ORIGINAL

IN THE SUPREME COURT OF OHIO

NANCY S. TOLIVER,	)	
	)	
Appellant,	)	**Case No. 2013 - 1807**
	)	
v.	)	
	)	**Appeal from the Public Utilities Commission of Ohio**
THE PUBLIC UTILITIES COMMISSION OF OHIO,	)	
	)	**Public Utilities Commission of Ohio Case No. 12-3234-GA-CSS**
Appellee.	)	

MERIT BRIEF AND APPENDIX OF INTERVENING APPELLEE, VECTREN ENERGY DELIVERY OF OHIO, INC.

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I. INTRODUCTION

Customers who choose to participate in the Percentage of Income Payment Program, or PIPP, receive a substantial financial benefit. Instead of paying the actual costs of energy, they pay a fixed percentage of their monthly income. And if they consistently make their fixed payments on time, they receive credits towards their unpaid energy costs. But this benefit, like the energy itself, is not free. Non-participating customers pay for the program's benefits.

Of course, how beneficial the program is for any given customer in any given month depends on the size of the underlying bill. Energy consumption can vary drastically with the weather, and for natural gas customers, colder weather generally means higher bills. So while PIPP's benefits are substantial during high-usage months, the PIPP payment might *exceed* the actual cost of service in low-usage months. Nevertheless, recognizing the need to defray the financial burden on other customers, the Commission requires PIPP customers to make the fixed monthly payment year-round.

But what if the customer, to avoid making these payments, leaves the program during low-usage months and then reenters during high-usage months? The case below addressed that question. Nancy Toliver, a customer of Vectren Energy Delivery of Ohio, Inc., left PIPP when the weather turned warm and sought to rejoin when the weather turned cold. In accordance with the Commission's rules and official interpretive materials, Vectren required her to make up the payments she had avoided. Ms. Toliver responded by filing a formal complaint, which the Commission correctly dismissed.

Ms. Toliver has now appealed this decision, but none of her arguments has merit, and the Court should affirm the Commission.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Percentage of Income Payment Program (PIPP)[1] is designed to assist customers who cannot afford the full price of natural gas service. In *Montgomery Cty. Bd. of Commrs. v. Pub. Util. Comm.*, 28 Ohio St.3d. 171, 174 (1986), the Court confirmed the Commission's power to create the PIPP program. It held that "it is clearly within the PUCO's emergency powers . . . to fashion such relief as that provided by the PIP plan and we find the plan of the commission to be manifestly fair and reasonable." Even then, the Court noted that the program represented a "*year-round* percentage of income payment plan." *Id.* at 171 n.1 (emphasis added).

As the name of the program implies, customers on PIPP pay a fixed percentage of their monthly income instead of the actual cost of their service. *See* Ohio Adm. Code. 4901:1-18-13(A)(1), PUCO Appx. 3–4. Any difference between the PIPP payment and the customer's actual cost of service is carried by other customers. Case No. 12-3234-GA-CSS Opin. & Order at 14 (July 17, 2013) (12-3234 Order), PUCO Appx. 27; *see also In re Commission's Review of Chapters 4901:1-17 & 4901:1-18*, Case No. 08-723-AU-ORD, Finding & Order, 2008 Ohio PUC LEXIS 769, at *125 (Dec. 17, 2008) (non-participating utility customers "pay to support these programs"). For a natural gas customer, PIPP has obvious benefits during a cold winter, when furnaces run longer and gas bills run higher.

But what about spring and summer? For some customers, the monthly PIPP installment during warm-weather months may be *greater* than the actual cost of service. This raises a policy question: should PIPP customers be permitted to switch back and forth to the lesser amount, or should they pay the fixed amount year-round? The Commission, in its rules and official guidance

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[1] For ease of reference, Vectren refers to the program solely as PIPP in this brief; the actual program name is "PIPP Plus," to distinguish the current program from a prior program. Any distinction between the programs has no relevance to the issues on appeal.

on PIPP, has chosen the latter course. (*See* VEDO Ex. 1.0, Sherri Bell Dir. Test. (Bell Dir.), at 3, VEDO Supp. 4; *see also id.*, Att. A at 8, VEDO Supp. 18.) If a customer will be on PIPP, she must pay the fixed monthly payment year-round. (*Id.*) Although this may require a higher payment from time to time, the rule recognizes that winter's benefit will generally be far greater than summer's burden, and requiring year-round payment helps defray the costs that must be borne by non-participating customers. (*See id.* at 5–6, VEDO Supp. 6–7.)

Nancy Toliver is a customer of Vectren and in 2012 was a PIPP customer. (*Id.* at 3, VEDO Supp. 4.) That April, she was about $180 behind on her fixed PIPP payments, and to stay on PIPP, she needed to make up the missed payments. (Tr. 101.) Instead, Ms. Toliver decided to depart the program and become responsible for her actual cost of service and account balance. (Bell Dir. at 3, VEDO Supp. 4.) Vectren implemented her decision, but it advised her that if she reenrolled in PIPP in the next 12 months, she would be required to make up the missed installments, less any actual payments. (*Id.* at 4–5, VEDO Supp. 5–6.)

Warm weather soon came to an end. In September 2012, Ms. Toliver applied to be reenrolled in PIPP, and on November 2012, seven months after she departed PIPP, she was reinstated. (*Id.* at 4, VEDO Supp. 5.) As Vectren had informed her ahead of time, Ms. Toliver was required under the Commission's rules and program guidance to make up the payments that would have been due during the seven-month hiatus. (*Id.*) Not only Vectren, but the Commission's Service Monitoring and Enforcement Department also specifically informed Ms. Toliver that she could not exit and reenter the program to avoid monthly payments:

> PIPP Plus is a 12-month program and is not designed for customers to go off the program and then return within that 12-month period. Therefore, any PIPP Plus installments that were not paid when a customer has gone off PIPP Plus must be paid minus any monthly payments that were made before the customer can return to the program within 12 months.

(*See* Complainant's Ex. 2, VEDO Supp. 64.) Nevertheless, when Vectren attempted to collect these payments, Ms. Toliver filed this complaint.

After a hearing, the Commission dismissed her complaint and denied her application for rehearing. This appeal followed.

III. STANDARD OF REVIEW

Vectren accepts the standard of review as stated in the Commission's brief.

IV. ARGUMENT

As the appellant in this case, Ms. Toliver bears the burden of demonstrating to this Court that the Commission's order was unreasonable or unlawful. *See, e.g.*, *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, ¶ 17 ("We presume that orders are reasonable; it falls to the appellant to upset that presumption."). She has not carried her burden: her brief mostly comprises a series of unsupported assertions, undeveloped arguments, and unexplained citations. And where she does state her arguments plainly, she is plainly incorrect. But before analyzing and responding to the arguments in her brief, Vectren would begin by explaining that the Commission properly and lawfully resolved this case.

PROPOSITION OF LAW NO. I:

The Commission reasonably and lawfully applied its rules and policies to the facts of Ms. Toliver's case.

Many of Ms. Toliver's arguments are difficult for Vectren to understand, but the heart of her complaint goes to the Commission's requirement that customers who choose to benefit from PIPP must remain enrolled year-round. Although Ms. Toliver plainly dislikes this requirement, it makes abundant sense and indeed is only fair in light of the substantial benefits received by PIPP customers, which are paid for by non-PIPP customers.

A. The rules require customers to make up missed payments to remain eligible for the program.

PIPP's benefits are substantial. Participating customers are shielded from actual energy costs, even during high-consumption months, making instead a fixed payment based on monthly income. *See* Ohio Adm. Code 4901:1-18-13(A)(1), PUCO Appx. 3–4. This payment is the greater of six percent of household income or ten dollars. *Id.* While the unpaid portion of the bill remains on the customer's account as an arrearage, on-time payments lead to arrearage credits. *Id.* 4901:1-18-14(A)(1), PUCO Appx. 4–5. Energy is not free, however, and the costs of the program are borne by the utility's non-participating ratepayers. 12-3234 Order at 14, PUCO Appx. 27; *see In re the Commission's Review of Chapters 4901:1-17 & 4901:1-18*, Case No. 08-723-AU-ORD, Finding & Order, 2008 Ohio PUC LEXIS 769, at *125 (non-participating utility customers "pay to support these programs").

Not surprisingly, customers who wish to receive PIPP's financial benefits must satisfy numerous eligibility requirements. One of those requirements is that the PIPP customer must stay current on her payments each year. Ohio Adm. Code 4901:1-18-12(D)(2), PUCO Appx. 3. If the customer is not current, then she must "pay any missed PIPP payments" at a certain annual date, or depart from the program. *Id.* The Commission's rules define two kinds of "missed payments," but this rule does not purport to exhaustively define what that category includes. *See id.* 4901:1-18-12(D)(2), PUCO Appx. 3.

One of the defined types, however, makes clear that payments may be required for months the customer was not benefiting from the program: "Missed PIPP payments include . . . payments which would have been due for the months the customer is disconnected from gas utility service." *Id.* 4901:1-18-12(D)(2)(b), PUCO Appx. 3. Similarly, another subsection provides that customers who were "dropped" from PIPP "due to nonpayment" must cure "all

missed PIPP payments, from the time of enrollment or the PIPP reverification date, up until re-enrollment." *Id.* 4901:1-18-12(D)(4), PUCO Appx. 3. Although the rules provide that (in these situations) missed payments to be repaid "shall not exceed the amount of the customer's arrearage," *id.* 4901:1-18-12(D)(2)(b) & (D)(4), PUCO Appx. 3, the definition of *arrearages* "does not include past due monthly PIPP payments," *id.* 4901:1-18-01(B), PUCO Appx. 1.

In short, to remain eligible for the program, a PIPP customer must remain current on their bills and must make up all missed payments that were due *or* that would have been due.

B. The Commission has interpreted its rules to include payments missed while exiting and entering the program.

These rules make clear that a customer must make up any missed monthly payments to remain on PIPP from year to year. And even if the customer is not receiving service, she still must make up PIPP payments that "would have been due" while absent. *Id.* 4901:1-18-12(D) & (D)(2)(b), PUCO Appx. 3.

The case below, however, concerned a slightly different situation: what if the customer had been receiving service under PIPP, left PIPP, and then rejoined in less than one year? Could such a customer avoid making year-round monthly payments by leaving and reentering the program? Although this situation is not *expressly* addressed in the rules, this is not a fatal problem. The rules plainly require customers to make up missed payments, and the examples of what the term "missed PIPP payment" includes are not stated to be exhaustive. *See id.* 4901:1-18-12(D)(2), PUCO Appx. 3. And before it ever issued the order in this case, the Commission had interpreted the rules to require customers who depart and then reenter the program to make up the avoided payments.

For example, the Commission had already generally addressed this situation through its official guidance regarding the program, The Energy Assistance Resource Guide. The Resource

Guide is an official publication issued jointly by the Commission and the Ohio Development Services Agency. (Bell Dir. at 3, VEDO Supp. 4; *see* Att. A at 53, VEDO Supp. 63 (official seal of the Commission).) The Resource Guide addressed the circumstances of Ms. Toliver's complaint virtually point-for-point, and it confirmed that customers who depart and re-enroll in PIPP must make up the avoided PIPP payments:

> *14. If an income eligible customer who is current on the PIPP plus installments, leaves PIPP plus, maintains service and chooses to re-enroll at a later time, what must be paid to re-enroll?*
>
> Gas: The customer must pay the difference between the amount of PIPP Plus installments and customer payments before re-joining PIPP Plus.
>
> * * *
>
> *23. What does a customer have to pay to avoid disconnection when the account balance is less than the PIPP Plus default?*
>
> To remain on PIPP Plus and avoid disconnection, the customer would be required to pay the PIPP Plus default amount.

(Bell Dir., Att. A at 13 and 16, VEDO Supp. 23 and 26 (emphasis in original).)

In addition to the general guidance of the Resource Guide, the Commission's Service Monitoring and Enforcement Department affirmed VEDO's application of the PIPP rules *specifically* to this case. After investigating Ms. Toliver's informal complaint, the Department informed her that

> PIPP Plus is a 12-month program and is not designed for customers to go off the program and then return within that 12-month period. Therefore, any PIPP Plus installments that were not paid when a customer has gone off PIPP Plus must be paid minus any monthly payments that were made before the customer can return to the program within 12 months.

(Complainant's Ex. 2, VEDO Supp. 64.)

The Commission's formal and informal guidance confirms what the PIPP rules already contemplate: a customer who has temporarily ceased making PIPP payments must make up the missed payments before rejoining the program and availing herself of the program's benefits. The consistency of this interpretation—in the Resource Guide, the informal guidance to Ms. Toliver, and the order below—confirms its reasonableness.

The most that could be said in Ms. Toliver's favor is that the rules are ambiguous regarding the facts of her case. But the law is clear that the Court will defer to an agency's reasonable interpretation of its own rules. An agency's interpretation of a statute—which the agency did not create—will frequently receive judicial deference. *See, e.g.*, *Lang v. Ohio Dept. of Job & Family Servs.*, 134 Ohio St.3d 296, 2012-Ohio-2882, ¶ 16. So it only makes sense that an agency's interpretation of its *own* rules and regulations—which it *did* create—is also entitled to deference. *See, e.g.*, *State ex rel. Kroger Co. v. Stover*, 31 Ohio St.3d 229, 235, 510 N.E.2d 356 (1987) ("we are required to give deference to an administrative agency's interpretation of its own rules and regulations"); *Norman v. Pub. Util. Comm.*, 62 Ohio St.2d 345, 352–53 (1980) (noting that where "[t]here is an ambiguity present in [service] regulations. . . . [i]t is neither unlawful nor unreasonable for the commission to interpret [them] in light of the statutory scheme for regulating that utility"); *Braddock Motor Freight, Inc. v. Pub. Util. Comm.*, 174 Ohio St. 203, 188 N.E.2d 162 (1963), paragraph four of the syllabus ("an order of the commission which is not inconsistent . . . with a reasonable interpretation of its own regulations is valid").

C. There are good reasons for the requirement to pay the PIPP payment irrespective of the account balance.

It bears noting that these requirements make good sense and are entirely fair. PIPP customers receive substantial benefits under the program. As the Commission found in adopting its rules, "PIPP customers are afforded an advantage over other residential customers when

making their required PIPP payments on time," namely, they "are forgiven the balance of their bill." *In re the Commission's Review of Chapter 4901:1-17 & 4901:1-18*, Case No. 08-723, 2009 Ohio PUC LEXIS 243, Entry on Rehg., at *49–50 (Apr. 1, 2009). Not only do PIPP customers avoid making full, immediate payments towards their actual usage, but they also "receive a credit toward their accrued arrearages." *Id.* at *50.

Of course, these benefits must be paid for, and they are paid for by other customers. So requiring PIPP customers to make consistent payments is only reasonable. Such a requirement maintains a balance between the program participants who directly benefit from the program and the non-PIPP customers who pay for those benefits. *See id.* at *49–50 (the requirement that PIPP customers cure missed payments is comparable to payment requirement for non-PIPP customers).

Finally, remember that a customer is *not required* to participate in PIPP. If the program's annual benefits do not justify the year-round monthly payment—that is, if winter's benefits are not worth summer's obligation—the customer may simply leave PIPP and pay their regular monthly bill year-round. The rules only require consistency: either remain on PIPP year-round, or pay the regular bill year-round. What participants may not do is game the program by opportunistically entering and exiting it.

D. The rules were correctly applied to Ms. Toliver.

Vectren correctly applied these rules to Ms. Toliver. In the course of one year, Ms. Toliver left PIPP in the spring, maintained service through summer and into the fall, and then re-enrolled in PIPP just before winter. (Bell Dir. at 4, VEDO Supp. 5.) As a result, she owed the PIPP payments she had avoided during the warm-weather hiatus if she wanted to remain enrolled in the program for the next 12 months. (*Id.*) This result is consistent with the rules requiring

customers to make up missed payments and is exactly as prescribed in the Commission's official guidance on the program.

E. Regardless of the outcome of this case, Vectren cannot be faulted for complying with the Commission's directions and orders.

The Commission's rules encompass a situation like Ms. Toliver's, and the rules and the Commission's interpretation of those rules are appropriate. Nevertheless, Vectren recognizes that the Court must resolve these questions. But the Company would ask that the Court, regardless of its ultimate view of the merits, make clear that Vectren cannot be faulted for its compliance with the Commission's direction.

Vectren is required by law to obey the Commission's orders and directions. Its compliance with the rules accordingly cannot constitute unjust and unreasonable service, nor can its attempt to collect amounts prescribed by the Commission's rules and orders. For example, R.C. 4905.54 requires Vectren to "comply with *every order, direction, and requirement* of the public utilities commission made under authority of [R.C. Chapter 4901, 4903, 4905, 4907, and 4909] so long as they remain in force." VEDO Appx. 5 (emphases added.)

Ohio law clearly requires Vectren to obey the Commission's direction. And the Commission, in turn, directed Vectren to administer the program as it did. It gave this direction in the order below, in the Resource Guide, and through its Service Monitoring and Enforcement Division. Ms. Toliver has not shown that the Commission's order was in any way unlawful or unreasonable. Nevertheless, even if the Court ruled in her favor on any point, it should also make clear that Vectren administered the program in accordance with the Commission's "order" and "direction," R.C. 4905.54, VEDO Appx. 5, and that it cannot be held liable for doing so.

V. RESPONSE TO MS. TOLIVER'S PROPOSITIONS OF LAW

Having shown that the Commission properly administered its program in this case, Vectren will now turn to the arguments raised by Ms. Toliver.

RESPONSE TO PROPOSITION NO. 1:

Ms. Toliver's first proposition of law is not reasonably understandable.

It is not clear to Vectren what Ms. Toliver is arguing in her first proposition of law. That proposition states that "HEAP [the Home Energy Assistance Program] requires an application [sic] apply for both PIP plus and [another program] in order to receive the credit." (Toliver Br. at 13.) Even if this is true, Vectren does not understand how it advances Ms. Toliver's cause. The issue resolved below was whether year-round payments are required to participate in PIPP. This proposition, however, seems to pertain to eligibility for a different assistance program. Vectren simply does not understand this argument.

Under this proposition, Ms. Toliver also asserts that the Commission "abused it[s] discretion when it overlooked Appellant['s] account balance of zero and ordered VEDO to reverse incentive credits of [$]130.74 to payments due." (*Id.* at 14.) This seems to pertain to the argument of the second proposition, and Vectren will address it there. Her first proposition of law lacks any clear argument, however, and should be rejected.

RESPONSE TO PROPOSITION NO. 2:

Although "arrearages" limit what customers must pay to cure default in certain situations, the term does not include past-due PIPP payments.

Ms. Toliver's second proposition makes several allegations, but the only one developed in the argument that follows is that the Commission acted inconsistently with both the Resource

Guide and Ohio Adm. Code 4901:1-18-12(D)(2)(b).[2] (Toliver Br. at 15.) She asserts that the PIPP "payment due shall not exceed the amount of the customer arrearage." (*Id.*) In Ms. Toliver's view, her account balance is less than her missed PIPP payments, so this means she should not be required to pay.

Ms. Toliver is actually correct that PIPP payments shall not exceed the amount of the arrearage in certain situations. Ohio Adm. Code 4901:1-18-12(D)(2)(b) states that "[t]he amount of the PIPP payments due shall not exceed the amount of the customer's arrearage." PUCO Appx. 3. But Ms. Toliver does not properly understand what that limitation means. First, the limitation only applies in certain situations that are inapplicable here: when the customer has been disconnected from service, *id.*, including disconnection for non-payment, *id.* 4901:1-18-12(D)(4), PUCO Appx. 3. And even if this rule did apply, Ms. Toliver does not account for the definition of *arrearages*, which clarifies that the term "does not include past due monthly PIPP payments." Ohio Adm. Code 4901:1-18-01(B), PUCO Appx. 1. So the limitation on curing past-due PIPP payments (not surprisingly) does not include the past-due payments themselves.

Ms. Toliver then quotes, without express attribution, a large segment of an appellate court's decision in *Waterville Gas Co. v. Mason*, 93 Ohio App.3d 798 (1994). (*See* Toliver Br. at 17–18.) That case is not on point. The court in that case held that a gas company could not institute a collection action against a PIPP customer when "the customer was in strict compliance with the PIP contract terms." *Id.* at 805; *see also id.* at 800 (customer "had complied with all the requirements for [PIPP]"). So relying on this case does not help Ms. Toliver—the entire issue is

[2] She also asserts that the Commission lacked jurisdiction. (Toliver Br. at 15.) This assertion is neither correct nor developed into anything resembling an actual argument and should be disregarded. *See In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, ¶ 14 (failure to "cite a single legal authority" or "present an argument that a legal authority applies on these facts and was violated . . . alone is grounds to reject [a] claim.").

whether she has "complied with all the requirements" of PIPP. *See id.* That was not at issue in *Waterville Gas*.

One statement that is on point, however, Ms. Toliver fails to note: the *Waterville Gas* court noted that, even back in the early 1990s, "[t]he actual bill for the amount of energy used by the customer may also be *lower* than the amount the customer pays under the PIP plan." *Id.* at 805 (emphasis added). While Ms. Toliver plainly does not like this aspect of the program, it was an essential element and remains so today.

Ms. Toliver concludes her second proposition by asserting that PIPP "is discriminatory" against low-income customers and "must be considered a subtle type of peonage." (Toliver Br. at 18.) Credit card companies, she notes, do "not require[] a customer to make payment not due an[d] owing but the actual amount of the charges." (*Id.*) Vectren suspects that many cardholders would gladly accept account benefits similar to those offered under PIPP. And it struggles to understand how a program in which higher-income, nonparticipating ratepayers directly pay for the energy costs of other customers is "discriminatory" or a "peonage" against those customers. Again, participation in PIPP is not mandatory, and if the program does not make financial sense for Ms. Toliver, she need not participate.

Ms. Toliver's second proposition of law lacks merit and should be rejected.

RESPONSE TO PROPOSITION NO. 3:

The Commission properly denied Ms. Toliver's motion to strike the testimony of Vectren's witness.

In her third proposition of law, Ms. Toliver also challenges the Commission's overruling of Ms. Toliver's motion to strike the prefiled testimony of Vectren witness Ms. Sherri Bell. (Toliver Br. at 18.) Once again, Ms. Toliver's argument contains a hodge-podge of statements

and citations that are generally undeveloped. Ms. Toliver appears to rely on the following major points:

- Vectren failed to identify an expert witness prior to the hearing. (*Id.* at 19.)
- The examiner actually *did* grant Ms. Toliver's motion to strike, but the Commission then overruled it. (*Id.*)
- Finally, Ohio Adm. Code 4901-1-26[3] *mandates* that the Commission issue a pretrial order to disclose lay and expert witnesses. (*Id.* at 20.)

None of these allegations shows error, and Vectren will respond to each in turn.

First, Ms. Toliver complains that Vectren failed to identify an expert witness before hearing. But Vectren did not offer Ms. Bell as an expert witness; it offered her as a fact witness. Indeed, the examiner expressly found that Ms. Bell's testimony was "not expert testimony." (Tr. 178.) So any rules regarding expert witnesses are inapplicable.[4]

Second, Ms. Toliver suggests that the attorney examiner actually *granted* her motion to strike but that the Commission then "overruled the Examiner decision." (Toliver Br. at 19.) This is plainly incorrect. The examiner expressly stated on the record that Ms. Toliver's motion to strike "at this time . . . will be held in abeyance." (Tr. 8; *see also* Tr. 178 (same).) In the portion of the transcript quoted by Ms. Toliver in her brief (*see* Tr. 147–48), the examiner did not grant a motion to strike but clarified that Ms. Bell was testifying as a layperson and not as an attorney. Ms. Toliver is simply incorrect on the facts.

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[3] Ms. Toliver actually specifies Ohio Adm. Code 4901:1-26 (with a colon), instead of 4901-1-26 (with a hyphen), but this appears to be a typographical error. The former rule concerns dispute resolution and does not address prehearing conferences.

[4] Vectren's customary practice in complaint proceedings is to file *all* written direct testimony at least seven days before hearing. This deadline only applies to expert testimony, but Vectren follows the deadline regardless of whether the witness is an expert. *See* Ohio Adm. Code 4901-1-29(A)(1)(h), VEDO Appx. 4. This is essentially *over*-compliance, and intended to avoid questions about admissibility. Vectren followed that practice in this case, and it hardly prejudiced Ms. Toliver, giving her an opportunity for advance review and preparation. But the fact that Vectren prefiled Ms. Bell's testimony did not convert her into an expert witness.

Finally, Ms. Toliver asserts that under Ohio Adm. Code 4901-1-26, the Commission "must . . . establish dates of discovery to disclose lay and expert witness [sic]." (Toliver Br. at 20.) This is not true. Ohio Adm. Code 4901-1-26(A) states that the Commission or its delegates "*may* . . . hold one or more prehearing conferences" for any number of purposes. VEDO Appx. 2. The word "may" is a permissive, not mandatory, term. *In re Ormet Primary Aluminum Corp.*, 129 Ohio St.3d 9, 2011-Ohio-2377, ¶ 17. So this rule allows, but does not require, prehearing conferences.

All of the bases on which Ms. Toliver challenges the rejection of her motion to strike lack merit. Her third proposition must also be denied.

RESPONSE TO PROPOSITION NO. 4:

The Commission properly granted Vectren's motion to strike Ms. Toliver's late-filed exhibits.

In her fourth proposition, Ms. Toliver asserts that the Commission "abused it[s] discretion when it unreasonable [sic] and unlawfully granted VEDO['s] Motion to Strike." (Toliver Br. at 20.) She is referring to the Commission's decision to strike several documents that Ms. Toliver submitted after the close of the hearing in this case. The Commission held that "consideration of the documents, at this stage of the proceeding, would deny Vectren the opportunity to cross examine Ms. Toliver on the documents or allow Vectren to introduce evidence to rebut the information in the documents, denying Vectren its right to due process." 12-3234 Order at 6, PUCO Appx. 19.

The Commission correctly granted Vectren's motion to strike. This Court has held that that "documents [that] were not part of the original record . . . and were submitted after the [agency's] hearing . . . must be disregarded by the [the agency]." *Columbus Bd. of Educ. v. Franklin County Bd. of Revision*, 76 Ohio St.3d 13, 16–17 (1996). This rule is necessary and

reflects the protection of the Due Process Clause. "A party is entitled . . . to know the issues on which [the agency's] decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *State ex rel. Canter v. Industrial Comm.*, 28 Ohio St.3d 377, 380 (1986). Thus, due process is violated when a tribunal bases its decision on evidence received "after trial": "There is an obvious and fundamental unfairness in receiving evidence [after trial], for it violates due process requirements," as it "deprive[s the parties] of the opportunity to test, explain or rebut it." *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, ¶ 20 (internal quotations omitted).

Because the evidence was not submitted at hearing, the Commission could not have lawfully relied on it. In defense, Ms. Toliver asserts that she sent the evidence to Vectren in letters dated April 2013. (Toliver Br. at 20–21.) But this was *after* the hearing, which was held on March 21, 2013 (*see* Tr. 1), and thus her mailing does not avoid the problems caused by her late filing. VEDO had no opportunity to review the evidence before or at hearing, to cross-examine Ms. Toliver regarding that evidence, or to present its own contrary or explanatory evidence. Receiving the evidence in the mail did not cure any of those problems.

The Commission properly struck the documents submitted after hearing, and Ms. Toliver's fourth proposition of law should be denied.

RESPONSE TO PROPOSITION NO. 5:

Vectren's counsel complied with all procedural rules.

Ms. Toliver's fifth and final proposition of law is that Ohio Adm. Code 4901-1-08(F) required Vectren's counsel "to file a Notice of Appearance, Notice of Withdrawal, and Notice of Substitution with the Commission." (Toliver Br. at 21.) She argues that Vectren's attorneys apparently violated an "ethnical [sic] or legal duty" when one attorney signed certain pleadings,

and another attorney signed others. (*Id.* at 21–22.) Once again, Ms. Toliver has not established error.

She seems to misunderstand the rules. Rule 4901-1-08(F) provides, "Where a party is represented by more than one attorney, one of the attorneys shall be designated as the 'counsel of record,' who shall have principal responsibility for the party's participation in the proceeding." VEDO Appx. 1. Vectren complied with this rule below; the same three attorneys appeared on the signature block of all its pleadings, one of whom was designated "counsel of record." There were no withdrawals or substitutions of counsel. To Vectren's knowledge, there is no rule prohibiting attorneys who have duly appeared in a case from signing pleadings.

Ms. Toliver's fifth proposition is meritless and should also be rejected.

VI. CONCLUSION

Ms. Toliver has not carried her burden of demonstrating the unlawfulness or unreasonableness of the order below. The Court should affirm.

Dated: March 5, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Vectren's Merit Brief was served by U.S. mail this 5th day of March 2014 to the following:

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VEDO Appendix Index

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Ohio Adm. Code 4901-1-08	VEDO Appx. 1
Ohio Adm. Code 4901-1-26	VEDO Appx. 2
Ohio Adm. Code 4901-1-29	VEDO Appx. 4
R.C. 4905.54	VEDO Appx. 5

4901-1-08 Practice before the commission, representation of corporations, and designation of counsel of record.

(A) Except as otherwise provided in section 4901.14 of the Revised Code and paragraphs (B), (C), (D), and (E) of this rule, each party not appearing in propria persona shall be represented by an attorney-at-law authorized to practice before the courts of this state. Corporations must be represented by an attorney-at-law.

(B) Persons authorized to practice law in other jurisdictions may be permitted to appear before the commission in a particular proceeding, upon motion of an attorney of this state.

(C) Certified legal interns may appear before the commission under the direction of a supervising attorney, in accordance with rule II of the "Supreme Court Rules for the Government of the Bar" of Ohio. No legal intern shall participate in a commission hearing in the absence of the supervising attorney without the written consent of the supervising attorney and the approval of the commission or the presiding hearing officer.

(D) If a prehearing conference is scheduled to discuss settlement of the issues in a complaint case, any person with the requisite authority to settle the issues in the case may represent a party at the conference.

(E) In cases involving complaints filed under section 4905.26 of the Revised Code, where there are numerous complainants who are not represented by counsel and whose interests are substantially similar, the commission, the legal director, the deputy legal director, or the attorney examiner assigned to the case may permit or require the designation of a spokesperson who shall examine witnesses, enter objections, and file all pleadings or papers on behalf of the complainants or petitioners.

(F) Where a party is represented by more than one attorney, one of the attorneys shall be designated as the "counsel of record," who shall have principal responsibility for the party's participation in the proceeding. The designation "counsel of record" shall appear following the name of that attorney on all pleadings or papers submitted on behalf of the party.

(G) No attorney shall withdraw from a commission proceeding without prior written notice to the commission and serving a copy of the notice upon the parties to the proceeding.

Effective: 05/07/2007
R.C. 119.032 review dates: 02/20/2007 and 09/30/2010
Promulgated Under: 111.15
Statutory Authority: 4901.13
Rule Amplifies: 4901.13 , 4901.18
Prior Effective Dates: 3/1/81, 12/25/87, 4/4/96, 7/7/97, 4/20/01

4901-1-26 Prehearing conferences.

(A) In any proceeding, the commission, the legal director, the deputy legal director, or an attorney examiner may, upon motion of any party or upon their own motion, hold one or more prehearing conferences for the purpose of:

(1) Resolving outstanding discovery matters, including:

(a) Ruling on pending motions to compel discovery or motions for protective orders.

(b) Establishing a schedule for the completion of discovery.

(2) Ruling on any other pending procedural motions.

(3) Identifying the witnesses to be presented in the proceeding and the subject matter of their testimony.

(4) Identifying and marking exhibits to be offered in the proceeding.

(5) Discussing possible admissions or stipulations regarding issues of fact or the authenticity of documents.

(6) Clarifying and/or settling the issues involved in the proceeding.

(7) Discussing or ruling on any other procedural matter which the commission or the presiding hearing officer considers appropriate.

(B) Reasonable notice of any prehearing conference shall be provided to all parties. Unless otherwise ordered for good cause shown, the failure of a party to attend a prehearing conference constitutes a waiver of any objection to the agreements reached or rulings made at such conference.

(C) Prior to a prehearing conference, the commission, the legal director, the deputy legal director, or the attorney examiner assigned to the case may, upon motion of any party or upon their own motion, require that all parties to the proceeding file with the commission and serve upon all other parties a list of the issues the party intends to raise at the hearing. Issues must be specifically identified and described and the presiding hearing officer may, upon motion of any party or upon his or her own motion, strike issues which do not meet this requirement. In any proceeding in which lists of issues are required, no party shall be permitted to raise an issue at hearing that was not set forth in its list, except for good cause shown.

(D) Following the conclusion of a prehearing conference, the commission, the legal director, the deputy legal director, or the attorney examiner may issue an appropriate prehearing order, reciting or summarizing any agreements reached or rulings made at such conference. Unless otherwise ordered for good cause shown, such order shall be binding upon all persons who are or subsequently become parties, and shall control the subsequent course of the proceeding.

(E) Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a disputed matter in a commission proceeding is not admissible to prove liability for or invalidity of the dispute. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for

another valid purpose.

(F) If a conference is scheduled to discuss settlement of the issues in a complaint case, the representatives of the public utility shall investigate prior to the settlement conference the issues raised in the complaint and all parties attending the conference shall be prepared to discuss settlement of the issues raised and shall have the requisite authority to settle those issues.

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R.C. 119.032 review dates: 02/20/2007 and 09/30/2010
Promulgated Under: 111.15
Statutory Authority: 4901.13
Rule Amplifies: 4901.13 , 4901.18
Prior Effective Dates: 3/1/81, 6/1/83, 7/18/85, 12/25/87, 4/20/01

4901-1-29 Expert testimony.

(A) Except as otherwise provided in this rule, all expert testimony to be offered in commission proceedings, except testimony to be offered by the commission staff, shall be reduced to writing, filed with the commission, and served upon all parties prior to the time such testimony is to be offered. The commission, the legal director, the deputy legal director, or an attorney examiner may establish a schedule in any proceeding for the filing of testimony to be presented by staff.

(1) Unless otherwise ordered by the commission, the legal director, the deputy legal director, or an attorney examiner:

(a) All direct expert testimony to be offered by the applicant, complainant, or petitioner in a general rate proceeding shall be filed and served no later than: ten days prior to the commencement of the hearing or the deadline for filing objections to the staff report of investigation, whichever occurs earlier.

(b) All direct expert testimony to be offered by any other party in a general rate proceeding shall be filed and served no later than the deadline for filing objections to the staff report of investigation.

(c) All direct expert testimony to be offered by the applicant in an emergency rate proceeding shall be filed and served no later than sixteen days prior to the commencement of the hearing.

(d) All direct expert testimony to be offered by any other party in an emergency rate proceeding shall be filed and served no later than seven days prior to the commencement of the hearing.

(e) All direct expert testimony to be offered by the gas utility in a purchased gas adjustment proceeding shall be filed and served no later than sixteen days prior to the commencement of the hearing.

(f) All direct expert testimony to be offered by any other party in a purchased gas adjustment proceeding shall be filed and served no later than seven days prior to the commencement of the hearing.

(g) All direct expert testimony to be offered by any party in a long-term forecast report proceeding shall be filed and served no later than sixteen days prior to the commencement of the hearing.

(h) All direct expert testimony to be offered in any other commission proceeding shall be filed and served no later than seven days prior to the commencement of the hearing.

(2) All expert testimony to be offered in rebuttal shall be filed and served within the time limits established by the commission or the presiding hearing officer, unless the commission or the presiding hearing officer determines that such testimony need not be reduced to writing.

(B) For purposes of this rule, "commencement of the hearing" means the scheduled date for beginning the hearing at which expert testimony is to be offered.

(C) Notwithstanding paragraph (A) of this rule, the presiding hearing officer may, in his or her discretion, permit an expert witness to present additional oral testimony at the hearing, provided that: such testimony could not, with reasonable diligence, have been filed and served within the time limits established by the commission or the presiding hearing officer or the presentation of such testimony will not unduly delay the proceeding or unjustly prejudice any other party.

4905.54 Compliance with orders.

Every public utility or railroad and every officer of a public utility or railroad shall comply with every order, direction, and requirement of the public utilities commission made under authority of this chapter and Chapters 4901., 4903., 4907., and 4909. of the Revised Code, so long as they remain in force. Except as otherwise specifically provided in section 4905.95 of the Revised Code, the public utilities commission may assess a forfeiture of not more than ten thousand dollars for each violation or failure against a public utility or railroad that violates a provision of those chapters or that after due notice fails to comply with an order, direction, or requirement of the commission that was officially promulgated. Each day's continuance of the violation or failure is a separate offense. All forfeitures collected under this section shall be credited to the general revenue fund.

Amended by 129th General AssemblyFile No.127,HB 487, §101.01, eff. 6/11/2012.

Effective Date: 09-29-1995; 09-29-2005