

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

**VECTREN ENERGY DELIVERY OF OHIO'S MEMORANDUM CONTRA
THE OHIO CONSUMERS' COUNSEL'S MOTION TO DISMISS**

REC'D BY: [illegible]

2008 JUL 14 PM 4:37

PUCO

Lisa G. McAlister
Gretchen J. Hummel
Joseph M. Clark
MCNEES WALLACE & NURICK, LLC
21 East State Street, 17th Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Fax: (614) 469-4653
lmcAlister@mwncmh.com
ghummel@mwncmh.com
jclark@mwncmh.com

July 14, 2008

**Attorneys for Vectren Energy
Delivery of Ohio, Inc.**

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 _____ Date Processed _____

**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)	Case No. 08-632-GA-AAM
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.)	

MEMORANDUM CONTRA OCC'S MOTION TO DISMISS

I. INTRODUCTION

On May 23, 2008, Vectren Energy Delivery of Ohio, Inc. ("VEDO") filed an application ("Application") in this case requesting the approval of the Public Utilities Commission of Ohio ("Commission") for continued accounting authority to defer differences between actual base revenues and Commission-approved base revenues, as previously authorized in Case No. 05-1444-GA-UNC ("Case No. 05-1444"), until resolution of VEDO's pending request to increase rates in Case No. 07-1080-GA-AIR. On June 27, 2008, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Dismiss ("Motion to Dismiss") the Application.

OCC argues that VEDO's Application should be dismissed for four reasons: 1) the Application is an increase in rates that is prohibited under Ohio law; 2) if approved, VEDO would be able to continue its unlawful alternative regulation plan while remaining subject to rate of return regulation in violation of R.C. 4929.01(A); 3) the doctrine of *res judicata* precludes VEDO from "overturning the Commission's Supplemental Opinion

and Order which permitted the deferral accounting only through September 30, 2008”; and, 4) VEDO failed to file an application for rehearing within 30 days of the June 27, 2007 Supplemental Opinion and Order in Case No. 05-1444, which set the deferral period. The Commission should deny OCC’s Motion to Dismiss.

In addition to considering the sound legal reasons discussed below for rejecting OCC’s claims, the Commission should not overlook the policy reasons for denying OCC’s Motion to Dismiss. Recently enacted Amended Substitute Senate Bill 221 (“SB 221”) incorporates into Ohio’s state policy the promotion of the “alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation.”¹ Both the Commission and OCC are statutorily obligated to adhere to Ohio’s state policy when carrying out their respective duties.² OCC previously asserted that it is important to adopt regulatory policies that work to align the interests of utilities and customers in favor of energy conservation and efficiency programs, yet its position in this case is contrary to this objective of Ohio’s state policy. Granting OCC’s Motion to Dismiss would be contrary to Ohio’s state policy, be unfair³ to VEDO and, as importantly perhaps, set back the progress achieved thus far in helping customers get better value for their energy dollar.

¹ Section 4929.02(A)(12), Revised Code (as amended by SB 221).

² Section 4929.02(B), Revised Code (as amended by SB 221).

³ VEDO moved forward and utilized shareholder dollars to fund the conservation program described in the Amended Stipulation and Recommendation approved by the Commission its Supplemental Opinion and Order in Case No. 05-1444. Case No. 05-1444, Supplemental Opinion and Order at 5 (June 27, 2007). Due to the timing of the issuance of the Staff Report in VEDO’s current rate case, as well as other factors, the rate case may not be resolved by a final order prior to the September 30, 2008 end date of the accounting authority established in Case No. 05-1444. Granting OCC’s Motion would deny VEDO the ability to obtain the benefit that the Commission approved in exchange for VEDO’s conservation program funding commitment.

II. ARGUMENT

A. VEDO's Application does not seek, nor will it cause, a rate increase.

VEDO's Application does not seek an increase in rates; it merely seeks a continuation of the accounting authority originally authorized in Case No. 05-1444. The Commission rejected OCC's similar arguments in Case No. 05-1444 and should do so yet again in this case.⁴

The Commission has long recognized the distinction between accounting practices under Section 4905.13, Revised Code, and the ratemaking provisions in Chapter 4909, Revised Code.⁵ A deferral is an accounting procedure that is not governed by the ratemaking statutes.⁶ A Commission grant of deferral authority affords the recipient the opportunity to record costs so that they may be properly reflected in future rates and charges subject to the Commission's review and subsequent action. It does not guarantee recovery of those costs or revenues. The legal issue raised by OCC is well-settled – deferral accounting does not equal a rate increase nor does it implicate the statutory ratemaking provisions.⁷

OCC's own pleadings and positions recognize this point of law and undermine its Motion to Dismiss. For example, OCC's Motion to Intervene in Case No. 05-1444 recognized that any resulting rate impacts stemming from the accounting authority requested by VEDO would be dealt with in a "subsequent" proceeding.⁸ OCC also

⁴ Case No. 05-1444, Entry on Rehearing at 8 (February 28, 2007); Case No. 05-1444, Supplemental Opinion and Order at 25-26 (June 27, 2007).

⁵ Case No. 05-1444, Entry on Rehearing at 8 (February 28, 2007).

⁶ *Consumers' Counsel v. Pub. Util. Comm.*, 4 Ohio St.3d 111, 115 (1983).

⁷ *Id.*

⁸ *Case No. 05-1444*, Motion to Intervene and Motion to Establish Procedural Process of the Ohio Consumers' Counsel at 1 (December 14, 2005). OCC also admitted, in another Commission proceeding,

signed an April 10, 2006 Stipulation and Recommendation ("April 2006 Stipulation") in Case No. 05-1444 which contained the same accounting authority ultimately approved by the Commission in its Supplemental Opinion and Order.⁹ The Commission recognized this fact in its Supplemental Opinion and Order, noting that the January 12, 2007 Stipulation and Recommendation ("January 2007 Stipulation") was the same as the April 2006 Stipulation (except for differences in demand side management and conservation programs) and that every party, including OCC, represented to the Commission that the April 2006 Stipulation did not violate any important regulatory practices or principles.¹⁰ Finally, in a Memorandum Contra to a VEDO Application for an Interlocutory Appeal, OCC recognized that the accounting implemented by VEDO "is in reality a mere tracking mechanism" and concluded there is "no financial consequence to the current tracking."¹¹

Moreover, approval of VEDO's Application to continue the deferrals will not exacerbate an unlawful retroactive rate increase. OCC claims that "[t]he effect of continuing the deferrals is that rates set in Vectren's current rate case will be

that accounting authority does not equate to a rate increase. In 2001, Columbia Gas of Ohio ("COH") asked for permission to defer bad-debt costs related to a Commission moratorium on the disconnection of residential gas or electric service during the winter of 2001. In that case, OCC encouraged the Commission to state that a Commission grant of accounting authority permitted COH "to defer certain items for booking purposes only" and that "the ratemaking treatment would be made by the Commission within the context of COH's next base rate case." *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Modify its Current Accounting Procedures for its Costs in Implementing the Commission's Moratorium on the Disconnection of Utility Service*, Case No. 01-3278-GA-AAM, The Ohio Consumers' Counsel's Motion to Intervene and Motion to Disapprove Application, or, in the Alternative, Motion to Modify the Application at 5 (December 28, 2001).

⁹ Case No. 05-1444, Stipulation and Recommendation at 7-8 (April 10, 2006).

¹⁰ Case No. 05-1444, Supplemental Opinion and Order at 23 (June 27, 2007).

¹¹ Case No. 05-1444, Entry on Rehearing at 8 (February 28, 2007); Case No. 05-1444, Commission Entry at 3 (January 10, 2007).

retroactively increased to customers.”¹² Approval of the Application will not permit VEDO, in its rate case, to institute an illegal retroactive rate increase. As indicated in the January 2007 Stipulation approved in the Commission’s Supplemental Opinion and Order, the Sales Reconciliation Rider (“SRR”) simply provides VEDO with a fair, just, and reasonable opportunity to collect the base rate revenue requirement established by the Commission in VEDO’s 2004 base rate case in accordance with a fundamental objective of regulation and “does not constitute an increase in rates”¹³. “The Commission has already determined that these revenues are required for VEDO to earn a fair and reasonable rate of return.”¹⁴ An extension of the deferral authority cannot amount to an unlawful retroactive rate increase if the SRR did not and will not cause a rate increase in the first place.

OCC’s argument has no merit in law or fact and the Commission should deny OCC’s Motion to Dismiss.

B. The Commission possesses the authority to approve VEDO’s Application. Approval of the continued accounting authority VEDO seeks will not contravene Ohio’s alternative regulation and rate of return statutes.

OCC’s claim that the Commission does not have the authority to approve VEDO’s Application because it would continue the illegal simultaneous operation of alternative and traditional regulation¹⁵ is incorrect and has already been addressed and

¹² Motion to Dismiss at 4-5 (June 27, 2008).

¹³ Case No. 05-1444, Stipulation and Recommendation at 10 (January 12, 2007); Case No. 05-1444, Supplemental Opinion and Order at 19 (June 27, 2007).

¹⁴ Case No. 05-1444, Supplemental Opinion and Order at 19 (June 27, 2007) (citing *In the Matter of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Service and Related Matters*, Case Nos. 04-571, et al., Opinion and Order at 16 (April 13, 2005)).

¹⁵ Motion to Dismiss at 6-9 (June 27, 2008).

rejected by the Commission. Nonetheless, VEDO will once more address OCC's incorrect assertions.

OCC's narrow view that the Commission may not allow a utility to implement an alternative regulatory framework while remaining subject to traditional regulation under Section 4909.15, Revised Code, is wrong because, as the Commission previously held, Sections 4909.15 and 4929.05, Revised Code, are not mutually exclusive.¹⁶ In its Supplemental Opinion and Order in Case No. 05-1444, the Commission highlighted the broad definition of alternative rate plan, finding that Section 4929.05 vests it with broad discretion, including the ability to approve a mechanism such as the SRR.¹⁷ Further, the recent revisions to Chapter 4929, Revised Code, as a result of SB 221, explicitly confirm the Commission's already-existing authority to utilize its alternate ratemaking authority to approve and implement a "revenue decoupling mechanism."¹⁸ This legislative language is not a new expansion of the Commission's authority, but rather a corroboration of the Commission's already-existing power under current law to approve alternate rate plans.¹⁹

OCC has again attempted to support its claim with a telephone case based on statutes not applicable to VEDO's Application.²⁰ The 2004 Cincinnati Bell Telephone case cited by OCC is largely analogous to Section 4929.04, Revised Code, which is applicable only in circumstances in which natural gas companies seek alternative

¹⁶ Case No. 05-1444, Supplemental Opinion and Order at 27 (June 27, 2007); Case No. 05-1444, Entry on Rehearing at 5-6 (February 28, 2007).

¹⁷ Case No. 05-1444, Supplemental Opinion and Order at 27 (June 27, 2007).

¹⁸ Sections 4929.01(O) and 4929.051, Revised Code (as amended by SB 221).

¹⁹ Section 4929.051, Revised Code (as amended by SB 221).

²⁰ Motion to Dismiss at 8-9 (June 27, 2008), *citing In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of an Alternative Form of Regulation Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 04-720-TP-ALT, Finding and Order at 13 (June 30, 2004).

regulation for commodity or ancillary services. VEDO's Application in Case No. 05-1444 sought alternative regulation for neither type of services. In fact, in Case No. 05-1444, VEDO did not propose to establish rates by a method different from that of Section 4909.15, Revised Code, but assumed that method as applied in Case No. 04-571-GA-AIR. As in Case No. 05-1444, OCC has cited no applicable statutory provisions to prove its claim.²¹

While the Commission's traditional determination of a reasonable revenue requirement for a utility is fairly explicitly dictated by Section 4909.15, Revised Code, there are no explicit statutory prescriptions for designing rates and charges to provide a utility with a reasonable opportunity to recover its authorized revenue requirement. The Commission possesses the authority to approve a rate design mechanism the purpose of which is simply to provide VEDO a reasonable opportunity to collect the revenue requirement found reasonable by the Commission in its most recent rate case.

OCC's assertions are not supported by Ohio law or Commission precedent. Ohio law does not compel the Commission or a utility to abandon traditional regulation when implementing a mechanism such as the SRR through an alternative rate plan. Both forms of regulation can simultaneously co-exist. The Commission previously rejected OCC's claims and should do so again in the course of denying OCC's Motion to Dismiss.²²

²¹ Case No. 05-1444, Supplemental Opinion and Order at 27 (June 27, 2007).

²² Case No. 05-1444, Supplemental Opinion and Order at 27 (June 27, 2007); Case No. 05-1444, Entry on Rehearing at 5-6 (February 28, 2007).

C. No legal authority, statute or otherwise, precludes VEDO from asking for an extension of the accounting authority.

OCC asserts that VEDO's Application seeks to undo and relitigate the appropriate deferral period and that the appropriate time frame in which VEDO should be permitted to defer revenues is the same issue now as it was in Case No. 05-1444.²³ OCC avers that the doctrine of collateral estoppel (issue preclusion) forbids VEDO from raising this issue.²⁴ Similarly, OCC also claims that VEDO's proper avenue to change the ending date of the deferrals was to file an application for rehearing of the Commission's Supplemental Opinion and Order.²⁵

The January 2007 Stipulation approved by the Commission in its Supplemental Opinion and Order explicitly provides that the pilot program would last two years and the deferrals would begin on October 1, 2006.²⁶ Additionally, the Commission required its approval for an extension of the SRR mechanism, including the necessary accounting authority underlying the SRR.²⁷ In accordance with the January 2007 Stipulation and the Commission's Supplemental Opinion and Order, VEDO's Application asks for an extension of the accounting authority from October 1, 2008 until final resolution of VEDO's currently pending rate case.²⁸

VEDO is not asking the Commission to reconsider its Supplemental Opinion and Order. Nor is VEDO attempting to collaterally attack the end date of the accounting authority granted in Case No. 05-1444. It is simply asking for an extension of the

²³ Motion to Dismiss at 10-11 (June 27, 2008).

²⁴ *Id.*

²⁵ *Id.* at 11-12.

²⁶ Supplemental Opinion and Order at 6, 8 (June 27, 2007).

²⁷ *Id.* at 19.

²⁸ Application at 2-4 (May 23, 2008).

accounting treatment necessary to implement the SRR, as contemplated by the Commission's Supplemental Opinion and Order. OCC's attempts at obscuring the legal issues at bar should be discarded. VEDO had no reason to file an Application for Rehearing of the Supplemental Opinion and Order. The Commission's January 10, 2007 Entry, February 28, 2007 Entry on Rehearing, and June 27, 2007 Supplemental Opinion and Order approved the very deferral period that VEDO and the other signatories to the January 2007 Stipulation asked the Commission to approve. VEDO's request to continue its accounting authority is required by the January 2007 Stipulation as well as the Supplemental Opinion and Order and VEDO is merely following the Commission's orders in this proceeding.

In fact, the doctrines of claim and issue preclusion that OCC tout actually bar OCC from pursuing the claims made in its Motion to Dismiss.²⁹ The Commission previously approved the same accounting authority requested in this case³⁰ and the Ohio Supreme Court dismissed OCC's appeal of this very issue.³¹ Indeed, VEDO only seeks to "continue its previously-granted authority ... in the same manner" as authorized in Case No. 05-1444.³² Similarly, in Case No. 05-1444, the Commission addressed OCC's claim regarding the legality of simultaneously regulating a utility under both an alternate rate plan and traditional rate of return regulation.³³ OCC did not

²⁹ 63 Ohio Jur. 3d Judgments § 381. For a Commission discussion of these doctrines, see *In the Matter of the Complaint of Warren Jay Yerian v. Buckeye Rural Electric Cooperative, Inc.*, Case No. 05-886-EL-CSS, Entry at 3-4 (August 24, 2005).

³⁰ Case No. 05-1444, Commission Entry at 3 (January 10, 2007); Case No. 05-1444, Supplemental Opinion and Order at 25-26 (June 27, 2007).

³¹ *Ohio Consumers' Counsel v. Pub. Util., Comm.*, 08/29/2007 Case Announcements, 2007-Ohio-4285.

³² Application at 4 (May 23, 2008).

³³ Case No. 05-1444, Supplemental Opinion and Order at 27; Case No. 05-1444, Entry on Rehearing at 6 (February 28, 2007).

include this claim in its April 30, 2007 appeal to the Ohio Supreme Court.³⁴ Further, when the Commission classified Case No. 05-1444 as an alternative regulation case, OCC failed to bring the required interlocutory appeal of the ruling and the Commission blocked OCC from raising the issue again due to this procedural failure.³⁵

OCC is overtly making a backdoor attempt to have the Commission address established issues again and the Commission should bar OCC from revisiting the Commission's previous decisions. OCC previously raised, and the Commission addressed, each of the issues put forth by OCC, and the doctrines of claim and issue preclusion should prevent OCC from once again attempting to put these issues into play.

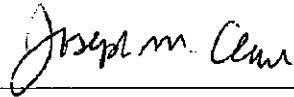
³⁴ *Ohio Consumers' Counsel v. Pub. Util. Comm. of Ohio*, Case No. 2007-0781, Notice of Appeal (April 30, 2007).

³⁵ Case No. 05-1444, Supplemental Opinion and Order at 10 (June 27, 2007); Case No. 05-1444, Attorney Examiner Entry at 5-6 (January 10, 2007).

III. CONCLUSION

Wherefore, for the reasons discussed herein, the Commission should deny OCC's Motion to Dismiss.

Respectfully submitted,

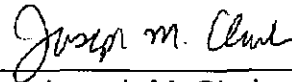


Gretchen J. Hummel
Lisa G. McAlister
Joseph M. Clark
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
(614) 469-8000 (T)
(614) 469-4653 (F)
ghummel@mwncmh.com
lmcAlister@mwncmh.com
jclark@mwncmh.com

**Attorneys for Vectren Energy Delivery
of Ohio, Inc.**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Vectren Energy Delivery of Ohio's Memorandum Contra the Ohio Consumers' Counsel's Motion to Dismiss* was served upon the following parties of record this 14th day of July 2008, via electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid



Joseph M. Clark

Maureen R. Grady
Joseph P. Serio
Michael E. Idzkowski
Assistant Consumers' Counsel
Office of Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
grady@occ.state.oh.us
serio@occ.state.oh.us
idzkowski@occ.state.oh.us