

IN THE SUPREME COURT OF OHIO

<b>THE KROGER CO.,</b>	:	
	:	<b>Case No. 2013-0521</b>
<b>Appellant,</b>	:	
	:	<b>Appeals from the Public Utilities</b>
	:	<b>Commission of Ohio</b>
<b>v.</b>	:	
	:	
<b>THE PUBLIC UTILITIES</b>	:	<b>Public Utilities Commission of Ohio</b>
<b>COMMISSION OF OHIO,</b>	:	<b>Case Nos. 11-346-EL-SSO,</b>
	:	<b>11-348-EL-SSO, 11-349-EL-AAM,</b>
<b>Appellee.</b>	:	<b>11-350-EL-AAM.</b>

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**APPELLEE/CROSS-APPELLANT OHIO POWER COMPANY'S AND  
APPELLEE PUBLIC UTILITIES COMMISSION OF OHIO'S JOINT  
MEMORANDUM IN OPPOSITION TO JOINT MOTION FOR AN ORDER  
INCREASING THE TIME FOR ORAL ARGUMENT OF APPELLANTS  
FILED BY THE KROGER CO., INDUSTRIAL ENERGY USERS-OHIO,  
OHIO ENERGY GROUP, AND THE OHIO CONSUMERS' COUNSEL**

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## **I. INTRODUCTION**

On April 9, 2015, the Court issued an Entry that specified the procedure to be followed during oral argument in this case. Specifically, the Court ordered that “Appellants The Kroger Co., Industrial Energy Users-Ohio, The Office of the Ohio Consumers’ Counsel and The Ohio Energy Group shall argue first and are permitted ten minutes of oral argument time.” Entry (Apr. 9, 2015). The Court also allotted ten minutes of oral argument time to Ohio Power Company (AEP Ohio), which as the applicant in the proceeding below and as the only Cross-Appellant/Appellee in this appeal stands diametrically opposed to all of the positions advanced by all of those Appellants in this appeal. Finally, the Court also granted ten minutes of oral argument time to the Public Utilities Commission of Ohio (Commission), which as the Appellee in this appeal seeks to defend its decision in all of the appeals. In short, the Court, in logical fashion, granted the same amount of oral argument time to each of the three principal points of view being advanced in this appeal.<sup>1</sup>

On April 15, 2015, The Kroger Co., Industrial Energy Users-Ohio, The Office of the Ohio Consumers’ Counsel, and The Ohio Energy Group (collectively, “Joint Movants”) filed a motion requesting that the Court amend its April 9, 2015 Entry “and afford each Joint Movant[ ] ten minutes individually to present its arguments to the Court.” (Mem. in Supp. at 4.) Joint Movant’s motion lacks merit, and the Court should deny it.

## **II. LAW AND ARGUMENT**

The April 9, 2015 Entry’s direction that Joint Movants share ten minutes for argument is reasonable and consistent with the Court’s Rules of Practice. *See* S.Ct.Prac.R. 17.05. Consistent

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<sup>1</sup> The Entry indicated that the Commission (Appellee) and the Industrial Energy Users - Ohio (Appellant) should share the third segment of 10 minutes. The Commission will address this aspect of the Entry by separate motion.

with S.Ct.Prac.R. 17.05, the Court has already decided, *sua sponte*, that Joint Movants' time for oral argument be varied as the Entry directs. The first 10-minute segment of time providing for Joint Movants to share time is reasonable and practical, given the substantial alignment of interests among the Joint Movants. The Court's allocation of oral argument time in this appeal is consistent with how it has allocated time in other appeals of PUCO. That determination was reasonable and need not be modified.

Joint Movants have not demonstrated that good cause exists to grant their request. This case concerns no more issues and involves no more parties than the typical ratemaking appeal that comes before this Court. Moreover, contrary to Joint Movants' contention that the Appellants "do not advance similar challenges" to the Commission's decision, Joint Movants' interests and arguments are overlapping and align with one another.<sup>2</sup> Finally, neither of the cases to which Joint Movants cite actually supports their argument that "[u]nder similar circumstances to those presented by this case, the Court has issued order[s] for the orderly presentation of arguments to the Court." (Mem. Supp. at 5.) In *Payphone Ass'n* and *In re Estate of Mason*, the Court did not enlarge the time for oral argument in the manner Joint Movants request, it merely issued decisions akin to its April 9, 2015 Entry in this case, allotting an equal amount of time to each of the three parties to that case. *Payphone Ass'n of Ohio v. Pub. Util. Comm.*, 2005-Ohio-4803, 834, N.E.2d 355; *In re Estate of Mason*, 107 Ohio St.3d 1704, 2006-Ohio-13, 840 N.E.2d 208. Joint Movants have cited no precedent supporting their request that Appellants be given four times as much argument time as either Appellee/Cross-Appellant Ohio Power Company

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<sup>2</sup> As is readily apparent from the table of contents in AEP Ohio's Second Brief in this case (responding to Appellant's arguments), every proposition of law responds to multiple, overlapping arguments by Appellants. (October 21, 2013 Merit Brief of Cross-Appellant/Appellee at i-iii.) For example, AEP Ohio's Proposition of Law No. I addresses overlapping arguments from all four Appellants that challenge the Retail Stability Rider. (*Id.* at i.)

(“Ohio Power”) or Appellee The Public Utilities Commission of Ohio (“Commission”) would have.<sup>3</sup> That request is unreasonable, and the Court should deny it.

Giving each Appellant its own ten minute block of time to present oral argument also would be a dangerous precedent that would encourage the filing of additional appeals in future cases. The reality is that appellants already coordinate in the presentation and pursuit of challenges before this Court and, if each appellant gets a separate block of time in this kind of appeal, the result would be to give one side of the appeal an inordinate and unfair advantage during oral argument.<sup>4</sup>

Finally, if the Court does grant Joint Movants’ motion, the Court should give Ohio Power and the Commission argument time equal to Joint Movants’ total time. Otherwise, Joint Movants will be unfairly advantaged, and Ohio Power and the Commission unfairly disadvantaged, by the disproportionate amount of time afforded to Joint Movants’ arguments and the lack of adequate time to respond thereto and for Ohio Power’s own cross-appeal arguments.

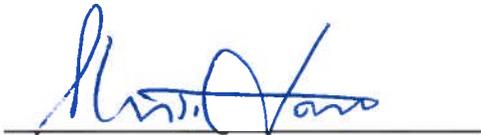
### **III. CONCLUSION**

For the foregoing reasons, Joint Movants’ motion to expand their time for argument fourfold is without merit. The Court should deny it. Alternatively, if the Court grants the motion, it should also order that AEP Ohio and the Commission be granted forty minutes of argument time.

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<sup>3</sup> In fact, the cases Joint Movants cite support that AEP Ohio and the Commission should each have equal the amount of argument time granted to Joint Movants – if there is going to be 40 minutes for the Appellant side of the appeals.

<sup>4</sup> It is also grossly disproportionate to the amount of time appellants in other, equally or more significant appeals are given. To put Joint Movant’s request into perspective, Appellants here seek forty minutes of argument time, while death penalty appellants receive only thirty minutes. *See* S.Ct.Prac.R. 17.05(A)(1).



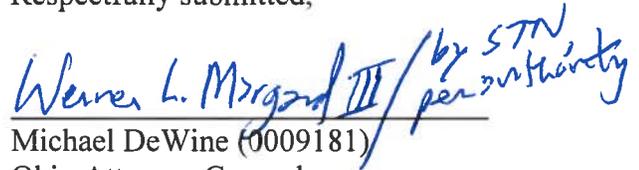
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## CERTIFICATE OF SERVICE

I certify that the foregoing *Joint Memorandum in Opposition to Joint Movants' Motion For An Order Increasing The Time For Oral Argument Of Appellants* was served by First-Class U.S. Mail or hand delivery upon counsel for parties to this proceeding, identified below, this 20<sup>th</sup> day of April, 2015.



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