

**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.)	

**MEMORANDUM CONTRA MOTION FOR LEAVE
BY
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP
AND
THE KROGER CO.**

On November 21, 2022, four days out of time,¹ OCC filed a Motion for Leave to File and simultaneously filed a Memorandum Contra the Joint Motion to Strike (Memo Contra), attempting to argue that the unsupported, prejudicial, and irrelevant hearsay statements should be admitted into the record.² In addition to being out of time, OCC's Memo Contra misstates hearsay rules,³ misrepresents Commission holdings⁴ and procedural history,⁵ and relies on the assertion that the declarant's statements are somehow relevant to this proceeding despite no indication that the

¹ See Entry at ¶ 8 (Sept. 20, 2022) (shortening the memorandum contra period to three business days).

² See OCC Memo Contra.

³ *Id.* at 5 (ignoring the unavailability requirement for prior testimony).

⁴ *Id.* at 6 (arguing that the improper statements “come from the PUCO’s own orders.”).

⁵ *Id.* at 5 (arguing that the Joint Movants cross examined the declarant on the alleged “redistributive coalition” more than a year before the Joint Stipulation was filed).

declarant is actually familiar with the facts of this case.⁶ The Commission should not accept OCC's Memo Contra for failing to comply with the procedural schedule.

OCC failed to cite to any extraordinary circumstance that exists to allow it to file its Memo Contra four days late. By filing its Memo Contra out of time, OCC has further prejudiced the Joint Movants.⁷ As the Joint Movants noted in their Joint Motion to Strike, OCC's Initial Brief already prejudiced them by forcing them to spend time responding to unsubstantiated, unsupported, and irrelevant out-of-court statements.⁸ Now, Joint Movants are further prejudiced by being forced to reply to this pleading before the holidays. Like OCC, the Joint Movants are also involved in multiple concurrent cases and have limited resources, but OCC's pleading is not one day late, it is four days late. Additionally, OCC has failed to demonstrate good cause for its requested extension of time, which is fatal to the request.⁹ OCC cannot have possibly been surprised that parties would object to a last-minute attempt to inject non-record evidence into its pleadings that was never admitted into the record in this hearing. In fact, OCC did not even raise the issue of a redistributive coalition at hearing, or request the testimony of the declarant to be admitted into the record, or state its intent to rely on extra record evidence to argue the point in its brief.

⁶ OCC Memo Contra at 2 (arguing the statements are "relevant to whether the stipulation is a product of serious bargaining" despite no indication the declarant reviewed the Joint Stipulation).

⁷ See Motion for Leave (Nov. 21, 2022).

⁸ Joint Motion to Strike at 3.

⁹ See *In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Adm.Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at ¶ 23 (Feb. 10, 2022), citing Ohio Adm.Code 4901-1-13.

As such, the Commission should not grant OCC authority to file its Memo Contra out of time and should not consider OCC's arguments against the Joint Motion to Strike.

Respectfully submitted,

/s/ Kimberly W. Bojko

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/s/ Kimberly W. Bojko

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Case No(s). 21-0887-EL-AIR, 21-0888-EL-ATA, 21-0889-EL-AAM

Summary: Memorandum Contra Motion for Leave electronically filed by Mrs.
Kimberly W. Bojko on behalf of The Ohio Manufacturers' Association Energy Group
and The Kroger Co.