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

REPLY MEMORANDUM TO VEDO'S MEMORANDUM CONTRA THE OCC'S MOTION TO DISMISS BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of all the approximately 315,000 residential utility consumers of Vectren Energy Delivery of Ohio, Inc. ("VEDO," "Vectren" or "the Company") and pursuant to Rules 4901-1-12, files its Reply to the Company's Memorandum Contra OCC's Motion to Dismiss. For the reasons set forth in OCC's Motion to Dismiss and reasons detailed below, the Public Utilities Commission of Ohio ("PUCO" or "Commission") should grant OCC's Motion to Dismiss because otherwise Vectren's customers will be subject to an unjust and unlawful increase in rates.

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

characterizes 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 are as much as $5,152,231 (and will be more if the PUCO approves Vectren's application). Vectren proposes to collect two years (plus additional months by extending the deferrals) worth of deferrals through a one-year rider. It has designated the rider as Sales Reconciliation Rider–A.

To understand the deferrals and what they really mean, one must go back to the underlying case, Case No. 05-1444. There the PUCO authorized Vectren to recover millions of dollars from residential and general service customers under an accounting legerdemain that creates assets from non-existent or phantom revenues. That case guaranteed Vectren will collect one single component of its approved rates plucked out of its last rate case -- the residential and general service sales revenue component. The accounting treatment that the PUCO authorized takes Vectren's 2004 test year sales revenues from its most recent rate case (Case No. 04-571-GA-AIR) and establishes it as the sales that the PUCO's Order guarantees for Vectren for two years. Essentially, the PUCO allowed Vectren -- three years after Vectren filed its last rate case -- to collect money from customers to make up for the money customers saved by reducing their usage of natural gas.

Under the PUCO-authorized accounting ploy, which Vectren now seeks to extend, Vectren's current sales revenues will be compared to the revenues that were incorporated in its last rate case. The difference in any revenues collected will be recorded as though Vectren received the revenues. Thus, assets are being created or

imputed from rate case revenues that were never collected, because customers used less gas than Vectren projected.[1] These booked assets were recorded monthly and deferred, without carrying costs, for subsequent collection in the current VEDO rate case through SRR-A. The initial rate for the rider 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.

II. ARGUMENT

A. The Commission's Orders In Case No. 05-1444 Have Permitted VEDO To Defer Uncollected Revenues And Have Ordered The Collection Of Such Revenues Through The Rates Charged To Customers In VEDO's Present Rate Case. This Amounts To A Rate Increase.

VEDO steadfastly maintains that it does not seek an increase in rates; rather, it is only asking for mere continuation of accounting authority granted in Case No. 05-1444.[2] This claim is not new; VEDO provided the same argument in defending its application in Case No. 05-1444.

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[1]These phantom revenues are akin to the delta revenues that the Ohio Supreme Court encountered in *Cincinnati Gas & Electric Co. v. Pub. Util. Comm.*(1999), 86 Ohio St.3d 53, 711 N.E.2d 670. The delta revenues, like the phantom revenues in this case, related to revenues not actually collected. Instead, the revenues sought to be inserted into the R.C. 4909.15 rate formula were revenues derived from the Staff substituting a price it thought the Company should charge for the service. The Court struck down Staff's adjustment noting that the Commission "ignored reality" and "instead of a snapshot of CG&E's revenues, the commission substituted its own surreal vision. The law requires Ansel Adams; the commission gives us Salvador Dali." *Id.* at 62.

[2] VEDO Memorandum Contra OCC's Motion to Dismiss at 3-5 (July 14, 2008).

The initial "accounting authority" granted in Case No. 05-1444[3] (which is sought to be continued by the instant application) permitted Vectren to recognize, for financial accounting purposes, revenues that were not collected from customers, due to declining usage per customers. The *Order* permitted Vectren to create regulatory assets (deferrals) to recognize order-granted revenues from Case No. 04-517-GA-AIR, not collected from customers for a two-year period. The *Order* was followed up by a *Supplemental Opinion and Order*[4] making it clear that Vectren "has authority to **recover** all of the deferrals 'made pursuant to the accounting treatment'" created under the initial *Order*.[5] Indeed Vectren proposes to collect from customers approximately $5 million by implementing collection rider, SRR-A, on the rate effective date of its current application.

The linkage the Commission has made between the accounting authority granted and the finding in its *Supplemental Opinion and Order* permitting Vectren to recover the deferrals transformed the accounting order into a rate increase. Thus, even if one accepts the distinction drawn by Vectren, between accounting and ratemaking--which OCC does

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[3] *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, Opinion and Order*(Sept. 13, 2006).

[4] *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., Supplemental Opinion and Orde*r at 28 (June 27, 2007).

[5] 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). Eleven 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.

not accept, the Commission has taken steps in the *Supplemental Opinion and Order* that change an accounting order to an order authorizing a rate increase.

B. The Ohio Supreme Court Has Determined That Accounting Orders Of The Commission Inextricably Influence Rates, Causing Harm To Customers.

Even without the *Supplemental Opinion and Order*, Vectren's claims that there is no rate increase must fail. The distinction Vectren clings to is one which the Supreme Court of Ohio has, as of late, set aside. The Ohio Supreme Court has determined that the accounting orders of the Commission are final orders and appealable.[6] In a recent appeal to the Ohio Supreme Court addressing the PUCO authorizing accounting deferrals for regional transmission organization expenses, the Court rejected the very same arguments presented here by Vectren -- that the accounting orders were not final because rate changes associated with the accounting would not be implemented until later.[7] "The PUCO orders were final and appealable." *Id.* at 15.

The Court found that the accounting orders were final, appealable orders because customers had already been harmed by the PUCO's actions: "The fact that subsequent orders may result in more direct effects does not mean that the orders allowing accounting procedure changes are not final. Thus the Consumers' Counsel may argue in these appeals that customers have already been harmed by PUCO actions that she claims were unreasonable or unlawful."[8]

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[6] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940 ("*FirstEnergy*").

[7] The Court's opinion relates to two consolidated cases, each raising accounting issues.

[8] *Id.* at ¶ 25.

The Court's decision in the *FirstEnergy* cases recognizes the reality of PUCO ratemaking -- customers end up paying in rates what PUCO accounting orders allow to be booked, as revenues. In the *FirstEnergy* appeal the PUCO pressed for the continuation of earlier rulings where this Court distinguished accounting from ratemaking and declined to find that rates are affected by such accounting.[9] In *FirstEnergy,* this Court identified the connection between accounting and rates: "To be sure, as Consumers' Counsel contends, FirstEnergy and Dayton Power and Light, having secured the accounting changes, will likely ask the PUCO for permission to raise their customers' rates after the market development period to cover the costs that the PUCO has allowed the companies to defer during that period."[10] *FirstEnergy* recognizes that when the PUCO creates a regulatory asset in an accounting case there is an inextricable "influence"[11] on future rates.

Indeed, the Commission in its *Supplemental Opinion and Order,* authorizes Vectren to recover all deferrals and collect from customers the revenues Vectren booked based upon the PUCO's accounting order. These booked revenues are real, not theoretical, and amount to millions of dollars Vectren intends to collect from customers as shown in its request in the rate case application, Case No. 07-1080-GA-AIR. In that

[9] See *e.g. Ohio Consumers' Counsel v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 111, 115; 4 OBR 358, 447 N.E.2d 749 (where the Court permitted the utility to amortize the balance of four terminated nuclear units over a fifteen year period for book purposes only); *Ohio Consumers' Counsel v. Pub. Util. Comm.* (1983), 6 Ohio St.3d 377, 6 OBR 428, 453 N.E.2d 673 (where the Court upheld the PUCO ruling allowing DP&L to change its accounting procedures to extend the period of time in which it could capitalize AFUDC).

[10] *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, at ¶ 35.

[11] *Ohio Consumers' Counsel v. Pub. Util. Comm.* (1983), 6 Ohio St. 3d 377, 380, 6 OBR 428, 453 N.E.2d 673 at 380, (Locher, R.S., dissenting) (where Justice Locher recognized that the purpose of an accounting change is to "influence rates").

case, Vectren requests the SRR-A be implemented on the rate effective date to permit Vectren to collect approximately $5 million in rates from its customers.

C. "Alternate" And "Alternative" Means One Or The Other. Not Both.

While Vectren claims that OCC is wrong in its argument that a dual regulatory scheme is impermissible under Title 49,[12] it fails to address the argument OCC makes as to the meaning of "alternate" or "alternative" under R.C.4929.01(A).[13] As explained by OCC, the plain meaning of the term "alternate" and "alternative" is a choice between one or the other, only one of which may be chosen. Under R.C. 1.42 "alternate" and "alternative" must be construed this way, absent any technical or specialized meaning. Had the General Assembly intended the alternative regulation provisions to be supplemental provisions, consistent with dual regulation, the General Assembly could have chosen other words to describe the Commission's authority under R.C. 4929.05. It did not.

Vectren also argues that recent revisions to Chapter 4929, 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.'"[14] SB 221 in large respect was the electric restructuring bill. Nonetheless, the fact that parties passed such legislation seems more likely to show that parties did not believe the current law allowed decoupling. Additionally, SB 221 is effective on a prospective basis,

[12] Vectren Memorandum Contra OCC Motion to Dismiss at 5 (July 14, 2008).

[13] Neither has the Commission acknowledged this argument, and in fact, the Commission goes so far as to claim that OCC cites no language in support of its argument. See *Supplemental Opinion and Order* at 27.

[14] Vectren Memorandum Contra OCC Motion to Dismiss at 6 (July 14, 2008).

not retroactively, so it should not be used to bolster arguments as to what the pre-existing law permitted or did not.

D. Extension Of The Accounting Treatment To Include Additional Deferrals Is A Collateral Attack On The Supplemental Opinion And Order And Vectren Should Be Estopped From Such An Attack.

Vectren claims that its request to continue the accounting authority granted in Case No. 05-1444 is nothing more than asking for an extension of the accounting treatment.[15] Thus, it claims that it is not collaterally attacking the Commission order.

Such an explanation belies the facts in this proceeding. The Commission discretely set a deferral period for two years. That decision was consistent with the PUCO's pilot approach to the SRR. The quid pro quo for the favorable SRR treatment was shareholder funding (albeit limited) of an expanded low-income weatherization program.

Now Vectren is asking for a more complete SRR by extending the period during which deferrals may be booked. The effect is Vectren will collect more revenues from its customers–and Vectren's commitment to weatherization funding, the quid pro quo for the SRR, has not changed. Hence, Vectren's self-serving application will change the very core of the stipulation agreement approved by the Commission, altering the balance achieved.

Collateral estoppel should be applied to prevent Vectren from having two bites at the apple here. By precluding Vectren from changing the very terms of the stipulation it committed to, and the PUCO adopted, this Commission will be preserving its decision as well as the stipulation it modified and adopted.

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[15] Id. at 8.

While Vectren seeks to turn the table on OCC by arguing that OCC should be estopped from raising the arguments on dual regulation, this argument must fail. The Commission, by it Entry on Rehearing, left open the door to OCC by finding 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." Since no rehearing entry has been issued, matters raised in OCC's application, including arguments against the dual regulatory scheme, have not been resolved. Collateral estoppel can not be used against parties where an order has left the issue in question unresolved.

III. CONCLUSION

Vectren's request to extend the deferral period related to uncollected revenues should be denied. Vectren is once again seeking to increase rates to customers through an accounting mechanism. The Commission must recognize this as an attempt to increase rates in light of the findings in its *Supplemental Order* and precedent set in *First Energy*. In order to preserve the Commission's *Supplemental Order* and maintain the balance established in the enabling stipulation, the Commission should estop the Company from relitigating the two year deferral period. OCC's motion to dismiss should be granted and consumers should be protected from Vectren's efforts to increase rates.

Respectfully submitted,

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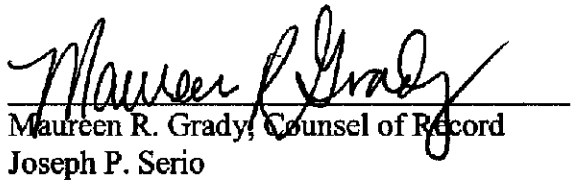

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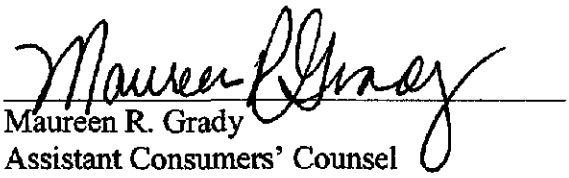
CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Reply to Memorandum Contra Motion to Dismiss by the Office of the Ohio Consumers' Counsel,* was served by Regular U.S. Mail Service (also electronically as a courtesy copy, where possible), postage prepaid, to all parties this 28th day of July, 2008.



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