

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Vectren)
Energy Delivery of Ohio, Inc. for Approval,)
pursuant to Section 4929.11, Revised Code, of)
a Tariff to Recover Conservation Expenses)
and Decoupling Revenues Pursuant to Auto-) Case No. 05-1444-GA-UNC
matic Adjustment Mechanisms and for such)
Accounting Authority as May Be Required to)
Defer Such Expenses and Revenues for Future)
Recovery Through such Adjustment Mecha-)
nisms.)

ENTRY

The attorney examiner finds:

- (1) On November 28, 2005, Vectren Energy Delivery of Ohio, Inc. (VEDO) filed an application for approval, pursuant to Section 4929.11, Revised Code, 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. VEDO's conservation rider would consist of a conservation funding component and a decoupled sales component. On February 7, 2006, the attorney examiner found that the application must be considered a request for an alternate rate plan as described in Section 4929.01(A), Revised Code, and thus the process would be controlled by Section 4929.05, Revised Code.
- (2) On April 10, 2006, VEDO, Ohio Partners for Affordable Energy (OPAE) and the Ohio Consumers' Counsel (OCC) filed a Stipulation and Recommendation (April Stipulation) for the purpose of resolving the issues in this proceeding. Among other terms, the April Stipulation provided for a Sales Reconciliation Rider and for an accounting deferral mechanism. The staff of the Commission (Staff) opposed the April Stipulation through testimony and post-hearing brief.
- (3) On September 13, 2006, the Commission issued its Opinion and Order in this case and approved the April Stipulation as modified by the Opinion and Order. The April Stipulation

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contained provisions for the termination of the Stipulation in the event that it was not adopted in its entirety without material modification by the Commission. The April Stipulation states, in relevant part:

Upon the Commission's issuance of an entry on rehearing that does not adopt the Stipulation in its entirety without material modification, any Party may terminate and withdraw from the Stipulation by filing notice with the Commission Upon notice of termination or withdrawal by any Party . . . the Stipulation shall immediately become null and void. In such event, *a hearing shall go forward* and the Parties will be afforded the opportunity to present evidence through witnesses, to cross examine all witnesses, to present rebuttal testimony, and to brief all issues which shall be decided based upon the record and briefs *as if this Stipulation had never been executed.*

April Stipulation at 9-10 (emphasis added).

OCC filed an application for rehearing of the Opinion and Order on October 13, 2006. On November 8, 2006, the Commission denied the application for rehearing filed by OCC. OCC filed a Notice of Termination and Withdrawal from Stipulation on December 8, 2006.

- (4) On December 21, 2006, a second Stipulation and Recommendation (December Stipulation) was filed by VEDO, OPAE and Staff (signatory parties). The signatory parties requested that the Commission affirm the September 13, 2006, Opinion and Order that adopted and modified the April Stipulation, based on the existing record, without further hearing. The signatory parties further requested that the Sales Reconciliation Rider and deferral mechanism adopted in the September 13, 2006, Opinion and Order, continue to be effective, as of the date of the order.
- (5) By entry dated December 29, 2006 (December 29 Entry), the attorney examiner noted that OCC had withdrawn from the April Stipulation and determined that a hearing regarding the December Stipulation should be held. Therefore, the attorney examiner scheduled a prehearing conference for January 22,

2007. Further, the attorney examiner directed that the signatory parties file an amended stipulation which enumerates all terms agreed to by the parties, rather than incorporating the terms by reference from other documents.

- (6) On January 2, 2007, VEDO and OPAE filed a joint interlocutory appeal and motion for certification regarding the December 29 Entry. OCC filed a memorandum contra the joint motion on January 5, 2007 and a supplement to its memorandum contra on January 8, 2007. On January 10, 2007, the attorney examiner certified the interlocutory appeal of VEDO and OPAE to the Commission for the limited question of whether VEDO should be permitted to continue the accounting treatment authorized by the Commission in the September 13, 2006, Opinion and Order. By entry dated January 10, 2007, the Commission granted VEDO authority to continue the accounting treatment previously authorized by the Commission in the Opinion and Order.
- (7) On January 3, 2007, OCC filed an application for review and interlocutory appeal regarding the December 29 Entry. On January 5, 2007, VEDO and OPAE each submitted memoranda contra OCC's application for review and interlocutory appeal. On January 10, 2007, the attorney examiner denied OCC's application for review and interlocutory appeal.
- (8) On January 12, 2007, pursuant to the December 29 Entry, the signatory parties filed an amended Stipulation and Recommendation (January Stipulation). The signatory parties state that the January Stipulation is substantively identical to the December Stipulation but that the January Stipulation enumerates all terms agreed to by the parties, rather than incorporating the terms by reference from other documents. The prehearing conference was held on January 22, 2007. Afterwards, by entry dated January 23, 2007, the attorney examiner established a procedural schedule for consideration of the January Stipulation, setting the matter for hearing on February 28, 2007.
- (9) On January 29, 2007, VEDO and OPAE filed a second joint motion for certification of an interlocutory appeal of the attorney examiner's January 23 Entry (Second Joint Motion). OCC filed a memorandum contra the joint motion on

February 5, 2007. The Second Joint Motion was denied by the attorney examiner by entry dated February 12, 2007.

- (10) Moreover, on January 29, 2007, OCC filed a second application for review and interlocutory appeal of the attorney examiner's January 23 Entry (Second Application). VEDO, OPAE and the Staff each filed memoranda contra OCC's application on February 5, 2007. The Second Application was denied by the attorney examiner by entry dated February 12, 2007.
- (11) On February 15, 2007, VEDO filed a motion for protective order and a motion *in limine*. On February 27, 2007, OCC filed a memorandum contra the motion for protective order and motion *in limine*.
- (12) On February 16, 2007, OCC filed a motion for a continuance and request for expedited ruling. The attorney examiner granted the motion for a continuance and rescheduled the evidentiary hearing for March 28, 2007.
- (13) Further, on February 22, 2007, OCC filed a motion to compel discovery regarding its first set of discovery. VEDO filed a memorandum contra the motion to compel on February 27, 2007. In addition, OCC filed a motion to compel discovery regarding its second set of discovery on February 27, 2007.
- (14) On February 28, 2007, a discovery conference was held to consider the outstanding discovery issues. At the discovery conference, the attorney examiners granted in part and denied in part VEDO's motion for a protective order, granted in part and denied in part VEDO's motion *in limine*, and granted in part and denied in part OCC's motions to compel.
- (15) On March 5, 2007, OCC filed a third application for review and interlocutory appeal (Third Application) of the attorney examiners' rulings at the February 28, 2007, discovery conference. VEDO filed a memorandum contra the Third Application on March 6, 2007.
- (16) Rule 4901-1-15, O.A.C., sets forth the substantive standards for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in

paragraph (A) of the rule or unless the appeal is certified to the Commission by the attorney examiner pursuant to paragraph (B) of the rule. Paragraph (B) of Rule 4901-1-15, O.A.C., specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of law or policy and an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties should the Commission ultimately reverse the ruling in question.

Notwithstanding the arguments raised by OCC, the February 28, 2007, discovery rulings do not fall within the four enumerated rulings specified by Rule 4901-1-15(A), O.A.C., from which interlocutory appeals may be taken without certification by the attorney examiner. OCC argues that the February 28, 2007, discovery rulings, taken as a whole, terminate its right to participate in this proceeding. However, OCC cites to no Commission precedent, despite a request by the attorney examiner for such a cite at the discovery conference, where the denial of a motion to compel discovery has been construed as the termination of a party's right to participate in a proceeding pursuant to Rule 4901-1-15(A), O.A.C.

Moreover, the attorney examiner notes that, at the February 28, 2007, discovery conference, OCC's motion to compel discovery was granted with respect to 18 specific discovery requests objected to by VEDO, and the record demonstrates that VEDO has answered numerous other specific discovery requests. Further, as a result of the ruling on VEDO's motion for a protective order, OCC will be permitted to depose each and every witness that VEDO intends to call at the March 28, 2007, hearing. OCC will be permitted to present relevant testimony at the March 28, 2007, evidentiary hearing; in fact, on February 21, 2007, OCC prefiled testimony for its witnesses. Finally, OCC has the same rights as any other party to cross-examine witnesses called by other parties and to file post-hearing and reply briefs. Accordingly, the attorney examiner finds that there is no basis for OCC's claim that the February 28, 2007, discovery rulings terminate its right to participate in this proceeding; therefore, an interlocutory appeal of the February 28, 2007, discovery rulings may be taken only if the attorney examiner certifies the appeal pursuant to Rule 4901-1-15(B), O.A.C.

- (17) The attorney examiner finds that OCC's Third Application should not be certified to the Commission for an interlocutory appeal. OCC has not demonstrated that the February 28, 2007, discovery rulings raise a "new or novel question of interpretation, law, or policy" or that the February 28, 2007 discovery rulings represent "a departure from past precedent" within the ambit of Rule 4901:1-15(B), O.A.C.

The attorney examiner finds that the February 28, 2007, discovery rulings do not involve a new or novel question of law or policy. Although this proceeding does have an unusual and convoluted history, none of the procedural issues raised in the three applications for interlocutory appeal filed by OCC in this proceeding presented new or novel questions for the Commission. With respect to the Third Application, the attorney examiner notes that motions to compel discovery, motions *in limine*, and motions for protective orders are all routine matters with which the Commission and its examiners have had long experience in Commission proceedings. Further, OCC does not identify any Commission precedent from which the February 28, 2007, discovery rulings allegedly depart.

OCC does argue that the attorney examiners did not properly apply the decision of the Ohio Supreme Court in *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St. 3d 300, in which the Court declined to recognize an absolute settlement privilege. However, OCC appears to misunderstand the basis for the attorney examiners' ruling. In denying the motion to compel with respect to Interrogatories No. 1 and 2, Request for Production of Documents No. 1 and Request for Admission No. 1, the attorney examiners did not rely upon an absolute settlement privilege or on the decision of the Sixth Circuit Court of Appeals in *Goodyear Tire & Rubber Co.*, 332 F. 3d 976 (6th Cir. 2003), as OCC suggests in the Third Application. Neither the attorney examiners nor OCC even mentioned the *Goodyear* case at the February 28, 2007, discovery conference; moreover, as OCC points out, the Ohio Supreme Court has ruled that *Goodyear* is not persuasive authority for an absolute settlement privilege in Ohio. *Ohio Consumers' Counsel*, 111 Ohio St. 3d at 321-322.

Instead of relying upon the absolute settlement privilege recognized by *Goodyear*, the attorney examiners determined, in denying the motion to compel (with respect to just four of the specific discovery requests), that the matters sought to be discovered were not reasonably calculated to lead to the discovery of admissible evidence. This was due to the broad nature of the discovery requests, which went beyond the side agreements addressed by the Court in *Ohio Consumers' Counsel* and sought all details of the settlement negotiations, including the underlying discussions of the settlement negotiations themselves.

The Commission's procedural rules generally do not permit the admission of evidence related to settlement negotiations. Rule 4901-1-26, O.A.C., states that:

Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another valid purpose.

In this case, the four specific discovery requests at issue sought detailed information regarding settlement negotiations between the signatory parties to the January Stipulation. Although VEDO had objected to these discovery requests on the basis that they related to settlement negotiations, this information may be discoverable if the information sought was reasonably calculated to lead to the discovery of admissible evidence. Rule 4901-1-16, O.A.C.

However, the discovery requests, on their face, cannot be construed to be reasonably calculated to lead to admissible evidence, and OCC failed to demonstrate, in its motion to compel or on the record at the discovery conference, that these broad discovery requests were reasonably calculated to lead to the discovery of admissible evidence. OCC's argument on this issue simply consisted of asserting, in its motion to compel, that the information sought to be discovered was relevant to the first prong of the Commission's three-prong test for the consideration of stipulations. The attorney examiners

determined that this assertion alone was not sufficient to support a finding that the discovery request was reasonably calculated to lead to the discovery of admissible evidence.

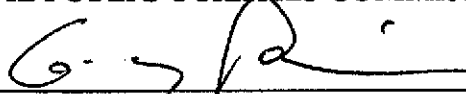
In contrast, the attorney examiner notes that OCC's motion to compel was granted where the specific discovery request appeared reasonably calculated to lead to the discovery of admissible evidence even though the discovery request touched upon settlement matters. Specifically, the attorney examiners granted the motion to compel with respect to Request for Admission No. 13 of the first set of discovery, which sought discovery on any agreements entered into by VEDO, OP&E or Staff separate from the April Stipulation. The attorney examiners determined that this particular discovery request was reasonably calculated to lead to the discovery of admissible evidence relevant to the Commission's consideration of the proposed stipulation. Further, this ruling was consistent with the Court's decision regarding the discovery of side agreements in *Ohio Consumers' Counsel*. Therefore, the attorney examiner finds that the February 28, 2007, discovery rulings do not represent a departure from past precedent and present no new or novel issues for the Commission. OCC's Third Application should be denied.

It is, therefore,

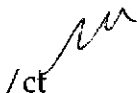
ORDERED, That the third application for review and interlocutory appeal submitted by OCC be denied.

ORDERED, That a copy of this entry be served upon all interested parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



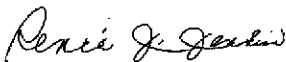
By: Gregory A. Price
Attorney Examiner



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MAR 07 2007



Renee J. Jenkins
Secretary