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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 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

VECTREN ENERGY DELIVERY OF OHIO, INC.'S MEMORANDUM CONTRA OCC'S MARCH 5, 2007 APPLICATION FOR REVIEW AND INTERLOCUTORY APPEAL

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March 6, 2007

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APPLICATION FOR REVIEW AND INTERLOCUTORY APPEAL

Pursuant to Ohio Administrative Code ("O.A.C.") 4901-1-15(D), Vectren Energy Delivery of Ohio, Inc. ("VEDO") hereby submits this Memorandum Contra Application for Review and Interlocutory Appeal by the Office of the Ohio Consumers' Counsel ("OCC") filed on March 5, 2007, and requests that the Public Utilities Commission of Ohio ("Commission") deny OCC's application for the reasons discussed below.

I. BACKGROUND

In a discovery conference on February 28, 2007, OCC made an oral appeal of the Attorney Examiners' rulings on motions VEDO filed to secure relief from OCC's discovery efforts that commenced after it withdrew from the Stipulation and Recommendation filed in this proceeding on April 10, 2006 ("*April 10 Stipulation*"). The Attorney Examiners asked OCC if it had any authority – any case law – that OCC could

cite in support of its claim that it has been denied the opportunity to meaningfully participate in this contested proceeding. OCC responded that it did not but that it might be able to come up with something. OCC was provided a limited period of time to supply the requested authority. Tr. 87-89. Yesterday, instead of simply supplying the requested authority, OCC filed a lengthy Application for Review and Interlocutory Appeal (hereinafter, "*March 5 Appeal*") directed, without specificity, at the Attorney Examiners' rulings made at the February 28, 2007 conference.

It is VEDO's position that OCC's *March 5 Appeal* is without merit and must be denied. The main facts relevant to the consideration of OCC's *March 5 Appeal* are as follows:

- VEDO filed an application ("*Conservation Application*") to establish a decoupling mechanism and conservation programs on November 28, 2005, some 15 months ago.

- On December 14, 2005, OCC filed a Motion to Intervene and a Motion to Establish a Procedural Process "...permitting OCC to evaluate, examine and comment on the proposed Application." OCC's December 14, 2005 supporting memoranda acknowledged that VEDO's November 28, 2005 Application sought approval of: (1) "...a tariff to recover expenses of conservation efforts and to provide a decoupling mechanism that would recover the difference between VEDO's actual weather-normalized usage-sensitive base rate revenue and the usage-sensitive base rate revenue approved in VEDO's last rate case;"[1] and (2) "accounting authority to permit VEDO ... to defer expenses and revenues for subsequent disposition and treatment pursuant to the addition of a conservation rider to its Commission-approved tariff."[2]

[1] Despite its more recent claims that the decoupling mechanism approved by the Commission results in a rate increase, it is clear from OCC's own pleadings that the mechanism operates to produce no more revenue than the Commission approved in VEDO's last rate case.

[2] OCC's December 14, 2005 Motion to Intervene and Motion to Establish Procedural Process also observed (at page 2 of the supporting memorandum) that VEDO's Application "...is a novel filing that impact rates and programs for Residential Customers." OCC's more recent discovery includes questions that appear to now suggest that the application is not novel.

- After a technical conference and a prehearing conference, the Attorney Examiner issued an entry on February 27, 2006 establishing the procedural schedule and setting April 3, 2006[3] as the date for the start of the evidentiary hearing in Columbus, Ohio.

- VEDO and OCC were parties to the *April 10 Stipulation* filed in this contested proceeding.

- The *April 10 Stipulation* followed the filing of direct testimony reflecting OCC's and VEDO's litigation positions with the testimony being filed in accordance with the procedural schedule.

- Among other things, the *April 10 Stipulation* acknowledged that the Commission could modify the *April 10 Stipulation*, committed the parties to a good faith effort to accommodate the intent of a Commission order modifying the *April 10 Stipulation*, established the ability of signatory parties to withdraw from the *April 10 Stipulation* under certain circumstances and indicated that upon an appropriate withdrawal, the withdrawing party would stand in the same position as if the *April 10 Stipulation* had not existed.

- The findings and orders contained in the Commission's September 13, 2006 Opinion and Order ("*September 13 Opinion and Order*") in this proceeding did not accept the entirety of the recommendations contained in the *April 10 Stipulation* and Recommendation. More specifically, the Commission's *September 13 Opinion and Order* concluded that the conservation program should be funded by VEDO in an amount totaling $2 million over two years and that the focus of the conservation programs should be on customers meeting income eligibility requirements established by the collaborative.

- Two of the three signatories to the *April 10 Stipulation*, VEDO and the Ohio Partners of Affordable Energy ("OPAE"), have, since the Commission's *September 13 Opinion and Order*, repeatedly advised the Commission that they accept the result in the *September 13 Opinion and Order* and urged the Commission to take action so that they could proceed with the implementation of conservation programs that have been designed to reach about 60% of VEDO's residential customers. The Commission's Staff has joined OPAE and VEDO in their efforts to move forward with the plan of alternative regulation approved by the Commission.

- Upon issuing its notice of withdrawal, OCC commenced discovery with a scope that is much larger than a proper scope and as though VEDO had filed its *Conservation Application* on the date of OCC's withdrawal. VEDO has made it clear for more than two months that it believed that OCC was not entitled to the

[3] The hearing date was subsequently rescheduled.

scope for discovery sought by OCC. OCC initially sought and obtained a discovery conference on February 8, 2007 to address the differences between the parties on the scope of discovery but asked that the conference be cancelled.

- As a result of the discovery dispute, VEDO filed a Motion for Protective Order and a Motion in Limine and OCC has filed Motions to Compel VEDO to respond to OCC's discovery requests. The Attorney Examiners ruled on the issues raised by these motions at the discovery conference on February 28, 2007.

OCC's *March 5 Appeal* seeks permission to bring the Attorney Examiners' February 28, 2007 rulings to the Commission for the Commission's review. OCC's *March 5 Appeal* states (memorandum at page 3), without any citation, that the language in the *April 10 Stipulation* requires the case to start over as a result of OCC's withdrawal. OCC's *March 5 Appeal* is based entirely on this claim. OCC's claim is without merit and OCC's *March 5 Appeal* must, accordingly, be denied.

II. ARGUMENT

OCC makes three basic arguments in its *March 5 Appeal*: 1) limiting discovery to "new issues" is unreasonable and unlawful and effectively terminated OCC's participation in the case; 2) motions in *limine* are not often granted by the Commission and, thus, should not be granted now; and, 3) because there is no absolute settlement privilege, OCC should be permitted to discover "information on all aspects of the settlement discussions." For the reasons discussed below, each of these arguments should be rejected and, thus, OCC's *March 5 Appeal* should be denied.

A. Discovery was properly limited to "new issues."

OCC's claim that its *March 5 Appeal* should be heard without certification required by the Attorney Examiner required by Rule 4901-1-15(A)(2), O.A.C., because it "terminates OCC's rights to participate in the proceeding" is without merit.

Notwithstanding the fact that the *March 5 Appeal* filed by OCC is drastically beyond the scope of the Attorney Examiner request for supporting case citations, the cases cited by OCC for the purpose of supporting OCC's argument that the adverse rulings on discovery issues terminate OCC's right to participate in the case in a meaningful way do not apply to this case.

OCC states that "[a]ppellate courts will reverse discovery orders 'where the trial court has erroneously denied or limited discovery.'" *March 5 Appeal.* But it is more than mere error that warrants a reversal on a discovery issue. *Wyant v. Marble,* 1235 Ohio App.3d 559, 563 (1999), sets forth the standard for reversing a court's decision on discovery issues:

> It is well established that the trial court exercises discretionary power in controlling discovery practices. Moreover, rulings on the admission of evidence generally rest in the sound discretion of the court and will not be reversed absent an abuse of that discretion amounting to prejudicial error. An abuse of discretion connotes more than a mere error in judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. The trial court's discretion is not without limits, and we will reverse where the court's decision prejudicially affect the substantial rights of a party.

Id. Moreover, the cases cited demonstrate that an appellate court is not likely to fault a lower court's determinations on discovery unless, "in the totality of the circumstances, its rulings are seen to be a gross abuse of discretion resulting in fundamental unfairness in the trail of the case"[4] and the court's judgment is "improvidently prejudicial to the plaintiff's substantial rights."[5] In each of the cases cited by OCC, the lower courts

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[4] *Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir. 1977).

[5] *Rossman v. Rossman*, 47 Ohio App.2d 103, 111 (1975).

abused their discretion to a level amounting to prejudicial error. That is simply not the case here.

OCC dramatically claims that the *April 10 Stipulation* is "vastly different from the one presented now," that the *April 10 Stipulation* was "greatly modified" by the Commission, and that OCC's ability to challenge the January 12, 2007 Amended Stipulation and Recommendation ("*Amended Stipulation*") have been "severely" limited. *March 5 Appeal* at 11. However, since the day VEDO's *Conservation Application* was filed, including the day the Attorney Examiner announced the decision to consider VEDO's *Conservation Application* as an alternative regulation plan controlled by Section 4929.05, Revised Code, OCC has had the choice to exercise all the rights and responsibilities of a full party to this proceeding, even before its intervention was approved on January 30, 2006. OCC now seeks to expand the scope of this proceeding to allow it to start over as if it had no opportunity to conduct discovery, present testimony, enter into a stipulation, and participate in a hearing on that stipulation. Moreover, as VEDO has attempted to make clear numerous times, the Commission made its decision regarding the *Conservation Application* through its *September 13 Opinion and Order* and November 8, 2006 Entry on Rehearing. The Stipulation and Recommendation filed on December 21, 2006 requests that the Commission affirm its *September 13 Opinion and Order*, and the *Amended Stipulation* proposes to implement the alternative regulation plan approved by the Commission. The remaining focus of this proceeding is narrow and OCC should only be allowed to conduct discovery related to the scope of this proceeding enunciated by the Attorney Examiners at the February 28, 2007 discovery conference. Any discovery not limited to

this scope is neither relevant to the remaining subject matter of this proceeding nor calculated to lead to evidence admissible in this proceeding. Accordingly, OCC's claim that its rights to participate in this proceeding are being terminated is specious.

B. The Motion in *Limine* was properly granted.

OCC's claim that motions in *limine* have no place in Commission proceedings is rebutted by precedent. Motions seeking Commission definition of the scope of Commission proceedings (whether entitled "motion in *limine*, motion to limit scope, or something else) are not uncommon in Commission practice. Whether the Commission has granted more of them than denied is of no relevance to their place in Commission proceedings.[6] In fact, OCC itself has filed several motions in *limine* in Commission proceedings.[7] Motions in *limine* and motions to limit have long been in use before the Commission. OCC's faulty memory and reinterpretation of Commission practice cannot change that and should not modify the Attorney Examiner's ruling.

C. OCC's discovery was properly limited to relevant matters.

OCC also argues that the Attorney Examiners improperly denied discovery requests aimed at discovering the specifics of settlement talks and negotiations between the signatory parties based upon an improper interpretation of *Ohio*

[6] Contrary to the impression left by OCC, the Commission has, on occasion, granted motions in *limine*. *See*, for example, Case No. 92-70-EL-ECP, Entry granting IEC's Motion In *Limine* (June 22, 1992) and Case No. 97-439-TP-CSS, Entry granting Cincinnati Bell Telephone Company's Motion In *Limine* (October 2, 1998).

[7] The earliest record of such a filing on the Commission's website is a Motion In *Limine* filed almost exactly twenty years ago on March 12, 1987 in Case No. 85-521-EL-COI by Paul Centollela on behalf of OCC. Also, the current Consumers' Counsel, previously representing Montgomery County, has filed motions in *limine* before the Commission in Case Nos. 88-649-EL-ATA and 88-809-EL-ATA, both on March 20, 1988.

Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300 (2006) (hereinafter "*Consumers' Counsel*").

First, while the Attorney Examiners did deny the discovery on the basis of privilege, they did not specify that they were relying on *Consumers' Counsel.*

Second, OCC's interpretation and application of *Consumers' Counsel* is not applicable here. In *Consumers' Counsel*, the Court held that discovery of side agreements could not be barred on the basis of an absolute federal settlement privilege. The Court did not address (because the issue was never raised) whether a settlement privilege barred the discovery of settlement communications or statements made during settlement talks. In *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300 (2006), the Court specifically noted, "Here, OCC is not seeking to discover the communications made during settlement negotiations but, rather, the terms of the side agreements and the agreements themselves."[8] However, in this case, OCC states that the Commission, based on *Goodyear*, does not have authority to "deny the rights of OCC access, through discovery, to **all details of the settlement negotiations, including the underlying discussions of the settlement negotiations themselves."** *March 5 Appeal* at 17 (emphasis added).

[8] The Court also held that while side agreements are not relevant to the Commission's determination of whether stipulations benefit ratepayers and the public interest, or whether they violate any important regulatory principle or practice, side agreements may be relevant to whether stipulations are the product of serious bargaining. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300 at ¶79-81 (2006). OCC is not arguing that it needs discovery of settlement communications for the purpose of determining whether any stipulation is the product of serious bargaining. Instead, OCC makes vague references to the three-part test and specifically states that discovery related to alternate regulation and the financial impact of decoupling on VEDO goes to the second prong of the test – whether the settlement benefits ratepayers and the public interest. *March 5 Appeal* at 8.

Finally, while the Court stated, "Evid.R. 408 provides that evidence of settlement may be used for several purposes at trial, making it clear that discovery of settlement terms and agreements is ***not always impermissible,***"[9] OCC's attempt to discover settlement discussions in this case is impermissible. Ohio Rule of Evidence 408 states that evidence of "accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or validity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible." OCC's desired purpose for the discovery does not fall within any of the categories excluded by this rule. Moreover, VEDO has already made clear that there are no side agreements in this case. Thus, nothing that OCC is attempting to discover is admissible and, thus, it is not discoverable.

[9] *Consumers' Counsel* at ¶92.

III. CONCLUSION

The Commission should deny OCC's *March 5 Appeal* and proceed pursuant to the Attorney Examiners' rulings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Vectren Energy Delivery of Ohio, Inc.'s Memorandum Contra OCC's March 5, 2007 Application for Review and Interlocutory Appeal* has been hand-delivered, sent electronically or served *via* ordinary U.S. Mail, postage prepaid, this 6th day of March, 2007 to the following parties of record.

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