

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates)))	Case No. 20-585-EL-AIR
In the Matter of the Application of Ohio Power Company for Tariff Approval))	Case No. 20-586-EL-ATA
In the Matter of the Application of Ohio Power Company for Approval to Change Accounting Methods)))	Case No. 20-587-EL-AAM

**JOINT MEMORANDUM CONTRA OF
INDUSTRIAL ENERGY USERS-OHIO,
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP, AND
THE KROGER COMPANY**

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July 1, 2021

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The Public Utilities Commission of Ohio (“Commission” or “PUCO”) or Attorney Examiners should deny the Joint Motion of the Ohio Environmental Council and Environmental Law & Policy Center (collectively, “Environmental Advocates”) to modify the evidentiary record by amending ELPC Exhibit 2 for three reasons: (1) it would be unreasonable (and potentially unprecedented) to modify the evidentiary record after Initial Briefs have been filed, (2) some of the evidence sought to be introduced was not “discussed in the course of the cross-examination,” (3) some of the information sought to be admitted constitutes inadmissible hearsay, and (4) the Environmental Advocates failed to preserve the issue as a distinct matter in their Initial Brief. Accordingly, Industrial Energy Users – Ohio (“IEU-Ohio”), the Ohio Manufacturers’ Association Energy Group (“OMAEG”), and the Kroger Company (“Kroger”) respectfully request that the

Commission deny the Joint Motion filed at the eleventh-hour by the Environmental Advocates to modify the evidentiary record.

Pursuant to Ohio Adm.Code 4901-1-12, any party may file a memorandum contra within 15 days after the service of a motion, or such other period as the Commission or attorney examiner requires. In this case, by Entry issued on April 5, 2021, the Attorney Examiners established the response time for memoranda contra any motions filed as five business days.¹ The Environmental Advocates filed their Joint Motion on June 24, 2021. Therefore, memoranda contra are due by July 1, 2021.

Initially, the Joint Motion should be denied because it is extremely tardy and would unduly prejudice parties to grant the motion and expand the evidentiary record after initial briefs have been filed. The information specifically sought to be introduced into the evidentiary record includes three paragraphs of ELPC Exhibit 2 (JFW-1 attached to the pre-filed testimony of Jon Williams) that were not admitted at hearing. At hearing, numerous parties made motions to strike and objections to the admission of ELPC Exhibit 2.² The reasons for those motions to strike and objections are varied, but generally they involve lack of foundation, relevance, and hearsay.³

After hearing arguments from all parties, the Attorney Examiners ultimately denied those motions and overruled those objections, but also ruled that only those sections of ELPC Exhibit 2 that were discussed in the course of the cross-examination of Jon Williams could be admitted into the record. Further, the Attorney Examiners directed the Environmental Advocates and AEP Ohio to work together to highlight those sections for

¹ Entry (Apr. 5, 2021) at ¶ 16; see *a/so*, Entry (Apr. 14, 2021) at ¶13.

² Tr. Vol. V at 988-989, 992 (starting at Line 13) through 1002.

³ *Id.*

review by the Attorney Examiners with admission to be addressed by subsequent Entry. On the final day of hearing, the Environmental Advocates were provided the opportunity to highlight the sections they thought were admissible under the Attorney Examiners' ruling and submitted the proposed exhibit to the Attorney Examiners. Through an Entry dated May 27, 2021, the Attorney Examiners specifically admitted only the highlighted portions of the draft exhibit.

IEU-Ohio, OMAEG, Kroger, and potentially other parties would be prejudiced by granting the Joint Motion because it would expand the scope of the evidentiary record after parties have already submitted their initial briefs. While simultaneously preparing this Joint Memorandum Contra, parties are also finalizing their reply briefs, which are due just 2 business days after this Joint Memorandum Contra. The subject matter that the Environmental Advocates seek to admit through their Joint Motion is on a topic that some parties (including IEU-Ohio, OMAEG, and Kroger) may intend to address in their respective reply briefs. Further, the Commission has previously rejected parties' attempts to expand the evidentiary record at this late stage of a case.⁴

Although IEU-Ohio, OMAEG, and Kroger would be prejudiced by granting the motion, the Environmental Advocates cannot complain as any perceived error in the admission (or lack thereof) of ELPC Exhibit 2 was of their own doing.⁵ The Environmental

⁴ *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) at 37 (“... new information should not be introduced after the closure of the record and parties should not rely upon evidence which has been stricken from the record.”).

⁵ See *In re Application of Columbus Southern Power Co.* 147 Ohio St.3d 439, 456, 2016-Ohio-16-8, 67 N.E.3d 734, 750 (“The company cannot take advantage of an error that it itself invited or induced the Commission to make.”); *State ex rel. Johnson v. Ohio Adult Parole Auth.*, 95 Ohio St.3d 463, 2002-Ohio-2481, 768 N.E.2d 1176, ¶ 6; *City of Fostoria v. Ohio Patrolmen's Benevolent Ass'n*, 106 Ohio St. 3d 194, 2005-Ohio-4558, 833 N.E.2d 720, ¶ 12.

Advocates had an opportunity to elicit additional evidence through their cross-examination of Jon Williams AND had the opportunity to produce a witness to offer their own evidence, but instead chose to ask just one question of Mr. Williams on the subject of Energy DRIPE. Moreover, the Environmental Advocates waited nearly a month after the Attorney Examiners' ruling to seek to expand the record. The Attorney Examiners should not now grant the Joint Motion to modify the evidentiary record and admit evidence that could have been introduced at hearing.

Additionally, the Environmental Advocates' motion should be denied because it goes beyond the Attorney Examiners' evidentiary ruling that only "portions that were discussed in the course of the cross-examination" would be admitted. At hearing, counsel for OEC asked Mr. Williams for a definition used in the energy efficiency context and the related theoretical benefits. Specifically, counsel for OEC asked Mr. Williams to "explain what energy DRIPE means and how this is a benefit to AEP Ohio customers as proposed in the DSM plan?"⁶ In response, Mr. Williams answered that "[f]or DRIPE, what that does is it looks at the price effects from energy and demand response. And in the case of energy – energy efficiency reduction as those costs come down, there's a benefit in generation pricing that could occur and those were taken into account in the – for participants' energy savings only."⁷

IEU-Ohio, OMAEG, and Kroger acknowledge that the first two paragraphs the Environmental Advocates seek to add to the record through the Joint Motion (i.e., the highlighted portions in ELPC Exhibit 2 attached to the Joint Motion) relate to the definition of Energy DRIPE and its theoretical benefits. However, there is no need to take the

⁶ Tr. Vol. V at 960, Lines 19-22.

⁷ Tr. Vol. V at 961, Lines 1-7.

unusual step to modify the evidentiary record after initial briefs have been filed just to admit into the record the definition of Energy DRIPE and the theoretical benefits associated with the concept as the above-quoted response Mr. Williams provided at the hearing **is already in the record.**

Additionally, the information in the third highlighted paragraph references a substantive analysis of energy efficiency that was included elsewhere in Mr. Williams' pre-filed testimony. Counsel for the Environmental Advocates did not ask Mr. Williams about the substantive analysis referenced in the third paragraph of this section, nor did they ask him about the underlying numerical detail in that analysis. As such, the information in the third highlighted paragraph is beyond the scope of the Attorney Examiners' ruling and should not be admitted.

Further, the Motion should be denied because it seeks to admit improper evidence into the record and other parties now have no ability to challenge such analysis through cross examination. Jon Williams did not conduct the analysis referenced in the third paragraph that the Environmental Advocates seek to belatedly admit into the record. On cross-examination, Mr. Williams testified that the analysis was not prepared by him or under his direction.⁸ Because the analysis consists of out-of-court statements offered for the truth of the matter asserted and the statements were made by a declarant who did not testify at the evidentiary hearing, the analysis constitutes hearsay under Ohio R. Evid. 801(C). In this context, no exception to the rule against hearsay is applicable and therefore the analysis is improper hearsay pursuant to Ohio R. Evid 802 and should not be admitted. Moreover, this is not a run-of-the-mill non-controversial type of analysis; the

⁸ Tr. Vol. V at 988, Lines 7-18.

fundamentals forecast analysis driving the substantive energy efficiency analysis in Mr. Williams' pre-filed testimony is the same type of fundamentals forecast that led to protracted litigation (by all sides) in the AEP Ohio affiliate PPA Case (Case Nos. 14-1693-EL-RDR, *et al.*) and the renewable non-bypassable charge case (Case Nos. 18-501-EL-FOR, *et al.*).

Finally, the Joint Motion should be denied because it is being made in contravention of Ohio Adm.Code 4901-1-15(F). This rule provides that any party adversely affected by a ruling issued during a public hearing may raise the propriety of that ruling as an issue for the Commission's consideration by discussing the matter as a distinct issue in its initial brief. The Environmental Advocates failed to preserve the scope of admissibility regarding ELPC Exhibit 2 as a distinct issue in their initial brief. Accordingly, the Environmental Advocates have waived the opportunity to seek admission through the Joint Motion.

While the Environmental Advocates ignored Ohio Adm.Code 4901-1-15(F), other parties did not. In its initial brief, IEU-Ohio explicitly challenged the Attorney Examiners' ruling that admitted portions of Mr. Williams' pre-filed testimony (as well as other matters) as a distinct issue. Of course, IEU-Ohio did not raise admission of the third highlighted paragraph regarding Energy DRIPE or the analyses elsewhere in the testimony cross-referenced in that paragraph because those portions were not part of, and still are not part of, the evidentiary record.

For the reasons set forth above, the Attorney Examiners should deny the Joint Motion by the Environmental Advocates to modify the evidentiary record this late in the case. Admission of the evidence at this point would create procedural and due process

problems, be inconsistent with the Attorney Examiners' prior ruling to admit only information "discussed in the course of the cross-examination," and result in admission of hearsay evidence. Further, the Environmental Advocates failed to preserve the issue as a distinct matter in their initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Joint Memorandum Contra of Industrial Energy Users-Ohio, the Ohio Manufacturers' Association Energy Group, and the Kroger Company* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio, to the following parties of record this 1st day of July 2021, via electronic transmission.

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Case No(s). 20-0585-EL-AIR, 20-0586-EL-ATA, 20-0587-EL-AAM

Summary: Memorandum Contra Environmental Advocates' Motion to Modify the Evidentiary Record electronically filed by Ms. Rebekah J. Glover on behalf of Industrial Energy Users-Ohio and Ohio Manufacturers' Association Energy Group and The Kroger Company