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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 REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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February 9, 2007

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

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the 293,000 residential gas consumers of Vectren Energy Delivery of Ohio, Inc. ("Vectren" "VEDO" or "Company"), applies for rehearing of the January 10, 2007 Commission *Entry* ("January Commission *Entry*" or "January *Entry*") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this proceeding. The January *Entry* reversed, in part, the Attorney Examiner's *Entry* of December 29, 2006, by approving the continuation of the "accounting" treatment. The Attorney Examiner *Entry* had determined that the Stipulation, filed on April 10, 2006, should be considered terminated, and along with it the rider that was filed in accordance with the stipulation. OCC asserts that the January Commission *Entry* was unjust, unreasonable and unlawful and the Commission erred in the following particulars:

A. THE COMMISSION ENTRY IS PREMISED UPON UNLAWFULLY PERMITTING VECTREN TO AVAIL ITSELF OF (AND SUBJECT CUSTOMERS TO) ALTERNATIVE REGULATION WHILE REMAINING SUBJECT TO RATE OF RETURN REGULATION, CONTRARY TO R. C. 4929.01(A) *ET SEQ.*

B. THE COMMISSION ENTRY IS PREMISED UPON UNLAWFULLY PERMITTING VECTREN TO AVAIL ITSELF OF (AND SUBJECT CUSTOMERS TO) ALTERNATIVE REGULATION IN SPITE OF VECTREN'S FAILURE, UNDER R.C. 4929.05, TO FILE ITS APPLICATION PURSUANT TO REVISED CODE 4909.18 AND RELATED STATUTES SUCH AS R.C. 4909.43.

C. THE COMMISSION ENTRY UNLAWFULLY APPROVED AN ACCOUNTING MECHANISM THAT IS AN INTEGRAL PART OF AN UNLAWFUL ALTERNATIVE RATE PLAN, SINCE VECTREN FAILED TO COMPLY WITH THE MANDATORY PROVISIONS OF R.C. 4929.07(A) TO FILE NOTICE OF ITS INTENTION TO IMPLEMENT THE ALTERNATIVE RATE PLAN.

D. EVEN IF THE COMMISSION DETERMINES THAT VECTREN COMPLIED WITH R.C. 4929.07(A), THE RATE PLAN NOTICED WAS SUBJECT TO OCC'S RIGHT TO TERMINATE THE SETTLEMENT AND PURSUE A HEARING FOLLOWING THE COMMISSION'S MATERIAL MODIFCATIONS; ABSENT SUCH A HEARING, AS REQUIRED UNDER R.C. 4929.05, IT IS UNREASONABLE AND UNLAWFUL FOR THE COMMISSION TO APPROVE THE SALES RECONCILIATION RIDER.

E. THE COMMISSION ENTRY UNLAWFULLY "CONTINUE[D] THE ACCOUNTING TREATMENT AUTHORIZED BY THE COMMISSION IN THE OPINION AND ORDER ISSUED ON SEPTEMBER 13, 2006" WITHOUT HAVING EVER APPROVED THE IMPLEMENTING TARIFF, ALL IN VIOLATION OF R.C. 4905.30 AND R.C. 4905.32.

F. THE COMMISSION ENTRY UNLAWFULLY FACILITATES, THROUGH APPROVAL OF THE "ACCCOUNTING TREATMENT," AN UNAUTHORIZED RATE INCREASE.

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

OCC's application for rehearing is taken from a PUCO *Entry* journalized on January 10, 2007. In the Commission's January *Entry*, it ruled on certain aspects of an interlocutory appeal that Vectren filed with regard to the Attorney Examiner's *Entry* dated December 29, 2006. In its January *Entry*, the PUCO let stand the Examiner's ruling that the alternative regulation plan was terminated per OCC's notice. The PUCO did, however, reverse the Examiner's ruling that the accounting treatment for decoupling should be denied. The PUCO then allowed Vectren to record deferrals on its books of account, which later can be used for decoupling to collect higher rates from customers. OCC is the statutory advocate for Ohio's residential consumers, and files this application to identify errors in the PUCO's *Entry* and thereby protect Ohioans.

By way of background, on November 28, 2005, Vectren Energy Delivery of Ohio ("Vectren," "VEDO," or "Company") filed an application ("Conservation Application"), pursuant to R.C. 4929.11, seeking authority to: (1) recover certain expenses associated with a proposed conservation portfolio; (2) establish a mechanism to collect from customers the accumulated deferred differences between the actual revenues collected and the base revenues approved by the Public Utilities Commission of Ohio ("PUCO" or "Commission") in Case No. 04-571-GA-AIR; (3) employ accounting as may be required to defer certain conservation program expenses for amortization in a subsequent rate proceeding; and, (4) employ accounting as necessary to implement the conservation program expense recovery mechanism and the base rate revenue reconciliation mechanism.[1]

On December 14, 2005, the Office of the Ohio Consumers Counsel ("OCC') filed a motion to intervene and a request to set a procedural schedule. OCC represents VEDO's 293,000 residential consumers who will be faced with an unlawful increase in their electricity rates as a result of the PUCO's decision to materially modify the Stipulation signed by OCC, VEDO, and OPAE. The PUCO granted OCC's intervention on January 30, 2006.

On December 21, 2005, VEDO conducted a technical conference to explain and answer questions about its conservation application. On January 30, 2006, an *Entry* was issued by Attorney Examiner Lesser granting, among other things, OCC's Motion to

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[1] *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, Application (November 28, 2005).

Intervene. Additionally, Attorney Examiner Lesser found that expedited consideration of the conservation application was not appropriate. *Entry* at 2 (January 30, 2006). The *Entry* also directed VEDO to conduct a public presentation, with prior notice, for the Commissioners at the Commission meeting on February 1, 2006. VEDO complied with the *Entry* and held a public presentation.

On February 7, 2006, Attorney Examiner Lesser 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 directed that Vectren would be bound by and should follow the process found in R.C. 4929.05. *Entry* at 2 (February 7, 2006).[2] Subsequently, by *Entry* dated February 27, 2006, a procedural schedule was established that included a local public hearing (March 27, 2006), and a public evidentiary hearing (April 3, 2006). The procedural schedule was modified by *Entry* dated March 23, 2006 and March 29, 2006.

Direct testimony was filed by VEDO on March 9, 2006, and was admitted into the record at the evidentiary hearing as Company Exhibits 2, 2a, 2b, 3, and 4. OCC and the PUCO Staff filed direct testimony on March 20, 2006, which was admitted into the record at the evidentiary hearing as OCC Exhibit 1 and Staff Exhibit 1, respectively. The OCC, OPAE and Vectren (collectively, "Signatory Parties") submitted a Stipulation and Recommendation ("April Stipulation") to resolve the contested issues in this proceeding. The April Stipulation was filed with the Commission on April 10, 2006, and was admitted into the record as Joint Exhibit 1.

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[2] OCC did not seek interlocutory appeal of this Attorney Examiner *Entry*. It is OCC's contention that the Attorney Examiner's *Entry* was akin to a preliminary, procedural order, did not affect a substantial right, and OCC was not aggrieved or prejudiced by the *Entry* at that time. Any substantial right of OCC was not affected until after the Commission adopted the R.C. 4929.05 standards to rule upon the April stipulation.

The April Stipulation was the result of extensive settlement discussions that commenced in January 2006. The April Stipulation was signed by all intervening parties to this proceeding, except the Citizens Coalition, which indicated that it did not oppose the Stipulation. The PUCO Staff did not sign the April Stipulation, despite the fact that it attended numerous negotiation sessions and was given the opportunity to sign. The April Stipulation was negotiated between parties to the proceeding that represented disparate and conflicting interests, including the interest of Ohio's residential consumers by OCC's representation. The April Stipulation resolved all issues in this case and represented a fair balance between adverse parties and included provisions that were favorable to consumers.

On April 19, 2006, OCC, OPAE, and VEDO filed rebuttal testimony[3] which supported the April Stipulation. The April Stipulation was explained and supported by the testimony of OCC's witness, Wilson Gonzalez (OCC Exhibit 1a), OPAE's witness, Dr. Hugh Gilbert Peach (OPAE Exhibit 1), and VEDO's witness, Jerrold L. Ulrey (VEDO Exhibit 2a). On April 21, 2006, Staff filed surrebuttal testimony[4] addressing the testimony of Company Witness Ulrey. The hearing commenced on April 24, 2006. All parties waived cross-examination of all witnesses. The evidentiary record was closed and submitted for Commission consideration the same day.

In its *Opinion and Order* dated September 13, 2006, the PUCO materially modified the April Stipulation by eliminating the broad-based energy efficiency programs for residential and commercial customers and replacing those with a much smaller

[3] The testimony was admitted into the record as OCC Exhibit 1a, OPAE Exhibit 1, and Company Exhibit 2a, respectively.

[4] The testimony was admitted into the record as Staff Exhibit 2.

program that benefits only a segment of, and not all, residential consumers. Vectren and OPAE, the other parties to the April Stipulation, each received substantial benefits from the modifications to the Stipulation: Vectren received one of the first-in-the-nation automatic rate increase decoupling mechanisms; and OPAE received $2 million for a low income weatherization program. With these modifications, the result no longer represented a balance of interests of all adverse parties.

Not all parties to the stipulation accepted the PUCO's modifications. On December 8, 2006, pursuant to its rights under paragraph 13 of the April Settlement, the OCC filed a Notice of Withdrawal and Termination from the April Stipulation. In its Notice of Withdrawal and Termination, OCC exercised its right to a hearing, consistent with the language in paragraph 13 of the April stipulation. On December 21, 2006, a revised Stipulation and Recommendation (December 21 Stipulation) was filed by VEDO, OPAE, and the Staff ("Signatory Parties") which requested the Commission to affirm the September 13, 2006 *Opinion and Order*. The Signatory Parties to the December 21 Stipulation urged the Commission to approve the December 21 Stipulation based on the record in the proceeding and without further hearing. These Signatory Parties, without OCC, did not represent the interests of Ohio's residential consumers -- and so it was not especially surprising that they found it possible to "settle" for huge automatic rate increases (via decoupling) for 293,000 consumers in southwest Ohio.

On December 29, 2006, the Attorney Examiner issued an entry addressing the numerous issues raised by the outstanding pleadings. The Attorney Examiner ruled that OCC had the right to terminate and withdraw from the stipulation based on the material

modifications made by the Commission.[5] Additionally, the Attorney Examiner determined that:

> the April Stipulation should be considered terminated. Thereby, 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. The stipulation [December 21 Stipulation] may be considered a request by the signatory parties to reopen the proceeding. In accordance with Section 4929.05, Revised Code, a hearing is required for consideration of the alternative rate plan.[6]

Interlocutory appeals of the December 29, 2006 Attorney Examiner *Entry* were filed by OCC and Vectren/OPAE. On January 10, 2007, the Attorney Examiner issued an entry which denied, in large part, all parties' requests for certification. The Attorney Examiner held, however, that an immediate determination by the Commission was warranted to prevent the likelihood of undue prejudice or expense to Vectren related to one issue. That issue was associated with Vectren's claim that it had commenced the "accounting necessary to support the operation of the SRR [sales reconciliation rider]."[7] Further, the Attorney Examiner held that "whether the accounting treatment should be suspended while further proceedings continue in this case presents a novel question of law and policy."[8] On that basis, the Attorney Examiner certified the interlocutory appeal on the "limited question of whether VEDO should be permitted to continue the

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[5] Attorney Examiner *Entry* at 2 (December 29, 2006).

[6] *Id.*

[7] Vectren and OPAE Joint Motion for Certification at 13 (January 2, 2007).

[8] *Id.*

accounting treatment authorized by the commission in the September 13, 2006, *Opinion and Order*."[9]

On January 10, 2007, this Commission issued an *Entry* ("January Commission *Entry*") modifying the Attorney Examiner's December 29, 2006 *Entry* to allow VEDO "pursuant to Section 4905.13, Revised Code, to continue the accounting treatment authorized by the Commission in the *Opinion and Order* issued on September 13, 2006."[10] OCC seeks rehearing on this January Commission *Entry*.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that, within thirty (30) days after issuance of an order from the Commission, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[11]

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."[12] Furthermore, if the Commission grants a rehearing and determines that "the original

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[9] *Id.*

[10] Commission *Entry* at 3 (January 10, 2007).

[11] R.C. 4903.10.

[12] *Id.*

order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same ***."[13]

Pursuant to R.C. 4903.221, OCC filed a motion to intervene on December 14, 2005. OCC has been actively involved in this proceeding. Even before the initial application was filed, OCC was engaged in detailed and numerous discussions with VEDO on the very issues of this case. Those discussions continued after the application was filed, and eventually led to the submission of the April Stipulation. OCC meets the statutory conditions applicable to an applicant for rehearing pursuant to R.C. 4903.10. Accordingly, OCC respectfully requests that the Commission hold a rehearing on the matters specified below.

III. ARGUMENT

The SRR (sales reconciliation rider) mechanism is unprecedented in Ohio -- "no other gas utility in Ohio has a similar benefit."[14] As the PUCO's witness testified, before the Staff signed onto a later settlement (with an SRR) with Vectren, "[t]his SRR would be the first time that I am aware that the Commission would approve a rider that would include a component of the company's profit."[15] The SRR is intended to fundamentally alter Vectren's current volumetric rate design, approved by the Commission in the last rate case, Case No. 04-571-GA-AIR.[16] In plain English, the rider is the way for the

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[13] *Id.*

[14] *See* Surrebuttal Testimony of Staff Witness Puican at 2 (April 21, 2006).

[15] *Id.*

[16] Testimony of Jerrold Ulrey at 8 (March 20, 2006).

stipulators (Vectren, the PUCO Staff, and OPAE) to allow Vectren to collect automatic rate increases from customers. The fundamental change to rate design sought to be achieved through the SRR is the breaking of the linkage ("decoupling") between volumes of natural gas sold and cost recovery.[17] It is generally accepted that allowing for the recovery of fixed costs through a rate mechanism such as the SRR, will remove a utility company's disincentive to promote energy conservation. OCC does not oppose such a rate mechanism but it must be coupled with a significant investment in energy conservation -- a commensurate *quid pro quo*.[18]

Under the SRR, the Company will collect the difference between the actual base revenues (weather normalized) and the "adjusted order granted base revenues." The "adjusted order granted base revenues" refer to the revenues approved in VEDO's last general rate case, adjusted to reflect changes in the number of customers from the levels reflected in the last rate case. Vectren at the present time is calculating or tracking the revenue differential between the actual base revenues and the adjusted order granted base revenues. Included in the tracking is the recognition that the revenue differential experienced **will create a deferral**[19] that will then be subject to recovery from customers

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[17] *Id.*

[18] Additionally, the decoupling mechanism must be approved through a process permitted by the Revised Code.

[19] Previously OCC was under the impression that no deferral was being created by the tracking. This impression was given by Vectren in its vague characterization of the "accounting necessary to support the operation of the SRR." *See* Joint Motion for Certification at 4. However, if one looks closely at the tariff sheet filed to implement the rider, it can be seen that the company "will defer the calculated differences between actual base revenues and adjusted order granted revenues" "for subsequent return or recovery via the SRR". *See* filing of September 28, 2006 at Original Sheet No. 43. Hence OCC's earlier perception that deferral accounting is not occurring at the present time, and will not occur until fourth quarter 2007, was a misperception that is clarified per the tariff. Of course, the tariff has never been approved by the PUCO, so the perception that Vectren intends to defer cannot become reality until and unless the PUCO authorizes the tariff.

starting in fourth quarter 2007. The differentials in revenues began to be tracked **and deferred** monthly by Vectren, beginning in October 2006, a month following the issuance of the Commission *Opinion and Order.*

Most importantly, the SRR will result in significant automatic rate increases to residential customers over the next two years, and is unrelated to whether or not Vectren will implement energy efficiency programs for its customers. According to the uncontroverted testimony of Vectren Witness Ulrey, the SRR, will **at a minimum,**[20] increase rates to residential customers by approximately $3.6 million per year. With the SRR in effect for two years, and with no cap on recovery of costs from consumers, Vectren's residential consumers will be saddled with rate increases of $7.2 million or more with no meaningful *quid pro quo,* and no ability to use energy efficiency tools to mitigate the bill impact of the rate increase.

A. THE COMMISSION ENTRY IS PREMISED UPON UNLAWFULLY PERMITTING VECTREN TO AVAIL ITSELF OF (AND SUBJECT CUSTOMERS TO) ALTERNATIVE REGULATION WHILE REMAINING SUBJECT TO RATE OF RETURN REGULATION, CONTRARY TO R.C. 4929.01(A) *ET SEQ.*

The Commission *Entry* approves the tracking **and deferral** of the revenue differential. This is the accounting necessary to enact the sales reconciliation rider which will collect $7.2 million or more in increased rates from residential customers. The January Commission *Entry* is based upon the notion that the Commission has authority to implement portions of an alternative rate regulation plan that was filed by Vectren. It does not, as OCC will explain below.

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[20] *See* rebuttal testimony of Vectren witness Ulrey at 4, Company Ex. 2A, explaining how the variances are expected to grow larger, as customer usage continues to decline in the face of persistently high gas prices.

The Commission's January *Entry* contravenes the alternative regulatory scheme established under Chapter 4929 of the Revised Code by permitting a portion of the unlawful alternative regulation scheme to be implemented. R.C. 4929.01(A) *et seq.* permits natural gas companies to file a "method, alternate to the method of section 4909.15 of the Revised Code, for establishing rates and charges."[21] Vectren's alternative regulatory filing encompasses a scheme whereby Vectren is subject to both rate of return regulation (per case no. 04-571-GA-AIR) and alternative rate regulation, pursuant to the September 13, 2006 *Opinion and Order* issued in this proceeding.

A double regulatory scheme, where utilities are allowed the opportunity for their profit under R.C. 4909.15 as well as allowed other opportunities for collecting charges from customers under Chapter 4929, is clearly not contemplated by the Ohio General Assembly. Under R.C. 4929.01(A), an alternative rate plan is defined as "a method, **alternate** to the method of section 4909.15 of the Revised Code for establishing rates and charges." This Commission has recognized, in the context of alternative telephone regulation, that alternative regulation means just that -- either alternative regulation or rate of return regulation, not both:

> Reiterating our finding in Case No. 00-1532-TP-COI, it should be emphasized that alternative regulation is an alternative to rate base/rate-of-return, revenue requirements regulation. In exchange for more flexible regulation, a utility must cap basic local exchange rates. By opting for alternative regulation and foregoing its opportunity to earn

[21] R.C. 4929.01(A).

> the authorized return on investments, the utility takes on additional risk while maintaining its obligations to the public.[22]

The alternative rate regulation plan proposed by Vectren, and approved by Commission *Opinion and Order*, permits Vectren to have the best of both worlds -- flexibility to automatically recover rate increases from customers, which results in reduced risk for Vectren, while maintaining its opportunity to earn the authorized return on investment.

The law allows one scheme for collecting charges from customers or the other, not both. The Commission should, on this basis, reverse its finding that facilitates the SRR, a crucial part of Vectren's unlawful and unreasonable alternative regulation plan.

B. THE COMMISSION ENTRY IS PREMISED UPON UNLAWFULLY PERMITTING VECTREN TO AVAIL ITSELF OF (AND SUBJECT CUSTOMERS TO) ALTERNATIVE REGULATION IN SPITE OF VECTREN'S FAILURE, UNDER R.C. 4929.05, TO FILE ITS APPLICATION PURSUANT TO REVISED CODE 4909.18 AND RELATED STATUTES SUCH AS R.C. 4909.43.

Under the January Commission *Entry,* the Commission has facilitated a crucial part of Vectren's unlawful alternative regulation plan -- the SRR rider.[23] Through the SRR, Vectren will be able to automatically increase rates to its customers without filing a rate case. Under the Commission *Entry* VEDO may continue to track the revenue differential on a monthly basis. These revenue differentials will be treated as deferrals.

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[22] *In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-04, Ohio Administrative Code*, Case No. 04-720-TP-ALT, *Finding and Order* at 13 (June 30, 2004), citing its findings in *In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies,* Case No. 00-1532-TP-COI, *Opinion and Order* at 27 (December 6, 2001).

[23] Ironically, while the Company has taken steps to implement the SRR, it has halted efforts to implement the low-income weatherization program, which was the Commission's *quid pro quo* for the SRR.

These deferrals will then become the basis for increased rates recovered from customers via the SRR. The Commission's January *Entry* will facilitate the SRR, a powerful utility tool that imposes unreasonable and unlawful rate increases on Vectren's residential customers.

The January Commission *Entry* violates the law by implementing a portion of the alternative regulation plan (the SRR) without requiring the Company to file its plan pursuant to R.C. 4909.18. A gas alternative regulation plan, per R.C. 4929.05, must be filed as part of a contemporaneous R.C. 4909.18 application. The Company has failed to make such a filing. Additionally, *inter alia*, a gas alternative regulation plan must be noticed, subjected to investigation, and just and reasonable rates must be determined before the Commission may authorize it.[24] None of these requirements were satisfied in this proceeding.

The notice requirements of R.C. 4929.05 are those that must be met with the contemporaneous R.C. 4909.18 filing. Vectren has failed to meet the notice requirements of R.C. 4909.18(E). Additionally, Vectren failed to comply with the associated notice provisions of R.C. 4909.43(B).

There was no investigation of the alternative regulation plan, as required in R.C. 4929.05(A). The "investigation" required is defined in the enabling rules of Ohio Adm. Code. Under Ohio Adm. Code 4901:1-19-07, a mandatory staff report is required "which addresses, at a minimum, the reasonableness of the current rates pursuant to section

[24] R.C. 4929.05 "After notice, investigation, and hearing, and determining just and reasonable rates and charges for the natural gas company pursuant to section 4909.15 of the Revised Code, the public utilities commission shall authorize the applicant to implement an alternative rate plan..."

4909.15 of the Revised Code." Additionally, there was no determination made that Vectren's rates are just and reasonable at this time.

Therefore, the alternative rate plan filing, including the SRR, is unlawful and unreasonable. The Commission should reverse its ruling permitting the implementation of the SRR, through the tracking and deferral of revenue variances. The Commission's approval of an integral portion of the alternative rate plan, the SRR, facilitates a rate increase where no application was filed pursuant to R.C. 4909.18, and the procedural requirements of R.C. 4909.18 *et seq.* were not met. Simply put, this was beyond the scope of the Commission's authority. The Commission cannot defeat the General Assembly's demand for quasi-judicial proceedings merely by supplying a different label to the attempted modification.[25] The Commission's actions here were unjust, unreasonable, and should be reversed.

C. THE COMMISSION ENTRY UNLAWFULLY APPROVED AN ACCOUNTING MECHANISM THAT IS AN INTEGRAL PART OF AN UNLAWFUL ALTERNATIVE RATE PLAN, SINCE VECTREN FAILED TO COMPLY WITH THE MANDATORY PROVISIONS OF R.C. 4929.07(A) TO FILE NOTICE OF ITS INTENTION TO IMPLEMENT THE ALTERNATIVE RATE PLAN.

R.C. 4929.07(A)(1) is a key component of the General Assembly's statutory scheme for alternative regulation. The statute requires that, after a PUCO order arranging for an alternative regulation plan, i.e. the September 13, 2006 *Opinion and Order*, the natural gas utility must take, among other things, two actions to implement the plan. The statute requires the utility to file at the PUCO (1) a "notice of intent to implement..." the

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[25] See *Ohio Bell Telephone Co. v. Pub. Util. Comm.*, 64 Ohio St. 3d 145, 148 (1992), requiring the Commission, before ordering a change in a utility's rates, to comply with the procedural requirements of R.C. 4905.06. R.C. 4905.26 is one of the limited exceptions in the Code that permits rate increases to be granted outside R.C. 4909.18.

plan and (2) a "copy" of its revised tariffs.[26] Vectren addressed step number two, filing a revised tariff.[27] Not so with step number one. Vectren never filed the notice required by law.

Joint applicants' have argued that Vectren sealed the deal on the alternative plan by supposedly giving notice of acceptance of the plan, pursuant to R.C. 4929.07(A)(1).[28] The joint applicants theorize that the notice was given by a Vectren's Form 8-K filing with the Securities and Exchange Commission ("SEC") or by Vectren's filing of tariffs at the PUCO or by a "Response" to OCC's Application for Rehearing or by two later settlements that were signed without OCC and that reflect further efforts by the stipulators, including Vectren and OPAE, to collect lots of money from 293,000 Ohio consumers via automatic rate increases.

That Vectren never filed the notice required by law is obvious. A quick review of the docket card on the PUCO's website shows there is no notice docketed. Of the filings listed above that Vectren references, none is the notice. Indeed, it's revealing of an attempt to fashion a notice out of non-notice filings that Vectren would perceive the need to list five filings as the supposed statutory notice.

The SEC filing that Vectren points to is not the statutory notice. It is a securities-related filing at the SEC, whereas R.C. 4929.07(A)(1) requires a notice filing that is specific to implementation in the alternative plan case at the PUCO.

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[26] The statute requires that the notice to implement be filed either thirty days after the issuance of the Opinion approving the alternative regulation plan or within twenty days after the rehearing entry, whichever is later. Thus, the notice to implement should have been filed on or before November 28, 2006.

[27] OCC does not concede that the filed tariff constitutes all tariff language that should be filed or that there was authority granted for the tariff.

[28] *See* Joint Appeal at 13 (January 29, 2007).

Next, the tariff filing that Vectren claims is notice is not notice. It is one of the two steps under the statute for implementing a plan. As referenced in R.C. 1.42, the law means what it says and the law says that the tariff filing is separate from the notice filing. As referenced in R.C. 1.47(B), the entire statute is intended to be effective -- so that both notice and tariffs are requirements. Tariffs do not equal notice.

Vectren's Response to OCC's Application for Rehearing likewise is not notice. It is not titled as notice such that members of the public or others would understand that it is the notice to implement the plan that will cost consumers automatic rate increases. It contains no specific designation of notice. It is a response designed to deflect the Application for Rehearing that was filed by OCC to obtain the benefit of the bargain that Vectren and OCC signed. For similar reasons, the two later stipulations that Vectren signed without OCC and that Vectren would now fashion as notices are not notices. They are not anything other than what they purport to be -- stipulations -- and they certainly are not notices as contemplated in the law. Vectren also had timing challenges with its supposed notice by way of the two later stipulations. R.C. 4929.07(A)(1) only allows twenty days to file the statutory notice after a rehearing entry. Vectren's claimed notices by way of the stipulations were more than forty and sixty days after the *Entry on Rehearing*, meaning more than twenty and forty days late, respectively. These late filings for the alleged notices by stipulation and the response just underscore the improvised nature of Vectren's claim that it filed any notice.

Because Vectren failed to properly notice its intent to implement the alternative regulation plan, the plan can not be placed in effect. This is consistent with the Attorney Examiner's *Entry* of December 29, 2006, finding the April stipulation terminated, and

ordering an additional evidentiary hearing to consider the December 21 alternative regulation plan. Those findings by the Attorney Examiner were left standing despite Vectren's attempts to overturn them.

With no effective alternative regulation plan in place, the SRR, a crucial component of the alternative regulation plan, cannot be authorized. This is another reason why the Commission's January 10 *Entry* is unreasonable and unlawful and should be reversed.

D. EVEN IF THE COMMISSION DETERMINES THAT VECTREN COMPLIED WITH R.C. 4929.07(A), THE RATE PLAN NOTICED WAS SUBJECT TO OCC'S RIGHT TO TERMINATE THE SETTLEMENT AND PURSUE A HEARING FOLLOWING THE COMMISSION'S MATERIAL MODIFCATIONS; ABSENT SUCH A HEARING, AS REQUIRED UNDER R.C. 4929.05, IT IS UNREASONABLE AND UNLAWFUL FOR THE COMMISSION TO APPROVE THE SALES RECONCILIATION RIDER.

In approving the Company's alternative regulation plan, the Commission specifically adopted the April Stipulation reached between OCC, OPAE, and Vectren. Part of the April Stipulation, paragraph 13, established rights of parties to terminate and withdraw from the stipulation if the Commission materially modified the Stipulation. Additionally, paragraph 13 of the Stipulation established rights, following a notice of withdrawal, to proceed to a hearing, "as if the Stipulation had never been executed." Notably, the Commission did not amend or modify the April Stipulation as it pertained to paragraph 13. OCC, based on other modifications by the Commission, withdrew from and terminated the Stipulation and pursued a hearing, consistent with its paragraph 13 rights.

In the December 29, 2006 *Entry,* the Attorney Examiner found OCC's withdrawal to be justified, and determined that the stipulation constituting the alternative rate plan was terminated.[29] Further, the Attorney Examiner found that the "Commission cannot approve a stipulation that by its own provisions has been terminated."[30] With the alternative rate plan no longer in effect, by virtue of the terminated stipulation, the Attorney Examiner treated the December 21 partial stipulation as an alternative rate plan proposal, and ordered a hearing to consider that alternative rate plan.

Assuming *arguendo* that Vectren has somehow complied (which it has not) with the provisions of R.C. 4927.07(A) and filed a notice of intent to implement an alternative rate plan, any notice of intent that would have been filed by Vectren[31] would of necessity be notice of the alternative rate plan adopted by the Commission in its *Opinion and Order.* That alternative regulation plan contained a provision allowing for termination by OCC and providing for a hearing if material modifications to the plan were made. Vectren's purported notice of implementation -- being such non-notices as its 8K filing, the tariff sheets, the "Response" to OCC's Application for Rehearing, and the two stipulations -- all pertained to the alternative regulation plan that was later suspended by Attorney Examiner *Entry*, based upon the Commission's material modifications and OCC's exercise of its right to terminate and withdraw. That alternative regulation plan, allegedly noticed for implementation, preserves OCC's right to pursue a hearing prior to its implementation.

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

[30] *Id.*

[31] OCC is not conceding that the notice of intent to implement the alternative rate plan was indeed perfected. *See* discussion *supra.*

Hence, the PUCO should have affirmed the Attorney Examiner *Entry* and recognized that the alternative rate plan approved in the September 13 *Opinion and Order,* even if it were properly noticed for implementation (which it was not), is undeniably subject to OCC's right to terminate and pursue a hearing as if there had been no plan. Implementation of the SRR, a crucial component of the alternative rate plan, is also subject to OCC's right to terminate and then a hearing as if the SRR were being first considered. For these reasons, the Commission should reverse its January *Entry*, and affirm the Attorney Examiner *Entry* of December 29, terminating the SRR.

E. THE COMMISSION ENTRY UNLAWFULLY "CONTINUE[D] THE ACCOUNTING TREATMENT AUTHORIZED BY THE COMMISSION IN THE OPINION AND ORDER ISSUED ON SEPTEMBER 13, 2006" WITHOUT HAVING EVER APPROVED THE IMPLEMENTING TARIFF, ALL IN VIOLATION OF R.C. 4905.30 AND R.C. 4905.32.

On September 28, 2006, Vectren filed "for Staff review and Commission approval" its tariff to implement the sales reconciliation rider. The Commission never approved the tariff to implement the sales reconciliation rider. Any implementation of the tariff and the deferrals in it without PUCO approval is a violation of R.C. 4905.30 and R.C. 4905.32. Given that the tariff for the deferrals has not been authorized by the PUCO as required by R.C. 4905.30 and 4905.32, the deferrals that Vectren has booked to date are invalid and cannot ever be collected from customers for this reason (in addition to the other reasons that OCC has raised).[32]

[32] It appears that for the three (3) month period running October through December 2006, the deferrals for residential customers alone amount to $1.167 million. Vectren response to OCC Request for Production Number 5.

F. THE COMMISSION ENTRY UNLAWFULLY FACILITATES, THROUGH APPROVAL OF THE "ACCOUNTING TREATMENT," AN UNAUTHORIZED RATE INCREASE.

Vectren is tracking the revenue differential between the actual base revenues and the adjusted order granted base revenues. Included in the tracking is the recognition that the revenue differential experienced **will create a deferral** that will then be subject to recovery from customers starting in fourth quarter 2007. The differentials in revenues began to be tracked **and deferred** monthly by Vectren, beginning in October 2006, a month following the issuance of the Commission *Opinion and Order*.

The SRR will result in significant automatic rate increases to residential customers over the next two years. According to the uncontroverted testimony of Vectren Witness Ulrey, the SRR, will **at a minimum**,[33] increase rates to residential customers by approximately $3.6 million per year. With the SRR in effect for two years, and with no cap on recovery of revenue from consumers, Vectren's residential consumers will be saddled with rate increases of $7.2 million or more.

This is more than a mere accounting approval. The effect of approving the accounting is that rates in this case **will** be increased significantly on the basis of the deferrals being permitted. The Commission is without authority to approve an increase in rates unless it has complied with the requirements of, *inter alia*, R.C. 4909.18. It has not done so here. The Commission has again acted outside the scope of its authority. The

[33] *See* rebuttal testimony of Vectren witness Ulrey at 4, Company Ex. 2A, explaining how the variances are expected to grow larger, as customer usage continues to decline in the face of persistently high gas prices.

Commission's January *Entry* is unreasonable and unlawful in this respect and should be reversed. The Attorney Examiner *Entry* of December 29, terminating the SRR, should be reinstated.

IV. CONCLUSION

There will be great harm to Vectren's 293,000 residential customers if the alternative rate plan, including the SRR component, is permitted to stand. Vectren has "settled" with the PUCO Staff and OPAE for a license to print automatic rate increases into its bills to 293,000 consumers. Vectren achieved such a settlement by bargaining without the signature of the representative of those consumers, OCC, for a result that is no bargain for consumers. What Vectren seeks the PUCO to do (or re-do) via the rate increase mechanism of the SRR (with no corresponding benefit of DSM) is unprecedented in Ohio regulation (as the PUCO's own witness acknowledges) and not contemplated in Ohio law.

For the reasons set forth herein, the Commission should issue an *Entry on Rehearing* that, pursuant to Ohio Adm. Code 4901-1-15(E), affirms, not reverses, the Attorney Examiner's finding that the SRR should be terminated. There is no alternative regulation plan that lawfully can be in place in any way, and all that can occur now is for the matter to be heard on the merits (or lack of merits) on the original application or for Vectren to withdraw its application, and pursue this issue in the context of its next rate case application.[34]

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[34] At its Quarterly Conference call "2006 and 2007 Earnings Guidance" (Dec. 14, 2006) and its "2006 Q4 & FYE Earnings Webcast" (Feb. 1, 2007) Vectren indicated that it planned on filing in Ohio an application for an increase in rates during 2007.

Respectfully submitted,

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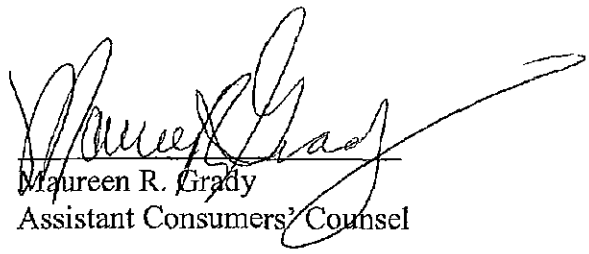
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing by the Office of the Ohio Consumers' Counsel* was served electronically, to the persons listed below, on this 9th day of February 2007.



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