FILE

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 Service and Related Matters.	)))))	Case No. 04-571-GA-AIR

**MOTION FOR CLARIFICATION,
OR, IN THE ALTERNATIVE,
APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") on behalf of residential natural gas consumers and, pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35(A), applies for rehearing of the July 26, 2006 Entry ("July 26 Entry") issued by the Public Utilities Commission of Ohio ("PUCO" or "the Commission") in this docket. The OCC submits that the July 26 Entry which modified the June 30, 2006 Addendum to the May 26, 2006 Stipulation and Recommendation was unreasonable and unlawful in the following particulars:

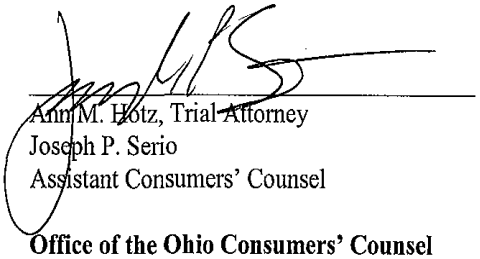
A. The Commission should clarify its decision because it misinterpreted the intent of the June 30 Addendum, or grant rehearing to correct a violation of law.

B. The Commission erred by not evaluating the June 30, 2006 Addendum to the May 26, 2006 Stipulation and Recommendation under the same criteria used to evaluate other Stipulations and Recommendations filed with the Commission.

The reasons that the Commission should grant rehearing are explained in further detail in the accompanying memorandum in support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Ann M. Hotz, Trial Attorney
Joseph P. Serio
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574-Telephone
(614) 466-9475-Facsimile
hotz@occ.state.oh.us
serio@occ.state.oh.us

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MEMORANDUM IN SUPPORT

I. INTRODUCTION AND BACKGROUND

The genesis of this proceeding was the April 16, 2004 Application of Vectren Energy Delivery of Ohio, Inc. ("Vectren" or "the Company") for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Service and Related Matters ("Rate Case Application"). The Rate Case Application was filed pursuant to the requirements of R. C. 4909.18 and 4909.19.[1] Among the requirements of R.C. 4909.19 is that an Application for a rate increase be set for a full evidentiary hearing, and that the Applicant bears the burden of proof to show that the increased rates or charges are just and reasonable.[2]

Pursuant to a Stipulation and Recommendation dated February 4, 2005 (February 4 Stipulation"), between Vectren, Commission Staff, Honda of America, Mfg., Inc. ("Honda"), Interstate Gas Supply ("IGS"), Pinnacle Energy LLP ("Pinnacle"), Industrial

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[1] *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 Service and Related Matters*, Case No. 04-571-GA-AIR, Opinion and Order (April 13, 2005) at 2-3 ("April 13 Opinion and Order").

[2] To that end, the Commission issued an Entry on January 7, 2005 setting an evidentiary hearing for February 1, 2005 and that local public hearings be held at the times and places designated in the Entry. The evidentiary hearing was held on February 8 and 9, 2005.

Energy Users-Ohio ("IEU-Ohio"), Alcoa, Inc. ("Alcoa"), Stand Energy Corporation ("Stand"), and Shell Energy Services Company ("Shell"), the signatory parties agreed among other things to bifurcate the proceedings by deferring proposed Tariff Sheet No. 51 for later resolution in the case and instead to schedule a Transportation Working Group ("TWG") meeting within 30 days of the effective date of the Company's new rates. Proposed Tariff Sheet No. 51 was intended to address the issue of transportation imbalances. The result of the February 4, 2005 Stipulation was to create two separate timelines for the separate issues. The February 4 Stipulation did not change the underlying nature of the proceeding, which was and remains a rate case filing. The TWG engaged in discussions regarding the transportation imbalance issue that were initially the subject of proposed Tariff Sheet No. 51.

Over the course of approximately a six-month period, the TWG, including the OCC, discussed the transportation imbalance issue. A subgroup of the TWG composed of Vectren, Commission Staff, Honda, IGS, Proliance Energy, LLC ("Proliance"), Alcoa, IEU-Ohio and Stand reached agreement and filed a second Stipulation and Recommendation in Case No. 04-571-GA-AIR, on May 26, 2006 ("May 26 Stipulation") that enacted certain modified transportation imbalance provisions. The OCC, representing the interests of Vectren's residential utility consumers, opposed the May 26 Stipulation.

The OCC notified Vectren and the signatory parties of its opposition to the May 26 Stipulation and expressed a desire to address the matter at a subsequent evidentiary hearing to be held to evaluate the May 26 Stipulation. The transportation imbalance issue continued to be considered under the umbrella of the original rate case application as is

evidenced by the fact that both the May 26 Stipulation and the June 30, 2006 Addendum to Stipulation and Recommendation ("June 30 Addendum") dealt with the issue (transportation imbalances) that was part of the original rate case Application, and were also filed in the original rate case docket. It was and remains the position of the OCC that bifurcation of the transportation imbalance issue (Tariff Sheet No. 51) did not, and could not negate the underlying statutory requirements for an evidentiary hearing set forth by R.C. 4909.18 and 4909.19.

However, in an attempt to avoid litigation and to permit the transportation imbalance provisions set forth in the May 26 Stipulation to go into effect prior to the start of the 2006-2007 winter heating season, Vectren, OCC, Commission Staff, Proliance, Stand and the Ohio Farm Bureau ("OFB") agreed to a June 30 Addendum to the May 26 Stipulation. The Commission should understand that the June 30 Addendum was only intended to postpone any challenge to the transportation imbalance provisions from potentially being litigated in the July-September, 2006 time period to a time period after the 2006-2007 winter heating season, sometime after April, 2007.

The postponement would serve the dual purpose of permitting the transportation imbalance provisions from the May 26 Stipulation to go into effect in time for the 2006-2007 winter heating season, thus providing some measure of protection for non-transportation customers. At the same time, by postponing any potential challenge, the signatory parties to the June 30 Addendum would save the cost of litigation and then only face litigation if a review of the actual transportation imbalances from the 2006-2007 winter heating season were such that the OCC determines that it is necessary to go forward with a hearing.

IGS made allegations that the June 30 Addendum was creating some type of super rights. There was never any intent to create or expand the rights of any party. Moreover, the June 30 Addendum did not create any new or pre-established rights. OCC will explain as follows.

II. ARGUMENT

A. The Commission should clarify its decision because it misinterpreted the intent of the June 30 Addendum or grant rehearing to correct a violation of law.

In its letter in opposition to the June 10 Addendum, IGS claimed that "the OCC Addendum would give OCC an unprecedented, super-priority right to litigate the Stipulation if OCC determines to do so for any reason, whether or not rational, at any time until May 15, 2007."[3] The July 26 Entry seems to echo that allegation when it stated, "While the Commission agrees that OCC has the right to file a motion for a hearing, the Commission will not preestablish OCC's or any party's right to a hearing on any matter."[4] Thus, it appears that the Commission either misinterpreted the intent of the June 30 Addendum or was misled by IGS's mischaracterization.

The June 30 Addendum would not grant the OCC any super-priority right to litigation. Nor would it pre-establish a right to a hearing. Instead, the June 30 Addendum would merely preserve the same right that the OCC had in response to the original February 4 Stipulation. Despite that fact that a number of parties had reached an agreement regarding the remaining rate case issues in Case No. 04-571-GA-AIR, the OCC had the right to litigate the proceeding because the case was filed pursuant to R.C.

[3] IGS Letter in Opposition, (July 25, 2006) at 1.

[4] July 26 Entry at 3.

4909.18 and 4909.19. The OCC right to that hearing had nothing to do with any super priority right or pre-established rights, but was based on the statutory requirements. Thus, not only is the OCC's right to an evidentiary hearing in response to the May 26 Stipulation not a super priority right; it also was not unprecedented.

Any right the OCC had to a hearing in response to the May 26 Stipulation is also based on the same statute that governed the May 26 Stipulation. Both the February 4 Stipulation and the May 26 Stipulation were subject to an evidentiary hearing based on the fact that the underlying subject matter was Vectren's May 28, 2004 Application, which was filed pursuant to the requirements of R.C. 4909.18 and 4909.19. There is no super priority right or pre-established right to a hearing in either instance. Instead there is a statutory right for any party including the OCC to an evidentiary hearing. The sole purpose of the June 30 Addendum was to simply transfer the OCC's right to a later point in time so that the parties involved might find a way to avoid litigation. It is possible that after a review of actual 2006-2007 transportation imbalance data that OCC will conclude there will be no need for a hearing. Thus, the June 30 Addendum meets the principle of avoiding litigation.

From the perspective of *stare decisis*, a failure to recognize the right to a hearing in this matter could lead to future situations where any utility company could file a rate case and then seek to avoid the statutory requirement for an evidentiary hearing by simply bifurcating specific issues and establishing different timelines for them. The requirement for a hearing set forth in R.C. 4909.19 is not voluntary, rather it is a mandatory requirement. The General Assembly did not intend for there to be exceptions to this requirement, because it did not include any exceptions in the statute. It is

undeniable that the transportation imbalance issue was filed as a part of a rate case proceeding under R.C. 4909.19. It is also undeniable that all objections, testimony, pleadings and prior stipulations regarding the transportation issue have been filed in the Vectren 04-571-GA-AIR rate case docket. Accordingly, the Commission should recognize that because the transportation imbalance issue is a rate case issue, there is a right to a hearing for any party, and that this right to a hearing is not a super priority right or a pre-established right.

If the Commission rejects this Clarification or Rehearing, then it is forcing the OCC to exercise its statutory right immediately instead of permitting postponement and the possibility that there will be no need for any litigation. The OCC has no desire to force litigation in a circumstance where an acceptable result for Ohio consumers might be achieved without it.

In response to other allegations by IGS, the OCC notes that the June 30 Addendum would not harm IGS or any other Suppliers who might incur costs or make long-term decisions in contemplation of the May 26 Stipulation's methodology. IGS alleges that there might be "uncertainty as to whether the operations would survive after they have been operationally implemented."[5] This risk does not change regardless of whether it is under the May 26 Stipulation or the June 30 Addendum. The May 26 Stipulation already provides that there will be a second phase to the transportation imbalance charges discussion. This later discussion could on its own result in the same type of change or modifications that the OCC might contemplate after a review of the actual transportation imbalance data after the 2006-2007 winter heating season. Thus,

[5] IGS Letter in Opposition (July 25, 2006) at 2.

there is no additional risk of changes than was originally contemplated by the May 26 Stipulation that IGS agreed with and signed.

B. The Commission erred by not evaluating the June 30, 2006 Addendum to the May 26, 2006 Stipulation and Recommendation under the same criteria used to evaluate other Stipulation and Recommendations filed with the Commission.

In its review of the May 26 Stipulation, the Commission noted that the reasonableness of the stipulation would be governed by the principles established in prior cases including *Cincinnati Gas & Electric Company,* Case No. 91-410-EL-AIR, Opinion and Order (April 14, 1994).[6] The Commission specifically set forth the three criteria that it would use and that the Ohio Supreme Court had approved.[7]

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties?

2. Does the settlement, as a package, benefit ratepayers and the public interest?

3. Does the settlement package violate any important regulatory principle or practice?

The Commission should apply these criteria to the June 30 Addendum, which would lead the Commission to approve the June 30 Addendum as submitted.

The June 30 Addendum meets the first principle of whether the settlement is a product of serious bargaining among capable, knowledgeable parties. In addition to the OCC, many of the parties who signed the June 30 Addendum also signed the May 26 Stipulation which the Commission determined did meet that standard. In this circumstance, the Company, OCC, Commission Staff, Proliance, Stand and the OFB

[6] April 13, Opinion and Order at 8-9.

[7] *Id.* at 9.

cannot be said to fail as capable knowledgeable parties. In addition, the June 30 Addendum was the product of serious bargaining among the parties. This is evidenced by the fact that the parties were able to resume negotiations about this matter after the May 26 Stipulation was signed and filed with the Commission. The June 30 Addendum constitutes a compromise among the signatory parties in that all of the signatory parties agreed to terms that are not necessarily consistent with their individual litigation positions.

The June 30 Addendum also meets the second principle of whether the settlement, as a package, benefits ratepayers and the public interest. The OCC maintains that the June 30 Addendum does benefit ratepayers and the public interest because it enables the parties to address the matter without the need for immediate litigation. In addition, it cannot be ignored that the cross section of stakeholder interests that signed and supported the June 30 Addendum is more representative of all customer classes than either of the other stipulations (February 4 Stipulation and May 26 Stipulation) that the Commission previously approved in this docket. As the statutory representative of residential ratepayers the OCC clearly maintains that the June 30 Addendum is in the interest of ratepayers because it permits the protection from the transportation imbalance tariff to go into effect prior to the 2006-2007 winter hearing season. Thus any benefits from transportation customers more closely balancing their operations will reduce the stress and pressure that the imbalances might place on the remaining Choice and sales customers.

Moreover, the June 30 Addendum also preserves the OCC's right to challenge the specific imbalance levels and the associated penalty provisions after the 2006-2007

winter heating season when actual data from imbalances is available.[8] To the extent that the actual transportation imbalance data from the 2006-2007 winter heating season demonstrates that the standards and penalty provisions have significantly reduced the extent to which transportation customers lean on system balancing tools that are paid for Choice and sales customers then there is also the chance that any litigation will be avoided entirely. On the other hand, if the actual transportation imbalance data demonstrates that the standards and penalties are insufficient, then the matter can be addressed through further negotiations or litigation.

The June 30 Addendum also meets the third principle of whether the settlement package violates any important regulatory principle or practice. As was explained above, there was no intent on the part of the OCC or any other signatory party to the June 30 Addendum to create any super priority right to a hearing. Rather the sole intent was to preserve and transfer the underlying right to a hearing to a later date.

A review of the July 26 Entry clearly demonstrates that the Commission did not apply the same criteria to the June 30 Addendum. The July 26 Entry does not apply the three principles and their accompanying analysis to the terms of the June 30 Addendum. Rather, the sole modification in the July 26 Entry appears to single out the interests of the OCC. It is unclear how the June 30 Addendum can be found to be a reasonable resolution of the issues in the case, when the sole issue in the June 30 Addendum was to preserve and transfer the OCC's right to a hearing under R.C. 4909.18 and 4909.19. The modification of the June 30 Addendum essentially negates the intent of the Addendum, thus denying the OCC the benefits it bargained for. The Commission cannot

[8] The OCC acknowledges that any challenge to the transportation imbalance standards or associated penalty provisions would be prospective only, and would be intended to be implemented prior to the 2007-2008 winter heating season.

simultaneously approve the June 30 Addendum and also negate the terms bargained for in that stipulation in disregard of the applicable standards.

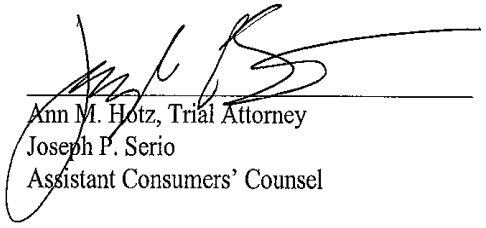
III. CONCLUSION

The June 30 Addendum was only intended to postpone and transfer OCC's current right to a hearing of a rate case issue (transportation imbalance issue) until after the 2006-2007 winter heating season. The intent of the June 30 Addendum was to permit the transportation imbalance standards and penalty provisions from the May 26 Stipulation to go into effect prior to the 2006-2007 winter heating season and still permit further review and analysis and remedial action if deemed appropriate on a prospective basis. The June 30 Addendum is a reasonable resolution of the remaining transportation imbalance issue based on the Commission's own three-prong principles and should be approved.

The OCC respectfully requests that the Commission clarify its July 25 Entry and approve the June 30 Addendum to reflect the intent of the signatory parties. In the alternative, the OCC respectfully requests that the Commission grant rehearing because the Commission, among other things, failed to apply its three-part criteria for reviewing stipulations and thereby failed to provide for the hearing that OCC and the other signatories arranged.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Ann M. Hotz, Trial Attorney
Joseph P. Serio
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574-Telephone
(614) 466-9475-Facsimile
hotz@occ.state.oh.us
serio@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that copies of the *Motion for Clarification, or in the Alternative Application for Rehearing of the Office of the Ohio Consumers' Counsel*, have been served by first class mail, postage prepaid to the following parties of record this 25th day of August 2006.

Joseph P. Serio
Assistant Consumers' Counsel

PARTIES

STEPHEN M. HOWARD
M. HOWARD PETRICOFF
W. JONATHAN AIREY
Vorys, Sater, Seymour & Pease, LLP
52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008

DUANE W. LUCKEY
Attorney General Section
Public Utilities Commission of Ohio
180 East Broad Street, 9th Floor
Columbus, OH 43215-3793

ROBERT E. HEIDORN
Vice President & General Counsel
Vectren Energy Delivery of Ohio, Inc.
P.O. Box 209
Evansville, IN 47709-0209

TIMOTHY L. STEWART
Lewis & Kappes, P.C.
17000 One American Square
P.O. Box 82053
Indianapolis, IN 46282-0003

SAMUEL C. RANDAZZO
McNees Wallace & Nurick LLC
Fifth Third Center
21 East State Street, Suite 1700
Columbus, OH 43215-4228

DAVID C. RINEBOLT
Ohio Partners For Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793

DANE STINSON
WILLIAM A. ADAMS
Bailey Cavalieri LLC
10 West Broad Street, Suite 2100
Columbus, OH 43215

ELLIS JACOBS
Attorney at Law
Legal Aid Society of Dayton
333 W. First Street, Suite 500
Dayton, OH 45402

BOBBY SINGH
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, OH 43215-4213

BRUCE B. MCINTOSH
McIntosh & McIntosh
15 East Eighth Street, Suite 300 West
Cincinnati, OH 45202

MICHAEL L. KURTZ
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202