

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**REPLY OF ENVIRONMENTAL LAW & POLICY CENTER AND OHIO  
ENVIRONMENTAL COUNCIL TO THE MEMO CONTRA THE MOTION  
TO AMEND ELPC EXHIBIT 2**

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**I. Introduction**

On June 24, 2021, the Environmental Law & Policy Center (“ELPC”) and Ohio Environmental Council (the “OEC,” and collectively, the “Environmental Advocates”) filed a motion to amend ELPC Exhibit 2 in order to add an additional section of withdrawn testimony to the exhibit. AEP Ohio, the applicant and party whose withdrawn testimony was in question for inclusion in the record, does not object to the amendment to ELPC Exhibit 2: the DRIPE sections on page 20 of JFW-1, paragraphs originally included in witness Jon Williams’ submitted documents.

The Environmental Advocates believe those paragraphs referencing DRIPE should have been included in the May 27, 2021 Order based upon the Attorney Examiner’s guidelines for what would be permitted as part of the exhibit. The Attorney Examiner directed AEP Ohio and the Environmental Advocates to work together to identify the portions of Jon Williams’ withdrawn testimony that was to be included in the record, based on the cross-examination of the

witness during the hearing. Specifically, ELPC, OEC, and AEP Ohio were directed “to work together to highlight those sections of this exhibit so that the parties can use the highlighted portions that were discussed in the course of the cross-examination as part of their brief.” *Tr. Vol. I* at 1004, line 22 to 105, line 2. Multiple drafts floated back and forth between the parties, and the final draft sent to the Attorney Examiner did not include a section that the Environmental Advocates believed should be included *based on the record of the hearing itself*.

When the May 27 Order was released, and the section was excluded, the Environmental Advocates discussed the exclusion of the DRIPE Energy paragraphs with the Attorney Examiner and AEP Ohio, and AEP Ohio did not object to including those DRIPE sections as part of the record. Per the Attorney Examiner, the Environmental Advocates filed their Motion to Amend ELPC Exhibit 2 requesting inclusion of the DRIPE section. In response, Industrial Energy Users-Ohio, The Ohio Manufacturers’ Association Energy Group, and the Kroger Company (collectively, the “Opposing Parties”) have made a mountain out of a molehill. On July 1, they filed a Memo Contra to the Environmental Advocates’ Motion to Amend ELPC Exhibit 2, arguing it prejudiced their briefs and arguments, that the sections weren’t properly admitted at the hearing, and that the Environmental Advocates’ should have addressed the issue in their Post-Hearing Brief.

For the reasons that follow, their arguments fail and the Environmental Advocates’ motion should be granted.

## **II. Argument**

### **A. The Environmental Advocates’ Motion to Amend ELPC Exhibit 2 does not prejudice any party to the proceeding.**

The issue at hand is fairly straightforward. During the hearing, Ms. Leppla, counsel for the OEC, had asked Mr. Williams on cross-examination to “turn to page 20” of the DSM Plan

attached to his testimony and to “explain what energy DRIPE means and how this is a benefit to AEP Ohio customers *as proposed in the DSM Plan.*” Tr. Vol. V. at 960, lines 19-22 (emphasis added). This discussion specifically referenced the page number and DRIPE in the context of the DSM plan. Nevertheless, the final version of ELPC Exhibit 2 admitted on May 27 did not include any highlighted portion of the exhibit related to DRIPE as identified by the Environmental Advocates on the day the proposed document was submitted.

AEP Ohio, the other party directed to work with the Environmental Advocates to determine which sections should be included in the record, does not object to the modification of the exhibit. Simply, the record established the DRIPE portions of page 20 of the DSM Plan should have been included in ELPC Ex. 2. The Opposing Parties, however, base their claim of prejudice on the fact that the sections sought to be included in the record “were not admitted at hearing.” The sections *were* admitted at hearing through the cross-examination of the witness, and the DRIPE Energy section should be included in the final exhibit admitted by the Attorney Examiners.

Similarly, the Opposing Parties argue that the Motion to Amend EPLC Exhibit 2 unduly prejudices them because it was filed after initial Post-Hearing Briefs were due. While this is true, the Environmental Advocates did not rely on the DRIPE Energy paragraphs in its post-hearing brief or in its post-hearing reply brief. Because the paragraphs were not yet officially part of the record, they were not referenced. The Opposing Parties reference a decision where the Commission stated that “parties should not rely upon evidence which has been stricken from the record.” *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. The DRIPE Energy paragraphs were not *stricken* from the record. Due to what the Environmental Advocates believe was a simple error, they were not included in the original exhibit , and the Environmental Advocates are requesting to appropriately modify the record based on the instructions of the Attorney Examiner both during the hearing and afterward as to what could be included in ELPC Ex. 2.

**B. The DRIPE Energy paragraphs should not be excluded under the Ohio Rules of Evidence.**

The Opposing Parties also argue for the exclusion of the DRIPE Energy paragraphs under the Ohio Rules of Evidence, claiming they are out-of-court hearsay statements. A few of these parties similarly made an argument in their Post-Hearing Brief to strike other portions of testimony. The Environmental Advocates reiterate the same general point made in our Post-Hearing Reply Brief: expert witnesses routinely rely on studies and analysis conducted by third parties, and the Public Utilities Commission of Ohio is sophisticated enough to weigh the relevance and legitimacy of “out-of-court” statements on issues within its expertise.

The Ohio Supreme Court has repeatedly recognized “that the commission is not stringently confined by the Rules of Evidence” and has “very broad discretion in the conduct of its hearings.” *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm’n of Ohio*, 2 Ohio St.3d 62, 68, 422 N.E.2d 1288 (1982); *see also, e.g., Chesapeake & Ohio Ry. Co. v. Pub. Util. Comm.*, 163 Ohio St. 252, 263, 126 N.E.2d 314 (1955) (“[T]he Public Utilities Commission, being an administrative body, is not and should not be inhibited by the strict rules as to the admissibility of evidence which prevail in courts . . .”). The Commission has explained that the concerns about hearsay simply do not apply in the context of a Commission proceeding:

We note that hearsay rules are designed, in part, to exclude evidence, not because it is not relevant or probative, but because of concerns regarding jurors’ inability to weigh evidence appropriately. These concerns are inapplicable to

administrative proceedings before the Commission, as the Commission has the expertise to give the appropriate weight to testimony and evidence.

*In the Matter of the Application of Ohio Power Co. & Columbus S. Power Co. for Auth. to Merge & Related Approvals*, No. 10-2376-EL-UNC, Opinion & Order at 13 (Dec. 14, 2011).

**C. Ohio Adm. Code 4901-1-15(F) does not apply to these circumstances; the parties were acting under the direction of the Attorney Examiners to file a separate motion to amend the record.**

Finally, the Opposing Parties claim the Environmental Advocates should have raised the issue at hand in its Post-Hearing Brief, purportedly under Ohio Adm. Code 4901-1-15(F). The Environmental Advocates were acting under the direction of the Attorney Examiner to file a motion to amend the record. In line with the original instructions for including sections of ELPC Exhibit 2, the Environmental Advocates worked with AEP Ohio to confirm AEP Ohio did not object to including the DRIPE Energy portions of the exhibit. Once AEP Ohio confirmed they did not object to the amendment to the exhibit, the Environmental Advocates filed the motion to amend the record, as instructed.

While the Environmental Advocates could have raised the issue through the Post-Hearing Brief, when this was raised with the Attorney Examiner prior to the initial briefs being filed, the Environmental Advocates were told to address it through a motion. Accordingly, the Opposing Parties are incorrect in their assertion that the amendment should have been conducted under Ohio Adm. Code 4901-1-15(F).

### **III. Conclusion**

For the foregoing reasons and the reasons stated in the original Motion, the Environmental Advocates' Motion to Amend ELPC Exhibit 2 should be granted. The Commission should amend the Exhibit as identified by the Environmental Advocates, which is not opposed by the applicant, AEP Ohio.

July 8, 2021

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Reply of Environmental Law & Policy Center and Ohio Environmental Council to the Memo Contra the Motion to Amend ELPC Exhibit 2* was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on July 8, 2021. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/Chris Tavenor  
Chris Tavenor

**This foregoing document was electronically filed with the Public Utilities**

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**in**

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

Summary: Reply to the Memo Contra the Motion to Amend ELPC Exhibit 2 electronically filed by Chris Tavenor on behalf of The Ohio Environmental Council and Environmental Law & Policy Center