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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

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VECTREN ENERGY DELIVERY OF OHIO, INC.'S  
POST-HEARING BRIEF

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April 23, 2007

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## **CERTIFICATE OF SERVICE**

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POST-HEARING BRIEF**

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**I. INTRODUCTION**

On November 28, 2005, Vectren Energy Delivery of Ohio, Inc. ("VEDO") filed an application for approval 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 those mechanisms ("Conservation Application").

On December 14, 2005, OCC filed a Motion to Intervene and a Motion to Establish a Procedural Process "...permitting OCC to evaluate, examine and comment on the proposed Application." OCC's December 14, 2005 supporting memoranda acknowledged that VEDO's November 28, 2005 Conservation Application sought approval of: (1) "...a tariff to recover expenses of conservation efforts and to provide a decoupling mechanism that would recover the difference between VEDO's actual

weather-normalized usage-sensitive base rate revenue and the usage-sensitive base rate revenue approved in VEDO's last rate case;"<sup>1</sup> and (2) "accounting authority to permit VEDO ... to defer expenses and revenues for subsequent disposition and treatment pursuant to the addition of a conservation rider to its Commission-approved tariff." The nature of the relief that VEDO has sought throughout this proceeding has not changed since VEDO filed its Conservation Application on November 28, 2005. More specifically, while the level, form of funding and the target population for the conservation programs has evolved since VEDO filed its Conservation Application, VEDO's proposed decoupling mechanism and accounting authority have remained the same as originally proposed by VEDO.

On February 7, 2006, the Attorney Examiner issued an Entry directing that the Conservation Application be "considered a request for an alternate rate plan as described in Section 4929.01(A), Revised Code and thus...controlled by Section 4929.05, Revised Code." Conservation Application, Entry at 2 (February 7, 2006). On February 27, 2006, VEDO filed a Motion to Incorporate Standard Filing Requirements from Rate Case requesting that certain of the standard filing requirements ("SFRs") from VEDO's recent rate case, Case No. 04-571-GA-AIR, be incorporated in the record of this proceeding, which was granted by Entry dated March 16, 2006. On March 10, 2006, VEDO filed a Motion for Waiver of Rules 4901:1-19-05 and 4901:1-19-03(B), O.A.C., which include the requirements for alternative rate plan applications and for seeking a waiver of those requirements, which was granted by Entry dated April 5,

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<sup>1</sup> Despite its more recent claims that the decoupling mechanism results in a rate increase, it is clear from OCC's own pleadings that the mechanism operates to produce no more revenue than the Commission approved in VEDO's last rate case.

2006. OCC did not object and did not file interlocutory appeals of either of these Entries.

On April 10, 2006, VEDO, Ohio Partners for Affordable Energy ("OPAE"), and the Office of the Ohio Consumers' Counsel ("OCC") filed a Stipulation and Recommendation ("April 10 Stipulation") for the purpose of resolving the issues in this proceeding. Rebuttal Testimony in support of the Stipulation was filed by VEDO, OPAE, and OCC on April 19, 2006; followed by Surrebuttal Testimony of Staff opposing the Stipulation filed on April 21, 2006. After a local public hearing, the hearing convened in Columbus, Ohio on April 24, 2006, at which the parties and Staff waived cross-examination of all witnesses, the record was closed, and the matter was submitted for Commission consideration based on the evidence of record. In effect, all the parties to the proceeding recognized that the contested issues were best left to resolution by the Commission because, fundamentally, the questions turned on the Commission's "policy call" guided by Ohio law. The contested issues reflected differences between the parties regarding the size and nature of the steps which the Commission should authorize.

On September 13, 2006, the Commission issued its Opinion and Order ("September 13 Opinion and Order") in which it resolved the contested issues and expressed its rulings by reference to a modified version of the Stipulation. On September 28, VEDO filed Tariff Sheet No. 43, Sales Reconciliation Rider ("SRR"), approved by the Commission in its September 13 Opinion and Order. On October 13, 2006, OCC filed its Application for Rehearing ("October 13 Application for Rehearing") which was denied by Entry dated November 8, 2006 ("November 8 Rehearing Entry").

On December 8, 2006, OCC filed a Notice of Termination and Withdrawal from the April 10 Stipulation, which OCC submitted renders the April 10 Stipulation "null and void" and entitled it to a hearing as if the April 10 Stipulation had never been executed ("Notice of Termination"). On December 21, 2006, VEDO, OPAE and Staff filed a Stipulation and Recommendation ("December 21 Stipulation") to address the uncertainty created by OCC's Notice of Termination, to clarify the desire of other parties to move forward based on the valid September 13 Opinion and Order, and to streamline the resolution of any procedural issues raised by OCC's Notice of Termination.

On December 29, 2006, the Attorney Examiner filed an Entry in this proceeding that concluded in paragraph 6 that "...the Commission cannot approve a stipulation that by its own provisions has been terminated. The rider that was filed in accordance with that stipulation is also no longer in effect." ("December 29 Entry"). The Attorney Examiner also ordered VEDO, OPAE, and Staff to file, within ten days, a document setting out the terms and conditions of the December 21 Stipulation. On January 2, 2007, VEDO and OPAE filed a Joint Motion for Interlocutory Appeal of the December 29 Entry. On January 3, 2007, OCC filed an Application for Review and Interlocutory Appeal from the December 29 Entry. By Entries dated January 10, 2007, one of VEDO and OPAE's issues was certified to and disposed of by the Commission; certification to the Commission of all other issues raised by both filings was denied. In its January 10, 2007 Entry, the Commission authorized the continuation of the accounting treatment for the SRR originally approved in its September 13 Opinion and Order through the pendency of the case. On January 12, 2007, VEDO, OPAE, and Staff filed an Amended Stipulation and Recommendation ("January Stipulation" or "Amended

Stipulation”) responsive to the directive of the December 29 Entry, the contents of which were identical to the December 21 Stipulation and the September 13 Opinion and Order. On February 9, 2007, OCC filed an Application for Rehearing of the Commission’s January 10, 2007 Entry which was denied by the Commission by Entry on Rehearing issued February 28, 2007.

Pursuant to the December 29 Entry and the January 10, 2007 Attorney Examiner Entry, the Attorney Examiner determined that a hearing would be held on the December 21 Stipulation (and January Stipulation) 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. The scope of the hearing and the procedural process were indeed discussed at the January 22, 2007 pre-hearing conference. As a result of that discussion, VEDO believed that the scope of the proceeding going forward would be limited to new issues raised by the December 21 Stipulation (and January Stipulation).

On January 23, 2007, the Attorney Examiner issued an Entry (“January 23 Entry”) establishing a February 7, 2007 deadline for service of discovery, a February 21, 2007 deadline for the filing of testimony and an evidentiary hearing date of February 28, 2007. The January 23 Entry was silent on the scope of the hearing, as well as the scope of the newly permitted discovery and testimony. On January 29, 2007, VEDO and OPAE filed a Joint Motion for Certification of an Interlocutory Appeal and OCC filed an Application for Review and Interlocutory Appeal (“Appeal”) of the January 23 Entry, both of which were denied by Attorney Examiner Entry dated February 12, 2007.

On February 7, 2007, OCC filed a Notice to Take Deposition upon Oral Examination and Request for Production of Documents (“OCC’s Deposition Notice”).

On February 15, 2007, VEDO filed a Motion for Protective Order and a Motion in Limine seeking protection from OCC's Deposition Notice and limitation on the scope of the proceeding going forward to new matters raised by the Amended Stipulation not already contemplated by the Commission in its September 13 Opinion and Order and November 8 Rehearing Entry. On February 22 and February 27, 2007 OCC filed Motions to Compel Responses to Discovery. A discovery conference ("February 28 Discovery Conference") was held on February 28, 2007, at which VEDO's Motion for Protective Order and OCC's Motion to Compel were each granted in part and denied in part. The Attorney Examiners substantially granted VEDO's Motion In Limine by limiting "...the scope of all future aspects of the proceeding to new issues raised by the January 12, 2007 amended stipulation and recommendation not already contemplated or could have been contemplated in the company's application." February 28 Discovery Conference, Tr. at 72.

At the end of the February 28 Discovery Conference, OCC sought certification of an Interlocutory Appeal from the Attorney Examiners' rulings (February 28 Discovery Conference, Tr. 86-91), followed by an Application for Review and Interlocutory Appeal filed on March 5, 2007, which was denied by Entry dated March 7, 2007. OCC conducted a deposition of VEDO witness, Jerrold L. Ulrey on March 13, 2007, the transcript and errata sheet of which were filed on March 23 and 27, 2007, respectively.

OCC filed a Motion for Continuance of the February 28, 2007 hearing date on February 16, 2007, in response to which the Examiner continued the hearing date to March 28, 2007 by Entry dated February 23, 2007.

The testimony of Martin G. Kushler and Paul L. Chernik for OCC and Jerrold L. Ulrey for VEDO was filed on February 21, 2007. Commission Staff filed the supplemental testimony of Stephen E. Puican on March 14, 2007. The second evidentiary hearing in this case was held on March 28, 2007. The Examiner established deadlines for post-hearing briefs and reply briefs of April 23, 2007 and May 3, 2007, respectively. This is VEDO's Post-Hearing Brief.

By Entry dated February 12, 2007, the Attorney Examiner specified that, "[a] hearing has been scheduled on the January Stipulation, which will be considered according to the Commission's three-part test for consideration of stipulations." Entry (February 12, 2007), paragraph 15 at 9. At the discovery conference held on February 28, 2007, the Attorney Examiners limited "...the scope of all future aspects of the proceeding to new issues raised by the January 12, 2007 amended stipulation and recommendation not already contemplated or could have been contemplated in the company's application." February 28 Discovery Conference, Tr. at 72. VEDO submits this Post-Hearing Brief respectfully addressing only those matters specified by and within the scope of the hearing as prescribed by the Examiners.

## **II. ARGUMENT**

### **A. The January Stipulation presents no new issues not already contemplated or which could have been contemplated in the company's application.**

The record in this proceeding demonstrates that the April 10 Stipulation jointly supported by VEDO, OPAE, and OCC proposed resolution of all issues raised by VEDO's application. The primary features of the April 10 Stipulation were a \$4.67 two-year conservation program (all but \$970,000 of which was rate-payer funded) available

to all residential and commercial customers and a sales reconciliation rider designed to provide VEDO a fair, just, and reasonable opportunity to collect the base rate revenue requirement approved by the Commission in VEDO's most recent rate case (Case No. 04-571-GA-AIR).

The Staff opposed the April 10 Stipulation, thereby requiring the Commission to issue a decision in accordance with Section 4903.09, Revised Code. The Commission considered the issues raised by VEDO's application in this proceeding on April 24, 2006 in a hearing on the merits pursuant to Section 4929.05, Revised Code, and resolved the contested issues in its September 13 Opinion and Order. The contested issues were resolved, after hearing, in the form of an alternative regulation plan based on the evidence submitted by the signatory parties to the April 10 Stipulation as well as the evidence presented by the Staff and the information (including sworn testimony provided by residential customers) the Commission obtained from the public hearing process. The primary differences between the proposals in the April 10 Stipulation and the Commission's approved *alternative rate plan* were the amount and source of funding for conservation programs (\$2M funded by VEDO) and the set of customers eligible for the conservation programs (low-income customers). These modifications, prescribed by the Commission, were, as discussed below, for the specific purpose of satisfying the Commission's three-part test for consideration of the reasonableness of stipulations. September 13 Opinion and Order at 13, 16, and 17.

Subsequent to the Commission's November 8 Rehearing Entry denying OCC's October 13 Application for Rehearing, OCC filed its Notice of Termination, introducing uncertainty and delaying delivery of assistance programs to low-income customers as

intended by the Commission. September 13 Opinion and Order at 13; March 28 Hearing, Tr. at 15.

To streamline the Commission's disposition of any issues raised by OCC's Notice of Termination, VEDO, OPAE, and Staff submitted the December 21 Stipulation, the results of which were identical to the September 13 Opinion and Order, in an attempt to provide a vehicle for expedited implementation of the alternative regulation plan approved by the Commission. As a result of the direction of the Attorney Examiner in the December 29 Entry they filed an Amended Stipulation on January 12, 2007. The terms and conditions of the Amended Stipulation (or January Stipulation) and the December 21 Stipulation describe and embrace a plan that is identical to the plan approved by the September 13 Opinion and Order. The Commission has already decided twice that this plan is supported by the record before it in this proceeding and was, as discussed below, molded by the Commission expressly so that, in the Commission's view, it would meet the three-part test used by the Commission to evaluate recommendations presented in a contested proceeding by parties to a stipulation.

Regardless of the procedural peculiarities<sup>2</sup> resulting from the process imposed in this proceeding following OCC's Notice of Withdrawal, no finding has been (or can be)

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<sup>2</sup> In spite of the fact that VEDO, OPAE, and Staff simply asked the Commission to confirm its previously-rendered decision following its consideration of the record in this case in which all parties had been afforded due process, defense of the reasonableness of the January Stipulation (as if the results it provides were not identical to those of the Commission's ordered alternative regulation plan) was required of VEDO, OPAE, and Staff. Ironically, the process followed subsequent to OCC's Notice of Withdrawal has served to provide OCC, after denial of its October 13 Application for Rehearing, what has amounted to a second rehearing of the September 13 Opinion and Order, with added significant new rights of discovery and the presentation of evidence which would not have been available to OCC had its October 13 Application for Rehearing been granted. The result is a generous abundance of process afforded to OCC which should obviate any attempt to criticize the opportunity afforded OCC by the Commission.

made that the January Stipulation raises any issues not already contemplated by or which could have been contemplated by VEDO's application. The issues raised by VEDO's application were considered in the Commission's review of the record presented in the April 24 hearing and resulted in the alternative regulation plan sought to be implemented by the January Stipulation. There being no new issues raised by the January Stipulation, the remaining consideration identified by the Examiners involves an application of the Commission's three-part test for consideration of stipulations to the January Stipulation. This application is streamlined by the determinations the Commission has already made during the course of this proceeding and is addressed below.

**B. The Commission has already found that the terms and conditions of the January Stipulation meet its three-part test for consideration of stipulations.**

In its review of the record of this proceeding, the Commission applied its three-part test to the April 10 Stipulation and, based on its review of the record in the case, found that the resolution of the issues contained in the April 10 Stipulation required modification to satisfy all three parts of the test. September 13 Opinion and Order at 12, 16, and 17. Accordingly, the Commission issued a decision in which it crafted an alternative regulation plan resolving the issues presented by the application which it concluded satisfied the three-part test. *Id.* As indicated above, the terms and conditions of the January Stipulation provide for the same alternative regulation plan specified by the Commission in its September 13 Opinion and Order. It follows, then,

that the January Stipulation meets the three-part test.<sup>3</sup> However, because of the process required following OCC's Notice of Withdrawal, VEDO filed the testimony of Jerrold L. Ulrey on February 21, 2007, and Staff filed the testimony of Stephen E. Puican on March 14, 2007, each supporting the reasonableness of the January Stipulation and addressing its compliance with the three-part test. Categorically speaking, the testimony filed by OCC on February 21, 2007, was largely devoted to providing copies of documents authored by and studies conducted by people other than the OCC witnesses (to which only references were made in the testimony preceding the April 24 hearing) and was all directed at convincing the Commission that the April 10 Stipulation should have been approved.

**1. The January Stipulation was the product of serious bargaining among capable, knowledgeable parties.**

Staff witness Puican and VEDO witness Ulrey both agree that the January Stipulation was the product of serious bargaining among capable knowledgeable parties. Staff Ex. 3 at 2-3; Company Ex. 2c at 4-5. As Mr. Ulrey testified, "The parties involved had been in serious, lengthy negotiations since . . . before the application was filed in this case, and the negotiations continued through the original Stipulation that was filed and continued in the preparation of the Amended Stipulation...." March 28 Hearing, Tr. at 23. In specific reference to the January Stipulation, Mr. Ulrey explained that discussions began shortly after the September 13 Opinion and Order and continued for a period of months. *Id.* at 25. As Mr. Ulrey pointed out, the January Stipulation

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<sup>3</sup> In fact, OCC witness Chernik testified that, "[c]learly, the January Stipulation is inextricably linked to the conclusions of the Commission in its September 13 Opinion and Order and its November Entry on Rehearing." OCC Ex. at 6.

evidences the signatory parties response to the "...very narrow question about the willingness of some or all of the parties to accept the Commission's guidance and move forward based on the plan approved by the Commission." Company Ex. 2c at 4. The record reflects that OCC was invited to participate in the January Stipulation and declined. *Id.*

The January Stipulation clearly meets the first criterion of the three-part test.

**2. The January Stipulation benefits ratepayers and the public interest and does not violate any important regulatory practice or principle.**

The best evidence that the January Stipulation benefits ratepayers and the public interest and does not violate any important regulatory practice or principle is the Commission's September 13 Opinion and Order. In agreement with the Staff's position that certain terms of the April 10 Stipulation failed to meet these two criteria, the Commission dictated modifications that, *inter alia*, provided for the two-year, \$2 million low-income conservation program and a requirement for Commission review after two years as a prerequisite to the continuation of the conservation program and the SRR. September 13 Opinion and Order 13, 16, and 17. The Commission explicitly stated that, "[w]ith these modifications, the Commission finds that the stipulation, as a package, benefits ratepayers and the public interest and does not violate any important regulatory principle or practice. *Id.* at 16. The Commission's modifications result in a Company-funded efficiency program in place of a program largely funded by customers--having reviewed the record with respect to the April 10 Stipulation, including the Staff testimony in opposition thereto, the Commission exercised its expertise in determining the public interest, including the level and source of funding for the programs. The OCC

already lost rehearing on this issue. OCC's second bite at the apple produced nothing new that would justify any modification of the September 13 Opinion and Order. Once again, since the January Stipulation prescribes the same results as the September 13 Opinion and Order, it satisfies the three-part test.

Although OCC suggests that the January Stipulation does not benefit ratepayers and is not in the public interest, it has offered nothing to controvert the Commission's determination. OCC witness Chernik devotes his testimony to support of the April 10 Stipulation, already rejected by the Commission. OCC Ex. E at 7. OCC witness Kushler concludes that a comparison of the net-of-tax low-income program cost to VEDO with the recovery he assumes VEDO will realize from the SRR "...suggests that the January Stipulation as currently structured does not necessarily benefit ratepayers and may not be in the public interest... ." OCC Ex. F at 3-4.<sup>4</sup> Both of these witnesses ignore that the only economic difference between the April 10 Stipulation and the September 13 Opinion and Order (and the January Stipulation) is a \$4.7 million swing in favor of customers as a result of the elimination of customer funding and the increase of the funding required from VEDO. From this perspective, it is impossible to say that the April 10 Stipulation meets this second criterion and the January Stipulation (and the September 13 Opinion and Order) does not. Neither of OCC's witnesses offered opinions with respect to the first and third criteria of the three-part test. March 28 Hearing, Tr. at 128-129, 160.

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<sup>4</sup> Mr. Kushler also recommends, without regard to the Commission's lack of authority, that the Commission order VEDO to fund energy efficiency programs in the amount of \$4.65 million. CITE at 14. Further he recommends that the Commission cap the amount that VEDO may collect through the SRR. *Id.* Staff witness Pulcan, on the other hand, testified that there existed Staff sentiment that VEDO would have been better off to file the SRR as a stand alone rider without any conservation program proposal. March 28 Hearing, Tr. at 185-186.

Both Staff witness Puican and VEDO witness Ulrey testify that the January Stipulation benefits ratepayers and the public interest and does not violate any regulatory practice or principle. Staff Ex. 3 at 3; Company Ex. 2c at 5. Mr. Ulrey has explained that the collaborative of stakeholders has designed low-income programs for which 60% of VEDO's residential customers are eligible, and that the associated marketing and education efforts, as well as the nexus on-line tool, will reach all customers. Company Ex. 2c at 3; March 28 Hearing, Tr. at 37-38. As Staff witness Puican points out, the January Stipulation provides customers with conservation programs at VEDO's expense and simply allows VEDO the opportunity to collect the revenues at a level the Commission has already authorized in a manner "...entirely consistent with the types of alternative rate-making approaches permitted under the statutes." Staff Ex. at 3.

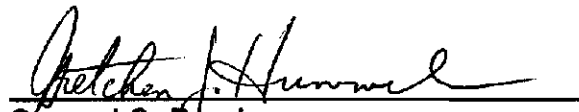
The January Stipulation, being consistent in all respects with the Commission's September 13 Opinion and Order, meets the three-part test by which the Commission evaluates stipulations.

### **III. CONCLUSION**

The January Stipulation is no more than an agreement by the parties to the Commission's September 13 Opinion and Order. The agreement was and is motivated by a shared interest in moving forward with conservations programs for which 60% of VEDO's residential customers are eligible, removing rate design barriers to conservation and providing VEDO with the accounting authority required to allow the alternative regulation plan's components to work in harmony. Any challenge to the January Stipulation, regardless of the subject matter of the claim, is no more than an

application for rehearing from the September 13 Opinion and Order. OCC has already exercised its right, pursuant to Section 4903.10, Revised Code, to seek rehearing of that order, which was denied in the Commission's November 8 Rehearing Entry. As indicated above, the process required in this case as a result of OCC's Notice of Withdrawal has provided expanded rights to OCC at the expense of parties who have sought to implement the Commission's decision. The continuing record in this proceeding, accumulated subsequent to OCC's Notice of Withdrawal, demonstrates that, as originally decided in its September 13 Opinion and Order, the terms and conditions of the January Stipulation continue to meet the three-part test by which the Commission considers the reasonableness of a stipulation.

Respectfully submitted,



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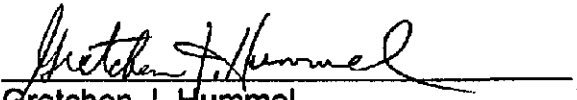
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Vectren Energy Delivery of Ohio, Inc.'s Post-Hearing Brief* has been hand-delivered, sent electronically or served via ordinary U.S. Mail, postage prepaid, this 23<sup>rd</sup> day of April, 2007 to the following parties of record.

  
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