if you could give it to us and distribute it. Anything further today?

MR. RANDAZZO: I would just say that to the extent that there are any case citations that are going to be made in support of the motion it would be helpful to so that we can respond to do them to get them sooner as opposed to later.

MS. GRADY: I think part of the delay that there may be would be with respect to getting a record of this proceeding, getting the transcript. I understand our court reporter is one of the topnotch reporters around, so we would certainly need a copy of the transcript prior to providing that so we understand the nature and can take some time to look at the nature of the ruling and how it relates to what you are asking for.

ATTORNEY EXAMINER LESSER: Okay.

MR. RANDAZZO: Can we go off the

record for a second?

ATTORNEY EXAMINER LESSER: Sure.

(DISCUSSION OFF THE RECORD)

ATTORNEY EXAMINER LESSER: Thank you very much.

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(At 1:40, P.M. the hearing was concluded)

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CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on February 28, 2007, and carefully compared with my original stenographic notes.

_____

Michael O. Spencer,
Registered Professional
Reporter.

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