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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 Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters.	)	Case No. 07-1080-GA-AIR
In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Approval of An Alternative Rate Plan for a Distribution Replacement Rider to Recover the Costs of a Program for the Accelerated Replacement of Cast Iron Mains and Bare Steel Mains and Service Lines, a Sales Reconciliation Rider to Collect Difference Between Actual and Approved Revenues, and Inclusion in Operating Expense of the Costs of Certain Reliability Programs.	)	Case No. 07-1081-GA-ALT

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REPLY TO VECTREN'S MEMORANDUM CONTRA OCC'S MOTION FOR A STAY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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REPLY TO VECTREN'S MEMORANDUM CONTRA OCC'S MOTION FOR A STAY BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

On September 30, 2009, the Office of the Ohio Consumers' Counsel ("OCC"), filed a Motion to Stay the implementation of Stage 2 of Vectren Energy Delivery of Ohio, Inc.'s ("VEDO's" "Vectren's" or "Company's") Residential Rates, Rates 310 and 315. On October 15, 2009, Vectren filed its Memorandum Contra to OCC's Motion. Consistent with its rights under Ohio Adm. Code 4901-1-12(B)(2), OCC replies to Vectren's Memorandum Contra OCC's Motion for Stay.

II. ARGUMENT

A. OCC's Motion Is Timely.

In its Memorandum Contra, Vectren alleges that because OCC filed its notice of appeal before it filed its motion for stay at the Public Utilities Commission of Ohio ("PUCO" or "Commission"), its motion for stay is untimely.[1] In support of its argument Vectren relies upon on the Commission Entry issued in the *Dominion East Ohio Gas* case.[2] There the Commission concluded that it had lost jurisdiction of the matter because an appeal had been filed at the Ohio Supreme Court: "[I]t is not within the commission's power to grant a stay of the implementation of the modified SFV rate design in year two for the GSS/ECTS classes, as requested by the Consumer Groups. Thus, at this time, the only avenue for consideration of such a request for stay would be the court itself."[3]

Apparently then, Vectren is relying upon the general proposition that once an appeal is filed, the underlying court (or administrative agency) loses jurisdiction on the matter until the case is remanded to it by the appellate court. While OCC would agree that this is the general rule, the Ohio Supreme Court has more clearly defined this rule in a way that supports, not limits, the Commission's jurisdiction in this case over the stay requested by OCC.

More specifically, the Ohio Supreme Court has held that the trial court retains jurisdiction over collateral issues that are not inconsistent with the appellate court's review: "the trial court does retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment, such as

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[1] VEDO Memo Contra at 6.
[2] Id.
[3] *In the Matter of the of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-GA-AIR, Entry at ¶ 14 (July 29, 2009).

the collateral issues like contempt, appointment of a receiver, and injunction." *The State ex. Rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, 9 O.O.3d 88, 378 N..E.2d 162 (citation omitted).

Here the issuance of a stay by the Commission is not inconsistent with the Ohio Supreme Court's review of the merits of OCC's appeal on straight fixed variable rate design and inadequate notice. A stay is a collateral issue, much like an injunction, that will not interfere with or impair the Court's ability to decide the merits of OCC's appeal. The stay merely seeks a remedy that will remain in effect and protect consumers from irreparable harm until the Court decides upon the merits of OCC's appeal.

Thus, the Commission need not self-impose a limit on its jurisdiction here, especially when the limit is inconsistent with the Ohio Supreme Court's rulings on this matter. Because the stay involves a collateral issue, it does not interfere with the Court's ability to decide OCC's appeal. Hence the Commission may exercise jurisdiction to issue a stay despite the fact that an appeal is pending on the issues of SFV and notice. The OCC motion, thus, is timely because the PUCO has retained jurisdiction on this collateral matter.

B. The Commission's Findings Are Not Determinative Of The Likelihood Of Success At The Court.

Vectren claims that because the Commission has rejected OCC's arguments "multiple times in this and three other natural gas rate cases" OCC cannot meet the first standard for a stay—that OCC is likely to prevail on the merits.[4] VEDO spends numerous pages of the pleading recounting the Company's success at the PUCO.[5] While Vectren is correct that the PUCO has rejected OCC's arguments, the results at the

[4] VEDO Memo Contra at 6-10.
[5] VEDO Memo Contra at 3-6.

Commission do not necessarily translate into success before the Ohio Supreme Court, where an appeal is currently pending.

It is inappropriate for Vectren to gauge the likelihood of its success on what has transpired at the Commission in these cases. The Ohio Supreme Court uses a *de novo* standard of review to decide all matters of law such as those raised in this case.[6] *Grafton v. Ohio Edison* (1996), 77 Ohio St.3d 102, 105; *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 523; *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.* (1994), 68 Ohio St.3d 559, 563. *De novo* review means, in the words of Justice Scalia of the U.S. Supreme Court, the weight to be accorded the Commission's findings is "zero."[7] Thus, the issues OCC raises will be given a new look, and success at the Commission level has little relevance to how likely OCC is to succeed at the appellate level.

C. Vectren Unreasonably Argues That Customers Will Not Suffer Irreparable Harm.[8]

The irreparable harm to Vectren's residential customers under the SFV rate design cannot be ignored. This harm takes the following forms: a) lost opportunities for conservation; b) nonrefundable over-payment and subsidies by low-usage residential consumers to commercial and industrial customers; c) SFV rate design may force low-use customers off the system, and d) lack of required due process.

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[6] Although there are questions of fact related to some portion of the notice of appeal, all but one is an issue of law.

[7] *Saul Ornelas and Ismael Ornelas-Ledesma v. United States* (1996), 517 U.S. 690,705; 116 S.Ct. 1657; 134 L. Ed.2d 911 (Scalia, J. dissenting) ("in de novo review, the 'weight due' to a trial court's finding is zero").

[8] Memo Contra at 6-12.

1) Lost Opportunities For Conservation Constitute Irreparable Harm.

Vectren argues that the SFV rate design does not discourage customers from conserving.[9] Its argument is unreasonable. In making this argument, the Company relies upon the commodity portion of the bill that comprises up to 75% to 80% of a customer's natural gas bill, as incentive for consumer conservation efforts.[10] But the rate design of the other 20% to 25% of the natural gas bill can also impact a consumer's conservation decisions. The Commission, its Staff, and/or Vectren cannot point to any evidence in the record to refute this position, because such evidence does not exist.

There is no evidence on the record that supports Vectren's claim that the SFV will not adversely impact conservation and energy efficiency efforts (e.g. extending the payback period). At the time the Commission's Order was rendered, there was no existing study, and no studies were performed before the implementation of the SFV rates. Therefore, it is impossible to know with any degree of certainty that the SFV rate design will not cause consumers to forego conservation efforts and energy efficiency investments thus leading to the irreparable harm described by OCC -- lost opportunities for customers to conserve.[11]

The Commission's Order was intended to encourage a desired outcome – increased conservation. The less Vectren relies upon volumetric charges to meet its fixed costs the more incentive Vectren has to encourage and foster conservation. However, imposition of the SFV rate design was unnecessary to achieve that desired outcome. As

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[9] Memo Contra at 6.
[10] Memo Contra at 7.
[11] OCC Motion to Stay at .7-8.

OCC argued, decoupling would have been an appropriate tool to do so. And decoupling did not have the disadvantages associated with SFV.

The Stage 2 SFV rate design will impose an unavoidable fixed monthly charge with no volumetric charge. The implementation of Stage 2 rates will adversely impact customers contemplating energy efficiency investments who may ultimately decide not to proceed given the ever-lengthening pay-back period for such investments that result from the SFV rate design. Therefore, the Stage 2 SFV rate design should not be implemented, and OCC's Motion should be granted.

2) Irreparable Harm Will Result Should The SFV Rate Design Force Low-Use Customers To Leave The System.

OCC argued that the SFV rate design harms Vectren's low-use residential customers. Customers who use the lowest volumes -- who do not use natural gas as a heat source -- could potentially find alternative sources of energy for their current natural gas consumption (e.g. cooking, clothes drying, decorative lighting, etc.). It is the potential for the loss of the low-use customers, who choose to migrate from Vectren's system, that could put an additional burden on remaining customers.[12] Vectren itself recognized that customers would migrate and attempted to recover lost revenues from such customers through a proposed pro forma adjustment. That adjustment was not adopted.

VEDO claims that this argument is both "specious" and "frivolous."[13] Vectren claims that the revenue responsibility to the residential class will not change unless and until VEDO files a new rate case and obtains Commission approval to change the

[12] OCC Motion to Stay at 8-9.
[13] VEDO Memo Contra at 11.

residential revenue requirement. That VEDO acknowledges the injury that could be suffered by customers is significant. It is this type of injury that is irreparable, though concededly not immediate.

3) Vectren's Failure To Provide Customers The Required Notice Of The SFV Rate Design Constitutes Irreparable Harm.

The notice that Vectren published of its Application was deficient because Vectren failed to convey the substance and prayer of its proposal to customers in its statutorily mandated notice, under R.C. 4909.18 and 4909.19. In this case, the Commission failed to enforce the notice requirements, thus denying consumers adequate notice with sufficient detail of the residential rate design ultimately approved by the Commission.

Customers did not receive notice of the rate design change here, similar to the customers in *Committee against MRT v. Pub. Util. Comm.*[14] *and Ohio Assn. of Realtors v. Pub. Util. Comm.*[15] who did not receive notice of the reasonable substance of the utility's rate proposals. Although here Vectren attempted to provide notice, its notice was so deficient that it equated to no notice of Stage 2 rates. Customers were not notified of the stages of the straight fixed variable rate design, nor was the concept of the rate design explained to them. Moreover, any reference to a straight fixed variable rate and transitioning to a total straight fixed variable rate design would not have been understandable -- it did not convey to customers what would happen to their customer charge and usage rates in the next stage. It did not even convey that what customers saw

[14] *Committee against MRT v. Pub. Util. Comm.* (1977), 52 Ohio St.2d 231, 6 O. O. 3d 475, 371 N.E.2d 547.
[15] *Ohio Assn. of Realtors v. Pub. Util. Comm.* 60 Ohio St.2d 172, 14 O.O.3d 409, 398 N.E.2d 784.

in the notice was only "Stage 1." It was not sufficient notice to alert customers of the essential nature and quality of Vectren's proposal.

The PUCO, however, despite the inadequate notice, approved Stage 2 rates for Vectren's customers and instead of adopting Vectren's staged proposal, imposed a complete straight fixed variable rate design on customers starting February 22, 2010.[16] As a result, instead of being phased in over five to seven years -- covering two separate rate cases -- the straight fixed variable rate design was imposed on customers in the same case over a two-year period.

a. Customers Have A Constitutional Right To Notice That Is Based On Statutes.

Vectren argues that there is no constitutional right to participate in ratemaking cases because the Ohio Supreme Court has found the right to participate is statutory.[17] OCC intends to argue that customers of the utility have a recognizable and protected property interest, created by statute, rules, or understandings,[18] in the benefits associated with demand-side management that will be undermined by the straight fixed variable rate structure. Customers of Vectren have participated in conservation programs, making investment decisions based on the pay-back period -- the time it takes to recover the capital spent on the investment in the energy efficient technology. Past conservation efforts were made, based on the then current rate design of Vectren, featuring a lower fixed customer charge coupled with a higher volumetric charge.

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[16] *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend its filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters*, Case No. 07-1080-GA-AIR, Opinion and Order (Jan. 7, 2009).
[17] VEDO Memo Contra at 12.
[18] The property interest of customers has been created in part by R.C. 4905.70 and 4929.02(A)(4).

A change to the straight fixed variable rate design, however, would extend the pay-back period of all energy efficiency investments (past and future) because the entire distribution bill will be collected through a fixed unavoidable customer charge.[19] Customers who made conservation investment decisions in the past in good faith and in reliance upon the regulatory rate design in place, will find their pay-back period extended and the benefits of reduced consumption lessened under a complete straight fixed variable rate design.

These are property rights akin to those recognized by the courts as being protected by the due process clause of the U.S. and Ohio Constitutions. This property interest can only be diminished if customers have been provided notice and opportunity to be heard on the straight fixed variable rate design proposal. This opportunity for customers to act or to be heard never occurred here because Vectren failed to give adequate legal notice to customers of its switch to a straight fixed variable rate design and the specific impact that rate would have on customer charges and volumetric rates.

b. Because Notice Is A Jurisdictional Issue, OCC May Challenge It At Any Time Without Being Untimely.

Vectren also argues that OCC has made an untimely challenge to the adequacy of VEDO's public notice.[20] Vectren argues that the Commission approved the notice by Entry of January 16, 2008, and OCC did not apply for rehearing of this Entry.[21] These arguments should fail.

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[19] See OCC Exhibit 3, Testimony of OCC Witness Novak at 21.
[20] VEDO Memo Contra at 12.
[21] Id.

The Ohio Supreme Court has determined that the notice provisions of R.C. 4909.18 and 4909.19 are jurisdictional.[22] That is the notice requirements of these statutes must be complied with in order for the Commission to obtain subject matter jurisdiction to approve the application itself. The Commission's failure to enforce the notice provisions of R.C. 4909.19, as construed in the *Committee against MRT* case, created a jurisdictional defect which rendered the rate order void ab initio. Hence, OCC had a right to attack jurisdiction at any time, since subject matter jurisdiction cannot be waived.[23]

c. OCC's Participation In A Case Is No Substitute For Notice Required Under R.C. 4909.18.

Vectren also argues that it is "disingenuous" for OCC to suggest that residential customers were, for lack of adequate notice, denied the opportunity to inquire further about VEDO's proposal or intervene in the proceedings.[24] Vectren seems to suggest that participation by OCC and OPAE is an effective substitute for statutorily required notice. Such comments convey a fundamental misunderstanding or disregard for the statutory notice provisions that underlie Ohio regulation. Such arguments should be summarily rejected.

In construing R.C. 4909.18 and 4909.19, the Ohio Supreme Court has properly recognized that the purpose of publication, as evidenced by the plain language of R.C. 4909.18(E), is to provide *any person, firm, corporation, or association, an opportunity to*

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[22] *Duff v. Pub. Util. Comm.* (1978) 56 Ohio St.2d 367, 375-376, 10 O.O.3d 493, 384 N.E.2d 264.

[23] *Time Warner v. Pub. Util. Comm.* (1996), 75 Ohio St.3d 229, 233, 661 N.E.2d 1097, citing to *Gates Mills Investment Co. v. Parks et al* (1971), 25 Ohio St.2d 16, 20, 54 O.O.2d 157, 266 N.E.2d 552 ("The failure of a litigant to object to subject-matter jurisdiction at the first opportunity is undesirable and procedurally awkward. But it does not give rise to a theory of waiver, which would have the force of investing subject matter jurisdiction in a court that has no jurisdiction." (citations omitted)).

[24] VEDO Memo Contra at 13.

file an objection to the increase under R.C. 4909.19.[25] Thus, notice should apprise affected subscribers, among others, of the utility's proposal to increase rates. That notice is provided by newspaper publication in the utility's service territory is further evidence that notice is directed to members of the public.

There is no statutory provision that says if OCC and OPAE are involved in the proceeding, the public need not be noticed. And yet this is exactly what VEDO is saying. This perverse interpretation borders on the absurd. Until and unless the Legislature changes R.C. 4909.18, the utilities are bound to comply, no matter what legal representation they are receiving from OCC or others.

D. Vectren Will Not Be Substantially Harmed By A Stay.

OCC argued that Vectren would not suffer substantial harm if the Commission were to grant the Motion to Stay Stage 2 of the SFV rate design.[26] Vectren responded to these claims by arguing that if a stay was granted it would be exposed to the risk of alleged declining sales[27] during the time Stage 1 rates are in effect.[28] Vectren also notes that OCC supported decoupling along with traditional rate design, which it insinuates is inconsistent with now claiming there is no substantial harm to VEDO caused by declining sales.[29]

First, to set the record straight, lest the Commission be misled by VEDO, it should be said that OCC supports decoupling when it is fundamentally and inherently linked to significant investment in DSM. OCC does not view decoupling as a tool that is

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[25] *Committee against MRT v. Pub. Util. Comm.* (1977), 52 Ohio St.2d 231, 233, 6 O. O.3d 475, 371 N.E.2d 547.
[26] Motion for Stay at 12-13.
[27] OCC Witness Novak testified that the sales were not declining, when considered on a weather normalized basis. See OCC Ex. 3 at 22.
[28] VEDO Memo Contra at 14.
[29] Id.

aimed at solely addressing declining sales that are unrelated to significant investment in DSM. To twist OCC's support on decoupling into an unqualified support for a mechanism to protect the utility from decreasing sales is inappropriate.

In any event, OCC does not support SFV rate design, which is significantly different in many respects than the decoupling OCC had supported. In addition to providing greater conservation incentives, a decoupling mechanism is symmetrical in nature and provides equal protection to the customer and the Company. If the Company sells additional volumes beyond those factored into the rate approved level, then customers get a refund under decoupling. Additionally, if the Company sells less volumes than those built into rates, then it gets to collect revenues for the reduced sales. This basic fairness is missing in the SFV approach where there is no accountability to assure that the Company is not over-collecting from customers money to which they are not entitled.

While it is true that more revenues of Vectren will be at risk of recovery if a stay is granted, that is not the same thing as saying Vectren will suffer *substantial harm.* Vectren itself developed these rates. Vectren's rates were designed to provide it with the opportunity to collect its authorized revenue requirements whether under Stage 1 or Stage 2 of its approved Residential Tariffs. Granting the stay of execution would freeze the rate design at Stage 1, while still allowing Vectren the opportunity to continue to collect its approved revenue requirements. The Company would merely miss the opportunity to collect more of its authorized revenues through a fixed monthly customer charge. The Company will nevertheless have the opportunity to collect those authorized revenues but through volumetric charges in lieu of a solitary, higher fixed charge.

In contrast, the irreparable harm to Vectren's residential customers is significant and exacerbated as the fixed monthly customer charge increases and the volumetric rate disappears. And it is that harm that is irreparable.

E. A Stay Is In The Public Interest.

Justice Douglas, in articulating a standard for stays, emphasized that the most important consideration is "above all ***, where lies the interest of the public" and that "the public interest [] is the ultimate important consideration for this Court in these types of cases."[30]

There is a disparate interpretation of the public interest in these cases between OCC and VEDO. OCC believes the public interest can best be served when low-income low-use customers do not subsidize larger, high-use customers. And yet the SFV rate design causes this problem. OCC believes the public interest is served when the state's policy of encouraging conservation and energy efficiency is fulfilled and not stymied. SFV undermines such a policy. OCC believes the public interest is served by not extending the pay-back period for conservation efforts. The SFV extends the payback period.

On the other hand, VEDO claims that the public interest is served by establishing utility rates that provide a utility a reasonable opportunity to recover its costs in a manner equitable to the customers being served.[31] Stage 1 rates, proposed by VEDO, do in fact provide VEDO with that opportunity to recover costs. VEDO seems to lose sight of the fact that it is an opportunity and not a guarantee of cost recovery. Moreover, OCC does

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[30] *MCI Telecommunications Corp. v. Pub. Util. Com.* (1987), 31 Ohio St.3d 604, 606, 510 N.E.2d 806 (Douglas, J., dissenting).
[31] VEDO Memo Contra at 15.

not believe that cost recovery under SFV is equitable to the residential customers being served for all of the reasons stated herein and in its related pleadings in this case.

III. CONCLUSION

For all the reasons stated above, OCC's Motion for Stay should be granted. The OCC has demonstrated that under the factors considered by the PUCO for stays, granting its motion will prevent irreparable harm and allow the Commission to realign its orders with the public interest. In addition, no *substantial* harm will be sustained by Vectren if the motion is granted. OCC is likely to prevail on the merits of a subsequent appeal given the issue presented on appeal.

Wherefore, the OCC respectfully request that the PUCO grant the motion to stay Stage 2 Residential Tariffs and spare consumers from paying an unavoidable $18.37 monthly customer charge, pending appeal of this case.

Respectfully submitted,

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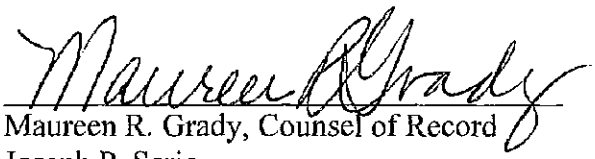

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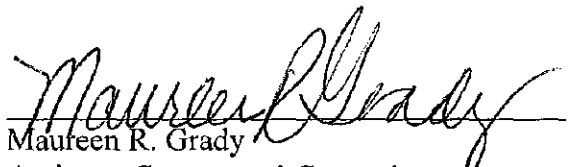
CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Reply* was served by Regular U.S. Mail Service (also electronically as a courtesy copy, where possible), postage prepaid, to all parties this 26th day of October, 2009.



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