

In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval of an Alternative Rate Plan.))	Case No. 18-0049-GA-ALT
In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval of an Increase in Gas Rates.))	Case No. 18-0298-GA-AIR
In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval of an Alternative Rate Plan.))	Case No. 18-0299-GA-ALT

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I. INTRODUCTION

Consumers have the right to make informed decisions when deciding whether to buy natural gas from their utility or a Marketer. In response to a settlement, the Office of the Ohio Consumers' Counsel ("OCC") filed testimony opposing the settlement, including the Supplemental Direct Testimony of OCC Witness Williams. In his Supplemental Direct Testimony, OCC Witness Williams testified that the settlement does not benefit the public interest. Mr. Williams testified that the public interest is greatly advanced when customers have a better understanding of savings and losses under the Vectren Energy Delivery of Ohio, Inc. ("Vectren") choice program. Mr. Williams testified that customers would benefit from a price to compare message on Vectren's bills and from shadow billings. Some of Mr. Williams' testimony on these subjects was stricken. But not all of it, as Vectren concedes.

While OCC referenced stricken testimony in its Initial Brief, it agreed in response to a request by Vectren to amend its Initial Brief, withdrawing those portions referencing stricken testimony. Now Vectren seeks to strike those portions of OCC's Initial Brief with the recommendations that rely upon *unstricken* Supplemental Direct Testimony of Mr. Williams. At this late date however, the Public Utilities Commission of Ohio ("PUCO") should deny what amounts to a belated motion to strike *additional* parts of Mr. Williams' Supplemental Direct Testimony. Instead, the PUCO should consider OCC's consumer protection recommendations based on record evidence (contained in Mr. Williams' Supplemental Direct Testimony).

The PUCO should reject Vectren's belated Motion to Strike for an alternative reason. When a settlement is filed, the scope of the proceeding (including testimony) changes to the three prong standard, and objections to Vectren's application no longer set the scope of the hearing. The Attorney Examiner's rulings to the contrary were in error.

II. BACKGROUND

Vectren filed its Application for an Increase in Gas Rates on March 30, 2018.¹ PUCO Staff filed its Report on October 1, 2018.² Parties filed objections on October 31, 2018, and Intervenor testimony supporting objections was filed on November 7, 2018.³ After negotiations between the parties, a proposed settlement was filed on January 4, 2019.⁴ Accordingly, the scope of the hearing was changed from Vectren's Application to

¹ See Docket.

² See *id.*

³ See *id.*

⁴ See *id.*

the three prong settlement test.⁵ As a result, parties filed additional testimony in late January addressing the proposed settlement under the three prong settlement test.⁶ OCC opposes the proposed settlement, and filed testimony addressing the three prong settlement test on January 28, 2019.⁷

A hearing on the proposed settlement occurred in late January and early February. During the hearing, the Retail Energy Supply Association, joined by IGS Energy and Vectren, moved to strike portions of OCC Witness Williams' Supplemental Direct Testimony in which he addresses the three prong settlement test.⁸ The Attorney Examiner granted some of the motions to strike, and denied another.⁹ Notwithstanding that a settlement was before the PUCO and, therefore, a different standard of review from Vectren's Application applies, the Attorney Examiner ruled (in relevant part) that the public interest issues raised by Mr. Williams could and should have been raised in objections to the PUCO Staff Report.¹⁰ The Attorney Examiner also said that OCC could make its public interest recommendations in a future proceeding.¹¹ The testimony stricken was Mr. Williams' testimony that the settlement was not in the public interest because it did not have a requirement that required Vectren to provide customers with

⁵ See, e.g., Vectren's Initial Brief at 5 (citing *In re Ohio Edison Co.*, 146 Ohio St. 3d 222 (2016)).

⁶ See Docket.

⁷ See Docket.

⁸ See Hearing Transcript, Vol. IV at 226-241.

⁹ See *id.*

¹⁰ See, e.g., *id.* at 230-31.

¹¹ See, e.g., *id.*

information that would enable them to make informed shopping decisions – a price to compare and shadow billing.¹²

In early April, parties filed their Initial Briefs.¹³ Inadvertently, OCC referenced Mr. Williams’ testimony that had been stricken. Vectren brought this to OCC’s attention and requested that OCC withdraw portions of its Initial Brief based on testimony that was stricken. In response, OCC did so.

Vectren now is making what amounts to a belated motion to strike *additional* testimony. As described below, Vectren’s effort should be rejected.

III. ARGUMENT

A. OCC’s Initial Brief Does Not Cite To Stricken Testimony.

Vectren asked OCC to withdraw portions of its Initial Brief “based on testimony that was stricken”¹⁴ OCC did so.¹⁵ Confusingly, Vectren nonetheless asserts now that OCC’s consumer protection recommendations in response to a settlement were “done so in reliance on testimony that was stricken[.]” but later admits (buried in a footnote) that OCC’s Initial Brief “cites testimony that was not stricken[.]”¹⁶ Vectren could have (and perhaps from its perspective and in hindsight, should have) moved to

¹² See Hearing Transcript, Vol. IV at 226-241 (discussing OCC Witness Williams’ Supplemental Direct Testimony at 12-13; 15).

¹³ See Docket.

¹⁴ See *id.* at Attachment A (April 5, 2019 email from M. Pritchard to W. Michael).

¹⁵ See April 8, 2019 Letter from W. Michael filed in the docket. Vectren’s characterization that OCC attempted to “rewrite” its Initial Brief is simply wrong. See Motion to Strike at 8-9. First, OCC was simply responding in good-faith to Vectren’s request. Second, it is worth noting that in a thirty-page brief, OCC’s inadvertent error amounted to two benign sentences, deleting four words, and changing a citation from one page to another.

¹⁶ See Motion to Strike at 9, footnote 13.

strike the testimony on which OCC's recommendations are now based.¹⁷ It did not (nor did any other party). Vectren is now attempting to make a belated motion to strike *additional* testimony. It should not be permitted to do so. OCC should be able to rely on testimony in the record and make recommendations based thereon in response to a settlement.

Recognizing as much, Vectren throughout its Motion to Strike equates relying on stricken testimony (the subject of Vectren's initial request to OCC) with making recommendations based on testimony that was *not* stricken (a subject not raised until now).¹⁸ So Vectren's Motion to Strike boils down to asking the PUCO to strike OCC's consumer protection recommendations even though the testimony on which the recommendations are based was not stricken and is record evidence.

But it is indisputable that settlements are merely recommendations to the PUCO that are not legally binding.¹⁹ The PUCO has the authority to modify settlements.²⁰ Its decisions must be based on record evidence, so parties can and do rely on record evidence.²¹ Parties contesting a settlement (as OCC is here) should be able to rely on the

¹⁷ On this score, the PUCO should note that not less than three different attorneys experienced in PUCO proceedings representing sophisticated clients weighed-in favorably on the motions to strike made during hearing. See Hearing Transcript, Vol. IV at 226-241. Vectren's Motion to Strike essentially says that OCC should have extended the Attorney Examiner's ruling at hearing to strike certain testimony to include additional testimony that was neither stricken nor made the subject of a motion to strike.

¹⁸ See, e.g., *id.* at 5 (acknowledging that OCC modified its Initial Brief and asserting that "OCC still seeks to include the improper *recommendations*"); *id.* at 8 (inaccurately describing that Vectren gave OCC an opportunity to withdraw sections of its Initial Brief addressing its consumer protection recommendations, when in fact Vectren requested withdraw of material "based on testimony that was stricken").

¹⁹ See, e.g., *Duff v. PUCO*, 56 Ohio St. 2d 367 (1978); O.A.C. 4901-1-30(E).

²⁰ See *id.*

²¹ See R.C. 4903.09; *Elyria Foundry Co. v. PUCO*, 114 Ohio St. 3d 305 (2007); *OCC v. PUCO*, 111 Ohio St. 3d 300 (2006).

record and make recommendations based thereon, particularly regarding consumer protection issues.

Because OCC's Initial Brief no longer contains stricken testimony, Vectren's Motion to Strike should be denied.

B. OCC's Consumer Protection Recommendations Based On Record Evidence In Response To A Settlement Should Not Be Stricken.

Vectren asserts that OCC's consumer protection recommendations relying on record evidence in response to a settlement should be stricken based on the scope of its objections made to the Staff Report.²² It cites to the Attorney Examiner's ruling striking certain parts of OCC Witness Williams' testimony (discussed above).²³

But Vectren admits that OCC's Initial Brief containing the consumer protections recommended in response to a settlement that it now seeks to strike "cites testimony that was not stricken[.]"²⁴ So once again, Vectren is now attempting to make a belated motion to strike *additional* testimony. It should not be permitted to do so.

The PUCO's decision in this case must be based on record evidence; the corollary being that parties may cite to, rely on, and make recommendations based on record evidence.²⁵ This is particularly so where, as here, the PUCO has before it a settlement that is nothing more than a recommendation, not legally binding, and that is subject to

²² See Motion to Strike at 6-7.

²³ See *id.*

²⁴ See Motion to Strike at 9, footnote 13.

²⁵ See R.C. 4903.09; *Elyria Foundry Co. v. PUCO*, 114 Ohio St. 3d 305 (2007); *OCC v. PUCO*, 111 Ohio St. 3d 300 (2006).

modification by the PUCO.²⁶ As Vectren admits, OCC's Initial Brief cites testimony that was not stricken. The Motion to Strike should be denied.

As stated earlier, Vectren's Motion to Strike boils down to asking the PUCO to strike OCC's consumer protection recommendations even though the testimony on which the recommendations are based was not stricken. There is no precedent for doing so, and Vectren cites to none. Relatedly, the Attorney Examiner's ruling striking certain parts of OCC Witness Williams' testimony is only germane regarding what was *not* stricken. The ruling struck certain testimony, no longer referred to in OCC's Initial Brief, *not* the testimony on which OCC's consumer protection recommendations are based. And it struck *testimony*, not OCC's *recommendations* based on testimony that is (indisputably, as noted herein) in the record.²⁷

OCC's consumer protection recommendations are based on record evidence. Vectren's Motion to Strike should be denied.

C. Denying Vectren's Motion To Strike Would Not Be Prejudicial To Vectren. If Anything, *Granting* The Motion To Strike Would Be Prejudicial To Consumers.

Vectren's assertion that denying its Motion to Strike would be prejudicial to it should be rejected.²⁸ Vectren itself describes the parties in this case as "capable" and "knowledgeable."²⁹ Not less than three different attorneys experienced in PUCO proceedings representing sophisticated clients weighed-in favorably on the motions to

²⁶ See, e.g., *Duff v. PUCO*, 56 Ohio St. 2d 367 (1978); O.A.C. 4901-1-30(E).

²⁷ Vectren's assertion that OCC failed to comply with the requirements to seek reversal of the Attorney Examiner's ruling is a red-herring. The Attorney Examiner did not strike the testimony on which OCC's recommendations are based, as Vectren admits, nor any recommendations *per se*.

²⁸ See Motion to Strike at 10.

²⁹ See Vectren's Initial Brief at 6.

strike made during hearing.³⁰ They could have moved to strike the portions of the testimony on which OCC's consumer protection recommendations are based. They did not. The testimony is in the record.³¹ Vectren's attempt to make a belated motion to strike should be denied. Because the testimony is in the record, all parties – Vectren included – had a full and fair opportunity to cross-examine OCC Witness Williams regarding his testimony. There would be no prejudice to any party were the Motion to Strike denied.³²

If anything, *granting* Vectren's Motion to Strike would be prejudicial to consumers. It would deny parties the ability to make recommendations based on record evidence in response to a settlement. This would be patently prejudicial to parties given that settlements are merely recommendations to the PUCO that are not legally binding and the PUCO has the authority to modify settlements.³³ Parties contesting a settlement (as OCC is here) should be able to rely on the record and make recommendations based thereon, particularly regarding consumer protection issues.

Granting the Motion to Strike would also be prejudicial because it would, in effect, give Vectren a “second bite at the apple” by allowing it to make a motion to strike that could have and should have been made during the hearing.

³⁰ See Hearing Transcript, Vol. IV at 226-241.

³¹ In its section discussing prejudice, Vectren asserts that that OCC's consumer protection recommendations are based on testimony that was struck. See Motion to Strike at 10. This is simply not true, as Vectren elsewhere admits. See *id.* at 9, footnote 13.

³² Vectren also asserts that it would be reversible error to rule on an issue without record support. See *id.* at 10. Whether the record evidence underlying OCC's consumer protection recommendations is sufficient or persuasive is something that the PUCO is more than capable of handling in its decision in this case. Put simply, Vectren's assertion goes to the record evidence's weight, not whether it is properly in OCC's Initial Brief.

³³ See, e.g., *Duff v. PUCO*, 56 Ohio St. 2d 367 (1978); O.A.C. 4901-1-30(E).

D. OCC Did Not Fail To Comply With The Requirements To Seek Reversal Of An Attorney Examiner's Ruling.

For the reasons described earlier, the PUCO should reject Vectren's Motion to Strike. OCC's Initial Brief relies on record evidence and makes recommendations based on that record evidence.

But if the PUCO finds it necessary to revisit the Attorney Examiner's rulings, which OCC recommends that it does, it now has an appropriate opportunity to do so. As Vectren concedes, O.A.C. 4901-1-15(F) allows a party to "raise the propriety of [any oral ruling issued during a public hearing] . . . *in any other appropriate filing*" ³⁴

Vectren, however, asserts that because "time is of the essence," there is no appropriate filing for revisiting the Attorney Examiner's rulings. ³⁵ But Vectren concedes that OCC could have contested the Attorney Examiner's rulings in its Initial Brief, and Vectren would have responded in its Reply Brief. ³⁶

That is essentially what is happening now under the filing of Vectren's Motion to Strike. The propriety of the Attorney Examiner's rulings is being addressed "in any other appropriate filing." The issues are squarely before the PUCO as a result of OCC's Initial Brief and Vectren's Motion to Strike. Vectren has the opportunity to address the rulings in its Reply. It loses no time, particularly given the Attorney Examiner's ruling shortening (to three days) the response time to the Motion to Strike.

The PUCO should revisit the Attorney Examiner's ruling. The PUCO has before it a settlement. It is subject to a different standard – the three prong settlement test – than

³⁴ O.A.C. 4901-1-15(F) (emphasis added).

³⁵ See Motion to Strike at 8.

³⁶ See *id.*

Vectren's Application.³⁷ The scope of the hearing was governed by the settlement test, not by Vectren's Application.³⁸ So it was error for the Attorney Examiner to rule that portions Mr. Williams' testimony should be stricken because OCC did not raise the issues in its objections to the PUCO Staff Report. Instead, Mr. Williams testified that the settlement was not in the public interest (under the second prong of the settlement test) because it did not require Vectren to provide customers with information that would enable them to make informed shopping decisions – a price to compare and shadow billing.³⁹ This testimony was addressing new issues in the Settlement that were not in Vectren's Application or the Staff Report. Therefore, such testimony fits squarely into the standard that governed the hearing – the three prong settlement test.

In fact, this case illustrates perfectly why parties contesting a settlement in a rate case cannot be, and should not be, prohibited from offering testimony beyond their objections to the PUCO Staff Report. Settlements, as the settlement did in this case, can contain provisions not raised in a utility's application. The proposed settlement here did. Various billing system matters (such as billing system enhancements) were part of the proposed settlement, but were nowhere raised in Vectren's Application.⁴⁰ OCC could not possibly have raised any objections to issues in response to the PUCO Staff Report that were not part of either Vectren's application *or* the PUCO Staff Report.

³⁷ See Hearing Transcript, Vol. IV at 226-41.

³⁸ See, e.g., Vectren's Initial Brief at 5 (citing *In re Ohio Edison Co.*, 146 Ohio St. 3d 222 (2016)).

³⁹ See Hearing Transcript, Vol. IV at 226-241 (discussing OCC Witness Williams' Supplemental Direct Testimony at 12-13; 15).

⁴⁰ Compare Settlement at 21 with Vectren's Application.

The Attorney Examiner's rulings striking Mr. Williams' testimony were wrong. They should be reversed.⁴¹

IV. CONCLUSION

In response to a settlement, OCC has made several consumer protection recommendations based on record evidence. OCC's recommendations were made in the context of reviewing the settlement to determine if it was in the public interest. Vectren is asking that the PUCO not consider OCC's recommendations when it is reviewing the settlement under the three prong test. But Vectren's motion amounts to a late filed motion to strike additional OCC testimony and should be rejected. Additionally, the PUCO should overturn the Attorney Examiner's faulty ruling that the permissible scope of testimony on a settlement should be limited to earlier objections made to a utility's application that preceded the settlement. In the interests of consumers, the PUCO should decline Vectren's request and consider OCC's recommendations based on record evidence.

⁴¹ As a result, the following pages and lines from Mr. Williams' Supplemental Direct Testimony would survive: 13:11-18; 15:16-17; 12:15-20; 13:1-3; 15:14-15; 15:1-3.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Motion to Strike* was served by electronic transmission upon the parties below this 12th day of April 2019.

/s/ William J. Michael
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Summary: Memorandum The Office of the Ohio Consumers' Counsel's Memorandum Contra Vectren's Motion to Strike Portions of OCC's Initial Brief for Consumer Protection electronically filed by Ms. Jamie Williams on behalf of Michael, William Mr.