

In The  
Supreme Court of Ohio

The Office of the Ohio Consumers'  
Counsel,

Appellant,

v.

The Public Utilities Commission of  
Ohio,

Appellee.

:  
:  
: Case No. 09-1547  
:  
:  
: On appeal from the Public Utilities  
: Commission of Ohio, Case Nos. 07-  
: 1080-GA-AIR, *et al.*, *In The Matter of*  
: *the Notice of Intent of Vectren Energy*  
: *Delivery of Ohio for an Increase in its*  
: *Natural Gas Rates.*  
:  
:

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**MEMORANDUM IN OPPOSITION TO  
APPELLANT'S MOTION TO SUPPLEMENT THE RECORD  
SUBMITTED ON BEHALF OF APPELLEE,  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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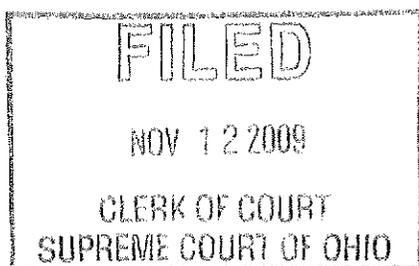
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**In The  
Supreme Court of Ohio**

<b>The Office of the Ohio Consumers’ Counsel,</b>	:	
	:	
	:	Case No. 09-1547
and	:	
	:	
<b>Ohio Partners for Affordable Energy,</b>	:	On appeal from the Public Utilities Commission of Ohio, Case Nos. 07- 1080-GA-AIR, <i>et al.</i> , <i>In The Matter of</i> <i>the Notice of Intent of Vectren Energy</i> <i>Delivery of Ohio for an Increase in its</i> <i>Natural Gas Rates.</i>
	:	
Appellants,	:	
	:	
v.	:	
	:	
	:	
<b>The Public Utilities Commission of Ohio,</b>	:	
	:	
	:	
Appellee.	:	

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**MEMORANDUM IN OPPOSITION TO  
APPELLANT’S MOTION TO SUPPLEMENT THE RECORD  
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**INTRODUCTION**

On November 4, 2009 the Office of the Ohio Consumers’ Counsel (OCC) moved the Court to “supplement” the record transmitted from the Public Utilities Commission of Ohio (Commission) with the October 23, 2009 Report of Vectren’s Demand Side Management Collaborative (DSM Report). OCC’s motion is improper for many reasons and should be denied as more fully discussed below.

## ARGUMENT

This appeal was initiated by OCC on August 26, 2009, the same day the Commission issued its Entry denying OCC's application for rehearing *In re: Vectren*, Case No. 07-1080-GA-AIR, *et al.* The Commission transmitted the record of the proceedings to the Court on September 25, 2009. On October 23, 2009, after the record in the case below was closed, the DSM Report was filed in the Commission's docket for the Vectren case. The record currently before the Court contains the "original papers and exhibits to those papers, along with an electronic version of the transcript ... and certified copies of the journal entries and the docket." S. Ct. Prac. R. V, § 1 (West 2009). OCC requests that a document, not a part of the record of the proceedings below, be made a part of the record.

OCC's request is improper. The DSM Report was filed to assist the Commission in later evaluating "the economic and achievable potential for energy efficient improvements and program designs to implement further reasonable and prudent improvements in energy efficiency." *In re: Vectren*, Case No. 07-1080-GA-AIR, *et al.* (Opinion and Order at 12-13) (January 7, 2009). It was not filed until after the close of the record below, nor was it considered by or relevant to the Commission's decision in the case.

The record of a case and the Commission's case docket are not one and the same. R.C. 4903.21 defines the "transcript" that the Commission is supposed to transmit to the Court "upon service or waiver of the notice of appeal." That "transcript" is limited both by the timing of the notice of appeal and "the journal entries, the original papers or transcripts thereof, and a certified transcript of all evidence adduced upon the hearing before

the commission in the proceeding complained of....” Ohio Rev. Code Ann. § 4903.21 (West 2009). Further, the timing of an appeal to this Court from a Commission proceeding is based on the issuance of the final Entry on Rehearing. *See*, Ohio Rev. Code Ann. §§ 4903.10, 4903.11 and 4903.13 (West 2009). Once the Commission’s final order denying OCC’s application for rehearing was issued on August 26, 2009, the record before the Commission was closed. The DSM Report was filed in the docket two months after the record closed. The aforementioned Ohio Revised Code procedures for appeal of a Commission decision and the Commission’s rules recognize this cut-off point. Ohio Administrative Code Section 4901-1-34 restricts the reopening of a Commission proceeding “for good cause shown” and “prior to the issuance of a final order.” The final order in this case was issued on August 26, 2009. OCC recognized this when it filed its notice of appeal with this Court on that same date. Thus, the “record” transmitted by the Commission pursuant to the Court’s rules necessarily originates from the time an application or complaint is filed with the Commission and ends at the time the final entry on rehearing is issued.

The rule OCC relies on for making its motion further demonstrates why the request is improper. Rule V, § 7 provides that “[i]f any part of the record is not transmitted to the Supreme Court but is necessary to the Supreme Court’s consideration of the questions presented on appeal, the Supreme Court, ...on motion of a party, may direct that a supplemental record be certified and transmitted to the Clerk....” S. Ct. Prac. R. V, § 7 (West 2009). The rule speaks in terms of “any part of the record”, yet OCC requests

that a document, the DSM Report, not a part of the record be transmitted to and considered by the Court *prior* to the Commission ever considering it.

Essentially, OCC asks this court to weigh evidence that the Commission never considered below. The irony in this is that the Commission could not have considered this information because it would run afoul of R.C. 4903.09. As this Court knows, R.C. 4903.09 requires the Commission to keep a complete record of its proceedings and “file, with the records of such cases, findings of facts and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” Ohio Rev. Code Ann. § 4903.09 (West 2009). Given the timing of the filing of the DSM Report it was not a part of the record under the Commission’s consideration. This Court has found many times that it will not reweigh the evidence of record and will not second guess the Commission on factual matters, yet OCC asks the Court to consider information not even “adduced upon the hearing before the commission in the proceeding complained of...” Ohio Rev. Code § 4903.21 (West 2009). By this motion OCC asks this Court to act like a trial court in consideration of this information for the first time in this matter.

Taking the action requested by OCC denies the Commission and the parties to the proceeding below the opportunity to determine the evidentiary weight that the DSM Report should be given. One way of providing the Commission, OCC and the other parties the process afforded by a hearing would be for OCC to file a proper complaint pursuant to R.C. 4905.26. There may be other appropriate ways to proceed. What is certain is that having the Court determine the facts in the first instance is procedurally improper.

The impropriety of this request in the context of the appellate process is apparent from OCC's own argument. OCC alleges that "[g]as usage shown in the report [DSM Report] verifies that residential customer usage is increasing, not decreasing, from the rate case test year [footnote omitted] usage the PUCO was confronted with in the case below. The PUCO had justified its move to straight fixed variable rate design, in large part, based on reduced gas usage by residential customers. Thus, part of the justification for implementing the straight fixed variable rates *may no longer be valid.*" OCC Motion at 2. By these statements, OCC admits that the DSM Report is not a part of the "evidence adduced upon the hearing before the commission in the proceeding complained of." Ohio Rev. Code Ann. § 4903.21(West 2009). Neither the Commission, nor the other parties to the proceeding below have had an opportunity to examine the veracity of OCC's allegations. OCC's request that the Court consider this information is contrary to the purpose of the appellate process and should be denied.

Respectfully submitted,

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**Counsel for Appellee,  
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## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Memorandum in Opposition to Appellant's Motion to Supplement the Record**, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 12<sup>th</sup> day of November, 2009.

  
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