

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke	)	Case No. 21-887-EL-AIR
Energy Ohio, Inc., for an Increase in Electric	)	
Distribution Rates.	)	
	)	
In the Matter of the Application of Duke	)	Case No. 21-888-EL-ATA
Energy Ohio, Inc., for Tariff Approval.	)	
	)	
In the Matter of the Application of Duke	)	Case No. 21-889-EL-AAM
Energy Ohio, Inc., for Approval to Change	)	
Accounting Methods.	)	

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**JOINT MOTION TO STRIKE  
OF  
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP  
AND  
THE KROGER CO.**

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Pursuant to R.C. 4901.18, Ohio Adm.Code 4901-1-12 and 4901-1-27, and Evid.R. 401, 402, 403, 408, 602, and 802, the Ohio Manufacturers' Association Energy Group (OMAEG) and The Kroger Co. (Kroger) (collectively, the Joint Movants) respectfully request that the Public Utilities Commission of Ohio (Commission) strike portions of the Initial Brief of the Office of the Ohio Consumers Counsel (OCC) filed on October 31, 2022 as improper, unreasonable, and prejudicial.

Specifically, the Joint Movants request that the Commission strike the following portions of OCC's Initial Brief:

- Page 4, the sentence beginning with the words "Ohio State Professor," and ending with "Dr. Hill's recommendations," including all related footnotes.
- Page 10, beginning with "The Settlement should," through page 11, ending "a diversity of interests," including all related footnotes.
- Page 29, beginning with "8. The settlement," through page 30, ending with "reject the settlement," including all related footnotes.

These portions of OCC's Initial Brief rely on testimony from entirely unrelated cases, involving different facts and separate parties, made by an individual who did not testify in this case. As such, the statements are outside the record in this case, and therefore, constitute improper and inadmissible hearsay, are irrelevant and prejudicial, and lack foundation. They should be stricken from the record accordingly.

Respectfully submitted,

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**BEFORE  
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In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates.	)	Case No. 21-887-EL-AIR
	)	
	)	
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	)	Case No. 21-888-EL-ATA
	)	
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Case No. 21-889-EL-AAM
	)	

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**MEMORANDUM IN SUPPORT**

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In support of its Initial Brief, OCC references and cites to portions of statements made by Dr. Ned Hill in relation to previous Commission cases that are outside the record in this case and taken out of context.<sup>1</sup> OCC pieces statements together purportedly claiming that this non-evidence demonstrates that several parties to this case are members of a so-called “redistributive coalition.” OCC also strings summary statements together to portray rulings by the Commission that simply do not exist. The use of testimony from another case in this fashion is improper and the Commission should give these arguments no weight and strike them from the brief.

These statements violate multiple rules of evidence. Under Evid.R. 801, 802, and 804, they constitute inadmissible hearsay.<sup>2</sup> For an individual’s prior testimony to be admissible in

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<sup>1</sup> Initial Brief of the Office of the Ohio Consumers Counsel at 4, 10-11, 29-30 (Oct. 31, 2022), *citing In re Dayton Power & Light Company Application to Modernize its Distribution Grid*, Case No. 18- 1875-EL-GRD, Opinion and Order at ¶ 70 (June 16, 2021) and *In the Matter of the Application of 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 Nos. 14-1297-EL-SSO, et al., Opinion and Order (Mar. 31, 2016).

<sup>2</sup> See *S.G. Foods, Inc. v. FirstEnergy Corp.*, Case Nos. 04-28-EL-CSS, et al., Entry at ¶¶ 58-64 (Mar. 7, 2006) (while the Commission is not strictly bound by the rule against hearsay, it will consider the rule when determining whether to admit evidence or what weight to give the evidence.)

another proceeding, the individual must be unavailable, and “the party against whom the testimony is now offered, or...a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”<sup>3</sup>

Moreover, statements about unrelated settlements are irrelevant and prejudicial, and lack foundation and probative value. Pursuant to Evid.R. 401 and 402, evidence that lacks any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable is inadmissible. Similarly, pursuant to Evid.R. 403, evidence must be deemed inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the factfinder, and evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence. Finally, Ohio Adm.Code 4901-1-27(B) affords the Commission the authority to exclude this type of evidence.<sup>4</sup>

The statements attributed to Dr. Hill by OCC in its Initial Brief constitute inadmissible hearsay by a person not a witness in this case and without personal knowledge of the facts of the present case. OCC had the opportunity to call witnesses in the case at hand and chose not to call Dr. Hill. OCC did not even attempt to call Dr. Hill, did not state that he was unavailable, and did not attempt to offer his testimony from those other cases into the record of this case.<sup>5</sup> The record is now closed and OCC cannot add to the record by citing to testimony from other cases involving different parties (including different utilities).

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<sup>3</sup> Evid.R. 804(B)(1).

<sup>4</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for an Adjustment to Rider MGP Rates*, Case Nos. 14-375-GA-RDR, et al., Opinion and Order at ¶¶ 44-46 (Apr. 20, 2022).

<sup>5</sup> *See* Initial Brief of the Office of the Ohio Consumers’ Counsel at 10-11 (Oct. 31, 2022).

At no point during the hearing or even in its Initial Brief does OCC even allege that Dr. Hill evaluated Duke's Application in this case, the Staff Report, the parties' objections, the settlement process, the Stipulation, or the Signatory Parties and Non-Opposing Parties. As such, Dr. Hill's statements are not relevant, offer no probative value, and do not establish any foundation of personal knowledge as to the facts of this case. OCC did not call Dr. Hill to the stand and offer him for cross-examination or afford the parties it accuses of "redistribution" the opportunity to develop cross-examination or rebuttal evidence regarding the facts of this case. Instead, OCC prejudicially compares the parties and facts concerning unrelated cases with testimony not offered or admitted into the record of the present case and without giving those parties the opportunity to counter the statements of Dr. Hill.

In short, OCC asks the Commission to make a factual determination in this case based on opinion testimony from a person who did not testify in this case. But, more importantly, OCC offers this testimony even though the Commission expressly rejected Dr. Hill's opinion in the cases in which it was offered. In one of the referenced cases in which Dr. Hill *did* testify and was cross-examined, the Commission found that:

[T]he Stipulation does not violate important regulatory principles based on OCC's redistributive coalition theory. Contrary to OCC's claims, the Signatory Parties represent a diverse interest of DP&L's customers, as well as various public interest groups. We are persuaded that residential customers were represented in negotiations through the participation of OPAE, the City of Dayton, and Staff. Moreover, many of the negotiated concessions contained in the Stipulation benefit all customer classes such that claims of bias or lack of protection as to residential customers are simply inaccurate. Overall, the terms of the Stipulation demonstrate that participants in the case fairly represented all customer classes and achieved substantial negotiated benefits such that claims of unfair influence by a redistributive coalition are not substantiated.<sup>6</sup>

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<sup>6</sup> *In re Dayton Power & Light Company Application to Modernize its Distribution Grid*, Case No. 18- 1875-EL-GRD, Opinion and Order at ¶ 70 (June 16, 2021).

It is unreasonable and misleading for OCC to misrepresent the above Commission ruling as supporting OCC's redistributive coalition theory as the Commission expressly rejected it, finding "claims of unfair influence by a redistributive coalition" to be "simply inaccurate."<sup>7</sup> Moreover, it is prejudicial for OCC to offer these irrelevant, unsupported statements without giving other parties, including the Joint Movants, any due process opportunity to cross examine the statements or rebut them.

The statements of Dr. Hill, and the portions of OCC's Initial Brief relying on those statements, violate multiple provisions of the Ohio Administrative Code and Ohio Rules of Evidence and should be stricken. Such statements serve only to prejudice, mislead, confuse, delay, and unnecessarily prolong the proceeding. As such, pursuant to R.C. 4901.18, Ohio Adm.Code 4901-1-12 and 4901-1-27, and Evid.R. 401, 402, 403, 408, 602, 801, 802, and 804 the Joint Movants respectfully request that the Commission strike the above-identified portions of OCC's Initial Brief.

Respectfully submitted,

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<sup>7</sup> *Id.*

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## **CERTIFICATE OF SERVICE**

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on November 14, 2022 upon the parties listed below.

/s/ Kimberly W. Bojko

Kimberly W. Bojko

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Summary: Motion Joint Motion to Strike electronically filed by Mrs. Kimberly W. Bojko on behalf of The Ohio Manufacturers' Association Energy Group and The Kroger Co.