

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Columbus Southern Power Company and)	Case No. 11-346-EL-SSO
Ohio Power Company for Authority to)	Case No. 11-348-EL-SSO
Establish a Standard Service Offer)	
Pursuant to §4928.143, Ohio Rev. Code,)	
in the Form of an Electric Security Plan.)	

In the Matter of the Application of)	
Columbus Southern Power Company and)	Case No. 11-349-EL-AAM
Ohio Power Company for Approval of)	Case No. 11-350-EL-AAM
Certain Accounting Authority.)	

**MOTION TO TAKE ADMINISTRATIVE NOTICE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
THE APPALACHIAN PEACE AND JUSTICE NETWORK**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of AEP Ohio's 1.2 million residential utility customers, and the Appalachian Peace and Justice Network ("APJN"), a not for profit organization whose members include low-income customers in southeast Ohio, jointly submit this Motion for taking administrative notice of materials in the record in Case No. 10-2929-EL-UNC.¹ The following materials are sought to be administratively noticed:

- (1) The Expert Opinion Testimony of Munczinski (Mar. 23, 2012), pages 3, 9-12 (Ohio Power Company ("Company") Ex. 101);
- (2) The Expert Opinion Rebuttal Testimony of Allen (May 11, 2012), pages 19-20 (Company Ex. 142);

¹ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC ("Capacity Charge Case").

- (3) Hearing Transcript Excerpts of the Cross-examination of Expert Witness Ringenbach (Tr. IV at 815);
- (4) Hearing Transcript Excerpts of the Cross-examination of Expert Witness Pierce (Tr. II at 304; 348-350); and
- (5) The Company's Initial Post-Hearing Brief (May 23, 2012) and the Company's Reply Post-Hearing Brief (May 30, 2012).

OCC and APJN seek administrative notice of this small number of documents submitted in the *Capacity Charge Case*, in light of the Commission's determination--after the hearing in these cases--that it would "establish the appropriate recovery mechanism for such deferred costs [capacity costs] and address any additional financial considerations in the 11-346 proceeding."² Given its recent ruling, the record in this proceeding should be expanded to incorporate the administratively noticed materials, so that the Commission can have before it a more complete record on these issues that could greatly affect customers' rates.³

There is good cause for granting this motion, as explained in the following memorandum. Additionally, no parties will be prejudiced by the taking of administrative notice, especially given that the parties to the *Capacity Charge Case* presumably have knowledge of and had an adequate opportunity to explain and rebut this evidence in that proceeding.

² Id., Opinion and Order at 23 (July 2, 2012) ("*Capacity Charge Order*").

³ While OCC has expressed concerns about the PUCO's use of administrative notice, this motion is consistent with PUCO practice.

Respectfully submitted,

BRUCE J. WESTON
CONSUMERS' COUNSEL

/s/ Maureen R. Grady

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**On Behalf of the Appalachian Peace and
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MEMORANDUM IN SUPPORT

The PUCO has broad discretion to conduct its own hearings.⁴ The PUCO is not stringently confined to the rules of evidence,⁵ but is directed by statute to observe the practice and rules of evidence in civil proceedings.⁶

Under Rule 201 of the Ohio Rules of Evidence, judicial notice may be taken of any adjudicative fact that is not subject to reasonable dispute. This rule permits courts to fill gaps in the record. Accordingly, courts have judicially noted documents filed, testimony given, and orders or findings. Under subsection (F) of Rule 201, “Judicial notice may be taken at any stage of the proceeding.”

The Supreme Court of Ohio has held that while there is no absolute right for the taking of administrative notice, there is no prohibition against the Commission taking

⁴ See e.g. R.C. 4903.02, 4903.03, 4903.04; Ohio Adm. Code 4901-1-27.

⁵ See *Greater Cleveland Welfare Rights v. Pub. Util. Comm.* (1982), 2 Ohio St.3d 62.

⁶ R. C. 4903.22.

administrative notice of facts outside the record in a case.⁷ The Court has held that the Commission may take administrative notice of the record of an earlier proceeding, subject to review on a case-by-case basis.⁸ The important factors for applying administrative notice, according to the Court, are that the complaining party has prior knowledge of and an opportunity to rebut the materials judicially noticed.⁹

The PUCO itself has recognized that it may take administrative notice of adjudicative facts,¹⁰ cases,¹¹ entries,¹² expert opinion testimony, and briefs and other pleadings filed in separate proceedings.¹³ The PUCO has also taken administrative

⁷ See *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1, 17-18 (citing to *Allen v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184, 185).

⁸ *Allen*, 40 Ohio St.3d at 185-186.

⁹ See, e.g., *id.*, 40 Ohio St.3d at 186.

¹⁰ *In the Matter of the Review of the Interim Emergency and Temporary PIP Plan Riders Contained in the Approved Rate Schedules of Electric and Gas Companies*, Case No. 83-303-GE-COI, Entry at ¶6 (Feb. 22, 1989) (administrative notice taken of facts adduced at hearing in another investigation, information compiled by Staff from the 1980 Census Report, and customer information reported pursuant to the Ohio Administrative Code).

¹¹ *In the Matter of the Amendment of Chapter 4901:1-13, Ohio Administrative Code, to Establish Minimum Gas Service Standards*, Case No. 05-602-AGA-ORD, Entry on Rehearing at 33 (May 16, 2006) (administrative notice taken of case filed where utility presented problems with remote technology, and sought to discontinue new installation of remote meters).

¹² *In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 89-1001-EL-AIR, Opinion and Order at 110 (Aug. 19, 1990) (administrative notice taken by the Attorney Examiner of entries and orders issued in an audit proceeding and an agreement filed in the audit docket).

¹³ See *In the Matter of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order at 18-21 (finding that the Court has placed no restrictions on taking administrative notice of expert opinion testimony, and that it declined to impose such restrictions); *In the Matter of the Application 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, Entry at ¶6 (Apr. 6, 2010), *aff'd* by Entry on Rehearing at ¶14 (May 13, 2010) (both Entries allowing the entire record of a prior proceeding to be administratively noticed in the ESP proceeding and ruling that all briefs and pleadings “may be used for any appropriate purposes”).

notice of the entire record¹⁴ and evidence presented in separate cases.¹⁵ And the PUCO, in taking administrative notice of the entire record of a prior proceeding in a FirstEnergy Electric Security Plan proceeding, allowed all briefs and other pleadings administratively noticed to be “used for any appropriate purposes.”¹⁶ Additionally, the Commission has followed Rule 201(F) and has permitted administrative notice to be taken at any time, and as late as the time when applications for rehearing are being filed.¹⁷

OCC and APJN seek administrative notice of materials submitted as part of the record in the recent *Capacity Charge Case*, Case No. 10-2929-EL-UNC, a proceeding closely related to this case. Parties to that case are the same parties, in large part, that are present in this proceeding. Thus, the parties to the *Capacity Charge Case* presumably have knowledge of and had an adequate opportunity to explain and rebut this very evidence in that proceeding. In the *Capacity Charge Order*, the Commission linked the two cases when it authorized the deferral of certain capacity costs¹⁸ and indicated it would “establish the appropriate recovery mechanism for such deferred costs [capacity costs] and address any additional financial considerations in the 11-346 proceeding.”¹⁹

¹⁴ Case No. 10-388-EL-SSO, Entry at ¶6 (Apr. 6, 2010), aff’d by Entry on Rehearing at ¶14 (May 13, 2010).

¹⁵ Id.; *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Rates in its Service Area*, Case No. 91-410-EL-AIR, Opinion and Order at 19 (May 12, 1992) (administrative notice taken of the record in the Zimmer restatement case and evidence presented in the case); *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service.*, Case No. 91-418-EL-AIR, Opinion and Order (taking administrative notice of entire record of Zimmer Restatement Case).

¹⁶ Case No. 10-388-EL-SSO, Entry at ¶6 (Apr. 6, 2010), aff’d by Entry on Rehearing at ¶14 (May 13, 2010).

¹⁷ *Cincinnati Bell Telephone Company v. Pub. Util. Comm.* (1984), 12 Ohio St.3d 280, 284-285 (Supreme Court upheld administrative notice taken through an application for rehearing).

¹⁸ The *Capacity Charge Order* authorized the Companies to defer the difference between AEP Ohio’s embedded cost of capacity (\$188.88/MW-day) and PJM’s reliability pricing model (“RPM”) pricing. *Capacity Charge Order* at 23.

¹⁹Id.

The materials OCC and APJN seek to have administratively noticed are not subject to reasonable dispute. The filed testimony and the hearing transcripts in the *Capacity Charge Case* are exactly what they are purported to be and are testimony presented by witnesses to the proceeding, under oath, and the testimony was subject to cross-examination in the *Capacity Charge Case*. It is this testimony that should be noticed for purposes of this proceeding to assist the PUCO in determining the appropriate recovery mechanism for deferred costs. Moreover, statements presented in the Company's Briefs in the *Capacity Charge Case* should be administratively noticed as they show and relate to a legal theory that OCC and APJN are asking the PUCO to use to determine who should bear the great cost of the deferrals created in the *Capacity Charge Case*.

Such materials are directed to the issues raised in the recent oral arguments held July 13, 2012. Those issues include the embedded capacity rate paid by standard service offer customers and whether it is lawful, fair, or equitable to charge vastly different capacity prices to the Company's standard service offer ("SSO") customers than are likely to be charged to non-shopping customers (vis-a-vis the RPM-priced capacity charged to competitive retail electric service ("CRES") providers). This part of the record in the *Capacity Charge Case* sheds light on this issue, and shows information that the Company's SSO rate fully compensates it for the cost of its capacity -- which it deems to be \$355/MW-day.

The Commission has the discretion to take administrative notice of the materials requested. Taking of administrative notice of these materials is appropriate and will be helpful to the Commission in deciding the new issues created by it when it authorized

capacity deferrals in the *Capacity Charge Case*. Moreover, there should be no prejudice to the parties if administrative notice is taken at this stage. Parties presumably had knowledge of and an opportunity to explain the materials in that case. Moreover, no decision has been rendered yet in this case.

For these reasons, OCC and APJN have established good cause for the Commission to administratively notice the materials requested herein. Taking administrative notice will provide information for consideration in these cases related to how the PUCO's Opinion and Order in the *Capacity Charge Case* will be reflected in charges to customers and others in these cases.

Respectfully submitted,

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**On Behalf of the Appalachian Peace and
Justice Network**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Take Administrative Notice has been served electronically upon those persons listed below this 20th day of July 2012.

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Summary: Motion Motion to Take Administrative Notice by the Office of the Ohio Consumers' Counsel and the Appalachian Peace and Justice Network electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.