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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan	**Case No. 10-388-EL-SSO**

MEMORANDUM OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY CONTRA APPLICATION FOR REHEARING BY ENERNOC, INC.

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I. INTRODUCTION

In its Application for Rehearing, EnerNOC, Inc. ("EnerNOC") challenges the Commission's administrative notice of the record in Case No. 09-906-EL-SSO ("MRO Case"). EnerNOC argues that notice was improper because "disputed facts exist" and because it violates due process. (*See* Reh'g App., pp. 3, 4.) Both of these arguments fail. Indeed, in making these arguments, EnerNOC betrays: (1) a misunderstanding of the Commission's April 6, 2010 Entry; (2) the lack of any resulting prejudice; and (3) an incomplete rendering of constitutional due process authority. EnerNOC's Application for Rehearing should be denied.

First, EnerNOC misconstrues the April 6 Entry. EnerNOC alleges that the Commission accepted disputed "facts" from the MRO Case pertaining to Economic Load Response ("ELR") and Optional Load Response ("OLR") Riders. (Reh'g App., p. 2.) But that is not so. The April 6 Entry merely directed that the MRO Case testimony and exhibits would be part of the record in this case. No "fact" pertaining to Riders ELR and OLR—or anything else—has been accepted as conclusive in this proceeding. No issues have been decided. No portion of the record has been weighed, credited or discounted. Rather, the Commission will make those determinations only after considering all evidence from the MRO Case record and the hearing in this proceeding.

Second, because EnerNOC has a full opportunity to present its case before the Commission makes those decisions, EnerNOC will suffer no prejudice. EnerNOC apparently disagrees with certain evidence in the MRO Case record. (Reh'g App., p. 2 ("EnerNOC disagrees with and contests FirstEnergy's assertions . . . .").) Its proposed solution—the exclusion of the MRO Case record—is wrong and unfair to other parties. Simply put, the Commission should not strike testimony and exhibits just because EnerNOC "contests" them.

EnerNOC has been and is not without recourse. It has had the right to sponsor testimony to support its claims and to highlight alleged flaws in the MRO Case record (and has already

done so). (*See* Direct Testimony of Kenneth Schisler dated Apr. 15, 2010.) It has had the right to cross-examine other parties' witnesses, which it did during the hearing in this proceeding. And it may discuss that evidence in post-hearing briefs. Because EnerNOC has been allowed to fully litigate its claims, it has suffered no prejudice.

EnerNOC's due process argument fails. A party claiming a violation of due process must show three things: (1) that party has a constitutionally protected interest; (2) a deprivation of that interest; and (3) constitutionally inadequate procedures prior to the deprivation. (*See* pp. 9-10, *infra.*) EnerNOC fails to make these showings. EnerNOC identifies no protected interest and fails to explain how (given that a decision is still pending) a deprivation has occurred. Nor does EnerNOC account for the procedures it has been afforded—the opportunity to intervene (which it took and was granted), file testimony (which it did), participate in hearing (which it did also), and brief the case (which presumably it will do). In sum, EnerNOC's due process claim is completely unsupported (and unsupportable) and should be rejected.

II. ARGUMENT

An application for rehearing may be granted only where the applicant demonstrates that a Commission order is "unreasonable or unlawful." R.C. 4903.10; *see* Rule 4901-1-35(A), Ohio Administrative Code. As demonstrated below, the Commission's administrative notice of the MRO Case record was not "unreasonable or unlawful." EnerNOC has failed to meet its burden, and its Application for Rehearing should be denied.

A. The Commission Properly Took Administrative Notice Of The Record In The MRO Case.

The Commission's decision to admit in this proceeding the MRO Case testimony and exhibits was neither unreasonable nor unlawful. In deciding whether administrative notice of a Commission record is appropriate, the Commission and the Supreme Court consider two factors:

> The factors we deem significant include [1] whether the complaining party had prior knowledge of, and had an adequate opportunity to explain and rebut, the facts administratively noticed. Moreover, [2] prejudice must be shown before we will reverse an order of the Commission.

Allen v. Pub. Util. Comm. (1988), 40 Ohio St. 3d 184, 185, 186 (noting that propriety of administrative notice is determined "based on the particular facts presented"); *see Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St. 3d 1, 8 (same).

EnerNOC's argument fails on both counts. First, EnerNOC suffered no prejudice from administrative notice of the MRO Case record. EnerNOC identifies no "fact" from that record that was conclusively established for purposes of this proceeding, and it will have a full opportunity to challenge evidence regarding the extension of Riders ELR and OLR (which it did during this proceeding), to present countervailing testimony (which it did during this proceeding) and to advocate its position in post-hearing briefs. Second, EnerNOC had ample notice that those riders were at issue in the MRO Case and a fair opportunity to intervene to be heard on them. The Commission properly took administrative notice of the MRO Case record.

1. EnerNOC misconstrues the April 6 Entry and suffered no prejudice from it.

In its April 6 Entry, the Commission held:

> FirstEnergy requested that the Commission take administrative notice of the record in Case No. 09-906-EL-SSO for purposes of this proceeding. The Commission finds that FirstEnergy's request is reasonable and should be granted. ***All testimony and exhibits which were admitted into evidence in Case No. 09-906-EL-SSO shall be admitted into the evidentiary record of this proceeding.*** Further, all briefs and other pleadings filed in Case No. 09-906-EL-SSO may be used for any appropriate purpose in this proceeding.

Apr. 6 Entry, ¶ 6 (emphasis added).

EnerNOC alleges that (i) the Commission thus "attempts to take administrative notice of ***facts*** from [the MRO Case] that are disputed"; and (ii) EnerNOC has been prejudiced as a result. (*See* Reh'g App., p. 2 (emphasis added).) Neither proposition is true.

(a) No "facts" have been administratively noticed.

In the April 6 Entry, the Commission took administrative notice of the MRO Case ***record itself***—not any "facts." The Entry states, "All testimony and exhibits which were admitted into evidence in [the MRO Case] shall be admitted into the evidentiary record of this proceeding." Apr. 6 Entry, ¶ 6. This means merely that parties may refer to the MRO testimony and exhibits without having to re-introduce them here. The Entry's purpose is clear: to avoid the unnecessary expenditure of time and administrative resources associated with the re-introduction of the very same evidence admitted in the MRO Case just four months ago.

It also clear what the Commission did ***not*** do—it did not find any "facts." No "fact" from the MRO Case—whether relating to Riders ELR and OLR or otherwise—is conclusive in this proceeding. The Commission did not decide any issue, weigh the credibility of opposing testimony or credit (or discount) any MRO Case evidence. To the extent that record contains conflicting evidence, the Commission has not resolved those conflicts. The Commission has simply re-admitted the MRO Case record; the Commission has decided nothing about the merits of the evidence contained therein.

EnerNOC does not claim otherwise, and its own Application for Rehearing belies its argument. Although EnerNOC notes that it disagrees with proposed Riders ELR and OLR, EnerNOC fails to identify a single "fact" regarding on that issue that was accepted for purposes of this proceeding. EnerNOC has failed to show even the existence of a "fact" supporting the Companies' alleged proposed Riders ELR and OLR in the MRO Case, much less one that was

conclusively determined by the Commission.[1] (*See* Reh'g App., p. 6 (alleging that MRO fact could not be noticed "***[t]o the extent that any evidence was offered***) (emphasis added).)

(b) EnerNOC has suffered no prejudice.

To prevail on its Application, EnerNOC must demonstrate prejudice from the April 6 Entry. It has failed. As shown above, EnerNOC has not identified a single disputed "fact" pertaining to Riders ELR and OLR that appears in the MRO Case record.

But even if EnerNOC had, admission of that evidence in this proceeding does not prejudice EnerNOC. EnerNOC is not entitled to strike MRO testimony and exhibits simply because it disagrees with them. (*See* Reh'g App., p. 2 ("EnerNOC disagrees with and contests FirstEnergy's assertions . . . .").) Rather, the proper way to resolve this disagreement—and the method provided by the Commission—is to cross-examine other parties' witnesses in the ESP proceeding, sponsor countervailing testimony and present relevant arguments in post-hearing briefs. EnerNOC has had—and taken—the opportunity to do all of this; it already has filed testimony and participated at hearing. (*See* Direct Testimony of Kenneth Schisler dated Apr. 15, 2010 and cross-examination conducted by EnerNOC counsel.) Moreover, the MRO Case record is not a secret. If EnerNOC believes evidence from that case is faulty, it has had the right to present evidence and make arguments on this subject. Because EnerNOC has had a full opportunity to highlight and challenge portions of the MRO Case record with which it disagrees,

[1] Indeed, EnerNOC contradicts itself as to whether certain facts from the MRO Case even exist. On one hand, EnerNOC seeks to exclude the Companies' evidence from the MRO Case that supported the extension of the riders. (*See* Reh'g App., p. 2 ("EnerNOC disagrees with and contests FirstEnergy's assertions relating to the propriety of extending Riders ELR and OLR . . . .").) Yet, on the other (and in the same sentence), EnerNOC acknowledges that "FirstEnergy proposed to extend [the riders] for the very first time on the record in its [ESP] Stipulation." (*Id.*) If the first time the Companies proposed extending those riders was in the ESP Stipulation (which is the crux of EnerNOC's supposed "prejudice"), then the Companies could not offer evidence supporting such extension in the MRO Case.

it has suffered no prejudice.[2] *See, e.g., Ohio Edison Co. v. Pub. Util. Comm.* (1992), 63 Ohio St. 3d 555, 560 (affirming administrative notice of utility's stock price, where no showing of prejudice); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (1984), 12 Ohio St. 3d 280, 285 (affirming administrative notice of industry standard reflected in Federal Communications Commission order, where no prejudice to utility); *see also City of Canton v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 76, 80 n. 1 (affirming administrative notice, where contracts from prior litigation were admitted into evidence of subsequent proceeding).

2. EnerNOC had prior notice that Riders ELR and OLR were at issue in the MRO Case and an opportunity to intervene to explain its position.

By its own admission, EnerNOC is no stranger either to Commission proceedings generally or to the MRO Case. In moving to intervene here, EnerNOC noted its own "extensive experience and expertise practicing before state and federal commissions." (Mot. to Intervene Memo. dated Mar. 29, 2010, p. 5.) Because "EnerNOC provides demand response and energy efficiency services to many Ohio retail customers," its business depends on the Ohio regulatory environment. (*See id.* at 4.)

According to the testimony of EnerNOC's Senior Director of Regulatory Affairs, Kenneth Schisler, EnerNOC keeps abreast of the developments in the regulatory arenas in which it might seek to do business. (Tr. Vol. II, p. 281; *see* EnerNOC Mot. to Vacate dated Apr. 16,

[2] EnerNOC devotes much of its Application to discussing Ohio R. Evid. 201, Fed. R. Evid. 201 and related case law, but that discussion and those authorities are irrelevant. The Commission is not bound by the Ohio Rules of Evidence and, as demonstrated above, the Court repeatedly has stated a different two-factor analysis used in evaluating administrative notice by the Commission. *See Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St. 3d 1, 8; *Allen v. Pub. Util. Comm.* (1988), 40 Ohio St. 3d 184, 185; *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1984), 14 Ohio St. 3d 49. Under that analysis, administrative notice of the MRO Case record was proper. (*See* pp. 2-6, *supra.*) Moreover, the Ohio and federal rules are irrelevant because they apply where a court has taken judicial notice of a "fact." As demonstrated above, the Commission did not notice a "fact"; it simply re-admitted the MRO Case record (*i.e.*, essentially taking administrative notice ***of the admissibility*** of that record). State and federal rules and case law pertaining to judicial notice have no bearing on this case.

2010, p. 2.) EnerNOC's witness further admitted that the status of Riders ELR and OLR was something that was very important to EnerNOC's business. (Tr. Vol. II, p. 286.)

In "monitoring" the Commission's proceedings, then, EnerNOC no doubt was aware that the Commission specifically required the Companies to offer interruptible service options as a result of their 2008 MRO proceeding. *See* Op. and Order dated Nov. 25, 2008, No. 08-936-EL-SSO, p. 24. EnerNOC must also have known that in the Companies' 2008 ESP case, Riders ELR and OLR were discussed and explicitly approved by the Commission. *See* Second Op. and Order dated Mar. 25, 2009, No. 08-935-EL-SSO, p. 10.

EnerNOC's witness Schisler further admitted that EnerNOC was not only aware of the MRO Case, but it actively monitored those proceedings. (Tr. Vol. II, p. 283.) EnerNOC reviewed various filings in the case (*id.*, pp. 286-88) and was aware of the opposition to the expiration of Riders ELR and OLR voiced by various parties in that case. (*Id.*, pp. 286-87.) And during the MRO Case itself, EnerNOC maintained discussions with the Companies regarding the potential effect of that proceeding on those riders. (*Id.*, pp. 284-84; *see* EnerNOC Mot. to Vacate dated Apr. 16, 2010, pp. 1, 2.)

Thus, EnerNOC had fair warning that Riders ELR and OLR would be addressed in that proceeding, and would know from the testimony in that case that at least two parties recommended their continuation. (*See* Direct Testimony of Stephen J. Baron dated Dec. 7, 2009, pp. 3-4, 14 (Ohio Energy Group); Direct Testimony of Dr. Dennis Goins dated Dec. 4, 2009, pp. 7, 25 (Nucor Steel Marion, Inc.).)

EnerNOC also would have known that the fate of Riders ELR and OLR was not certain by its participation in the cases before the Commission reviewing the Companies' Energy Efficiency and Peak Demand Reduction Plans (*e.g.*, Case No. 09-1947-EL-POR). As Mr.

Schisler admitted, EnerNOC intervened in that case. (Tr. Vol. II, pp. 320-23.) As part of that case, the Companies publicly stated in the plans under review:

> As a component of the Market Rate Offer (Case No. 9-906-EL-SSO) filed in the fall of 2009, the Company proposed to substitute a Request for Proposal process to secure customer commitments to reduce loads, rather than continue the provisions included in the ELR and OLR riders. This issue is currently the subject of litigation and, therefore, it is not yet known whether the Request for Proposal process will be incorporated in 2011 as currently contemplated

(Energy Efficiency and Peak Demand Reduction Program Portfolio and Initial Benchmark Report dated Dec. 15, 2009, Nos. 09-1947-EL-POR, *et al.*, p. 26.)

The record shows that EnerNOC is not shy about advocating its position before the Commission. In just the last two years alone, EnerNOC has filed comments in Commission proceedings regarding proposed energy efficiency rules and sought intervention in at least six SSO and other proceedings filed by Ohio electric utilities. (*See, e.g., In re Application of Ohio Edison Co., the Cleveland Elec. Illuminating Co. and The Toledo Edison Co for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan*, No. 10-388-EL-SSO, Mot. to Intervene dated Mar. 29, 2010; *In re Application of Columbus So. Power Co. to Amend its Emergency Curtailment Service Riders, et al.*, Nos. 10-343-EL-ATA, *et al.*, Mot. to Intervene dated Mar. 23, 2010; *In re Application of Columbus So. Power Co. for Approval of its Program Portfolio Plan and Request for Expedited Consideration, et al.*, Nos. 09-1089-EL-POR, *et al.*, Mot. to Intervene dated Jan. 15, 2010; *In re Application of Ohio Edison Co., the Cleveland Electric Illuminating Co., and the Toledo Edison Co. for Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2010 through 2012 and Associated Cost Recovery Mechanisms, et al.*, Nos. 09-1947-EL-POR, *et al.*, Mot. to Intervene dated Jan. 13, 2010; *In re Proposal of FirstEnergy Service Co. to Modify its RTO Participation*, No. 09-778-EL-UNC, Mot. to Intervene dated Sept. 23, 2009; *In re*

Application of Columbus So. Power Co. and the Ohio Power Co. for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan, Nos. 08-917-EL-SSO, *et al.*, Mot. to Intervene dated Oct. 10, 2008; *In re Adoption of Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements, et al.*, No. 08-888-EL-ORD, EnerNOC's Comments On Staff's Proposed Rules – New Chapter 4901:1-39, Sept. 9, 2008.)

As a frequent, sophisticated participant in Commission proceedings, EnerNOC was on notice that Riders ELR and OLR were at issue in the MRO case and had every opportunity to participate and rebut the evidence presented on them. EnerNOC identifies no evidentiary infirmity in the MRO Case record—it just disagrees with parts of it. That EnerNOC chose not to participate in that proceeding does not mean that all other parties (and the Commission) must pretend it never happened. EnerNOC's Application for Rehearing should be denied.

B. Administrative Notice Of The MRO Case Record Does Not Violate Due Process.

Not content merely to argue that the April 6 Entry violated the two-factor *Allen* test (which it did not), EnerNOC attempts to breathe constitutional significance into the Commission's decision. Specifically, EnerNOC argues that administrative notice violated the Due Process Clauses of the Ohio and United States Constitutions. (Reh'g App., pp. 4-6.) This effort falls flat, and quickly. "In order to establish a procedural due process claim, a plaintiff must show that (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest." *Waeschle v. Dragovic*, 576 F. 3d 539, 544 (6th Cir. 2009). A cursory review of its claim shows that EnerNOC fails all three prongs.

First, EnerNOC has no constitutionally protected property interest at stake in this case. "[P]roperty interests are principally created by state law . . . [and] [t]he due process clause only protects those interests to which one has a legitimate claim of entitlement." *Id.* at 544. Here, EnerNOC does not allege ***any*** property interest, much less one protected by the Constitution. Nor does EnerNOC identify the state statute or other authority that creates it. EnerNOC fails this prong.

Second, even indulging the notion that a protected interest exists, one can find no deprivation of it. As it stands today, Riders ELR and OLR are set to expire on May 31, 2011, just as EnerNOC prefers. (*See* Direct Testimony of Kenneth Schisler dated Apr. 15, 2010, p. 3.) Although the Companies and other supporters of the Stipulation proposed that the riders be in place beyond that date, decision on that issue is reserved to the Commission, which has yet to decide whether to accept the proposal. And unless it does, EnerNOC will not be deprived of its hypothetical property interest. EnerNOC fails this prong as well.

Third, the Commission has provided EnerNOC with constitutionally adequate means to address its concerns regarding Riders ELR and OLR. Here, EnerNOC has constitutionally-adequate process in this case. *See Lane Hollow Coal Co. v. Director, Office of Workers' Compensation Programs*, 137 F.3d 799, 808 (4th Cir. 1998) ("core components of due process" are "notice and the right to a hearing"); *Fries v. Helsper*, 146 F.3d 452, 458 (11th Cir. 1998) ("[Party] had his day in court and has been rendered due process of law"). Before the Commission decides whether to approve Riders ELR and OLR, EnerNOC will have had the opportunity to challenge evidence in favor of that extension, present evidence opposing it, and make relevant arguments in post-hearing briefs. By the time the Commission makes its decision,

EnerNOC will have had its "day in court." EnerNOC fails this prong as well, and it cannot remotely support a due process claim.[3]

III. CONCLUSION

For the above reasons, the Companies respectfully request that the Commission deny EnerNOC's Application for Rehearing.

[3] The case authorities cited by EnerNOC in support of its due process argument, all of which deal with administrative or judicial notice, are easily addressed. None of them find a due process violation in the context of faulty judicial notice, none support application of a due process framework to judicial or administrative notice questions and, but for one exception where recounting a party's (losing) argument, none even mention the words "due process."

DATED: April 29, 2010

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Application for Rehearing by EnerNOC, Inc. was delivered to the following persons by e-mail this 29th day of April, 2010:

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