ORIGINAL

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,	:	Case No. 09-1547
Appellant,	:	Appeal from the Public Utilities Commission of Ohio
v.	:	
The Public Utilities Commission of Ohio,	:	Public Utilities Commission of Ohio Case Nos. 07-1080-GA-AIR
Appellee.	:	and 07-1081-GA-ALT

VECTREN ENERGY DELIVERY OF OHIO, INC.'S MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S MOTION TO SUPPLEMENT RECORD

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MEMORANDUM CONTRA

I. INTRODUCTION

The Public Utilities Commission of Ohio ("Commission") issued its Opinion and Order ("Order") in the Vectren Energy Delivery of Ohio, Inc. ("VEDO") cases below on January 7, 2009, in which it approved a Stipulation and Recommendation ("Stipulation") providing for a total of $4.1 million of ratepayer funding for a number of demand-side management (conservation) programs and the establishment of a collaborative comprised of certain parties to the cases ("Collaborative") to oversee, on an ongoing basis, the development, deployment, and assessment of the programs.[1] The Commission directed "that the collaborative shall file a report within nine months of this order, identifying the economic and achievable potential for energy efficient improvements and program designs to implement further reasonable and prudent improvements in energy efficiency."[2] The Collaborative filed its report ("DSM Report") in the docket of the cases below on October 23, 2009. On November 4, 2009, the Office of the Ohio Consumers' Counsel ("OCC") filed a motion ("Motion") in this appeal in which it asks the Court to order the Commission to certify this DSM Report and transmit it to the Court as a supplement to the record in these cases "in accordance with S.Ct.Prac R. V(3)(B) and (7)."

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[1] *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Authority to Amend it Filed Tariffs to Increase the Rates and Charges for Gas Service and Related Matters*, Case No. 07-1080-GA-AIR, *et al.*, Opinion and Order at 12-13.

[2] *Id.* at 13.

II. ARGUMENT

The cases below were initiated on November 20, 2007 by the filing of applications by VEDO and concluded on August 26, 2009, when the Commission issued its Entry on Rehearing, thereby rendering its decision ripe for appeal pursuant to R. C. 4903.10, 4903.11, and 4903.13. OCC filed its Notice of Appeal on August 26, 2009, the same day the Entry on Rehearing was issued. On September 25, 2009, the Commission timely certified the record it compiled pursuant to R.C. 4903.09 and transmitted it to the Court in compliance with R.C. 4903.21 and S.Ct.Prac.R. V(1). OCC does not claim otherwise. Rather, OCC asks that, in accordance with S.Ct.Prac.R. V(7), the Commission be required to certify and transmit the DSM Report to the Court so that it can become a "part of the record before the Court in the present appeal." Motion at 2. S.Ct.Prac.R. V(7), however, is applicable only if "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 DSM Report was not a part of the record below and, moreover, was not even available until the Commission had issued its final, appealable order in these cases.

Additionally, OCC suggests, as if it were significant, that, had the DSM Report been filed prior to September 25, 2009, the date on which the Commission transmitted the record in these cases to the Court, it would have been "part of the record before the Court in the present appeal." Motion at 2. OCC fails to grasp that the record transmitted to the Court properly ended with the Commission's August 26, 2009 Entry on Rehearing. Yet, even if the DSM Report had been among the documents transmitted to the Court, it would not, and could not, have qualified as evidence considered by the Commission in rendering its decision. It was never sponsored or introduced in the hearing in these cases; it was never subject to cross-examination; and it was never admitted into evidence. In fact, the Commission, by requiring that the DSM Report be

filed nine months after its Order, put it out of reach for consideration in these cases. The DSM Report, not being evidence in the cases below, can be given no evidentiary weight for purposes of this appeal. Furthermore, there is no legal basis for the Court to convert this extra-record information into evidence for the purpose of this appeal.

OCC also claims that the Commission "justified its move to straight fixed variable ["SFV"] rate design, in large part, based on reduced gas usage by residential customers." *Id.* OCC is wrong. The Commission made it clear that the revenue and earnings stability issues caused by declining customer usage which jeopardize the utility's ability to recover its fixed distribution costs influenced its decision to depart from the traditional rate design. This lead the Commission to address, "the question of whether to adopt a levelized rate design (i.e., SFV) ... or a decoupling rider or sales reconciliation rider (SRR) ...."[3] The Commission stated in plain language that both the SFV (proposed by its Staff and VEDO) and the decoupling rider (proposed by OCC) address the issues raised by declining customer usage as well as the goal of removing "any disincentive to the utility to promote conservation and energy efficiency."[4] Clearly, either option addresses the interests of the utility. Yet, the Commission chose the SFV because it is better for customers for all the reasons set forth in its order.[5] The important point is that the declining usage trend caused the Commission to abandon the traditional rate design, but did not lead it to choose the SFV rate design.

Alternatively, in the unlikely event that the Court grants OCC's request to require the Commission to certify this document and make it part of the record of these cases, VEDO

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[3] Order at 11.

[4] *Id.*

[5] *Id.* at 11-15.

requests that the Court provide the same treatment for the Final Report Addendum ("Addendum") filed in the docket of the cases below on November 12, 2009. The Addendum explains that the methodology used to demonstrate average residential usage for the cases below was different from that used in the DSM Report and provides revised data using the same methodology as was used in the cases below. The results clearly indicate, that when consistent weather normalization methodology is used, residential customer usage continues to decline through 2008. Therefore, if the Court finds it appropriate to supplement the record with respect to customer usage data, the Addendum is the correct reference document.

As a member of the Collaborative, OCC received a draft of the DSM Report on September 21, 2009 for review, comment, and agreement prior to filing with the Commission. Had OCC inquired about the apparent increase in residential gas usage shown in the draft report before it was filed with the Commission a month later, the weather normalization methodology could have been explained and reconciled with that used in the cases below. It is regrettable that OCC chose, instead, to wait until November 4, 2009 and burden the Commission and the Court with its unnecessary Motion.

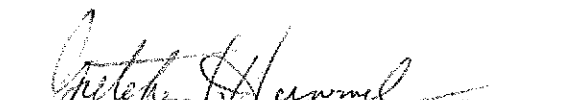
III. CONCLUSION

There is no basis in law or rule that would support the request made by OCC that the Court require that extra-record information be treated as evidence in the record below for purposes of this appeal. The document OCC seeks to have included in the record of the cases below, even if included in the documents transmitted to the Court, does not qualify as evidence for purposes of the Commission's decision. Even if accurate, the data at issue in the DSM Report was not the basis for the Commission's decision. Finally, the conclusion OCC draws

from the DSM Report is unsupported when consistent calculation methodologies are applied to the raw data.

WHEREFORE, VEDO respectfully requests that the Court deny OCC's Motion that it require the Commission to certify the DSM Report and transmit it to the Court as a supplemental record in this appeal.

Respectfully submitted,



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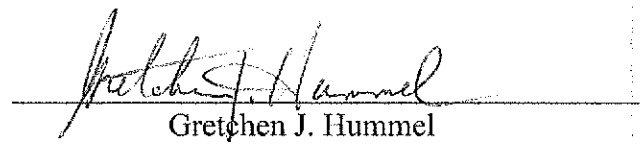
CERTIFICATE OF SERVICE

I hereby certify that copies of this Vectren Energy Delivery of Ohio, Inc.'s Memorandum Contra the Office of the Ohio Consumers' Counsel's Motion to Supplement Record has been served by first class mail, postage prepaid, or hand-delivered to the following parties of record, this 16th day of November, 2009.



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