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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**

MEMORANDUM CONTRA OF OHIO PARTNERS FOR AFFORDABLE ENERGY TO THE APPLICATION FOR REVIEW AND INTERLOCUTORY APPEAL OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. Introduction

Pursuant to § 4901-1-15(D), Ohio Administrative Code (O.A.C.), Ohio Partners for Affordable Energy (OPAE), on behalf of its members and the low-income and working poor customers served by those members, hereby submits this memorandum contra to the application for review and interlocutory appeal filed on January 3, 2006 by the Office of the Ohio Consumers' Counsel regarding the Attorney Examiner's Entry (Entry) issued in this proceeding on December 29, 2006.[1] OPAE also disagrees

[1] OCC alleges that OPAE is merely a group of providers of weatherization services seeking funding. This characterization is incorrect and the citation to a footnote in *Ohio Consumers Counsel v. Pub.Util.Comm.*, 109 Ohio St. 3d 328, 335 (2006) is misplaced. OPAE was not a party in the Supreme Court appeal cited and a footnote in the decision merely references OPAE

with OCC that this appeal does not require certification under §4901-1-15(A)(2), O.A.C.; rather, certification is required under §4901-1-15(B), O.A.C. and the matters being appealed by OCC do not meet the criteria of §4901-1-15(A)(2), O.A.C.

OCC makes two arguments in its interlocutory appeal: (1) the use of §4929.05, Ohio Revised Code (O.R.C.) in the Entry to require a hearing; and, (2) OCC's interpretation that the Entry that the Revised Stipulation and Recommendation filed by Vectren Energy Delivery of Ohio (VEDO), the Staff of the Public Utilities Commission of Ohio (Staff), and OPAE functioned as a request to reopen the proceeding. Neither argument has merit.

Likewise, the preamble to OCC's arguments completely mischaracterizes the settlements that are the core of this proceeding. OPAE was a signatory party to the stipulation that was filed with this Commission and was subsequently the subject of a fully contested hearing. OCC supported the settlement as being in the public interest. The Commission chose – within its authority – to eliminate a demand-side

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as a party in the underlying case, providing a brief description of one of its multi-faceted roles in regulatory proceedings. As the Public Utilities Commission of Ohio (Commission) is well aware, and as is regularly noted in OPAE's various motions to intervene, OPAE is "an Ohio corporation with a stated purpose of "advocating for affordable energy policies for low and moderate income Ohioans" and includes as its members non-profit organizations that are customers of the applicant in this matter. OCC has never been granted a statutory monopoly to represent residential and/or low-income customers. OPAE is a corporation formed for the express purpose of representing the interests of low and moderate income customers; its track record before this Commission speaks for itself.

management (DSM) program funded by ratepayers and through deferrals, and substitute a program targeted to low-income customers funded directly by VEDO.[2] The rate design that was approved, and was supported by OCC as a part of the original stipulation, is not an "automatic rate increase mechanism" but in fact can result in a rate decrease should customer purchases increase, under a weather-normalized basis.

After the decision was final, OCC chose to exercise its rights under the original stipulation to withdraw from the agreement and filed a notice with the Commission regarding that withdrawal on December 8, 2006. The fundamental issue now before the Commission is the determination of the appropriate procedure to be followed to bring this matter to a conclusion, *to wit*, can a party to a stipulation modified by the Commission after a contested hearing overturn a final order of the Commission. OPAE and VEDO have attempted, through an amended settlement filed on December 21, 2006, and filed an interlocutory appeal to the Attorney Examiner Entry referenced above to bring clarity to the requirements under order to deploy the approved energy conservation program and continue the deferrals authorized by the rate design ordered by the Commission.

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[2] OCC also alleges, incorrectly, that OPAE is administering the program, apparently seeking to imply that OPAE somehow directly benefits from the modification to the stipulation in the Opinion and Order. The program, in fact, is overseen by a collaborative that includes OCC, administered by VEDO, and implemented by seven community action agencies with the Community Action Partnership of the Greater Dayton Area (CAP-Dayton) serving is the lead agency. The vast majority of the funding, should the program go forward, will finance energy efficiency measures for vulnerable customers with incomes below the median income in the VEDO service territory.

II. Certification of the OCC appeal is required by §4901-1-15(B), O.A.C. because effect of the Attorney Examiner decision does not qualify for the exception provided by §4901-1-15(A)(2), O.A.C.

OCC argues that the Commission need not certify this appeal because the issue at stake is, as defined by §4901-1-15(A)(2), O.A.C., the Entry "...terminates a party's right to participate in a proceeding ...." This allegation is patently incorrect. OCC after negotiation with all parties, chose to sign a stipulation and fully participated in the hearing. As is common practice, the hearing was focused on the terms of the stipulation filed by VEDO, OPAE, and OCC. All parties filed testimony including the Staff, which opposed the stipulation.[3] Since there were no factual disputes, all parties agreed to forego cross-examination; the parties, in effect, voluntarily limited the scope of the hearing. Ironically, OCC now argues that the Entry limits the scope of the hearing.[4] Apparently, OCC, having failed to persuade the Commission of the efficacy it the proposed DSM program, wants a second bite at the apple and essentially asks the Commission to ignore the evidence which all parties and the Commission found to be an adequate basis for the decision.[5]

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[3] OCC, OPAE and VEDO filed testimony in favor of the stipulation, including the rate design, and the proposed DSM program which the Commission ultimately revised.
[4] OCC Interlocutory Appeal at 7.
[5] OPAE notes that it still supports the conservation program proposed in the original stipulation and believes the evidence supports a finding that the program is just and reasonable. The record evidence also supports the conservation program ordered by the Commission.

Given the procedure agreed to by all parties to the case it is disingenuous to argue that any party has been denied the opportunity to "participate in the hearing". OCC presented evidence, waived cross examination, chose not to submit rebuttal testimony, filed a brief, and waived its right to a reply brief. As a result, OCC's interlocutory appeal must be certified by the Commission.

III. Response to the Arguments of OCC

A. The Entry properly relies on §4929.05 as the basis for rulings in this case.

The application in this matter was originally filed under the authority of §4929.11, O.R.C. However, in an Entry dated February 7, 2006, the attorney examiner found the application must be considered as a request for an alternate rate plan described in §4929.01(A), O.R.C. and therefore must follow the procedure dictated by §4929.05, O.R.C. The Company then filed motions to incorporate the pleadings filed in its recent rate case, to fulfill the requirements of §4909.18, O.R.C. as required by §4929.05, O.R.C. No party objected to the attorney examiners ruling or the incorporation of existing information from a very recent rate proceeding to fulfill statutory requirements. OCC's argument that VEDO is now benefiting from operating under a double regulatory scheme is spurious at best. The Commission authorized a two year pilot of an alternative

regulatory scheme. That does not translate into double collection as alleged by OCC. These grounds for appeal should be rejected.

B. VEDO has satisfied the filing requirements of all applicable statutes and rules and a hearing as been held.

OCC next argues that the proceeding to this point has failed to meet the requirements of statute, specifically §4909.18, O.R.C. As noted above, VEDO has filed the required filings or incorporated previous filings via waivers approved by the attorney examiner and supported by all parties. In addition, a hearing has been held and the Commission has made the requisite findings required under §4929.04, O.R.C. and §4929.02, O.R.C. as required. The OCC argument ignores the previous activity which has occurred in this case. The requirements of Title 49, O.R.C. have been met.

C. VEDO has met the filing requirements of §4909.18, O.R.C.

OPAE has pointed out above, the filing requirements of §4909.18, O.R.C. have been met. The initial attorney examiner Entry ordered the case follow the procedures dictated by §4929.05, O.R.C., rather than §4929.11, O.R.C. VEDO complied. The fact that the initial application cited a different authority as the authority for the application was changed by the attorney examiner and followed by the parties. The OCC argument is without merit.

D. The joint filings of VEDO, OPAE and Staff subsequent to OCC's withdrawal are not a request to reopen the hearing because a final order has been issued in the case.

OCC creates a strawman in its final argument alleging that the attorney examiner as illegally reopened the proceeding under §4901-1-34, O.A.C., and then proceeds to knock it down. There is a final order in this case; thus, §4901-1-34, O.A.C. is not applicable. OCC further notes that §4901-1-34, O.A.C. "restricts the presentation of evidence associated with a reopened proceeding to evidence that could not have, with reasonable diligence, been presented earlier in the proceeding."[6] The only party to this proceeding arguing there is insufficient evidence on the record is OCC, yet it had ample opportunity to file evidence prior to the hearing. OPAE, VEDO and Staff have attempted to manage the risk associated with OCC's withdrawal to ensure the implementation of a valid opinion and order approved an alternative regulation plan issued in a case with an adequate record and a hearing. §4901-1-34, O.A.C. is not applicable and this argument should be rejected.

IV. Conclusion

This is a novel case in one regard only; after the development of a full record providing evidence of compliance with §§4929.01 and 04, O.R.C., and §4909.18, O.R.C., the Commission issued a decision that deviated

[6] OCC Interlocutory Appeal at 7.

from the stipulation proposed by the parties. OCC takes exception to the ruling and has withdrawn from the stipulation, seeking to wash its hands of the entire matter and take no responsibility for its role in the case. OCC's actions are consistent with the terms of the stipulation but its request to start the proceeding from square one is in error.[7] OPAE has appealed the Attorney Examiners Entry because it feels this case is over, the pilot rate design should proceed as approved and families suffering from high utility bills be helped through conservation measures be helped as soon as possible. The arguments of OCC should be rejected.

Respectfully Submitted,

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[7] Adopting OCC's suggested approach would be tantamount to the Commission ruling that when a stipulation is changed in a contested case based on an adequate record, the position of parties opposing the stipulation is not relevant and if the Commission makes modification based on the evidence placed on the record by an opposing party, the whole case starts anew. The basic concept of judicial economy and efficiency does not warrant this outcome.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Intervene and Memorandum of Support and the attached Motion to Admit *Pro Hac Vice* was served by regular U.S. Mail upon the parties of record identified below in this case on this 5th day of January, 2007.

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