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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 Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Service and Related Matters	)))))	Case No. 04-571-GA-AIR

INTERSTATE GAS SUPPLY, INC.'S MEMORANDUM CONTRA

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I. INTRODUCTION

Interstate Gas Supply, Inc. ("IGS") is a party to the partial Stipulation and Recommendation docketed on May 26, 2006 ("Stipulation"), which contains an arrangement to implement a daily balancing methodology for the transportation program – not Choice program – on Vectren Energy Delivery of Ohio, Inc.'s ("VEDO") system ("Sheet 51 Operations"). By the Addendum to Stipulation and Recommendation ("OCC Addendum") docketed on June 30, 2006, the Office of the Ohio Consumers' Counsel ("OCC"), without reservation, recorded its "wishes to avoid delay of implementation of the May 26 Stipulation for the 2006-2007 winter heating seasons, and, agree[d] to expedited approval, by the Commission, . . . by August 1, 2006."[1]

The Commission approved the Sheet 51 Operations by its Entry of July 26, 2006, and there is nothing unclear about the Commission's approval. Therefore, IGS respectfully requests the Public Utilities Commission of Ohio ("Commission") to reject the OCC's "Application for

[1] *See* OCC Addendum at p. 2.

Rehearing,"[2] for the reasons set forth herein.

First, however, the Commission should note that the procedural and substantive purpose of the "Motion for Clarification, or in the Alternative, Application for Rehearing, by the Office of the Ohio Consumers' Counsel" filed on August 25, 2006 (the "Application for Rehearing") is to request rehearing of the Commission's July 26, 2006, Entry. Therefore, notwithstanding the OCC's styling of its pleading, the Commission should procedurally treat it as a rehearing request. Indeed, the OCC's styling of its rehearing request as a "Motion," appears to be an improper attempt to game the Commission's rules that procedurally prohibit a reply to a memorandum contra to a rehearing request, but permit a reply to a memorandum contra to a motion request.[3] The OCC has no procedural entitlement to reply to this IGS pleading.

II. DISCUSSION

From a practical standpoint, the proposal of the Sheet 51 Operations by way of the Stipulation is akin to a proposal presented by way of an application to the Commission. Accordantly, the OCC's demand to reserve a unilateral right to retroactively challenge *the approval* of an application, after the application has been lawfully approved and with the burden of proof remaining on the applicant, is procedurally unprecedented, unreasonable, and unlawful. Clearly, once the Sheet 51 Operations are implemented, the Commission's complaint process under Ohio Revised Code ("RC") § 4909.24 provides opportunities for OCC to challenge as unreasonable, unduly discriminatory, or otherwise inadequate the practices pursuant to the Sheet 51 Operations; however, the OCC's demand to retrospectively challenge the underlying approval

[2] The "Motion for Clarification, or in the Alternative, Application for Rehearing, by the Office of the Ohio Consumers' Counsel" filed on August 25, 2006, is referred to herein as the "Application for Rehearing."

[3] *See* Ohio Administrative Code ("OAC") 4901-1-35(B) and 4901-1-12(B)(2).

of the Sheet 51 Operations is unlawful and unduly prejudicial.

Indeed, OCC's new gambit to reserve a retrospective, unilateral right to challenge the approval of an application, rather than challenge the operations under the application as unreasonable or otherwise inadequate, is as ridiculous and counterproductive as the rejected OCC arguments that a stipulation is not a product of serious bargaining among capable parties just because the OCC chose to not join the stipulation.[4] Aptly concerned that "dissenting parties could exercise a virtual veto over any . . . partial settlement agreements,"[5] the Commission has consistently rejected such ploys by the OCC to retain unilateral or veto power over proceedings, stating that the "Commission will not require OCC's approval of stipulations."[6] Once again, the Commission should reject this maneuver by the OCC to hold hostage an arrangement that is the product of settlement among reasonable parties.

RC § 4909.18 and RC § 4909.24 set forth the statutory scheme for approving applications and challenging operations pursuant to the same. If an application is not for an increase in rates, the Commission shall set the matter for hearing, if the proposals in the application appear to be unjust and unreasonable.[7] Hence, there is no entitlement to a hearing for an application not for an increase in rates; regardless, the applicant has the burden of prosecuting the application. Once the application is approved, a person may challenge practices under the application as unreasonable or otherwise inadequate in accordance with RC § 4909.24; however, the complainant bears the burden of proof. While practices and operations under an application can

[4] *See* Case No. 03-2405-EL-CSS, Opinion and Order (Feb. 2. 2005), pp. 17-18.

[5] *See* Case No. 05-474-GA-ATA, Opinion and Order (May 26, 2006), pp. 12-13.

[6] *See* Case No. 03-2405-EL-CSS, Opinion and Order (Feb. 2. 2005), p. 18.

[7] *See* RC § 4909.18 (If the application is not for an increase in rates, the Commission may set the matter for hearing if it appears to by unjust and unreasonable); *see also, e.g.*, Case No. 03-1459-GA-ATA *et al.*, (Entry on Rehearing approving continuation of Choice program, with operational modifications, without a hearing).

be challenged under RC § 4909.24, the doctrine of *res judicata*[8] does *not* permit any person to challenge the underlying approval of an application once the application has been approved and deemed just and reasonable by the Commission. Despite the foregoing, the OCC is demanding an "unprecedented, super-priority right to litigate . . . if OCC determines to do so for any reason, whether or not rational."[9]

Indeed, the OCC admits that the "Commission should understand that the June 30 Addendum was . . . intended to *postpone* . . . challenge to the transportation imbalance provisions from . . . being litigated in the . . . 2006 time period to a time period after . . . April, 2007."[10] Further, the OCC admits that the Sheet 51 Operations would "face litigation if" OCC, at its sole whim "determines that it is necessary to go forward with a hearing."[11] There is nothing unclear about OCC's gambit to hold hostage entire operations by gaining this unilateral, veto-like right to retrospectively litigate the approval of stipulations and applications. Moreover, Ohio law does not permit any party "to transfer" objections to the approval of stipulations or applications "to a later point in time."[12] OCC's demand does not comport with the OCC's assertion that the OCC "Addendum did not create any new or pre-established rights."[13] The Commission should nip in the bud this gambit by the OCC to acquire rights that it is not entitled to under Ohio law.

Apparently recognizing that RC § 4909.18 does not mandate hearings if the application is not for an increase in rates, OCC misrepresents to the Commission, whether knowingly or not,

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[8] *See, e.g., Hixon v. Ogg* (1895), 53 Ohio St. 361 (*res judicata* precludes the litigation of issues more than once, because a properly rendered judgment is the end of the litigation on those issues).

[9] *See* IGS's July 25, 2006 letter.

[10] *See* Application for Rehearing at p. 3 (emphasis added).

[11] *See id.*

[12] *See id.* at p. 5.

that it is entitled to a hearing solely because this proceeding has a rate case caption. The OCC has been a party to this proceeding since its inception, and therefore, OCC should be charged with the knowledge that the Commission has held that parties are precluded from challenging the Sheet 51 Operations on the basis of process relating to rate cases, including any statutory right to an evidentiary hearing. Specifically, pursuant to the Commission's April 13, 2005, Opinion and Order ("Order") that approved the rate case stipulation, no party "shall contest or oppose such an application [to implement the Sheet 51 Operations] on the grounds that the revisions to Sheet No. 51 sought therein amount to a proposal to increase rates or charges under Section 4909.18, Revised Code."[14] Hence, in accordance with the doctrine of *res judicata*, the OCC's assertion that it has a right to a rate-case hearing is an improper collateral attack on the Order.[15]

Moreover, inasmuch as the OCC is a signatory to the OCC Addendum that urges the Commission to approve the Sheet 51 Operations, the OCC has waived any right to challenge the approval and implementation of the Sheet 51 Operations. Indeed, nowhere in its Application for Rehearing does the OCC explicitly ask the Commission to overturn its approval of the Stipulation. As noted above, the OCC Addendum expressly provides that the OCC "wishes to avoid delay of implementation of the May 26 Stipulation for the 2006-2007 winter heating seasons, and, agree[d] to expedited approval, by the Commission, . . . by August 1, 2006."[16] This demonstrates that OCC believes the Stipulation to be just and reasonable, and therefore, the

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[13] *See id.* at p. 4.

[14] *See* Order at Para. 10, p. 6 (emphasis added). *See, e.g., Hixon v. Ogg* (1895), 53 Ohio St. 361 (*res judicata* precludes the litigation of issues more than once, because a properly rendered judgment is the end of the litigation on those issues).

[15] *See, e.g., Hixon v. Ogg* (1895), 53 Ohio St. 361 (*res judicata* precludes the litigation of issues more than once, because a properly rendered judgment is the end of the litigation on those issues).

[16] *See* OCC Addendum at p. 2.

OCC has waived any right it had to oppose the approval of the Stipulation.

The OCC Addendum does state that the "OCC does not waive its right to a hearing before the Commission on the provisions of the May 26 Stipulation on a *going forward basis.*"[17] However, this demand is for a hearing on a *going forward* basis, *not the retrospective initial* approval of the Stipulation. Ohio law does not allow OCC to vacillate about its support or opposition to an application. Ohio law allows OCC to either: (i) oppose an application during consideration of its approval in accordance with RC § 4909.18, in which case the burden of proof is on the applicant; or, (ii) *on a going forward basis*, challenge practices pursuant to the application, in accordance with RC § 4909.24's complaint process, in which case the burden of proof is on the challenger. Ohio law does not allow any person, and that includes the OCC, to retroactively challenge the approval of an application, and in doing so unlawfully shift the burden of proof to the applicant for a challenge made on a going-forward basis.

Lastly, the OCC alleges that the Commission failed to evaluate the OCC Addendum under the Commission's three-part test to review stipulations. OAC 4901-1-30 authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight.[18] The following standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings, and has been endorsed by the Ohio Supreme Court for the purpose of resolving issues for the benefit of ratepayers and public utilities:[19]

(i) Is the settlement a product of serious bargaining among capable,

[17] *See id.* (emphasis added).

[18] *See, e.g., Consumers Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, at 125, citing *Akron v. Pub. Util. Comm.* (1978), 55 Ohio St.2d 155.

[19] *See, e.g.,* Industrial. *Energy Consumers of Ohio Power Company v. Public Utilities Commission* (1994), 68 Ohio St.3d 547 (citing *Consumers' Counsel, supra,* at 126).

knowledgeable parties?

(ii) Does the settlement, as a package, benefit ratepayers and the public interest?

(iii) Does the settlement package violate any important regulatory principle or practice?[20]

As discussed above, OCC's demand to retain a retroactive right to litigate the approval of the Stipulation is unlawful under RC § 4909.18 and RC § 4909.24, and therefore, to that extent the OCC Addendum fails the Commission's test to evaluate stipulations.

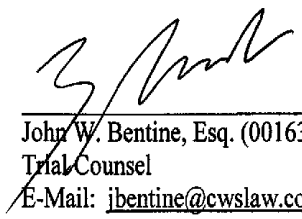
III. CONCLUSION

The OCC can have no greater rights than that permitted by statute. RC § 4909.18 requires the Commission to approve an application not for an increase in rates to the extent it finds the application to be just and reasonable. Once approved, RC § 4909.24 allows any person to challenge practices under the application. However, there is no allowance under Ohio law to retrospectively challenge the underlying approval of an application. Therefore, for all of the reasons set forth above, OCC's demand to reserve a veto-like, unilateral right to retroactively challenge *the approval* of an application, after the application has been lawfully approved, with the burden of proof remaining on the applicant, is procedurally unprecedented, unreasonable, and unlawful. To that extent, the Commission rejected the OCC Addendum, and should also, therefore, reject the OCC's Application for Rehearing.

In any event, the Commission's rejection or approval with modifications of the OCC Addendum is irrelevant to the Commission's approval of the Stipulation, which, as noted above, the OCC's Application for Rehearing does not challenge.

[20] *See, e.g.,* Cincinnati Gas & Electric Company, Case No. 91-410-EL-AIR (April 14,1994); Western Reserve Telephone Company, Case No. 93-230-TP-ALT (March 30,1004); Ohio Edison Company, Case No. 91-698-EL-

Respectfully Submitted,



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FOR *et al.* (December 30, 1993); Cleveland Electric Illuminating Company, Case No. 88-170-EL-AIR (January 30, 1989); Restatement Of Accounts and Records (Zimmer Plant), Case No. 84-1187-EL-UNC (November 26, 1985).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following parties of record or as a courtesy, via U.S. Mail postage prepaid, express mail, hand delivery, or electronic transmission, on September 5, 2006.

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