**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| --- | --- | --- |
| In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion Energy Ohio for Approval of Tariff Revisions.  In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion Energy Ohio for Approval of Carbon Offset Program. | )  )  )  )  )  )  )  ) | Case No. 22-179-GA-ATA  Case No. 22-180-GA-UNC |

**INITIAL BRIEF**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

Bruce Weston (0016973)

Ohio Consumers’ Counsel

Angela D. O’Brien (0097579)

Counsel of Record

Deputy Consumers’ Counsel

**Office of the Ohio Consumers' Counsel**

65 East State Street, Suite 700

Columbus, Ohio 43215

Telephone: [O’Brien]: (614) 466-9531

[angela.obrien@occ.ohio.gov](mailto:angela.obrien@occ.ohio.gov)

(willing to accept service by e-mail)

August 2, 2023

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**INITIAL BRIEF**

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# INTRODUCTION

It should not impress the PUCO that natural gas marketers[[1]](#footnote-2) were, unsurprisingly, able to reach a settlement among themselves and their own national association, plus with monopoly utility Dominion Energy Ohio (“Dominion”). The Settlement would affect consumers but no consumer representatives signed it, nor did the PUCO staff. Their agreement would allow monopoly Dominion to establish itself as sort of a carbon-offset czar, in a so-called Decarbon Ohio Program, in what is supposed to be competitive marketing. The program would enable marketer promotions to consumers about the marketers’ claimed greenness. The program provides no assurance to consumers that the marketers’ charges for the promoted de-carboned energy would be reasonable. Note that those parties also added the state’s name into the mix, for an additional touch of officiality to draw consumers in. The PUCO should reject the settlement.

In Ohio, energy marketers are supposed to compete in the marketplace for the benefit of consumers. At least that is the theory. The competition for consumers is to be without the government and the monopoly utility’s involvement in picking (or appearing to pick) winners and losers in marketers’ success with consumers.

Carbon offset opportunities can be a good thing for consumers. But having a monopoly like Dominion promoting, verifying and otherwise involved in carbon offsets for energy marketers (to use in promotions to consumers) is not a good thing under Ohio’s competitive market approach for natural gas consumers.

Dominion (and the PUCO) should leave the marketing of natural gas, with carbon offsets, to energy marketers in the competitive market. To protect consumers, the PUCO should reject the Settlement.

1. THE SETTLEMENT VIOLATES THE PUCO’S THREE-PART TEST FOR CONSIDERING SETTLEMENTS

Settlements are evaluated by the PUCO under a three-part test. The PUCO will adopt a settlement only if it meets the following three criteria: 1. the settlement is a product of serious bargaining among capable, knowledgeable parties; 2. the settlement, as a package, benefits customers and the public interest; and 3. the settlement package does not violate important regulatory principles or practices.[[2]](#footnote-3) In addition, the PUCO also routinely considers whether the parties to the settlement represent diverse interests.[[3]](#footnote-4)

The Settlement violates all three prongs of the three-part settlement test. The Settlement is not a result of serious bargaining (and lacks diverse interests such as no consumer advocate’s signing), it does not benefit consumers and it is not in the public interest. And the Settlement is contrary to regulatory principles and practices.

## The Settlement lacks serious bargaining and lacks diverse interests. And the settlement should not be given the benefit of a PUCO evaluation under the settlement standards.

A group of stakeholders with common interests negotiated a settlement to serve their interests. Diverse interests are lacking. No representative of Dominion’s million consumers signed the settlement.

The seriousness of the bargaining by the settlement parties is belied by their limited-interest result. Their limited-interest result serves their corporate interests. That includes interests in finding -- through a result by government regulation and utility involvement, instead of by direct competition -- a way for certain marketers to gain a competitive advantage. And the regulated monopoly utility (Dominion) gains the enhanced public image, such as with its ESG goals, of association with unregulated carbon offsets by marketers. The fact that their bargaining did not result in compromise with a real party in interest, consumers as represented by OCC, reflects the lack of serious bargaining.

Finally, the PUCO should not automatically give any and every settlement the favorable treatment of its three-part settlement review. This Settlement should be denied those favorable PUCO review standards. Here, parties with relatively common (not diverse) interests joined together to serve their corporate interests. *Mainly, marketers reached an agreement with themselves.* A real party in interest, consumers, did not join the Settlement. Nor did the PUCO staff sign the Settlement. The PUCO should not favor Dominion and the marketers with review under the preferential settlement standards.

## The Settlement does not benefit consumers and the public interest. Allowing Dominion, a monopoly utility, to promote and facilitate competitive carbon offset offers could unfairly discriminate against non-participating natural gas marketers and confuse consumers.

Under the Decarbon Ohio Program in the Settlement, natural gas marketers in Dominion’s territory would be responsible for buying and selling carbon offsets and marketing carbon-offsetting rate offers to consumers.[[4]](#footnote-5) Dominion would facilitate the program, which would include providing educational information to consumers, along with validating carbon offsets through a third-party verifier.[[5]](#footnote-6) Dominion’s insertion of its monopoly self as the facilitator and administrator for the program is harmful to consumers and the public interest. That is in violation of prong two of the PUCO’s three-part settlement test. The PUCO should reject the Settlement.

### The Decarbon Ohio Program is unnecessary and would unfairly favor participating marketers, which could harm consumers.

Dominion’s residential consumers already have the option to purchase a carbon offset plan through a natural gas marketer in the competitive market. OCC witness Andrew Tinkham testified that there are numerous marketers (including IGS, Tomorrow Energy, and CleanSky Energy) offering carbon offset rates on the PUCO Apples to Apples website.[[6]](#footnote-7) Thus, the Decarbon Ohio Program is unnecessary for consumers in the first place.

OCC witness Tinkham further testified that the program agreed to in the Settlement would unfairly advantage participating natural gas marketers, putting Ohio consumers at risk.[[7]](#footnote-8) Under the Settlement, marketers that participate in the program are allowed to use a “Decarbon Ohio” trademark at no cost for marketing service to consumers.[[8]](#footnote-9) Mr. Tinkham explained that this could provide a marketer participating in the program with an inappropriate competitive edge over a non-participating marketer.[[9]](#footnote-10)

Mr. Tinkham also testified that this aspect of the Decarbon Ohio Program is contrary to Dominion’s Standards of Conduct language in its tariff, which provides:

**24.4** (c) East Ohio shall not give any Supplier, including its marketing affiliate, or Customers of any Supplier, including its affiliate, preference over any other Suppliers or Customers. For purposes of East Ohio’s firm transportation program, any ancillary service provided by East Ohio that is not tariffed (e.g., billing and envelope service), shall be priced uniformly for affiliated and nonaffiliated companies and available to all equally.[[10]](#footnote-11)

Mr. Tinkham testified that the Decarbon Ohio Program in the Settlement provides a preference to marketers participating in the program (through advertising benefits) that non-participating marketers will not receive.[[11]](#footnote-12) This would interfere with the competitive natural gas market in Ohio, which would in turn harm consumers. Through marketing or visiting the Dominion website, consumers might not realize there are other options to secure natural gas related to carbon offsets outside of the Decarbon Ohio Program. That is unfair to marketers that do not participate in the program and problematic for consumer choices.[[12]](#footnote-13)

### The Decarbon Ohio Program could harm consumers by encouraging mis-marketing through greenwashing.

The PUCO should also reject the Settlement because it could enable greenwashing. OCC witness Tinkham testified that “greenwashing” is a term to describe deceptive and misleading marketing practices when a company *claims* that a product is good for the environment when it may not be as advertised.[[13]](#footnote-14) The Settlement does not adequately protect Ohio consumers from greenwashing. Indeed, the Settlement can contribute to greenwashing, against the public interest.

The Federal Trade Commission (“FTC”) has Carbon Offset rules to protect consumers from false carbon offset marketing. The FTC’s Carbon Offset rules (16 C.F.R. §260.5) provide the following:

(a) Given the complexities of carbon offsets, sellers should employ competent and reliable scientific and accounting methods to properly quantify claimed emission reductions and to ensure that they do not sell the same reduction more than one time.

(b) It is deceptive to misrepresent, directly or by implication, that a carbon offset represents emission reductions that have already occurred or will occur in the immediate future. To avoid deception, marketers should clearly and prominently disclose if the carbon offset represents emission reductions that will not occur for two years or longer.

(c) It is deceptive to claim, directly or by implication, that a carbon offset represents an emission reduction if the reduction, or the activity that caused the reduction, was required by law.

Public utilities and energy marketers offering so-called green services through carbon offsets (such as in Dominion’s program) would likely claim that they are not specifically subject to the FTC’s Carbon Offset rules. Ohio certainly disfavors deceptive marketer practices, given O.A.C. 4901:1-29-05(D) and other regulations. But greenwashing is not specifically mentioned. In any event, even with the PUCO’s enforcement actions against marketers, most marketer transactions with consumers are beyond the PUCO’s awareness and protection. Therefore, avoidance of mis-marketing opportunities is needed for consumer protection, instead of reliance merely on the questionable potential to catch mis-marketing.

Under the Settlement “carbon offsets acquired through the carbon registries maintained by the following entities shall constitute preapproved third-party verified carbon offsets: Verified Carbon Standard (VCS), the American Carbon Registry (ACR), the Climate Action Reserve (CAR), CSA CHG CleanProjects Registry and the Gold Standard (GS).”[[14]](#footnote-15) However, this may not be sufficient to protect consumers. OCC witness Tinkham testified that major registries overreporting carbon offset credits include American Carbon Registry, Climate Action Reserve, and Verified Carbon Standard.[[15]](#footnote-16) In addition, carbon offset credits are susceptible to fraud and can be misrepresented as providing green benefits that don’t exist.

For these reasons, the Decarbon Ohio Program under the Settlement should not be implemented. And the PUCO should not approve a program that has the potential to mislead consumers by claiming environmental benefits that may not be fully realized. The PUCO should reject the Settlement.

## The PUCO should reject the Settlement because it violates regulatory principles and practices -- and violates Ohio law. The Decarbon Ohio Program involves the monopoly utility (Dominion) providing a non-utility service that unfairly benefits participating marketers to the detriment of competition. It also can create customer confusion which is contrary to regulatory practices and principles.

At the outset, we note that OCC’s preceding arguments on the second prong for settlements, such as principles against deception of consumers, are also applicable to the third prong.

To protect consumers, natural gas marketers should compete on a level playing field. But that will not happen if the PUCO approves the Settlement. The Decarbon Ohio Program favors participating marketers over non-participating marketers. The PUCO should reject the Settlement.

To begin, providing carbon offsets is not engaging in the business of supplying natural gas for lighting, power, or heating purposes to consumers in Ohio. To the contrary, the Decarbon Ohio Program is a non-utility, non-tariffed program.[[16]](#footnote-17) Thus, the PUCO should not be involved in approving the Settlement or the Decarbon Ohio Program.

Under R.C. 4905.04, the PUCO has the “power and jurisdiction to supervise and regulate public utilities.” Under R.C. 4905.02, a “public utility” is any person or entity “defined in section 4905.03 of the Revised Code,” other than non-profit electric light companies, a utility owned and operated exclusively by and for the utility’s customers, or a municipal utility. R.C. 4905.03 defines a “natural gas company” as any person or entity “when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers . . . .” Promoting and verifying carbon offsets is none of these things. Thus, the PUCO should reject the Settlement as unlawful.

The Settlement also violates regulatory principles because, as noted, it would provide an inappropriate competitive advantage, courtesy of the government (PUCO) and a monopoly utility, to the participating marketers. The Settlement provides advertising benefits to marketers participating in the Decarbon Ohio Program but not to non-participating marketers.[[17]](#footnote-18) This would be contrary to R.C. 4905.35(A), which provides that “no public utility shall make or give any undue or reasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.”The PUCO should reject the Settlement.

The Settlement would also violate regulatory practices and principles, including state policy in R.C. 4929.02(A)(3) to “promote diversity of natural gas supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers.” The Decarbon Ohio Program will promote marketers that participate in the program over non-participating marketers. Marketers participating in the Decarbon Ohio Program will be included in marketing and on Dominion’s website.[[18]](#footnote-19) Consumers’ recognition of Dominion’s name could influence consumers’ decisions to choose the marketers participating in the program. Consumers may not realize there are other options to secure natural gas with green attributes outside of the Decarbon Ohio Program.[[19]](#footnote-20)

Moreover, promoting marketers participating in the Decarbon Ohio Program over non-participating marketers would be contrary to Dominion’s standard of conduct in its tariff, as noted above. And in doing so, it would violate R.C. 4905.30 which requires utilities to abide by their filed and approved tariffs. Accordingly, the Settlement violates the third prong of the PUCO’s three-part settlement test. The PUCO should reject the Settlement.

Dominion’s carbon-offset proposal is an intrusion into the market that could ultimately harm cost consumers. Under Ohio’s structure for energy supply, marketers should respond in the competitive market to consumers who want greener energy and carbon offsets.

Finally, and as discussed in the preceding section, the Program can create consumer confusion with the monopoly utility’s involvement in the competitive market. That includes that Dominion’s focus on carbon offsets can distract consumers from what the marketers are charging them (consumers), which might be considerable. And the Program can confuse consumers by using the state’s name, as in Decarbon Ohio, to give the Program an officiality that it in reality lacks.

# III. CONCLUSION

It should not impress the PUCO that natural gas marketers were, unsurprisingly, able to reach a settlement among themselves and their own national association, plus with monopoly utility Dominion. The Settlement would affect consumers, but no consumer representatives signed it, nor did the PUCO staff. Their agreement would allow monopoly Dominion to establish itself as sort of a carbon-offset czar, in a so-called Decarbon Ohio Program, in what is supposed to be competitive energy marketing.

The PUCO should protect consumers and reject the Settlement for a government/monopoly program, the Decarbon Ohio Program. Carbon reduction is a good

idea for the world, but the Decarbon Ohio Program is a bad idea for Ohio consumers. In Ohio, carbon offset programs should be, and are, provided through the competitive market.

Respectfully submitted,

Bruce Weston (0016973)

Ohio Consumers’ Counsel

*/s/ Angela D. O’Brien*

Angela D. O’Brien (0097579)

Counsel of Record

Deputy Consumers’ Counsel

**Office of the Ohio Consumers' Counsel**

65 East State Street, Suite 700

Columbus, Ohio 43215

Telephone: [O’Brien]: (614) 466-9531

[angela.obrien@occ.ohio.gov](mailto:angela.obrien@occ.ohio.gov)

(willing to accept service by e-mail)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Initial Brief was served on the persons stated below via electronic transmission, this 2nd day of August 2023.

*/s/ Angela D. O’Brien*

Angela D. O’Brien

Deputy Consumers’ Counsel

The PUCO’s e-filing system will electronically serve notice of the filing of this document on the following parties:

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| [shaun.lyons@ohioAGO.gov](mailto:shaun.lyons@ohioAGO.gov)  [werner.margard@ohioAGO.gov](mailto:werner.margard@ohioAGO.gov)  [dproano@bakerlaw.com](mailto:dproano@bakerlaw.com)  [tathompson@bakerlaw.com](mailto:tathompson@bakerlaw.com)  [jweber@elpc.org](mailto:jweber@elpc.org)  Attorney Examiner:  [patricia.schabo@puco.ohio.gov](mailto:patricia.schabo@puco.ohio.gov) | [kennedy@whitt-sturtevant.com](mailto:kennedy@whitt-sturtevant.com)  demonte@whitt-sturtevant.com  [whitt@whitt-sturtevant.com](mailto:whitt@whitt-sturtevant.com)  [andrew.j.campbell@dominionenergy.com](mailto:andrew.j.campbell@dominionenergy.com)  [mjsettineri@vorys.com](mailto:mjsettineri@vorys.com)  [glpetrucci@vorys.com](mailto:glpetrucci@vorys.com)  [michael.nugent@igs.com](mailto:michael.nugent@igs.com)  [evan.betterton@igs.com](mailto:evan.betterton@igs.com)  [stacie.cathcart@igs.com](mailto:stacie.cathcart@igs.com)  [dparram@bricker.com](mailto:dparram@bricker.com)  [gkrassen@nopec.org](mailto:gkrassen@nopec.org)  pwillison@bakerlaw.com |

1. Marketers signing the settlement include Interstate Gas Supply, LLC (IGS); SFE Energy Ohio, Inc. and StateWise Energy Ohio, LLC (SFE Energy); Direct Energy Business LLC, Direct Energy Services LLC, Direct Energy Business Marketing LLC, Energy Plus Natural Gas LLC, Reliant Energy Northeast LLC, Stream Ohio Gas & Electric, LLC, and XOOM Energy Ohio, LLC (the NRG Retail Companies); and the Retail Energy Supply Association (RESA). *See* Joint Ex. 1.0 (Stipulation and Recommendation) (“Settlement”). [↑](#footnote-ref-2)
2. *Consumers’ Counsel v. Pub. Util. Comm’n*. (1992), 64 Ohio St.3d 123, 126. [↑](#footnote-ref-3)
3. OCC Ex. 1 (Tinkham Direct) at 5. [↑](#footnote-ref-4)
4. OCC. Ex. 1 (Tinkham Direct) at 6. [↑](#footnote-ref-5)
5. *Id.* [↑](#footnote-ref-6)
6. OCC Ex. 1.0 (Tinkham Direct) at 8. [↑](#footnote-ref-7)
7. *Id.* at 6. [↑](#footnote-ref-8)
8. Settlement, at 5. [↑](#footnote-ref-9)
9. OCC 1.0 (Tinkham Direct) at 6. [↑](#footnote-ref-10)
10. *Id.* at 7 (quoting Dominion Tariff, Fourth Revised Sheet No. ECPS 47). [↑](#footnote-ref-11)
11. OCC 1.0 (Tinkham Direct) at 7. [↑](#footnote-ref-12)
12. *Id.* [↑](#footnote-ref-13)
13. *Id.* at 9. [↑](#footnote-ref-14)
14. Settlement, at 5-6. [↑](#footnote-ref-15)
15. OCC Ex. 1.0 (Tinkham Direct) at 11. [↑](#footnote-ref-16)
16. OCC Ex. 1.0 (Tinkham Direct) at 4. [↑](#footnote-ref-17)
17. *Id.* at 12-13. [↑](#footnote-ref-18)
18. *Id.* at 12. [↑](#footnote-ref-19)
19. *Id.* [↑](#footnote-ref-20)