FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generation Assets.	))))))	Case No. 08-917-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan.	)))))	Case No. 08-918-EL-SSO

REPLY TO MEMORANDUM CONTRA MOTION TO STRIKE PORTIONS OF COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO POWER COMPANY'S INITIAL POST HEARING BRIEF ON REMAND BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND OHIO PARTNERS FOR AFFORDABLE ENERGY AND INDUSTRIAL ENERGY USERS-OHIO

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC"), Ohio Partners for Affordable Energy ("OPAE"), and Industrial Energy Users-Ohio ("IEU") reply to the memorandum contra ("Memo Contra") filed by Columbus Southern Power Company and Ohio Power Company (collectively, the "Companies" or "AEP Ohio") on August 16, 2011. The Companies' Memo Contra responded to a motion to strike jointly filed by OCC and OPAE on August 10, 2011 as well as to a motion to strike filed by IEU on August 11, 2011. These motions to strike applied to portions of the Companies' Initial Post Hearing Brief on Remand ("Initial Remand Brief") filed on August 5, 2011.

The portion of the Companies' Initial Remand Brief that is the subject of the motions to strike begins on page 30, first paragraph, and ends at the conclusion of the table.[1] The material found in the Companies' Initial Remand Brief that is complained of was not offered by the Companies at the hearing through either a request for administrative notice or through either prefiled or live testimony. The intervenors had no opportunity to challenge the correctness of the claims contained in the table or provide evidence to demonstrate the unreasonableness of the conclusions the Companies attempt to draw from the table. As a result, it should not be relied upon by the PUCO as a basis to make a decision regarding provider of last resort ("POLR") charges. The material was not offered as part of the Companies' direct or rebuttal case. The material was not made available for any party to cross-examine in the remand proceeding. To consider the material submitted in the Companies' Initial Remand Brief with the intervenors unable to rebut and respond to the material would be highly prejudicial to their cases. The Commission should grant the Intervenors' Motions to Strike.

II. ARGUMENT

At this late date, when the record in this proceeding is closed, the Companies ask that administrative notice of tariffs for other utilities be taken.[2] The seeking of administrative notice appears to be a fallback response to Intervenors' Motions to Strike.

Administrative notice is, under Ohio Rule of Evidence 201,[3] confined to adjudicative facts that are not subject to reasonable dispute. Although the Ohio Supreme

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[1] OCC and OPAE Motion to Strike at 1 (August 10, 2011); IEU Motion to Strike at 1 (August 11, 2011).

[2] Memo Contra at 3 (August 16, 2011).

[3] Although the PUCO is not stringently confined to the Rules of Evidence, Ohio Rule 201 is instructive as to general civil practice in Ohio. R.C. 4903.22 directs the Commission to generally follow these practices.

Court has recognized that there is neither an absolute right for, nor prohibition against the PUCO taking administrative notice of facts outside the record, the Court has resolved administrative notice issues on a case-by-case basis. The Court has emphasized that whether notice should be taken depends upon the facts presented.[4] The factors the Court "deem[s] significant include whether the complaining party had prior knowledge of, *and had an adequate opportunity to explain and rebut, the facts administratively noticed.*"[5]

The Companies' Memo Contra, nonetheless, ignores these factors. The Companies do not address how they have provided intervenors with an opportunity to explain and rebut the facts they seek to notice. Indeed, by waiting until the briefing stage, after the record has been closed, the Companies seek to deny the intervenors this very opportunity to explain and rebut the material that is not located in the record. The Companies' most unusual and inappropriate tactics should be rejected, and the Commission should, consistent with precedent established by itself and the Ohio Supreme Court, grant the Motions to Strike.

The Ohio Supreme Court has recognized the importance of allowing parties an opportunity to explain and rebut facts administratively noticed. The Ohio Supreme Court in *Forest Hills Utility Company v. Public Utilities Commission*[6] held that the Commission erred when it took judicial notice of facts gathered from its own records to conduct its own analysis *after a hearing*. The utility company complained the Commission's analysis was not available at the time of the hearing, and thus it had no opportunity to be heard as to the propriety of the Commission's taking of administrative

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[4] *Allen v. Public Util. Comm.* (1988), 40 Ohio St.3d 184, 185.

[5] *Canton Storage and Transfer Co. v. Public Util. Comm.* (1995), 72 Ohio St.3d 1 18, citing *Allen v. Public Util. Comm.*, 40 Ohio St.3d at 186 (emphasis added).

[6] *Forest Hills Utility Co. v. Public Utilities Commission of Ohio* (1974), 39 Ohio St.2d 1, 3.

notice. The court agreed: "Even though an administrative authority has statutory power to make independent investigations, it is improper for it to base a decision on findings upon facts so obtained, unless such evidence is introduced at a hearing or otherwise brought to the knowledge of the interested parties prior to decision, *with an opportunity to explain and rebut.*"[7] The Court further noted that the United States Supreme Court issued a holding supporting this proposition in *West Ohio Gas Co. v. Public Utilities Commission:*[8] "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known."

The PUCO on its own has embraced the concept that parties must be afforded the opportunity to explain and rebut evidence that is subject to judicial notice. It has refused to grant judicial notice when requested at the briefing stage, due to the lateness of the request.[9] For instance, in a case that involved the Perry nuclear power station in Northern Ohio, the Commission refused to take administrative notice of material presented by the Citizens Group, which was "not proper under these circumstances [of presentation the first time on brief]. If the Citizens Group wanted the Commission to consider this data, it should have presented it at the hearing."[10] More recently, the Commission even refused to consider information presented by IEU under circumstances where it was only available after a case order was issued.[11]

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[7] Id. (emphasis added).

[8] *West Ohio Gas Co. v. Pub. Util. Comm.* (1935), 294 U.S. 63, 69.

[9] See e.g. *Re Columbus Southern Power Company*, Case No. 07-63-EL-UNC, Opinion and Order at 3 (October 3, 2007).

[10] *In re Perry and Beaver Valley Nuclear Power Stations*, Case Nos. 88-170-EL-AIR, et al., Rehearing Entry at 53 (March 28, 1989).

[11] *In re Unique Arrangement for Ormet*, Case No. 09-119-EL-AEC, Entry on Rehearing at 4, ¶(8).

No such excuse is available to AEP Ohio, nor is any explanation offered as to why it chose to present its "facts" in its Initial Remand Brief, despite the fact that the disputed tariff information was available throughout the remand phase of this case. The Commission should in keeping with precedent[12] deny the request for judicial notice, especially since the material subject to the notice was known at the time of the hearing.

The Companies place great emphasis on the fact that it is acceptable for the Commission to take administrative notice of tariffs from various utilities, and cite, as precedent, a case that involved the Ohio Power Company.[13] The Companies' citation itself states that the administrative notice was taken by the "*examiner*" (i.e. at the hearing stage of the proceeding) and not by the Commission in its ultimate Opinion and Order.[14] Here however, administrative notice is being sought not during the course of the hearing, but post-hearing, after the record has been closed.

By presenting the tariff information only on brief, the Companies have intentionally limited the ability of intervenors to rebut this information through cross-examination at the hearing, the "greatest legal engine ever invented for the discovery of truth."[15] For example, the Companies' tactic (if countenanced by the PUCO) prevents intervenors from establishing the non-comparability of the Duke and DP&L "POLR" to AEP Ohio's POLR. The timing of the Companies' actions is highly prejudicial to

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[12] *In re Columbus Southern Power Company*, Case No. 05-376-EL-UNC, Opinion and Order at 3 (April 10, 2006).

[13] Memo Contra at 3 (August 16, 2011), citing *Buckeye Linen Service v. Ohio Power Company*, Case No. 93-782-EL-CSS, Opinion and Order (April 7, 1994).

[14] See also *Buckeye Linen Service v. Ohio Power Company*, Case No. 93-782-EL-CSS, Opinion and Order at 6 (noting that after the witness sponsored an exhibit, "thereafter, administrative notice was taken of the tariffs of other Ohio utilities" and the witness then further testified and was subject to cross examination).

[15] See *California v. Green*, 399 U.S. 149, 158, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970) (quoting 5 J. Wigmore, Evidence § 1367, at 32 (J. Chadbourn rev. 1974)).

intervenors who should have been given the opportunity to confront the information at the evidentiary hearing.

The Companies argue that the tariff provisions equate to a statute, stating that "[i]n essence, OCC and IEU are objecting to a citation to a Commission issued document that has the standing of a statute."[16] This argument is a red herring and should be disregarded. While AEP-Ohio seeks to avoid the problem it has created by suggesting that the information could be administratively noticed, it has ignored the more fundamental and prejudicial effect of the way it has gone about attempting to place the Duke and DP&L information into the record. By violating the procedural safeguards inherent in Commission practice and contained in Rule of Evidence 201, the Companies are seeking to assert a claim that is not supported.

The policy supporting the procedural requirements of notice during the hearing when there is an opportunity to rebut is particularly evident in this case. The so-called POLR charges that AEP-Ohio wants noticed were submitted to prove that AEP-Ohio's POLR was in the proper range for such a charge. Yet, the DP&L tariff material, the charge listed in AEP Ohio's Brief as "monthly POLR" refers to DP&L's "Rate Stabilization Charge." Under DP&L's tariffs, the charge is "intended to compensate DP&L for providing stabilized rates for customers *and* provider of last resort service."[17] The characterization of this approved and legally required charge as "POLR" is contradicted by the tariff that AEP Ohio relies upon. The Rate Stabilization Charge is explicitly a *combined* charge as stated in the tariff that does not separate out a POLR component. AEP Ohio's characterization and use of DP&L's tariff as showing

[16] Memo Contra at 2 (August 16, 2011).

[17] Id., Attachment 1, reproducing DP&L's Electric Generation Services Tariffs, PUCO No. 17, Electric Generation Service Rate Stabilization Charge, Second Revised Sheet No. G25.

comparability, is misleading at best. This is clearly a matter that would have been raised by parties at the evidentiary hearing if the Companies had attempted to introduce the tariff information on the record at the hearings.

Similarly, AEP Ohio's characterization of a Duke "POLR" is misleading as well. There is no explicit tariff that contains a charge labeled "POLR" for Duke,[18] and the rate listed in the table located in the Companies' Initial Remand Brief does not correspond to any stand-alone charge in Duke's current electric service tariffs. The Companies' Initial Remand Brief failed to provide citations for the source of the "POLR" charge information for Duke, but Attachment 2 to the Memo Contra confirms the absence of a clearly defined POLR charge in Duke's tariffs.

Additionally, the charges characterized as POLR charges for DP&L and Duke -- even if they were in some manner comparable to AEP Ohio's POLR circumstances (a disputed matter) -- were provisions that formed part of an overall approach to rates in filed stipulations[19] that were later approved by PUCO orders.[20] By the very terms of the approved stipulations, they were submitted only for specific proceedings and not intended for use in any other proceeding (except for enforcement purposes).[21] Thus, using the stipulated tariff rates as precedent for purposes of this proceeding is inappropriate.

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[18] Id., Attachment 2.

[19] *In re DP&L ESP Proposal*, Case No. 08-1094-EL-SSO, Stipulation and Recommendation at ¶3, ¶35 (February 24, 2009); *In re Duke ESP Proposal*, Case No. 08-920-EL-SSO, Stipulation and Recommendation (October 27, 2008).

[20] *In re DP&L ESP Proposal*, Case No. 08-1094-EL-SSO, Opinion and Order (June 24, 2009); *In re Duke ESP Proposal*, Case No. 08-920-EL-SSO, Opinion and Order (December 17, 2008).

[21] *In re DP&L ESP Proposal*, Case No. 08-1094-EL-SSO, Stipulation and Recommendation at ¶35 (February 24, 2009); *In re Duke ESP Proposal*, Case No. 08-920-EL-SSO, Stipulation and Recommendation (October 27, 2008).

By attempting to slide "facts" regarding the Duke and DP&L rates in through their brief, the Companies would have the Commission accept as "true" assertions that were questionable at best, wrong at worst, and certainly a violation of proper management of the case's record. As the Commission is well aware, each case presents a unique record -- with facts, experts, and legal arguments. A case-by-case determination is appropriate in a rate-setting that fits the circumstances of the utility under consideration. Issues in this case regarding the POLR charge should not be determined based upon values for various charges located in the tariffs of other electric distribution utilities, especially under circumstances where those values were established under stipulated packages. The Commission should grant the motions to strike the non-record material presented by AEP Ohio in its Initial Remand Brief, and ignore the Companies' material.

III. CONCLUSION

The record closed on July 28, 2011 at the end of the rebuttal phase of the hearing. Hearing Examiner Parrot confirmed that "these cases shall be submitted to the Commission on the record subject to the filing of initial and reply briefs."[22] The portion of the Companies' Initial Remand Brief that is subject to the motions to strike ignores the confines of the closed record and should not be considered in the Commission's deliberations. The Commission should strike the portion of the Companies' Initial Remand Brief identified in the motions to strike.

[22] Remand Tr. V at 897.

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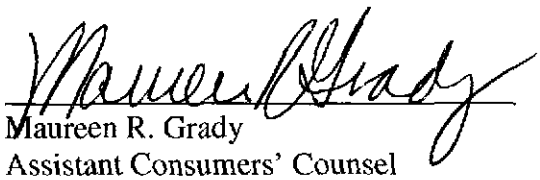
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was served electronically to the persons listed below, on this 18th day of August 2011.



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