**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Vectren Energy Delivery of Ohio, LLC d/b/a CenterPoint Energy Ohio for Approval to Continue Demand Side Management Programs. | ))))) | Case No. 22-1015-GA-UNC |

**REPLY BRIEF**

**BY**

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**TABLE OF CONTENTS**

**PAGE**

[I. INTRODUCTION 1](#_Toc147240980)

[II. REPLY 3](#_Toc147240981)

[A. The PUCO should reject Vectren’s misguided arguments that the advocacy of OCC and PUCO Staff in this proceeding show the
Settlement involved serious bargaining among capable,
knowledgeable parties. 3](#_Toc147240982)

[B. Consumers who want energy efficiency products can get the
purported benefits of Vectren’s program at better prices in the
competitive market. 6](#_Toc147240983)

[C. Because consumers have no choice whether to fund energy efficiency programs, Vectren and OPAE are wrong that the Settlement
comports with Commission-recognized principles of encouraging competitive markets. 7](#_Toc147240984)

[III. CONCLUSION 12](#_Toc147240985)

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# I. INTRODUCTION

Vectren Energy Delivery of Ohio, LLC (“Vectren”) is trying to force all residential consumers to pay for utility-run energy efficiency programs that benefit a relatively small group of non-low-income consumers. Vectren and OPAE[[1]](#footnote-2) (a weatherization provider group) have signed a settlement[[2]](#footnote-3) to increase the amount that all consumers pay for utility run energy efficiency programs. The Settlement requires Vectren consumers to pay, over six years, $14.3 million for low-income energy efficiency programs and $21.7 million for non-low-income energy efficiency programs.[[3]](#footnote-4) The Settlement fails to include OCC’s recommended consumer protections. It should be rejected.

Energy efficiency is a good thing. But it is already available to consumers in the competitive market without the need for charging consumers subsidies to be paid to monopoly utilities. The PUCO should not force all residential consumers to subsidize utility-run non-low-income energy efficiency programs. Utilities need not be involved and should not be involved in providing energy efficiency programs to consumers where alternatives are readily available in the competitive market. Removing the utility from the transaction eliminates costs for the majority of a utility’s consumers, including low-income consumers, that do not participate in energy efficiency programs.[[4]](#footnote-5)

In its Initial Brief, Vectren argues the PUCO should adopt the Settlement because it meets the PUCO’s three-part standard for approving Settlements.[[5]](#footnote-6) Vectren argues that the settlement is a product of serious bargaining among capable, knowledgeable parties;[[6]](#footnote-7) the settlement, as a package, benefits customers and the public interest;[[7]](#footnote-8) and the settlement does not violate any important regulatory principle or practice.[[8]](#footnote-9)

Vectren is wrong. OCC presented evidence demonstrating that the Settlement violates all three parts of the PUCO’s test. OCC recommends that the PUCO adopt a fair, just, and reasonable resolution of Vectren’s application *instead of the Settlement*. The PUCO should reject the Settlement, for reasons OCC describes in this brief.

# II. REPLY

## The PUCO should reject Vectren’s misguided arguments that the advocacy of OCC and PUCO Staff in this proceeding show the Settlement involved serious bargaining among capable, knowledgeable parties.

Vectren argues the stipulation is “the product of serious bargaining among capable, knowledgeable parties.”[[9]](#footnote-10) Vectren states that “OCC’s comments and participation in settlement discussions influenced…the terms of the Stipulation. Specifically, the Stipulation reallocates funding from commercial programs to residential programs….”[[10]](#footnote-11)

That is not evidence of serious bargaining with OCC. OCC did not advocate in this proceeding for reallocation of commercial funding to residential consumers. In fact, later in its brief, Vectren admits “CEOH agreed to modify the Application to reallocate funding for the Commercial Programs in direct response *to the Staff recommendation*,”[[11]](#footnote-12) not the recommendation of OCC.

To show the Settlement satisfies prong one, Vectren also emphasizes terms in the Settlement that *it* believes benefits consumers and misattributes that same position to OCC. This is not evidence of serious bargaining.

In support of its claim that this Settlement meets the first part of the Settlement standard, Vectren also notes that PUCO Staff “recommended approval of the Application….”[[12]](#footnote-13) But, the Settlement includes terms that differ from those in the Application. The PUCO should not infer that Staff’s support for the Application indicates Staff tacitly approved a Settlement *it* *did not sign.*

Vectren further argues it “is clear that the parties engaged in serious bargaining over the course of several settlement meetings in May and June 2023.”[[13]](#footnote-14) It is true that Vectren held settlement meetings in which OCC participated. But, that does not mean serious bargaining in fact occurred. It is not enough to hold a series of meetings and invite parties to attend. *Serious* bargaining must occur.

No serious bargaining was required for OPAE and Vectren – the only parties that signed the settlement - to reach agreement on the energy efficiency proposals in the Settlement. As OCC expert Colleen Shutrump testified, “These parties have similar interests in this case. That includes interests in finding a way to gain a competitive advantage through government regulation and utility involvement, instead of by direct competition for DSM services to consumers.”[[14]](#footnote-15) Vectren benefits because the Settlement allows it to charge all consumers for energy efficiency programs, even consumers who do not use them. And “OPAE’s members include DSM service providers.”[[15]](#footnote-16) So, the only two parties in favor of the Settlement both benefit from the DSM projects.

Vectren also argues that “the Stipulation is supported by parties representing a range of interests.”[[16]](#footnote-17) Not so. The broad interests of all residential consumers (including *both* non-low-income and low-income) are not represented in the Settlement. Neither PUCO Staff nor OCC signed the Settlement. Again, the only parties to sign the Settlement were OPAE and Vectren, both of whom benefit from charging consumers for DSM projects.

OPAE argues OCC’s position “ignores OPAE’s status as a low-income consumer advocate.”[[17]](#footnote-18) Far from it. In fact, the absence of diverse support for this Settlement is in part *caused* by OPAE’s status as a low-income consumer advocate. This settlement does not impact low-income consumers alone; it calls for $21.7 million in total subsidies for *non-*low-income energy efficiency programs.[[18]](#footnote-19) By OPAE’s own admission, it does not represent non-low-income consumers. No signatory party does. For this reason, the parties that signed the Settlement do not represent diverse interests.

OPAE then misrepresents OCC expert Ms. Shutrump’s testimony as an attempt by OCC to “be considered the only true residential advocate,” which the “Commission has previously rejected.”[[19]](#footnote-20) But, Ms. Shutrump’s conclusion that the Stipulation does not represent diverse interests[[20]](#footnote-21) was not based on her opinion that OCC has a veto over Settlements. OCC does not need a veto in this case, as it is not the only party that did not sign the Settlement. Again, the PUCO Staff did not sign either.

The Settlement is not the product of serious bargaining. For this reason, the PUCO should reject or modify the Settlement to include OCC’s recommendations.

## Consumers who want energy efficiency products can get the purported benefits of Vectren’s program at better prices in the competitive market.

Vectren argues that the Settlement “as a package, benefits ratepayers and is in the public interest”[[21]](#footnote-22) for several reasons. These reasons are wrong.

Vectren first claims the Settlement benefits consumers because its energy efficiency programs have produced “significant” “energy savings,” measured by reduced CCF of natural gas.[[22]](#footnote-23) Energy efficiency products can reduce energy consumption.

But consumers do not need utility-run energy efficiency programs to use less energy. Energy efficiency products are available to consumers in the competitive market. Removing the utility from the transaction eliminates costs for the majority of a utility’s consumers, including low-income consumers, that do not participate in energy efficiency programs.[[23]](#footnote-24) Utility-run programs also impose inflated costs on consumers, including for administrative costs that consumers do not pay for market products.[[24]](#footnote-25) The PUCO should not force all residential consumers to subsidize utility-run, non-low-income energy efficiency programs, which do not benefit consumers and the public interest.

Vectren then claims the Settlement “encourages…residential consumers to engage in more energy efficient behavior,”[[25]](#footnote-26) “supports energy efficiency jobs,”[[26]](#footnote-27) and “promotes long-term environmental and health benefits.”[[27]](#footnote-28) Again, it does so by forcing consumers to pay for programs even if they do not use them, while imposing costs that competitive market does not. Competitive energy efficiency products available in the marketplace can provide these same benefits without forcing non-participating consumers to pay for them. And they provide these benefits at lower prices.[[28]](#footnote-29)

Lastly, Vectren argues the Settlement reduces consumers’ utility bills because energy efficiency programs help consumers use less natural gas. But the Settlement also charges consumers about $36 million ($14.3 million for low-income and $21.7 for non-low-income) over six years, to fund utility-run energy efficiency programs.[[29]](#footnote-30) Consumers pay for energy efficiency programs even if they do not participate in them, and most consumers do not.[[30]](#footnote-31) So, the Settlement will increase most consumers’ natural gas bills, including low-income consumers who struggle to make ends meet.

The Settlement does not benefit consumers and the public interest because it increases bills for consumers who do not participate in energy efficiency programs. Competitive energy efficiency products can provide the benefits Vectren’s program does, at lower cost, without forcing non-participating consumers to pay for them.

## **Because consumers have no choice whether to fund energy efficiency** **programs, Vectren and OPAE are wrong that the Settlement comports with Commission-recognized principles of encouraging competitive markets.**

Vectren argues the Settlement complies with important regulatory principles and practices because it “encourages compromise as an alternative to litigation.”[[31]](#footnote-32) But, every Settlement can reduce litigation costs. Effectively, Vectren argues the Settlement complies with regulatory practices and principles just by *being* a settlement. That is not a useful way to determine whether the settlement is in the public interest. The PUCO should not put a finger on the scale for the utility by finding settlements, regardless of their content, to be inherently better than litigated outcomes.

Vectren next argues that the Settlement “advances State policies regarding natural gas service recognized by the Commission.”[[32]](#footnote-33) These include “innovation and market access for demand-side natural gas.”[[33]](#footnote-34) To the contrary, the Settlement *violates* the Commission-recognized principle of promoting market-based approaches to energy efficiency. The Settlement requires all consumers to pay a fixed level of funding - $about 36 million, for six years – to fund utility-run energy efficiency programs. Consumers have no choice whether to pay or how much to pay, as they would in a competitive market.

It is unreasonable to make consumers subsidize non-low-income energy efficiency programs when market products provide the same benefits (at better prices) to consumers who want them. As Ms. Shutrump testified that “energy efficiency is available in the market at a variety of prices depending on what products the consumers choose.”[[34]](#footnote-35) Per Ms. Shutrump, “the market already provides these programs on an optional, not mandatory basis.”[[35]](#footnote-36) Yet, the Settlement requires all consumers to pay for Vectren’s utility-run energy efficiency programs. Mandating that all consumers provide funding for energy efficiency benefits that are already competitively available violates the market-based approach to energy efficiency the PUCO routinely interprets R.C. 4929.02(A) to require.

Further, Vectren argues that the Stipulation comports with important regulatory practices and principles because it “promote[s] energy conservation and encourage[s] reduced energy consumption by providing opportunities for customers to reduce their energy usage and make more educated choices about natural gas consumption.”[[36]](#footnote-37) But in a recent ruling on energy efficiency issues, the Commission has prioritized preservation of the competitive markets, rather than energy conservation, as an important regulatory principle. As OCC expert Colleen Shutrump noted, the PUCO has repeatedly “recognized the need for flexible regulatory treatment” in recent energy efficiency cases.[[37]](#footnote-38) For example, the PUCO recently stated that, “[I]t is time to look to competitive markets to play a more significant role in the provision of energy efficiency services in this state.”[[38]](#footnote-39)

Next, OPAE states that the Settlement comports with regulatory principles and practices by advancing “State policy, as enunciated in O.R.C. 4929.02” “to encourage demand-side resources and align utility and customer interest in energy efficiency and energy conservation.”[[39]](#footnote-40) OPAE further argues that “OCC, as a state agency, is required to support these policies.”[[40]](#footnote-41) But R.C. 4929.02 does not obligate OCC to advance any specific position before the PUCO. OPAE cites no PUCO or Supreme Court of Ohio precedent interpreting R.C. 4929.02 to limit positions OCC may take in the interests of residential consumers.

Further, R.C. 4911.02(A)(2)(a) gives the Ohio Consumers’ Counsel “*all* the rights and powers of any party in interest appearing before the public utilities commission.” That includes the rights and powers to advance any position on matters of public utility law properly before the Commission, just like any other party to PUCO litigation. And R.C. 4911.02(A)(2)(b) states that OCC “may take appropriate action with respect to residential consumer complaints concerning quality of service, service charges, and the operation of the public utilities commission.”[[41]](#footnote-42) OCC has discretion to determine what constitutes “appropriate action” under R.C. 4911.02(B).

In addition, OPAE’s interpretation (and Vectren’s) of state policy in R.C. 4929.02 contradicts PUCO precedent. In Columbia’s most recent rate case, the PUCO established that promoting competitive markets for energy efficiency effectuates state policy as codified by R.C. 4929.02(A).[[42]](#footnote-43) The PUCO made further statements in favor of competitive markets for energy efficiency products in recent cases[[43]](#footnote-44) involving Duke and AEP. Per the PUCO in both of those cases, “the future of energy efficiency programs in this state…will be best served by reliance on market-based approaches….”[[44]](#footnote-45) These cases clearly establish the PUCO prioritizes competitive market over energy conservation as an important regulatory principle and practice.

 OPAE also wrongly attempts to substitute its own judgment for that of PUCO Staff. OPAE asks the PUCO to “infer that Staff would not be silent regarding a Stipulation Staff believed was in violation of an important regulatory principle or practice.”[[45]](#footnote-46) The PUCO should not make this inference. Doing so would conflate PUCO Staff’s silence with support for the Settlement. The PUCO has stated “we believe that parties themselves are best positioned to determine their own best interests and whether any potential benefits outweigh any potential costs.”[[46]](#footnote-47) If PUCO Staff wished to take the position that this Settlement comports with important regulatory practices and principles, the PUCO Staff could have done so by signing the Settlement and filing testimony in support. It did not. Its silence on this issue speaks volumes.

OPAE finally argues[[47]](#footnote-48) the Settlement “does not violate any important regulatory principle or practice” because the Settlement includes terms PUCO Staff recommended in its February comments.[[48]](#footnote-49) OPAE effectively argues that adopting Staff’s recommendations automatically makes a Settlement compliant with important regulatory principles and practices. But, R.C. 4905.04 gives the PUCO, not the PUCO Staff, exclusive jurisdiction to make that decision.[[49]](#footnote-50) Further, the PUCO Staff has signed prior settlements that the Ohio Supreme Court later found *did* violate important regulatory

principles and practices.[[50]](#footnote-51) Lastly, the PUCO has stated that “No one possesses a veto over stipulations.”[[51]](#footnote-52) Similarly, no one party – *especially* *a party that did not sign the Settlement* – unilaterally decides what violates regulatory principles and practices. Yet, OPAE asks the PUCO to treat PUCO Staff’s February comments as determinative on this issue. It should not.

Mandating that all consumers provide funding for energy efficiency benefits that are already competitively available violates the market-based approach to energy efficiency the PUCO routinely interprets R.C. 4929.02(A) to require. The PUCO should find the Settlement contravenes important regulatory principles and practices.

# III. CONCLUSION

For the reasons explained above, the settlement filed by Vectren and OPAE fails the PUCO’s three-part test for evaluating settlements. To protect consumers, the PUCO should reject the Settlement and adopt OCC’s recommendations set forth in its witnesses’ testimony.

 Respectfully submitted,

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**CERTIFICATE OF SERVICE**

 I hereby certify that a copy of this Reply Brief was served on the persons stated below via electronic transmission, this 3rd day of October 2023.

 */s/ Connor D. Semple*

 Connor D. Semple

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1. Ohio Partners for Affordable Energy. [↑](#footnote-ref-2)
2. Stipulation and Recommendation (August 1, 2023) referred to in OCC’s Initial Brief as the “Settlement.” [↑](#footnote-ref-3)
3. OCC Ex. 1 at CLS-1. [↑](#footnote-ref-4)
4. *See* Comments of the Ohio Consumers Counsel (“OCC”) (“OCC Initial Comments”) (February 23, 2023) at 9. [↑](#footnote-ref-5)
5. *Consumers’ Counsel v. Pub. Util. Comm’n*. (1992), 64 Ohio St.3d 123, 126. [↑](#footnote-ref-6)
6. Initial Brief of Vectren Energy Delivery of Ohio, LLC (“Vectren Brief”) at 8. [↑](#footnote-ref-7)
7. *Id.* at 10. [↑](#footnote-ref-8)
8. *Id.* at 15. [↑](#footnote-ref-9)
9. *Id.* at 8. [↑](#footnote-ref-10)
10. *Id.*  [↑](#footnote-ref-11)
11. Vectren Brief at 16. [↑](#footnote-ref-12)
12. *Id.* at 9. [↑](#footnote-ref-13)
13. *Id.* at 8. [↑](#footnote-ref-14)
14. OCC Ex. 1 at 4. [↑](#footnote-ref-15)
15. *Id.*  [↑](#footnote-ref-16)
16. Vectren Brief at 9. [↑](#footnote-ref-17)
17. OPAE Brief at 3. [↑](#footnote-ref-18)
18. OCC Ex. 1 at 11. [↑](#footnote-ref-19)
19. *Id.*  [↑](#footnote-ref-20)
20. *See* OCC Ex. 1 at 4. [↑](#footnote-ref-21)
21. Vectren Brief at 10. [↑](#footnote-ref-22)
22. Vectren Brief at 11. [↑](#footnote-ref-23)
23. *See* Comments of the Ohio Consumers Counsel (“OCC”) (“OCC Initial Comments”) (February 23, 2023) at 9. [↑](#footnote-ref-24)
24. OCC Ex. 1 at 14. [↑](#footnote-ref-25)
25. Vectren Brief at 12. [↑](#footnote-ref-26)
26. Vectren Brief at 13. [↑](#footnote-ref-27)
27. Vectren Brief at 14. [↑](#footnote-ref-28)
28. OCC Ex. 1 at 14. [↑](#footnote-ref-29)
29. OCC Ex. 1 at CLS-1. [↑](#footnote-ref-30)
30. *See* Initial Comments of the Ohio Consumers Counsel (“OCC”) (“OCC Initial Comments”) (February 23, 2023) at 9. [↑](#footnote-ref-31)
31. Vectren Brief at 15. [↑](#footnote-ref-32)
32. *Id.* at 16. [↑](#footnote-ref-33)
33. *Id.* at 17. [↑](#footnote-ref-34)
34. OCC Ex. 1 at 5. [↑](#footnote-ref-35)
35. *Id.* at 6. [↑](#footnote-ref-36)
36. Vectren Brief at 17. [↑](#footnote-ref-37)
37. OCC Ex. 1 at 12. [↑](#footnote-ref-38)
38. Case No. 21-637-GA-AIR, Opinion & Order (January 26, 2023) at 19. [↑](#footnote-ref-39)
39. OPAE Brief at 7. [↑](#footnote-ref-40)
40. *Id.*  [↑](#footnote-ref-41)
41. R.C. 4911.02(a) (emphasis added), R.C. 4911.02(b). [↑](#footnote-ref-42)
42. Case No. 21-637-GA-AIR, Opinion & Order (January 26, 2023) at 19. [↑](#footnote-ref-43)
43. Case No. 20-1013-EL-POR, Entry (June 17, 2020) at 2, Case No. 20-585-EL-AIR, Opinion & Order (November 17, 2021) at 47-48. [↑](#footnote-ref-44)
44. *Id.*  [↑](#footnote-ref-45)
45. OPAE Brief at 7. [↑](#footnote-ref-46)
46. Case No. 14-1497-EL-SSO, Opinion & Order (March 31, 2016) at 44. [↑](#footnote-ref-47)
47. OPAE Brief at 8. [↑](#footnote-ref-48)
48. Comments of the PUCO Staff (February 23, 2023). [↑](#footnote-ref-49)
49. *Corder v. Ohio Edison Co.*, 162 Ohio St.3d 639, 2020-Ohio-5220, 166 N.E.3d 1180, ¶ 2 (“The General Assembly has vested the Public Utilities Commission of Ohio ("PUCO") with exclusive jurisdiction over most matters relating to public utilities, including the rates charged and the services provided.”) [↑](#footnote-ref-50)
50. *See e.g. In re Suburban Natural Gas Co.*, 166 Ohio St.3d 176, 2021-Ohio-3224, 184 N.E.3d 44, ¶ 45 (reversing PUCO Opinion & Order adopting a settlement between Suburban Natural Gas Company and PUCO Staff for violating the important regulatory principle and practice that property of a public utility must be used and useful at date certain to be included in rate base). [↑](#footnote-ref-51)
51. Case No. 07-478-GA-UNC, et al., Opinion & Order (April 8, 2008) at 32. [↑](#footnote-ref-52)