

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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-AIR
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.)	Case No. 21-889-EL-AIR

**MEMORANDUM CONTRA THE JOINT MOTION TO STRIKE OF THE OHIO
MANUFACTURERS’ ASSOCIATION ENERGY GROUP AND THE KROGER
CO.
BY
OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

At a time of soaring energy prices, inflation and a potential recession, the Ohio Manufacturers’ Association Energy Group¹ and the Kroger Co.², among others, have signed a settlement³ to raise rates for consumers of Duke Energy Ohio, Inc.⁴ The settlement provides Duke with a \$23.1 million distribution service rate increase and costly rider charges, at the expense of residential consumers.

Now, the Joint Movants seek to keep the Public Utilities Commission of Ohio⁵ from considering the perspective of residential utility consumers by moving to strike

¹ “OMA.”

² Collectively referred to as “the Joint Movants.”

³ Stipulation and Recommendation (September 19, 2022) (“the settlement” or “the stipulation”).

⁴ “Duke.”

⁵ “PUCO” or “the Commission.”

arguments Ohio Consumers' Counsel⁶ made on their behalf. Specifically, the Joint Movants requested 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.

The PUCO should not grant the Joint Motion to Strike. The PUCO must determine whether the settlement is the product of serious bargaining, benefits consumers and the public interest, and does not violate important regulatory principles and practices.⁷ To do so, the PUCO must assess a full and accurate record and consider perspectives of all stakeholders, including residential consumers. That includes OCC's arguments based on Dr. Hill's testimony, which is relevant to whether the stipulation is a product of serious bargaining and benefits consumers and the public interest. Further, hearsay rules and their purposes do not require exclusion of Dr. Hill's testimony, for two reasons. First, the PUCO has the expertise to weigh Dr. Hill's testimony appropriately. Second, the Joint Movants themselves cross examined Dr. Hill on his testimony during a hearing in a prior case.⁸

⁶ "OCC."

⁷ Consumers' Counsel v. Pub. Util. Comm'n. (1992), 64 Ohio St.3d 123, 126.

⁸ See *In the Matter of the Application of the Dayton Power and Light Company for Approval of Its Plan to Modernize Its Distribution Grid*, Case No. 18-1875-EL-GRD.

Finally, OCC's references to Dr. Hill's testimony come from the PUCO's own orders.⁹ OCC may properly rely on the PUCO's discussions of Dr. Hill's testimony in those orders. For these reasons, OCC asks the PUCO to reject the Joint Movants' Motion to Strike.

II. LAW AND ARGUMENT

A. **Dr. Hill's expert testimony about the PUCO settlement process is relevant to whether the stipulation meets the PUCO's three-prong standard for approving settlements.**

Dr. Hill's testimony is relevant because it concerns whether the stipulation is the product of serious bargaining as well as whether it benefits consumers and the public interest. Dr. Hill is an expert in regulation and energy economics.¹⁰ On this topic, he has authored several academic research papers and testified before the Ohio General Assembly as well as multiple regulatory bodies, including the PUCO.¹¹ As an expert, Dr. Hill may provide his opinion about matters outside his personal knowledge, per Evid. R. 602.

Dr. Hill's expert testimony is relevant to OCC's arguments in opposition to this stipulation. In summary, Dr. Hill previously testified at hearing that a group of signatories (a "redistributive coalition") representing narrow special interests can create the illusion of widespread support for a stipulation that does not benefit most consumers.¹² A utility may induce these parties to support a stipulation by including provisions that benefit their

⁹ OCC Initial Brief at 4 ("Ohio State Professor Ned Hill has criticized such settlement practices, *as described in PUCO orders* where the PUCO did not act upon Dr. Hill's recommendations.") (emphasis added); *see also* OCC Initial Brief at 10, notes 23 and 24.

¹⁰ Direct Testimony of Edward W. Hill, Ph.D. (December 17, 2020) ("Hill Direct") at 1-19 to 4-14.

¹¹ *Id.*

¹² Hill Direct at 6-15 to 9.

narrow self-interests, rather than consumers generally.¹³ Dr. Hill provided this opinion about the PUCO settlement process generally, in his capacity as an expert on regulation and energy economics. This testimony is relevant to whether any stipulation before the PUCO, including the one at issue in this case, is the product of serious bargaining and benefits consumers. Because Dr. Hill's expert opinion about the PUCO settlement process is relevant to the first two prongs of the PUCO's standard for assessing stipulations, the PUCO should not strike it.

B. The PUCO can give Dr. Hill's testimony appropriate weight without striking it from the record.

The PUCO should not strike Dr. Hill's testimony because the PUCO is not strictly bound by the rule excluding hearsay. The PUCO has "allowed the admission of hearsay testimony" when it has "deemed it appropriate."¹⁴ One purpose of the hearsay rules is to address "concerns regarding jurors' inability to weight evidence appropriately...."¹⁵ This concern is "inapplicable to administrative proceedings before the Commission because the Commission has the expertise to give the appropriate weight to testimony and evidence."¹⁶ So, even if Dr. Hill's testimony is hearsay, the PUCO need not strike it or OCC's related arguments. The PUCO has the expertise to weigh Dr. Hill's testimony as it deems appropriate.

¹³ *Id.*

¹⁴ *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376, Opinion and Order (December 14, 2011) at 29.

¹⁵ *Id.*

¹⁶ *Id.*

Another “purpose of the rule against hearsay is to keep unreliable evidence, particularly evidence that is not subject to cross-examination,” out of the record.¹⁷ This purpose does not apply to Dr. Hill’s testimony, about which he was cross examined at a prior hearing. And under Evid. R. 804(b)(1), a now-unavailable witness’s testimony in a prior hearing is admissible where parties had “an opportunity and similar motive to develop it by direct, cross-, or redirect examination.”¹⁸ Dr. Hill testified in opposition to another stipulated rate increase that parties similar to this case’s supported.¹⁹ As in the present case, these parties included utilities, retail suppliers, PUCO Staff, as well as commercial and industrial customers, *including the Joint Movants – OMA and the Kroger Co.*²⁰ Further, at hearing, both OMA and the Kroger Co. cross examined Dr. Hill extensively on the topic of redistributive coalitions.²¹ Since the parties seeking to strike Dr. Hill’s testimony about redistributive coalitions already cross examined him on it in a prior case, it is uniquely reliable. The PUCO should not exclude the testimony or OCC’s arguments on the basis of the hearsay rules.

C. The motion to strike improperly seeks to strike OCC’s arguments based on the record evidence in this case, and from PUCO Orders.

Joint Movants’ motion to strike should also be denied because it is overbroad and seeks to strike OCC’s arguments based on evidence in this record. For example, Joint Movants seek to strike OCC’s arguments at pages 10-11 regarding the narrow interests of

¹⁷ *State v. Bradley*, 7th Dist. Columbiana No. 11 CO 26, 2012-Ohio-5880, ¶ 39.

¹⁸ *See Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289, 1295 (6th Cir. 1983) (deposition testimony of witness in prior case was admissible where defendants in that case “had a similar motive in confronting [expert]’s testimony, both in terms of appropriate objections and searching cross-examination, to that which [defendant] has in the current litigation”).

¹⁹ Hill Direct at 4.

²⁰ Joint Stipulation and Recommendation (December 23, 2020) at 54.

²¹ Hearing Transcript I (January 28, 2021), at 603-682.

the City of Cincinnati. Joint Movants also seek to strike similar arguments at pages 29-30 regarding the City of Cincinnati, People Working Cooperatively, and Ohio Partners for Affordable Energy. But OCC's arguments are supported by OCC witness Williams *in this case*,²² independent from Dr. Hill's testimony in prior matters. Accordingly, the PUCO should deny the motion to strike. Finally, OCC's references to Dr. Hill's testimony come from the PUCO's own orders. OCC may properly rely on the PUCO's discussions of Dr. Hill's testimony in those Orders.

III. CONCLUSION

To determine whether the stipulation meets its three-prong standard for approval, the PUCO must consider a full and accurate record that reflects perspectives of all stakeholders, including residential consumers. Striking OCC's arguments and excluding Dr. Hill's testimony from consideration would be unfairly prejudicial to consumers. The PUCO should deny the Joint Movants' Motion to Strike.

²² See OCC Ex. 3 (Williams Supplemental) at 5, 7-8.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra the Joint Motion to Strike of the Ohio Manufacturers' Association Energy Group and the Kroger Co. was served on the persons stated below via electronic transmission, this 21st day of November 2022.

/s/ Angela D. O'Brien

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Summary: Memorandum Memorandum Contra the Joint Motion to Strike of the Ohio Manufacturers' Association Energy Group and the Kroger Co. by Office of the Ohio Consumers' Counsel electronically filed by Ms. Alana M. Noward on behalf of O'Brien, Angela D.