

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING  
2007 FEB 20 PM 5:13  
PUCO

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 ) Case No. 05-1444-GA-UNC  
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. )

---

MEMORANDUM CONTRA STAFF'S MOTION TO INCORPORATE STAFF  
REPORT OF INVESTIGATION AND UPDATED SCHEDULE A-1 BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

---

JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL

Maureen R. Grady, Trial Attorney  
Jacqueline L. Roberts  
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
614-466-8574 (Telephone)  
614-466-9475 (Facsimile)  
[grady@occ.state.oh.us](mailto:grady@occ.state.oh.us)  
[roberts@occ.state.oh.us](mailto:roberts@occ.state.oh.us)

February 20, 2007

This is to certify that the images appearing are an  
accurate and complete reproduction of a case file  
document delivered in the regular course of business.  
Technician KW Date Processed 2-21-07

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. PROCEDURAL HISTORY.....	1
III. BACKGROUND .....	3
IV. ARGUMENT .....	3
A. The statutory requirements of an alternative regulation proceeding cannot be waived by the Commission, including the requirement for a staff report.. .....	3
B. The Staff Report cannot cure the filing defects in this case, is not relevant to this proceeding, and must be excluded. ....	7
V. CONCLUSION.....	9
CERTIFICATE OF SERVICE .....	11

**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	)	Case No. 05-1444-GA-UNC
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.	)	

---

**MEMORANDUM CONTRA STAFF'S MOTION TO INCORPORATE STAFF  
REPORT OF INVESTIGATION AND UPDATED SCHEDULE A-1 BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

---

**I. INTRODUCTION**

Pursuant to Ohio Adm. Code 4901-1-15 (D), the Office of the Ohio Consumers' Counsel ("OCC"), hereby submits its Memorandum Contra Motion To Incorporate Staff Report Of Investigation And Updated Schedule A-1 ("Motion to Incorporate") filed on February 5, 2007 by the Staff of the Public Utilities Commission of Ohio ("Staff"). OCC is the representative of the 293,000 residential gas consumers of Vectren, pursuant to R.C Chapter 4911.

**II. PROCEDURAL HISTORY**

On February 5, 2007, Staff filed a Motion To Incorporate into the record in this proceeding the Staff Report of Investigation and the "updated" Schedule A-1, attached to a stipulation that was adopted by the Commission in Vectren's last rate case, Case No.

04-571-GA-AIR. The basis for the Staff Motion is that these documents “together fully address the reasonableness of the current rates pursuant to Section 4909.15 of the Revised Code.”<sup>1</sup> Staff argues that “in the interest of efficient processing of this case” it is lawful and reasonable to incorporate the actual examination of the Company’s current rates to fulfill” the legal requirements of Section 4929.05, Revised Code. Further Staff argues that the motion should be granted because “the reasonableness of Vectren’s current rates is not contested in this proceeding.” However, on February 12, 2007 the Attorney Examiner issued an *Entry* ruling on interlocutory appeals taken by OCC, OPAE and did not rule that the reasonableness of the rates is not contested in this proceeding. Instead the Attorney Examiner ruled that this issue is “premature.” *Id* at paragraph 14. Vectren then attempted to argue that because the Commission waived certain administrative *rules* it did not have to satisfy *statutory* filing requirements. *Id* at 8,

By its motion, Staff attempts to have its Report from an investigation of a 2004 rate case be incorporated into this proceeding in an effort to cure the statutory requirements that it did not meet. Because the statutes require a Staff investigation and Report on a filing made contemporaneously with the filing of an alternative rate plan, the Staff Report of a 2004 rate case is not properly admissible in this proceeding and Staff’s Motion to Incorporate should be denied.

---

<sup>1</sup> Motion to Incorporate Staff Report of Investigation and Updated Schedule A-1 Attached to Stipulation From Rate Case and Memorandum in Support (“Motion to Incorporate Staff Report”) (February 5, 2006).

### III. BACKGROUND

The purpose of alternative rate plans in Ohio for natural gas companies is clearly stated in R.C. 4929.02 and includes, *inter alia*, promoting the availability of unbundled and comparable natural gas services (R.C. 4929.02 (A)(2)), recognizing the emergence of competitive markets by implementing flexible regulatory treatment (R.C. 4929.02 (a)(6)), transitioning to effective competition and reducing the need for regulation (R.C. 4929.02 (A)(7))), and addressing a gas company's offering of nonjurisdictional services balancing a companies non-exempt offerings (R.C. 4929.02 (a)(9)). The decoupling authority requested by Vectren in this case meets none of these policy interests. It has absolutely no effect upon competition or emerging markets. Were such policy interests present in a case before the Commission, which policy interests are lacking in the instant case, the Staff, the company – Vectren in this case – and the Commission – are bound to satisfy the statutory requirements established by the Ohio General Assembly in enacting Alternative Rate Plans pursuant to R.C. 4929.01 et. seq. These statutory requirements, including the requirement of a written report of investigation by the Staff, are jurisdictional. Staff's request to "incorporate" its Report into this proceeding is in essence, a request that it be permitted to waive its statutory investigatory requirements. Such statutory requirements must be met and cannot be waived.

### IV. ARGUMENT

**A. The statutory requirements of an alternative regulation proceeding cannot be waived by the Commission, including the requirement for a staff report.**

The Commission has the authority to waive its administrative rules in appropriate circumstances pursuant to O.A.C. 4901-1-19-03. *In the Matter of the Application of the*

*Cincinnati Gas & Electric Company for an Increase in its Gas Rates in its Service Territory (01-1228-GA-AIR) and Approval of an Alternate Rate Plan (01-1478-GA-ALT), Order, July 26, 2001. ("CG&E Alt Reg Case").* The waiver provisions of Ohio Adm. Code 4901-1-19-03 relate to waiving certain filings by the **Company** and cannot alter Staff's obligation to conduct an investigation and file a report, as required by *statute*.

The statutory requirements cannot be ignored. The need to ensure that the Commission complies with the process set forth under R.C. 4929.05 is great and of heightened concern here where the PUCO could impose significant rate increases on approximately 300,000 residential customers of Vectren over the next two years. The U.S. Supreme opined on this very issue, in reviewing the Ohio Supreme Court's affirmance of a PUCO Opinion and Order:

Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the inexorable safeguard of a fair and open hearing be maintained in its integrity. \*\*\* There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.

*Ohio Bell Telephone Co. v. Pub. Util. Comm.*, 301 U.S. 292 (1937).

Accordingly, Commission lacks jurisdiction to approve an alternative rate plan when there is not compliance with the specific statutory requirements of R.C. 4929.01 et. seq. *Hess v. Dyer*, 2004 Ohio 6877 (C.A. 2nd District 2004). In *Gallion v. Am Fedn. Of State, Cty, & Mun. Emp*, 71 Ohio St. 3<sup>rd</sup> 626 (1995), the Ohio Supreme Court Stated, "In

our view the language of R.C. 2711.13 is clear, unmistakable, and above all mandatory...[if the statutory requirements are not met] the trial court lacks jurisdiction.” (Bracketed explanation supplied). Staff conceded in its instant Motion that it is subject to the statutory requirements for an alternative rate plan are codified in R.C. 4929.05, R.C. 4909.18, and R.C. 4909.19: “an alternative rate plan application under Section 4929.05 of the Revised Code must comply with the requirements of an application filed pursuant to Section 4909.18 of the Revised Code, to include, a written report of investigation by Staff as required by Section 4909.19 of the Revised Code and Rule 4901:1-19-07, O.A.C.” *Motion To Incorporate Staff Report Of Investigation And Updated Schedule A-1 Attached To Stipulation From Rate Case filed by the Staff of the Public Utilities Commission of Ohio*, February 5, 2007 at 3. R.C. 4909.19 states, “Within a reasonable time as determined by the commission after the filing of such application, a written report **shall** be made and filed with the commission.” (Emphasis supplied).

There are logical, if not compelling, reasons for requiring contemporaneous filings of base rate cases and requests for alternative rate plans. This provides the Commission with information to consider that is the most currently available regarding the company’s revenues and expenses and permits the base rate case revenue requirements to be correlated with the proposed alternative rate plan. It avoids, to the greatest extent possible, regulatory mismatch in ratemaking and alternative ratemaking.

This has been the practice of the Commission in the past when it has had the occasion to rule upon a natural gas alternative regulation plan. In the original CG&E Alternative Regulation case, *supra*, CG&E filed its base rate case contemporaneously with its request for an alternative rate plan on July 31, 2001. On January 18, 2002 Staff

filed a comprehensive 140 page report on CG&E's applications. The staff reported on the investigation involving the company's finances, rate of return, rates and tariffs, consumer services, accounting modifications and proposed alternative rate plan. The Report had an entire section devoted to the evaluation of CG&E's alternative rate plan proposal. The Staff report focused closely upon whether CG&E's proposal and the commitments satisfied the policies detailed in R.C. 4929.02. Based upon the application and the Staff's investigation, Staff was able to make recommendation to the commission regarding the bill impacts of the alternative rate plan, as well as the appropriate timeframe for recovery. In addition, Staff recommended limited approval of the plan "with the expectation that additional rate recovery does not result in an annual return on average common equity in excess of that approved *in this proceeding*." Id at 79.

Such findings and recommendations in Vectren's "alternative rate plan" are impossible for Staff to make here. The Staff has before it dated information, from another case not related to this proceeding that is at least 3 years old. Vectren should file a new base case that permits a deliberate and statutorily required evaluation of these same issues as was done in the CG&E case. In fact, OCC understands that Vectren expects to file a new base rate case in the near future, which would be an appropriate time to consider it's decoupling/alternative regulation request. Then Staff can investigate that filing and make a report that satisfies statutory requirements.

Staff has failed to meet the statutory filing requirements in this case. The filing of a Staff report from a 2004 rate case does not comply with the filing requirements. This is completely contrary to the law and statements by the Ohio Supreme Court that statutory requirements are "clear, unmistakable, and above all mandatory" *Gallion, supra*. As



such, the Commission lacks jurisdiction and authority to implement an alternative rate plan for Vectren.

**B. The Staff Report cannot cure the filing defects in this case, is not relevant to this proceeding, and must be excluded.**

From even a cursory review of the requirements of R.C. 4909.18 it is clear that the Vectren application wholly fails to satisfy such filing requirements. Vectren, Staff, and OPAE suggest that the Vectren rate case filed in 2004 (Case No. 04-571-GA-AIR) can cure the filing defects in this case. This is completely inconsistent with the plain language of R.C. 4929.05: **“(A) As part of an application filed pursuant to section 4909.18 of the Revised Code, a natural gas company...after 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 if the company has made a showing and the commission finds that both of the following conditions are met...”** The statute requires a 4909.18 application be made and *a request for alternative rate plan must be made with the 4909.18 application*. An application filed under R.C. 4909.18, requires, pursuant to R.C. 4909.19, that the “commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith.” Moreover, the rules enacting R.C. 4929.05 affirm the mandatory investigation. Under Ohio Adm. Code 4901-1-19-07, promulgated pursuant to R.C. 4929.10, “the Commission Staff will file a written report which addresses, at a minimum, the reasonableness of the current rates pursuant to section 4909.15 of the Revised Code for applications filed pursuant to section 4929.05 of the Revised Code.” Clearly that has not been done here.

Staff's feeble attempt to argue that a prior rate case proceeding stipulation satisfies the requirement of a written report that "addresses the reasonableness of the current rates" should be summarily dismissed. Staff first attempted to make it's earlier report part of the record in this case by requesting administrative notice of the report. Administrative notice of the stipulation merely reflects the fact that, as a matter of history, a stipulation was filed in another legal proceeding, and contained recommendations based in part, on a prior staff report. Now it requests the report be "incorporated" into the instant case.

The suggestion that a 4909.18 filing made by Vectren almost *three years ago* (that failed to include a request for an alternative rate plan) can cure filing defects in this case is contrary to the law. The requirement that Staff investigate and file a report pursuant to R.C. 4909.18 refers *to the case at bar, and not a case filed in 2004*. Had Vectren properly filed this case as an alternative rate plan, as the Commission insists that it is, the Staff report would relate to an investigation of an R.C. 4909.18 filing made *in this proceeding*. It is not available to Vectren, the Staff or the Commission to pluck a staff report out of a 2004 case and offer it up as the Staff report required in the instant case. Again, neither the Commission nor the hearing examiner has the discretion to waive the statutory requirements.

Moreover, it is inappropriate for this Commission to misuse administrative notice here as a means of fulfilling the statutory requirements under R.C. 4929.05. There is no other substantial evidence in this record to support a staff report or investigation of Vectren's current rates. The General Assembly established a presumption for telephone and railroad companies that rates established within two years were reasonable and

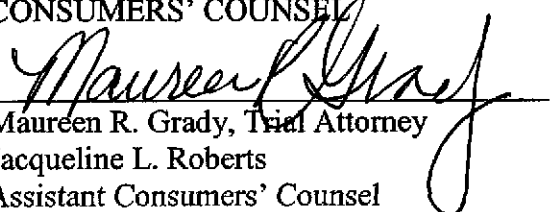
lawful. R.C. 4909.03. This presumption was not extended to gas companies. The principle of statutory construction – *expressio unius est exclusio alterius* – the expression of one thing is the **exclusion** of another – requires these statutes to be interpreted to establish that the existing Vectren rates are not *prima facie reasonable or lawful*. In fact, many things have changes since Vectren's rates were last set: rate base, expenses, operating revenues, and rate of return. The PUCO Staff has not investigated or produced a report in this proceeding that addresses whether the rates embodied in the prior stipulation are reasonable at this point in time. Reliance upon a Staff Report or investigation conducted during 2005 for the purposes of an entirely different proceeding is not reasonable and violates the mandates of R.C. 4929.05. Thus, the scope of the hearing should be redefined or clarified by the Commission to permit OCC to inquire into issues germane to the Staff's investigation or lack thereof.

## V. CONCLUSION

Staff's report fails to meet the criteria for incorporation in this proceeding. First, it does not address the case at hand. A plain reading of the relevant statutes, R.C. 4909.18 and 4909.19 is that the requisite Staff report address the investigation of the rate case filing *in which an alternative rate plan is requested by the company*. Vectren never made such a filing, nor can the filings made in this case be "deemed" made within the discretion of the hearing examiner or commission because they are statutory, jurisdictional requirements. Therefore, the Staff report is irrelevant and should not be admitted as evidence in this proceeding.

Respectfully submitted,

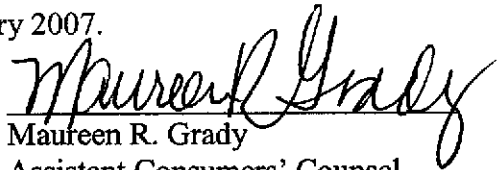
JANINE L. MIGDEN-OSTRANDER  
CONSUMERS' COUNSEL

  
Maureen R. Grady, Trial Attorney  
Jacqueline L. Roberts  
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
614-466-8574 (Telephone)  
614-466-9475 (Facsimile)  
[grady@occ.state.oh.us](mailto:grady@occ.state.oh.us)  
[roberts@occ.state.oh.us](mailto:roberts@occ.state.oh.us)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Memorandum Contra Staff's Motion to Incorporate Staff Report of Investigation and Updated Schedule A-1 by the Office of the Ohio Consumers' Counsel was provided, as specifically agreed to by the persons listed below, electronically this 20<sup>th</sup> day of February 2007.

  
Maureen R. Grady  
Assistant Consumers' Counsel

**DUANE W. LUCKEY**  
Assistant Attorney General  
Chief, Public Utilities Section  
180 East Broad Street, 9<sup>th</sup> Floor  
Columbus, Ohio 43215-3793  
[duane.luckey@puc.state.oh.us](mailto:duane.luckey@puc.state.oh.us)

**JOSEPH P. MEISSNER**  
Legal Aid Society of Cleveland  
1223 West Sixth Street  
Cleveland, Ohio 44113  
[jpmeyssn@lasclev.org](mailto:jpmeyssn@lasclev.org)

**GRETCHEN J. HUMMEL**  
McNees, Wallace & Nurick  
Fifth Third Center  
21 East State Street, Suite 1700  
Columbus, Ohio 43215  
[ghummel@mwncmh.com](mailto:ghummel@mwncmh.com)

**DAVID RINEBOLT**  
Ohio Partners For Affordable Energy  
Law Director  
231 West Lima Street  
P.O. Box 1793  
Findlay, Ohio 45839-1793  
[drinebolt@aol.com](mailto:drinebolt@aol.com)