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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application for)
Establishment of a Reasonable) Case No. 09-80-EL-AEC
Arrangement Between The Ohio Edison)
Company and V&M Star.)

APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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April 3, 2009

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Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of approximately 925 thousand residential electric customers of Ohio Edison Company ("OE"), applies for rehearing of the March 4, 2009 Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this proceeding. The Order addressed the application ("Application") by V&M Star, Inc. ("V&M") before this Commission seeking approval of a "reasonable arrangement" between V&M and OE for electric service provided to V&M's Youngstown steel producing facility.

OCC asserts that the Commission Order was unjust, unreasonable and unlawful and the Commission erred in the following particulars:

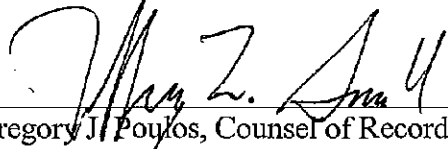
- A. Assignment of Error 1: The Commission depended upon V&M's representations that it had short-term plans to expand its facility and create hundreds of jobs in Ohio, a premise that is incorrect based upon information that was neither made available to OCC at the time of the hearing nor made known to the Commission for purposes of informing its finding in the Order.

- B. Assignment of Error 2: The Commission erred when it approved a settlement that permits V&M and OE to circumvent reasonable oversight and accountability requirements.
- C. Assignment of Error 3: The Commission erred when it approved a settlement that permits V&M and OE to circumvent reasonable transparency requirements.
- D. Assignment of Error 4: The Commission erred when it continued to withhold from public view the entire contents of V&M's submissions to the PUCO, violating transparency requirements under Ohio statutes.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION AND STATEMENT OF THE CASE

On January 29, 2009, V&M filed its Application before this Commission seeking approval of a "reasonable arrangement" between V&M and OE for electric service provided to V&M's Youngstown steel producing facility. V&M's Application was premised upon V&M's plans to expand its facility and create an additional 250 to 300 jobs.¹

On February 5, 2009, an Entry was issued that, among other things, provided interested parties the opportunity to intervene and file comments and objections to the Application by February 18, 2009. OCC filed a Motion to Intervene and Comments on February 18, 2009, and OE also filed comments on that date. On February 23, 2009, V&M filed Reply Comments. On February 25, 2009, OCC's Motion to Intervene was granted by Attorney Examiner Entry.

¹ Order at 1.

At the subsequent hearing on February 26, 2009, V&M presented Roger Lindgren, CEO and President of V&M, as a witness.² William Ridmann, from OE, also testified pursuant to a subpoena issued by the Commission at OCC's behest.³

A Joint Stipulation and Recommendation ("Stipulation") was reached between V&M, Staff, and OE. The Stipulation was filed on February 27, 2009.⁴ On March 2, 2009, V&M, Staff, OE, and OCC filed briefs. On March 4, 2009, the Commission issued its Order in this proceeding, and approved the Stipulation with modifications. One of the modifications rejected the creation of a separate tariff schedule for V&M service and required "V&M and OE to file in this docket an executed contract under seal . . . within 20 days of this order, for electric service that comports with the terms of the Stipulation."⁵

On March 23, 2009, V&M filed a redacted version of a contract ("Contract") between V&M and OE. The Contract states that its effective date "shall be the date upon which the Company receives written notice from Customer [i.e. V&M] that Customer has obtained corporate approvals to proceed with the Ohio-based expansion project described in the [A]pplication submitted by Customer in Commission Case No. 09-80-EL-AEC."⁶ That effective date conflicts with a provision of the approved Stipulation in which the effective date is set at "the date upon which the Commission issues an order permitting the schedule or arrangement to become effective."⁷

² Id. at 2.

³ Id.

⁴ Joint Ex. 1 (Stipulation).

⁵ Order at 9.

⁶ Contract at 2 (March 23, 2009) ("Effective Date and Term").

⁷ Joint Ex. 1 (Stipulation) at 4 ("Term").

The statement in the Contract regarding the effective date appears partly explained by recent announcements regarding a delay in announcement of expansion plans for V&M's Youngstown facilities. As an example, the attached news account states that V&M is laying off workers in Youngstown and that the expansion decision expected in September has been delayed further.⁸ The news account also states that V&M officials have informed Youngstown Mayor Williams regarding a date for the expansion decision, but that the Mayor was unwilling to reveal that information and would rely on V&M to make such announcements. The Contract filed at the PUCO on March 23, 2009 appears to reflect the greater uncertainty regarding the expansion in Youngstown than existed at the time of the hearing.

II. STATUTORY BASIS FOR APPLICATIONS FOR REHEARING

Applications for rehearing are governed by R.C. 4903.10. In considering an application for rehearing, Ohio law provides that the Commission "may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear." Furthermore, if the Commission grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same"⁹

R.C. 4903.10 also provides that upon the filing of an application for rehearing, "the commission may grant and hold such rehearing on the matter specified in such application" In such a rehearing determination, the Commission "shall specify the

⁸ *V&M Star Steel expansion decision delayed*, Vindy.com (March 12, 2009).

⁹ R.C. 4903.10.

scope of the *additional evidence*, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.”¹⁰ As provided in the above-stated Statement of the Case, additional information is available from V&M regarding recent revisions to its expansion plans. That information was made known to OCC after the close of the record and did not exist for OCC to offer at the time of the original hearing. That information should be made part of the record and considered for purposes of changing the Commission’s Order on rehearing.

III. SUMMARY OF OCC’S POSITION

OCC supports economic development and the retention and creation of jobs in Ohio, especially in these challenging economic times. OCC sincerely hopes and desires that V&M will be successful in expanding its operations in Ohio. In viewing economic development contracts, it is important to strike a balance between the business that will benefit and the burden on customers who will pay and who may or may not be direct or indirect beneficiaries of the proposed business project. To that end, consideration needs to be given to the magnitude of cost increases resulting from one or more economic development contracts and its impact on a struggling customer to maintain affordable service. Subsidies may increase the number of disconnections of utility service for families because the incremental cost increase takes the family over the edge of what they can afford to pay. Tying economic development to utility service may not be good public policy if benefits provided to businesses cause untold hardship on families struggling to keep food on the table and the lights on.

¹⁰ Id. (emphasis added).

If state policy makers are going to link economic development to utility service, then certain inviolable protections are warranted in exchange for the hardship imposed on every day families. These include: the guarantee and verification that the promised jobs and other economic benefits will be realized in a timeframe promised by company officials; that these contracts include oversight and accountability provisions; that the contracts be transparent and the cost to customers be quantifiable prior to approval because the public has a right to know what they are paying for and how much it will cost them over a period of years; and that the Commission's rules (that are currently pending at the Joint Committee on agency Rule Review (JCARR)) that set forth criteria for approving special contracts and unique arrangements are adhered to.

While OCC is filing an Application for Rehearing, it is not to protest the V&M project but to call into question the practices surrounding the terms and the approval of the contract that fails to adhere to the above principles to which the public is entitled. OCC believes that in approving the V&M contract, the Commission should apply its policies as they are stated in the PUCO's recently approved rules that require accountability, transparency, and verification.

IV. ARGUMENT

- A. Assignment of Error 1: The Commission depended upon V&M's representations that it had short-term plans to expand its facility and create hundreds of jobs in Ohio, a premise that is incorrect based upon information that was neither made available to OCC at the time of the hearing nor made known to the Commission for purposes of informing its finding in the Order.**

The Commission's Order is clear about the relationship between the approved special arrangement for V&M and representations made regarding the expansion of V&M's facilities. The Order states:

V&M is requesting that the Commission establish an arrangement or schedule for electric service, which will permit V&M to successfully expand its operation in Ohio.¹¹

[T]he commission is approving the recovery of 100 percent of the delta revenue for this arrangement based on the specific circumstance and the benefits that will occur to the parties to the arrangement, all OE ratepayers, and the state of Ohio from the expansion of V&M's operation in Youngstown, Ohio.¹²

The Commission is also mindful of its responsibilities to ratepayers to ensure that V&M fulfills the representations of economic development that it has made in its application, which is the *basis for the Commission's approval* of the reasonable arrangement.¹³

Considering the PUCO's reliance upon the representations by V&M regarding its expansion plans, the information that V&M has delayed and reconsidered its expansion plans should be important to the final determinations in this case. The revisions should prompt a change in the Commission's decision on rehearing.

R.C. 4903.10 provides that in a rehearing determination, the Commission "shall specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing."¹⁴ The timeframes stated above demonstrate that the additional information regarding changes to V&M's business plans became available after the hearing. The Contract, filed on March 23 and post-hearing (and also post-

¹¹ Order at 1.

¹² Id. at 7.

¹³ Id. at 8 (emphasis added).

¹⁴ Id.

Order), contains a provision for an effective date that conflicts with the terms of the approved Stipulation. The Commission should specify that evidence regarding the expansion plans at V&M's Youngstown facilities that were not available at the time of the hearing will be taken on rehearing and considered for purposes of the final decision in this case.

The Commission should -- upon rehearing based post-hearing information that casts doubt upon any short-term plans for expansion at V&M's Youngstown facilities -- reconsider and modify the Order. V&M should update the information contained in its Application and again seek PUCO approval (if it so desires) for a special arrangement at a time when representations regarding expansion plans are more firm or under other circumstances that V&M may argue are pertinent to the Commission's decisions. The Commission should, at a more appropriate point in time, judge the merits of V&M's business plans under rules applicable for such a judgment.

In the alternative, the Commission should recognize on rehearing that V&M has modified its request in the wake of its business developments and filed the Contract stating the effective date for the rate discounts will be when V&M "has obtained corporate approval to proceed with the Ohio-based expansion project. . . ." ¹⁵ V&M's change in its request regarding the effective date should be viewed as a positive development from a regulatory standpoint, revealing recognition on the part of V&M that the discounted rates approved by the Commission were integrally linked to the expansion plans. However, it is poor regulatory policy to base the existence of discounted rates -- and compensating payments by residential and other customers -- on an announcement by

¹⁵ Contract at 2 (March 23, 2009) ("Effective Date and Term").

the head office of a large industrial customer without additional PUCO involvement. As an alternative to requiring an entirely new authorization for the discounts, the Commission should order that the rate discounts may not become effective without notice to the PUCO and an entry from the Commission authorizing an effective date for the discounted rates.

Even the Stipulation, which contains an unlawful limitation upon the Commission's supervision (explored later), provides that the "Stipulation is predicated upon a successful expansion of V&M's operations in Northeast Ohio" and that the Commission may "amend, modify or terminate the arrangement . . . if the expectations described in V&M's [A]pplication are not substantially aligned with actual performance."¹⁶ V&M's actual performance will, according to recent news accounts, be less than that described in its Application. The Commission should terminate the arrangement (or, in the alternative, amend and modify the arrangement).

B. Assignment of Error 2: The Commission erred when it approved a settlement that permits V&M and OE to circumvent reasonable oversight and accountability requirements.

In the event the Commission does not amend its Order based on post-hearing information, the Commission should modify its Order so that it is consistent with the Commission's oversight authority under R.C. 4905.31 and the rules pertaining to "[f]ailure to comply" as stated in Ohio Adm. Code 4901:1-38-09(A) through (C). The PUCO's rules have not yet become effective, but they represent the Commission's policy

¹⁶ Joint Ex. 1 (Stipulation) at 8-9 ("Expansion Expectations").

statements regarding reasonable arrangements after the PUCO considered input from the PUCO Staff and substantial comments from interested parties.

Paragraph 9 of the Stipulation limits the Commission's authority to amend, modify, or terminate the arrangement if the expectations described in V&M's application are not substantially aligned with actual performance. In addition, the Stipulation significantly curtails the remedies available to the Commission if the expectations described in V&M's Application are not substantially aligned with actual performance. The Stipulation modifies and limits V&M's responsibilities to fulfill the representations of economic development that it made in its Application. These provisions are unreasonable and should not be approved.

The Order states that the Commission found "nothing in Section 9 of the Stipulation that limits the Commission's authority to amend, modify, or terminate the arrangement if the expectations described in V&M's application are not substantially aligned with actual performance."¹⁷ Yet, *any* limitation on the Commission's continuing jurisdiction is not permitted according to R.C. 4905.31(E):

Every such schedule or reasonable arrangement *shall be under the supervision and regulation of the commission*, and is subject to change, alteration, or modification by the commission.¹⁸

The Stipulation places a "good cause shown" requirement on the Commission's supervisory authority that modifies the Commission's oversight.¹⁹ That requirement is akin to one normally placed upon a party to a proceeding,²⁰ yet it is inappropriately *placed upon the PUCO* (i.e. the decision-maker) in this instance. The General Assembly

¹⁷ Opinion and Order at 8.

¹⁸ Emphasis added.

¹⁹ Stipulation at 9.

²⁰ See, e.g., Ohio Adm. Code 4901-1-18 ("good cause shown").

gave the Commission -- not some unstated authority who judges “good cause” -- oversight authority under R.C. 4905.31(E), and the Commission should not permit any modification to this authority by stipulation. This limitation upon the PUCO in Section 9 should be eliminated.

Section 9 of the Stipulation also modifies the remedies available to the Commission if the expectations described in V&M’s Application are not substantially aligned with actual performance. The Commission should modify its Order so that it remains consistent with PUCO rules pertaining to “[f]ailure to comply” as stated in Ohio Adm. Code 4901:1-38-09(A) through (C). These rules are not effective yet, but these rules represent the Commission’s policy statements regarding reasonable arrangements.

As part of the Stipulation, the PUCO Staff agreed to limit the Commission to three remedies in the exercise of its continuing jurisdiction. For “good cause shown,” the Commission may only “amend, modify, or terminate the arrangement.”²¹ The Stipulation limits V&M from being charged “all or part of the incentives previously provided by the electric utility” as provided in the recently approved rules²² Only months after proposing and adopting Ohio Adm. Code 4901:1-38-09(A) through (C) (i.e. “[f]ailure to comply”), the Commission permitted V&M to limit the appropriate remedies for any failure by V&M to meet the expectations set in V&M’s Application. The change in policy is unexplained in the Order.

The remedies under Ohio Adm. Code 4901:1-38-09 are particularly appropriate for the scope of the discount that was approved for V&M. V&M requested that the discounted rate it receives be applied to its full electricity requirements -- i.e. the discount

²¹ Stipulation at 9.

²² Ohio Adm. Code 4901:1-38-06.

would cover the electricity requirement pertaining to existing operations even though the Application is supported on the basis of expanded operations. Without even breaking ground for the proposed expansion and without creating a single additional job, V&M may be able to benefit from a discounted rate for its existing facility and the Commission's only remedies under the approved Stipulation is to amend, modify, or terminate the arrangement. The violation of the statutory provisions regarding the Commission's authority and the repudiation of the policies embedded in the Commission's recently approved rules regarding special arrangements provides a poor start for considering this first ever request for approval of a special arrangement after the PUCO's rules were adopted.

C. Assignment of Error 3: The Commission erred when it approved a settlement that permits V&M and OE to circumvent reasonable transparency requirements.

The Commission's directive (on February 11, 2009) that clarified and adjusted the PUCO Staff's draft rules -- rules that provide oversight and transparency for economic development arrangements -- should not be circumvented in this early request for approval of a special arrangement after enactment of S.B. 221. The PUCO recently adopted rules specifically addressing economic development arrangements, energy efficiency arrangements, and unique arrangements.²³ As stated above, these rules reflect the Commission's policy pronouncements until they are finally effective after a legislative review. Accordingly, the Commission's recent policy pronouncements

²³ Ohio Adm. Code Chapter 4901:1-38. (The rules were adopted on September 17, 2008, Case No. 07-888, and subsequently modified and adopted by Entry on Rehearing on February 11, 2009.)

regarding transparency should be followed by the Commission in this case (as well as future cases).

The PUCO's rules on reasonable arrangements were modified by the Commission on February 11, 2009 to include requirements that the application contain: (1) information regarding the associated incentives; (2) estimated annual electric billings without incentives for the term of the incentives; (3) and annual estimated delta revenues for the term of the incentives.²⁴ The February 11, 2009 Entry also explained why these provisions were added to the rules:

[The Ohio Consumer and Environmental Advocates ("OCEA")] believe[] that the customers should provide the contract terms and conditions, the *associated incentives*, the terms of the incentives if different than the contract term, estimated annual electric on-peak/off-peak demand and usage over the term of the incentives, estimated annual electric billings without incentives over the terms of the incentives, and the *estimated annual delta revenues over the term of the incentives*. When the Commission adopted these rules [on December 17, 2008] and provided for the filing of applications for the approval of reasonable arrangements, we believed that the arrangements, which would contain certain of the information OCEA seeks to be added to the eligibility criteria, would be included with the application.²⁵

None of this information was included in the Application or included in the Stipulation filed on February 27, 2009.

Additionally, the Stipulation transfers V&M's obligations under Ohio Adm. Code 4901:1-38-06 ("reporting requirements") by placing a prerequisite condition *on the Commission* to seek documents rather than requiring a filing by V&M. Ohio Adm. Code 4901:1-38-06 was modified by the Commission on February 11, 2009 to require that OE

²⁴ *In re Rule Set 1 Pursuant to Sections of the Revised Code, as Amended by S.B. 221*, Case No. 08-777-EL-ORD at 20 (February 11, 2009).

²⁵ *Id.* (emphasis added).

obtain information from all customers -- including V&M -- and submit that information to the Staff as part of an annual basis that includes “the value of any incentives received by the customer(s) is identified, and the potential impact on other customers can be calculated.”²⁶ However, according to the terms of the Stipulation, the PUCO Staff agreed to eliminate that mandatory inclusion of V&M’s information in the “annual report.”

According to the approved Stipulation, the Commission is obligated to request this information: “V&M’s periodic reports shall not be filed with the Commission unless otherwise directed by the Commission.”²⁷ The Stipulation’s proposal to place an additional burden on the PUCO and to relieve V&M from an affirmative duty to provide reports to the PUCO’s Staff eliminates transparency that was intended by the Commission. The proposed rules established that all reasonable arrangements will be evaluated as part of a utility’s annual report.²⁸ The understanding by outside parties, like OCC, that all reasonable arrangements are a part of this review is undermined by the terms of the Stipulation. OCC and other interested parties will not know if the reports submitted by OE under Ohio Adm. Code 4901:1-38-06 include V&M, and this situation may easily worsen if the terms of the Stipulation are repeated by other applicants for special arrangements.

²⁶ Id.

²⁷ Stipulation at 8.

²⁸ Ohio Adm. Code 4901:1-38-06(A).

D. Assignment of Error 4: The Commission erred when it continued to withhold from public view the entire contents of V&M's submissions to the PUCO, violating transparency requirements under Ohio statutes.

The Order declares key information that has been withheld from the public -- information that is important for the calculation of any "delta revenue" subsidies that would be paid by other customers -- "trade secret" and continues to withhold that pricing information. Disclosure of critical information such as that necessary for the calculation of the delta revenues should be accessible to the public that is asked to pay for another customer's discount. The filing of such information is a practice that promotes transparency and is required under Ohio law.

A strong presumption exists toward public disclosure of information presented to the PUCO. R.C. 4901.12 requires that "all proceedings of the public utilities commission and all documents and records in its possession are public records," except as provided in the exceptions under R.C. 149.43 (Ohio's public records law). R.C. 4905.07 states that, "[e]xcept as provided in section 149.43 of the Revised Code . . . , all facts and information in the possession of the public utilities commission shall be public" The Commission has noted that R.C. 4901.12 and R.C. 4905.07 "provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome."²⁹

Rate-setting in a regulatory environment is inherently a public process that produces rates that are published and accessible to others. This is the underlying

²⁹ *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Order at 5 (October 18, 1990).

environment for R.C. 4901.12 and 4905.07, parts of which are recited above. There is no public service provided by hiding information on pricing of electricity to V&M when the prices paid for such service to other customers, including V&M's competitors, is publicly revealed. The Order does not reveal any analysis on the PUCO's part regarding the appropriateness of the "trade secret" claim other than to state that the PUCO considers the claim "reasonable."³⁰ The PUCO should release information that it has thus far shielded from public view.

V. CONCLUSION

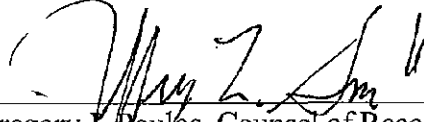
On rehearing, the Commission should correct the errors identified by OCC in this Application for Rehearing. Additionally, the Commission should grant rehearing and specify that it will take additional evidence on V&M's changed plans regarding the expansion of facilities in OE's service area. Thereafter, the additional evidence should be considered by the Commission.

The Commission should find, on rehearing, that rate discounts for V&M will only be provided after a modified application is submitted to the Commission and the PUCO makes a decision based upon additional information. The facts underlying V&M's application should be considered at the time of that application (if any).

³⁰ Order at 9.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

A handwritten signature in black ink, appearing to read "Gregory J. Poulos", is written over a horizontal line.

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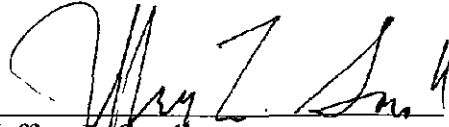
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Application for Rehearing was served by regular mail, postage prepaid, and by electronic mail service to the following parties of record, this 3rd day of April, 2009.


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V&M Star Steel expansion decision delayed

Thursday, March 12, 2009

YOUNGSTOWN — V&M Star Steel is laying off about 50 of its local workers and has delayed a decision on its nearly \$1 billion expansion proposal.

But the company's decision on expansion isn't delayed indefinitely, said Youngstown Mayor Jay Williams and Girard Mayor James Melfi.

The two say they remain optimistic that the major expansion project will happen and will do whatever it takes to make it a reality.

The mayors said today that they spoke to top V&M officials on Wednesday about the layoffs and expansion delay.

The expansion decision was to be made in September, Williams said.

"Now, they've pushed it out a little further," he said of the decision delay. "It's absolutely not delayed indefinitely. It's extended, but they said it wouldn't be stalled indefinitely."

Williams said V&M officials told him when they would have a decision on whether to move ahead with the expansion project. He declined to provide that information saying that should come from the company.

Attempts today by *The Vindicator* to reach V&M Star President Roger Lindgren were unsuccessful.

Melfi said he wasn't given a new date for a decision when he spoke to V&M officials.

Land in Youngstown and Girard near V&M's location on Martin Luther King Jr. Boulevard in Youngstown is "still their preferred site" for a major expansion project, Williams said.

About 50 V&M Star workers at the Youngstown plant are losing their jobs, Melfi said.

The plant employs about 465.

For the complete story, read Friday's Vindicator or Vindy.com