

**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.)	

**OHIO POWER COMPANY'S
MEMORANDUM CONTRA
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND APPALACHIAN PEACE AND JUSTICE NETWORK'S
MOTION TO TAKE ADMINISTRATIVE NOTICE**

On Friday, July 20, 2012, the Office of the Consumers' Counsel (OCC) and the Appalachian Peace and Justice Network (APJN) (collectively "OCC/APJN") filed a motion seeking to take administrative notice in these dockets of select documents contained in the record of Case No. 10-2929-EL-UNC (Capacity Case). Ohio Power Company (Company) does not support the motion filed by OCC/APJN because it is inappropriate, raises due process concerns, and fails to recognize that the present proceeding has already been submitted to the Commission for decision.

OCC/APJN's request for administrative notice at this point in the proceeding is awkward at best. The modified ESP proceeding is now submitted to the Commission for decision and the record is established. The Commission held public hearings, an evidentiary hearing, entertained two rounds of post hearing briefing and held an oral argument before all of the Commissioners.

The time for procedural maneuvers and argumentation is now complete and the record is in the hands of the Commission for determination. Yet, OCC/APJN seeks to add documents to the record from another Commission proceeding at this late stage when there is no place for further action by OCC/APJN. The next official action in this case is a Commission decision and then parties have a right to a rehearing process. The request for the addition of documents from another docket at this time is ill-timed and inappropriate.

The Company does agree with OCC/APJN that the Commission has broad discretion to conduct its own hearings and it is not stringently confined to the rules of evidence. The Commission also has a great amount of discretion in determining the most efficient manner to conduct its proceedings. The Supreme Court of Ohio even recognized the broad discretion of the Commission in managing its dockets to avoid undue delay and duplication of effort:

"Under R.C. 4901.13 the commission has *broad discretion in the conduct of its hearings*." *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St. 2d 367, 379, 10 Ohio Op. 3d 493, 500 N.E.2d 264, 273. "It is well-settled that pursuant to R.C. 4901.13, the commission has the *discretion* to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, *avoid undue delay and eliminate unnecessary duplication of effort*." (Footnote omitted.) *Toledo Coalition for Safe Energy v. Pub. Util. Comm.* (1982), 69 Ohio St. 2d 559, 560, 23 Ohio Op. 3d 474, 475, 433 N.E.2d 212, 214.

Weiss v. Pub. Util. Comm. (2000), 90 Ohio St. 3d 15, 2000 Ohio 5, 734 N.E.2d 775 (emphasis added). To the extent the Commission determines that it needs to recognize portions of the Capacity Case record it can do so under its broad discretion, as appropriate and as it relates to the ultimate decision, in its Opinion and Order in this case. The Company even pointed out the Commission's authority in this regard in its briefs in this docket concerning the recognition of a "need finding" from the 10-501-EL-FOR *et. al* dockets for purposes of finding need "in this proceeding" as discussed by other parties relating the GRR. Company Initial Br. at 32;

Company Reply Br. at 8. However, at this point in the proceeding OCC/APJN should not place itself in the shoes of the Commission and determine that only the small subset of items it highlights are appropriately noticed as a result of the decision that has not been reached yet by the Commission. OCC/APJN's request is untimely and inappropriate.

There is a difference between the Commission recognizing its actions in other dockets and OCC/APJN's request at this time in this proceeding. While the Commission has not yet made a decision in these cases, there are no further actions on the procedural schedule for OCC/APJN to offer further evidence and no opportunity for opposing parties to test that additional evidence. The portions sought by OCC/APJN for administrative notice are items OCC/APJN feel apply from their point of view, but that is not the point of view relevant at this point in the proceeding. OCC/APJN's attempt to predict how the Commission will determine the modified ESP proceeding and its belated attempt to reargue points in these dockets is inappropriate and should be denied by the Commission.

The Company does not intend to entertain OCC/APJN's efforts to extend the argumentation of the issues in the case when the matter is submitted and awaiting the Commission's decision, but the documents OCC/APJN seek to have administratively noticed do illustrate the inherent risk or harm in taking notice of limited documents post-hearing. Item one is a page out of the cross-examination of RESA witness Ringenbach on a matter that could have been raised with her in the instant proceeding as she appeared in both proceedings. Item two is prefiled rebuttal testimony, also filed before the start of the modified ESP proceeding by a witness appearing in both cases, without any corresponding request to notice the corresponding testimony from the hearing. Items three and four on OCC/APJN's list focuses on the cross-examination of AEP Ohio witness Pearce and the level of capacity charges currently being

charged. But a review of the testimony shows that Dr. Pearce relied upon AEP Ohio witness Allen for any specifics of this topic. Dr. Pearce relies upon Mr. Allen for the underlying point, yet OCC/APJN seek to rely on Dr. Pearce instead for this point.

Item five from the list seeks to inappropriately take notice of the Company's briefs from the Capacity Case. Under OCC/APJN's own analysis, the purpose of administrative notice is to take notice of any adjudicative fact that is not subject to reasonable dispute. The post-hearing briefs are instruments to present arguments to the Commission, not adjudicative facts.

OCC/APJN misstates precedent as support for administrative notice of the Company's briefs. In footnote 13 on page 2 of the motion, OCC/APJN cite to language from Commission entries in Case No. 10-388-EL-SSO. In that case, the Commission was considering taking notice of a prior record (and in particular the evidence). The Commission decided it was appropriate to take notice of the record and then beyond that, "[f]urther, all briefs and other pleadings filed in Case 09-906-EL-SSO may be used for any appropriate purpose in this proceeding." The Commission recognized that beyond the administrative notice of facts it was granting that "further" there are appropriate purposes for using a party's prior briefing. That is not administrative notice of adjudicative facts. OCC/APJN inappropriately overextends the Commission's holding in that proceeding. The request should be denied.

In the alternative, if the Commission did decide to grant the motion and allow the limited requested items into the record, then due process would require that other parties be provided the right to have other items added to the record. At this point there is no telling how such items would be used or referenced or if the items are really applicable in this proceeding. As discussed above the references refer to other witnesses and other analysis beyond what is sought for notice. The grant of OCC/APJN's request without providing all other parties the same right to

supplement the record would create serious problems with the record. Due process requires notice of the complete record or providing other parties the opportunity to provide the relevant portions. However, this exercise shows the inappropriateness of OCC/APJN's request at this point in the proceeding and why the request should be denied and the Commission should focus on reaching its decision.

For the foregoing reasons, AEP Ohio respectfully requests the Commission to deny OCC/APJN's motion to take administrative notice of this untimely and improper request.

Respectfully submitted,

//s/ Matthew J. Satterwhite

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CERTIFICATE OF SERVICE

I hereby certify that a copy of *AEP Ohio's Memorandum Contra the Office of the Ohio Consumers' Counsel's and Appalachian Peace and Justice Network's Motion for Administrative Notice* upon counsel for all other parties of record in this case, on this 24th day of July, 2012.

//s/ Matthew J. Satterwhite

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Summary: Memorandum Contra electronically filed by Mr. Matthew J Satterwhite on behalf of Ohio Power Company