

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of )  
Vectren Energy Delivery of Ohio, Inc., for )  
Continued Accounting Authority to Defer )  
Differences between Actual Base )  
Revenues and Commission-Approved )  
Base Revenues Previously Granted in )  
Case No. 05-1444-GA-UNC and Request )  
to Consolidate with Case No. 07-1080- )  
GA-AIR. )

Case No. 08-632-GA-AAM

PUCO

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**MOTION TO DISMISS VECTREN ENERGY DELIVERY OF OHIO'S  
APPLICATION FOR CONTINUED ACCOUNTING AUTHORITY  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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June 27, 2008

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The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of all the approximately 293,000 residential utility consumers of Vectren Energy Delivery of Ohio, Inc. ("VEDO" "Vectren" or "the Company") moves the Public Utilities Commission ("PUCO" or "Commission") to dismiss Vectren's Application for Continued Accounting Authority, so as to prevent unjust increases in the rates that consumers pay for natural gas service. There are several grounds for OCC's motion. First, Vectren is seeking an increase in rates that is prohibited under Ohio law. Second, through the accounting proposes, Vectren will be able to continue its unlawful alternative regulation plan<sup>1</sup> while remaining subject to rate of return regulation, in violation of R.C. 4929.01(A) et seq. Third, the application to extend the accounting approved by the Commission in Case No. 05-1444-GA-UNC should be rejected because the doctrine of res judicata should

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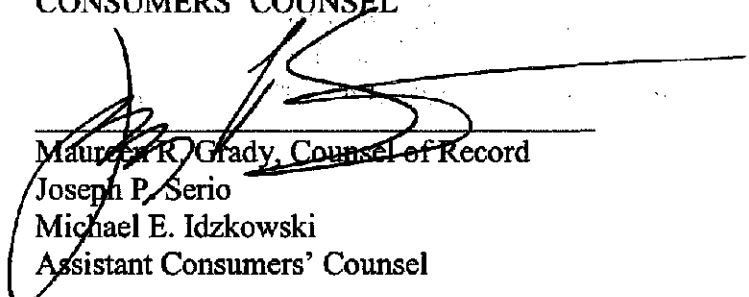
<sup>1</sup> For the reasons set forth in OCC's Application for Rehearing, filed July 27, 2007, in Case No. 05-1444-GA-UNC, the approval of VEDO's alternative rate plan was unlawful. OCC's Application for Rehearing (and the Coalition's) was granted "for further consideration of the matters specified in the applications for rehearing," but no Entry on Rehearing has been issued.

preclude Vectren from overturning the Commission's *Supplemental Opinion and Order* which permitted the deferral accounting only through September 30, 2008. Finally, Vectren's application should be dismissed because Vectren failed to seek the appropriate relief from the *Supplemental Opinion and Order* which set the deferral period. Under R.C. 4903.10 (as well as Ohio Adm. Code 4901-1-35 (A)) it was incumbent upon Vectren to file an application for rehearing for relief from the *Supplemental Opinion and Order*. It failed to do so.

The reasons for granting OCC's Motion to Dismiss are further set forth in the attached Memorandum in Support.

Respectfully submitted,

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**TABLE OF CONTENTS**

	<b>PAGE</b>
I. INTRODUCTION .....	1
II. SUMMARY OF ARGUMENT .....	2
III. ARGUMENT .....	4
A. Vectren is Seeking a Rate Increase That is Prohibited by Ohio's Ratemaking Law. ....	4
B. Through the Accounting Changes Vectren Proposes, it Will be Able to Continue its Alternative Regulation Plan While Remaining Subject to Rate of Return Regulation, in Violation of R.C. 4929.01(A) et seq. ....	6
C. Under the Doctrine of Res Judicata, Vectren Should be Precluded from Relitigating the Length of the Deferral Period Since That Issue Was Fully Litigated in Case No. 05-1444-GA-UNC and the Parties to the Proceeding are Identical to the Case at Bar. ....	10
D. Vectren's Application Should be Denied Because Vectren Failed to Properly Seek Appropriate Relief from the Supplemental Opinion and Order by Means of an Application for Rehearing. ....	11
IV. CONCLUSION .....	13
CERTIFICATE OF SERVICE .....	14

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**MEMORANDUM IN SUPPORT OF OCC'S MOTION TO DISMISS**

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**I. INTRODUCTION**

Vectren is seeking PUCO approval to continue the accounting mechanism approved by the Commission in Case No. 05-1444-GA-UNC, which Vectren perceives as a way to track revenues (not authorized in tariffs) in order to later collect those revenues from customers. It is in the context of the current rate case that Vectren is seeking to collect these deferred revenues from customers, which total as much as \$5,152,231 (and will be more if the PUCO approves Vectren's application).

Under the accounting approved in Case No. 05-1444-GA-UNC, Vectren was permitted to defer the difference between the actual base revenues (weather normalized) experienced and the "adjusted order granted base revenues." The "adjusted order granted base revenues" refer to the revenues approved in Vectren's last general rate case, Case No. 04-571-GA-AIR, adjusted to reflect changes in the number of customers from the levels reflected in that case. The deferrals were approved through September 30, 2008. The Commission also approved the collection of the deferrals from customers through a

mechanism called a sales reconciliation rider (“SRR”) in conjunction with Vectren’s alternative rate plan. The SRR was set initially at zero and the tariffs for the SRR were approved. The initial rate for the SRR was to be filed as part of an application to increase rates under R.C. 4909.18. That application is presently before the Commission as Case No. 07-1080-GA-AIR.

In Case No. 07-1080, Vectren is seeking to set the initial rate for the SRR and to collect the deferred revenues from customers. Vectren proposes to collect two years (plus additional months by extending the deferrals) worth of deferrals through a one-year rider. It has redesignated the rider as Sales Reconciliation Rider–A. Vectren is seeking to collect from residential customers at least \$5,152,231 that represents two years of deferrals permitted in Case No. 05-1444-GA-UNC.<sup>2</sup>

## **II. SUMMARY OF ARGUMENT**

Vectren’s application is unlawful because the deferred accounting facilitates an unlawful increase to customers’ utility rates that is prohibited by law. It should be rejected and customers should be protected by the Commission from this unlawful increase for a number of reasons. First, if the deferral accounting is continued as requested in its application, then revenues will be sought from customers to cover the extended deferral period. The original deferral period began October 2006 and was to run two years and represents revenues that were not collected from customers from October 1, 2006 through September 30, 2008. Now Vectren requests that the Commission extend the deferral period until the date on which rates set in its rate case become effective. Vectren has proposed to collect these deferred revenues from its

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<sup>2</sup> If the Commission approves Vectren’s application to extend the deferral accounting, even more deferrals will be collected from Vectren’s customers.

customers in its rate case application. This amounts to an unlawful rate increase under Ohio law.

Second, Vectren proposes to continue its unlawful alternative regulation plan while remaining subject to rate of return regulation. This violates R.C. 4929.01(A) et seq. which requires an alternate, not dual, regulatory scheme.

Third, the doctrine of res judicata should be applied to preclude Vectren from reopening the PUCO's decision in Case No. 05-1444-GA-UNC. That PUCO decision permitted deferrals for a two-year period only, consistent with a pilot approach and subject to future review by the parties and the Commission during that period. Vectren's application would extend the deferral period until the date on which rates set in its current rate case become effective. This contravenes the earlier decision of the PUCO and upsets, to Vectren's favor, the delicate balance in the rate-setting process that the General Assembly intends to exist between customers and utilities.

Finally, in filing an application to change the deferral accounting period, the Company failed to seek the appropriate relief from the *Supplemental Opinion and Order* which set the deferral accounting period. Relief from the *Supplemental Opinion and Order* should have been sought through an application for rehearing as required under R.C. 4903.10. Vectren's failure to timely apply for rehearing on the deferral period cannot be cured by its application when the Revised Code (and the Administrative Code) clearly provides that an application for rehearing is the exclusive relief from an opinion and order of the PUCO.

### III. ARGUMENT

#### A. Vectren is Seeking a Rate Increase That is Prohibited by Ohio's Ratemaking Law.

Vectren is deferring and booking the revenue differential between the actual base revenues that it collected and the revenues approved from its preceding rate case, Case No. 04-571-GA-AIR, starting October 1, 2006. The accounting application filed here would extend the period for the deferrals, and would increase the revenues to be collected from its customers in the current rate case, Case No. 07-1080-GA-AIR.

Vectren can only book these deferrals if it has "reasonable assurance" that the deferrals will be collected from customers, which underscores that this case is about ratemaking and not just accounting.<sup>3</sup> Indeed, in its rate case, Vectren proposes to collect these deferred revenues -- revenues not collected from customers during the period of October 2006 through the rate effective period -- in this rate case. But these revenues do not fit the ratemaking formula for the pending rate case, under Ohio law. For example, the test period in Vectren's current rate case is the twelve months ended May 31, 2008. The deferred revenues are not associated with the test period and thus are not permitted for inclusion in ratemaking, under Ohio law.

In its *Supplemental Opinion and Order*, the Commission took an additional step that reinforced its earlier ruling (in the September 13, 2006 *Opinion and Order*<sup>4</sup>) by allowing Vectren to retroactively recover revenues that were not collected from

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<sup>3</sup> See FASB 71, par. 9.

<sup>4</sup> *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, *Opinion and Order* (Sept. 13, 2006).



customers, as anticipated, because customer usage was less than projected by Vectren in its last rate case. “Vectren has authority, pursuant to the alternative rate plan approved in this Supplemental Opinion and Order, to recover all deferrals made pursuant to the accounting treatment approved by the Commission by Entry dated January 10, 2007.”<sup>5</sup> Now the Company is seeking to extend the deferrals beyond the two-year period allowed, further exacerbating the retroactive rate increase that is being sought from customers in Vectren’s present rate case.

The effect of continuing the deferrals is that rates set in Vectren’s current rate case will be retroactively increased to customers. Vectren seeks to collect the deferred revenues, through rates in its present rate case, that relate back to the approved rates in its former rate case. Moreover, the revenues being sought by this application go back to the order issued in Case No. 04-571-GA-AIR, representing revenues that were not received from customers, yet were factored into the rate increase granted.

The Commission is without authority to approve retroactive increases. *KECO Industries v. Cincinnati & Suburban Bell Telephone Co.* (1957), 166 Ohio St. 254. It is not permitted in R.C. 4909.15, 4909.18, or under 4929.05. To do so would be outside the scope of the Commission’s authority, given that “[t]he commission, as a creature of statute, may exercise only that jurisdiction conferred upon it by statute.” *Canton Storage v. PUCO* (1995), 72 Ohio St.3d 1, 5; *Columbus S. Power Co. v. Public Util. Comm.* (1993), 67 Ohio St.3d 535, 537. The Commission should not allow a continuation of the

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<sup>5</sup> *Supplemental Opinion and Order* at 28. OCC applied for rehearing of the *Supplemental Opinion and Order*, on this and other grounds, and on Aug. 22, 2007 the Commission granted OCC’s Application for Rehearing “We believe that sufficient reason has been set forth by OCC and the Coalition to warrant further consideration of the matters specified in the applications for rehearing.” *Entry on Rehearing* at 4 (Aug. 22, 2007). Nine months have passed since the Commission’s *Entry on Rehearing* and no additional rehearing has been held, nor has an additional Entry been issued. The lack of a final order in that case has denied OCC the opportunity to appeal the underlying PUCO Order.

unlawful deferrals initially authorized in its September 13, 2006 *Opinion and Order* and reaffirmed in its *Supplemental Opinion and Order*.

**B. Through the Accounting Changes Vectren Proposes, it Will be Able to Continue its Alternative Regulation Plan While Remaining Subject to Rate of Return Regulation, in Violation of R.C. 4929.01(A) Et Seq.**

In its September 13, 2006 *Opinion and Order* in Case No. 05-1444-GA-UNC, the Commission approved the deferral of the revenue differential which was the basis for Vectren to book the deferrals as revenues.<sup>6</sup> This is the accounting necessary to implement the sales reconciliation rider which will be used to collect increased rates from residential customers in Vectren's current rate case. The sales reconciliation rider is a crucial component of Vectren's alternative rate plan. The alternative regulation plan is not functional unless the deferrals of the revenue differential are recognized from an accounting (and ratemaking) perspective. Vectren's request here is to permit the deferral accounting to continue.

Thus, the deferral accounting is based upon the notion that the Commission has authority to implement Vectren's alternative rate regulation plan. It does not, as OCC explained in its June 27, 2007 Application for Rehearing and will further explain below.

The Commission's *Supplemental Opinion and Order* (and its September 13, 2006 *Opinion and Order*) contravenes the alternative regulatory scheme established under Chapter 4929 of the Revised Code. R.C. 4929.01(A) *et seq.* permits natural gas

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<sup>6</sup> *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 *Opinion and Order* (Sept. 13, 2006).

companies to file a “method, *alternate to the method of section 4909.15* of the Revised Code, for establishing rates and charges.”<sup>7</sup> Vectren’s alternative regulatory filing approved in the *Supplemental Opinion and Order* encompasses a scheme whereby Vectren is simultaneously subject to both rate of return regulation (per Case No. 04-571-GA-AIR) and alternative rate regulation.

A dual regulatory scheme, where utilities are allowed the opportunity to earn their rate of return under R.C. 4909.15, in addition to allowing other opportunities for collecting charges from customers under Chapter 4929, is clearly not contemplated by the plain language of the statute. 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” (emphasis added).

According to R.C. 1.42 “words and phrases shall be read in context and construed according to the rules of grammar and common usage.” “Alternate” and “alternative” are not terms that have acquired a technical or specialized meaning.<sup>8</sup> Hence, they must be defined by how they are commonly used. “Alternative” is defined as “a proposition or situation offering a choice between two or more things only one of which may be chosen” or “an opportunity for deciding between two or more courses or propositions.”<sup>9</sup>

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<sup>7</sup> R.C. 4929.01(A).

<sup>8</sup> Even if it is argued that these terms have a technical meaning, it is clear that the PUCO itself has construed the technical meaning consistent with common usage. See *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 (Dec. 6, 2001).

<sup>9</sup> Merriam-Webster 2006-2007.

Thus the General Assembly's choice of words --"alternative" and "alternate"-- in R.C. 4929.01(A) supports OCC's argument that the statute does not permit dual regulation.

The gas alternative regulation statutes were enacted with the 1996 passage of Amended Substitute House Bill 476 of the 121<sup>st</sup> General Assembly. Almost a year later, the Commission adopted rules to enable House Bill 476.<sup>10</sup> In enacting those rules the Commission responded to the gas companies' arguments that the Act did not require any commitments from those filing an alternative rate plan. In doing so the Commission described the alternative plans as a "move away from rate of return/rate base regulation" and found "the further the deviation from traditional rate of return/rate base regulation, the more the commitments should relate to items which are no longer tied to traditional cost of service ratemaking principles."<sup>11</sup> These findings, proclaimed in the months following enactment of the legislation, appear to be forgotten or ignored by this Commission. Such findings are consistent with OCC's argument that alternative rate regulation is a substitute for, not a supplement to, traditional regulation.

The telephone alternative regulation statutes codified in Chapter 4927 preceded the gas alternative regulation statutes and formed the basis for the later enacted gas statutes. The definition of what gas "alternative rate plans" may include under R.C. 4929.01(A) is almost exactly word for word the "alternate methods" permitted in the telephone statute, R.C. 4927.04(A)(1). This is significant because the Commission has defined "alternative" under the telephone alternative regulation statute as one or the other, not both:

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<sup>10</sup> *In the Matter of the Adoption of Rules to Carry Out the Provisions of Amended Substitute House Bill 476 as Enacted by the 121<sup>st</sup> General Assembly*, Case No. 96-700-GA-ORD Finding and Order (Mar. 13, 1997), modified on rehearing by *Entry on Rehearing* (May 22, 1997).

<sup>11</sup> *Id* at 11-12.

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 the authorized return on investments, the utility takes on additional risk while maintaining its obligations to the public.<sup>12</sup>

The same reasoning, thus, should be applied to the gas alternative regulation statute, where the same definition and term “alternate” or “alternative” is used. Alternate means one or the other, not both.

The alternative rate regulation plan proposed by Vectren and being implemented by the accounting approved and sought to be continued here, permits Vectren to have the best of both worlds -- flexibility to automatically collect rate increases from customers, which results in reduced risk for Vectren, while maintaining its opportunity to earn the authorized return on investment. The law and Commission precedent allow one scheme for collecting charges from customers, not both. The Commission should, on this basis, dismiss Vectren’s application to continue its deferral accounting and find that such accounting, which facilitates the Sales Reconciliation Rider, a crucial component of the alternative rate plan, is unlawful and unreasonable.

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<sup>12</sup> *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 (Dec. 6, 2001).*

**C. Under the Doctrine of Res Judicata, Vectren Should be Precluded from Relitigating the Length of the Deferral Period Since That Issue Was Fully Litigated in Case No. 05-1444-GA-UNC and the Parties to the Proceeding are Identical to the Case at Bar.**

In Ohio, under the doctrine of res judicata, a final judgment rendered on the merits by a court of competent jurisdiction acts as a bar to any subsequent action on the same claim or issues between the parties.<sup>13</sup> Ohio has defined res judicata as both claim preclusion (estoppel by judgement) and issue preclusion (traditionally known as collateral estoppel).<sup>14</sup> Vectren's application invokes issue preclusion or collateral estoppel.

Underlying res judicata is the general public policy that seeks to confine, within a reasonable period of time, the duration of litigation, while at the same time permitting parties a fair opportunity to fully litigate and be heard in the due process sense. Additionally it is based on the notion that justice to the prevailing party requires that he or she not be burdened to maintain his or her rights a second time on account of the negligence or caprice of the defeated opponent.<sup>15</sup>

In order for collateral estoppel to apply and preclude relitigation of issues, there must be "an identity of parties and issues in the proceedings."<sup>16</sup> The Ohio Supreme Court has found that collateral estoppel applies equally to administrative hearings.<sup>17</sup> When the doctrine of collateral estoppel is applied to Vectren's application it is clear that Vectren should be precluded from relitigating, in the present application, the appropriate deferral

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<sup>14</sup> See *Whitehead v. Gen Tel Co.*, 20 Ohio St. 2d 108 (1969); *Krahn v. Kinney*, 43 Ohio St. 3d 103, 107 (1989).

<sup>15</sup> *City of Cincinnati v. Emerson*, 57 Ohio St. 132, 48 N.E. 667 (1987).

<sup>16</sup> *Beatrice Foods Co. Inc. v. Lindley*, 70 Ohio St.2d 29, 35, 24 O.O.3d 68, 434 N.E.2d 727 (1982).

<sup>17</sup> *Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 9 (1985).

period for the sales reconciliation rider. The parties to both the instant application and Case No. 05-1444 are the same. The issue of the appropriate time to permit Vectren to defer revenues is the same issue now as it was during the 05-1444 case. In Case No. 05-1444, the Commission specifically limited the deferrals to a two-year period in order to allow parties and the Commission to further review the untested mechanism.<sup>18</sup> Now Vectren is seeking to undo and relitigate the appropriate period for deferring revenues. Vectren's application, thus, should, under the doctrine of collateral estoppel, be dismissed.

**D. Vectren's Application Should be Denied Because Vectren Failed to Properly Seek Appropriate Relief from the Supplemental Opinion and Order by Means of an Application for Rehearing.**

Vectren's Application seeks to modify the Commission's *Supplemental Opinion and Order*. But Vectren failed to follow the statutory procedure of filing an application for rehearing. The *Supplemental Opinion and Order* permitted the creation of deferrals from October 1, 2006 to September 30, 2008 for a two year period, consistent with a pilot approach and subject to future review by the parties and the Commission during that period.<sup>19</sup>

Under R.C. 4903.10, after an order has been made by the PUCO, any party may apply for rehearing with respect to matters determined in the proceeding. Such applications are to be filed within thirty days after the entry of the order. Because the deferral period was one of the matters determined in the *Supplemental Opinion and*

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<sup>18</sup> See *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 *Supplemental Opinion and Order* at 19 (June 27, 2007).

<sup>19</sup> *Id.*

*Order*, it was incumbent upon Vectren to seek rehearing if it deemed it necessary to seek changes to the deferral period. It did not do so as required under R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A). Its failure to properly seek an application for rehearing on the period for the deferrals is grounds enough to dismiss the application.

Recent Commission precedent supports the dismissal of the current application on grounds that Vectren failed to file a proper pleading. In a recent case, the Attorney Examiner decided a similar matter where Duke Energy improperly contested an attorney examiner's procedural ruling. In an Entry issued on October 14, 2005, the Attorney Examiner set a procedural schedule for the Company's distribution rate case. Duke Energy filed a motion that requested the modification of the procedural schedule. Duke Energy's motion in that case was denied by the Attorney Examiner:

The motion asks for reconsideration of the substance of any entry that was issued ten days before the motion was filed. CG&E cannot avoid the strictures of Rule 4901-1-15, Ohio Administrative Code (O.A.C.), by calling its filing a motion rather than an interlocutory appeal.<sup>20</sup>

The same Commission rule applies regardless of the name given to an improperly submitted pleading. Vectren failed to file the proper pleading, which was an application for rehearing, under the PUCO's rules<sup>21</sup> and Ohio law. The PUCO should deny Vectren's Application.

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<sup>20</sup> *In re CG&E Distribution Rate Case*, Case No. 05-59-EL-AIR, Entry at 2 (Nov. 3, 2005).

<sup>21</sup> Ohio Adm. Code 4901-1-35(A).

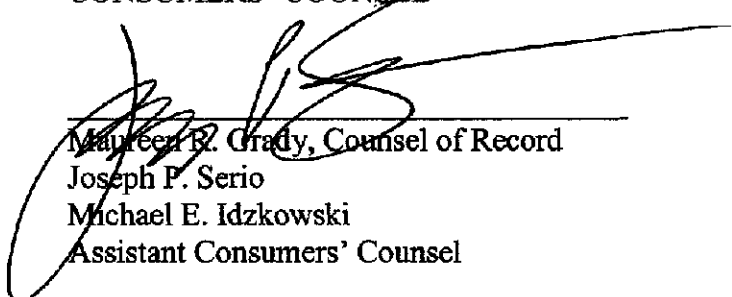


#### IV. CONCLUSION

Vectren's application for continued accounting authority to create deferred revenues, to be collected as a rate increase from its customers, should be rejected by the Commission and dismissed. The Commission should put an end to the deferred accounting which has facilitated an unlawful, retroactive increase to customers' utility rates. Moreover, denial of the application will provide some consumer protection against Vectren's continued unlawful alternative regulation plan which permits it to reap the benefits of alternative regulation while being protected with an authorized rate of return under traditional regulation. Res judicata should be applied to preclude Vectren from reopening the PUCO's decision in Case No. 05-1444-GA-UNC which permitted deferrals for a two-year period only. Moreover, the Company should not be permitted to circumvent R.C. 4903.10 by filing an application when it failed to file an application for rehearing on the *Supplemental Opinion and Order*. Wherefore, for the reasons stated above, the Commission should reject and dismiss Vectren's Application.

Respectfully submitted,

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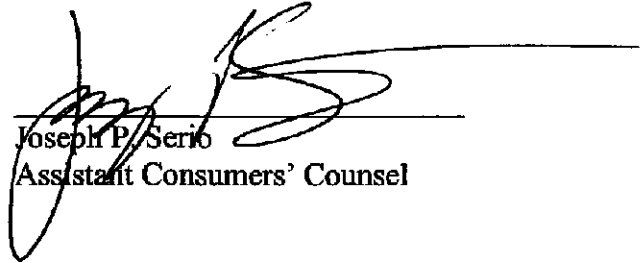


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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of OCC's *Motion to Dismiss Vectren Energy Delivery of Ohio Inc. Application for Continued Accounting Authority* was provided to the persons listed below via first class U.S. Mail, postage prepaid this 27<sup>th</sup> day of June, 2008.

  
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