

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company and The Toledo) Case No. 12-1230-EL-SSO
Edison Company for Authority to Provide for)
a Standard Service Offer Pursuant to R.C. §)
4928.143 in the Form of an Electric Security)
Plan)

**MEMORANDUM OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY
CONTRA TO MOTION TO TAKE ADMINISTRATIVE NOTICE BY THE
OFFICE OF THE OHIO CONSUMER'S COUNSEL**

James W. Burk, Counsel of Record
Arthur E. Korkosz
Kathy J. Kolich
Carrie M. Dunn
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-5861
(330) 384-3875 (fax)
burkj@firstenergycorp.com
korkosza@firstenergycorp.com
kjkolich@firstenergycorp.com
cdunn@firstenergycorp.com

David A. Kutik
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939
(216) 579-0212 (fax)
dakutik@jonesday.com

Attorneys for Applicants, Ohio Edison
Company, The Cleveland Electric Illuminating
Company, and The Toledo Edison Company

I. INTRODUCTION

In the Office of the Ohio Consumers' Counsel's ("OCC") Motion to Take Administrative Notice, OCC seeks to have the Commission take administrative notice of six documents attached to Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company's (collectively, the "Companies") Application dated July 31, 2012 and filed in Case Nos. 12-2190-EL-POR, 12-2191-EL-POR and 12-2192-EL-POR¹ (the "EE/PDR Cases"). In the Application for Rehearing filed by OCC and Citizens Power (collectively, "OCC/CP"), these parties also seek to have the Commission take administrative notice of two evaluative and investigative reports drafted by external auditors hired by the Commission that were filed in Case No. 11-5201-EL-RDR² (the "AER Case").

The timing of these requests for administrative notice, however, is dispositive. These requests are made over two months after the record in this case was closed. The hearing concluded on June 8, 2012. The Commission issued its Order on July 18, 2012. The objecting parties have filed applications for rehearing. Taking administrative notice of eight additional documents at this late stage of the proceedings would thus deny the Companies an opportunity to explain and rebut these documents at the hearing in this case. For this reason alone, the Commission should deny the requests for administrative notice.

Administrative notice of the documents from the EE/PDR Cases and AER Case, moreover, would prejudice the Companies. The documents from the AER Case were filed on

¹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2013 through 2015*, Case Nos. 12-2190-EL-POR, 12-2191-EL-POR and 12-2192-EL-POR (Filed: July 31, 2012).

² *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR (Opened: Sept. 20, 2011).

August 15, 2012 and drafted by external auditors. These documents contain evaluative opinions that the Companies have not yet had an opportunity to investigate, analyze, explain or rebut. The Companies thus would be prejudiced by the administrative notice of these documents in this proceeding without first having an opportunity to conduct a thorough analysis of these reports and respond to them accordingly.

The Commission also should deny these requests to take administrative notice because the eight documents that these parties seek to interject into this case will be thoroughly addressed in two separate proceedings that are currently pending before the Commission. OCC has already intervened in one of those proceedings³ and has moved to do so in the other.⁴ Administrative notice of these documents is thus unnecessary in this case.

Perhaps recognizing the flaws with its requests, OCC incorrectly infers in its Motion that the Companies failed to disclose the documents from the EE/PDR Cases in discovery. But OCC's complaint is a red herring. The documents from the EE/PDR Cases that OCC seeks to administratively notice were not published until July 31, 2012—nearly two months after the record closed in this case. OCC cites no authority that a party is required to supplement discovery after the record is closed. Thus, the Companies had no obligation to do so, and there would be no purpose in doing so. OCC's complaints are unfounded. The Commission should deny OCC's requests for administrative notice.

³ See Case No. 11-5201-EL-RDR, Motion to Intervene by the Office of the Ohio Consumers' Counsel (Filed: No. 14, 2011) subsequently granted in the Entry dated Dec. 15, 2011.

⁴ See Case No. 12-2190-EL-POR, Motion to Intervene by the Office of the Ohio Consumers' Council (Filed: Aug. 6, 2012).

II. ARGUMENT

As the Commission has noted in this case, the Supreme Court of Ohio has recognized “neither an absolute right to nor prohibition against the Commission’s taking administrative notice of facts outside the record in a case.” Case No. 12-1230, Opinion and Order (July 17, 2012), p. 19. Instead, the Commission has discretion to resolve requests for administrative notice based on the particular facts presented in each case. *Allen v. Pub. Util. Comm.*(1988), 40 Ohio St. 3d 184, 185. The Supreme Court of Ohio, however, has held that the Commission *may* take notice if the complaining party has an adequate opportunity to explain and rebut the information that is administratively noticed.⁵ *Id.* at 186.

Here, the facts demonstrate that the Commission should not take administrative notice of the documents from the EE/PDR Cases and AER Case. The requests to take administrative notice of these documents fail to satisfy the Supreme Court of Ohio’s test for the propriety of taking administrative notice. OCC also seeks to interject a large number of documents that will be addressed in concurrent litigation. Accordingly, the Commission should exercise its discretion to deny OCC’s requests for administrative notice.

A. Taking Administrative Notice Would Deny The Companies An Opportunity To Explain Or Rebut The Information Contained Within The Documents.

The instant requests fail to meet the Supreme Court of Ohio’s test for when taking administrative notice is proper. Here, the record has already closed. The Commission has already issued its Opinion and Order. Moreover, the Companies have had no prior notice of OCC’s intention to introduce these documents into evidence in this case. Taking administrative notice at this point in the case would thus deny the Companies an opportunity to explain and

⁵ When deciding whether to affirm or reverse an order granting administrative notice, the Ohio Supreme Court also considers whether the complaining party was prejudiced by the Commission’s order granting administrative notice of the evidence. *Allen*, 40 Ohio St. 3d at 186.

rebut any additional evidence. *See Id.* For this reason, granting these requests would prejudice the Companies.

Indeed, the Commission has found that taking administrative notice during the late stage of a proceeding is improper because the parties were not afforded the opportunity to challenge the information in question during the hearing in the case.⁶ *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets; 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 Nos. 08-917-EL-SSO, 08-918-EL-SSO, 2011 Ohio PUC LEXIS 1084, *19-20 (Oct. 3, 2011) (Order on Remand). The Commission should similarly find that taking administrative notice of documents after the hearing in this case would be improper.

Taking administrative notice of the documents from the EE/PDR and AER Cases also would prejudice the Companies. OCC cites *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* as support for the Commission's authority to take administrative notice after the record has closed and applications for rehearing have been filed. (Mem. Supp. at 3.) This reliance is misplaced. In *Cincinnati Bell*, the Supreme Court of Ohio found that the complaining party was not prejudiced by the Commission's order granting administrative notice of an order issued by the Federal Communications Commission ("FCC") that modified an ENFIA usage figure relevant to the case. 12 Ohio St. 3d 280, 285 (1984). The court also noted that the FCC order was retroactive and thus would apply to the Commission's decision in that case. *Id.*

⁶ The Commission also has stricken late-filed information as "an improper attempt to supplement the record." *In the Matter of the Application of The East Ohio Gas Company for Approval of Arrangements of Natural Gas Service, GCR Treatment and Pre-Granted Initiation and Termination Authority*, Case No. 87-304-GA-AEC, 1987 Ohio PUC LEXIS 836 (Oct. 6, 1987) (Opinion and Order).

Here, OCC seeks to introduce eight additional documents to support its application for rehearing. These documents are voluminous. The EE/PDR documents contain summaries of the Companies' portfolio energy and demand savings that OCC/CP have apparently, and inappropriately, used in an attempt to introduce new calculations of these parties' projection of the Companies' lost distribution revenue. The Commission should reject this improper attempt. The Companies must be provided the opportunity to investigate the basis of OCC/CP's calculations, explain documents and rebut any arguments made by OCC/CP relying on those calculations. Indeed, OCC's misuse of similar data is not theoretical. At the hearing in this case, the Companies demonstrated that OCC incorrectly interpreted such information.⁷ If OCC/CP had their way, the Companies would be denied that opportunity regarding these additional documents and related calculations and argument.

Similarly, taking administrative notice of the evaluative reports from the AER Case at this stage of this proceeding will deny the Companies the opportunity to respond to the third-party unsworn opinions contained therein.⁸ These reports were issued two days before OCC/CP requested administrative notice. The Companies have not yet had the opportunity to respond to these documents in the AER Case. Accordingly, taking administrative notice of the documents from the EE/PDR Cases and AER Case would prejudice the Companies. The Commission should deny OCC's requests to administratively notice the documents from the EE/PDR Cases and the AER Case.

⁷ Tr. Vol. III, pp. 123-124 (OCC's witness Gonzalez testified that he corrected his interpretation of the Companies' lost distribution revenue after the Companies' witness Ridmann testified that these numbers were cumulative; not incremental.).

⁸ Notably, OCC/CP's request for the taking of administrative notice of these reports contradicts their argument in their Application for Rehearing that the Commission cannot take administrative notice of opinions. (OCC/CP Application for Rehearing, pp. 60-62.)

B. The Commission Should Deny The Requests To Take Administrative Notice Because The EE/PDR Documents and AER Documents Will Be Subject To Extensive Litigation In Separate Proceedings.

Even if the Companies had an opportunity to explain or rebut the eight documents (which they have not), the Commission should exercise its discretion to deny the administrative notice requests for an additional reason. The eight documents that are the subject of the instant motions relate to issues that will be litigated in two separate cases pending before the Commission. The Commission has scheduled the EE/PDR Cases for hearing on October 16, 2012. The hearing will address whether the Commission should approve the Companies' energy efficiency and peak demand reduction portfolio plans for the years 2013 through 2015. Indeed, several parties have already moved to intervene, including OCC.⁹ OCC thus will have the opportunity to raise any concerns regarding the Companies' energy efficiency and peak demand reduction portfolio in that action.

The Commission also scheduled a hearing in the AER Case for November 27, 2012. The Commission initiated the AER Case to review the Companies' Rider AER. This review will include an evaluation of Rider AER and renewable energy credit acquisitions as well as the financial aspects thereof. As part of the review, the Commission will analyze the two evaluative and investigative reports that OCC/CP seek to have the Commission administratively notice in this case. OCC has already intervened in this proceeding¹⁰, and thus has the opportunity to address the evaluative and investigative reports in the AER Case.

⁹ See Case No. 12-2190-EL-POR, Motion to Intervene by the Office of the Ohio Consumers' Council (Filed: Aug. 6, 2012).

¹⁰ See Case No. 11-5201-EL-RDR, Motion to Intervene by the Office of the Ohio Consumers' Counsel (Filed: No. 14, 2011) subsequently granted in the Entry dated Dec. 15, 2011.

Accordingly, the documents from the EE/PDR Cases and the evaluative and investigative reports from the AER Case will be addressed in other proceedings. As a result, administrative notice of the documents is unnecessary in this proceeding. The Commission should exercise its discretion and deny the requests here.

C. The Companies Complied With Their Discovery Obligations.

OCC attempts to bolster its administrative notice request relating to the EE/PDR Documents by inferring that the Companies improperly failed to produce those documents in discovery. That is false.

The EE/PDR documents were not filed until July 31, 2012. This information was not published at the time of the hearing in this matter, which was held on June 4 through June 8, 2012. OCC cites no authority that a party is required to supplement discovery after the record is closed. Thus, the Companies had no obligation to do so. Therefore, OCC's complaints regarding the Companies' response to OCC's discovery are unfounded.

III. CONCLUSION

For the reasons set forth above, the Companies respectfully request that the Commission deny OCC's Motion for Administrative Notice and OCC/CP's request for administrative notice contained in its Application for Rehearing.

Respectfully submitted,

/s/ David A. Kutik

James W. Burk, Counsel of Record
Arthur E. Korkosz
Kathy J. Kolich
Carrie M. Dunn
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 384-5861
(330) 384-3875 (fax)
burkj@firstenergycorp.com
korkosza@firstenergycorp.com
kjkolich@firstenergycorp.com
cdunn@firstenergycorp.com

David A. Kutik
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939
(216) 579-0212 (fax)
dakutik@jonesday.com

Attorneys for Applicants, Ohio Edison
Company, The Cleveland Electric Illuminating
Company, and The Toledo Edison Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company in Support of Their Application to Provide for A Standard Service Offer in the Form of an Electric Security Plan was sent to the following by e-mail this 27th day of August, 2012:

"Amy.Spiller@Duke-Energy.com" <Amy.Spiller@Duke-Energy.com>,
"cynthia.brady@constellation.com" <cynthia.brady@constellation.com>,
"dakutik@JonesDay.com" <dakutik@JonesDay.com>, "dane.stinson@baileycavalieri.com"
<dane.stinson@baileycavalieri.com>, "david.fein@constellation.com"
<david.fein@constellation.com>, "DBoehm@bkllawfirm.com" <DBoehm@bkllawfirm.com>,
"drinebolt@ohiopartners.org" <drinebolt@ohiopartners.org>, "dryan@mwncmh.com"
<dryan@mwncmh.com>, "ehess@mwncmh.com" <ehess@mwncmh.com>,
"Garrett.Stone@bbrslaw.com" <Garrett.Stone@bbrslaw.com>, "gregory.dunn@icemiller.com"
<gregory.dunn@icemiller.com>, "GKCrassen@Bricker.com" <GKCrassen@Bricker.com>,
"jbowser@mwncmh.com" <jbowser@mwncmh.com>, "Lang, Jim" <JLang@Calfee.com>,
"korkosza@firstenergycorp.com" <korkosza@firstenergycorp.com>, "mhpeticoff@vorys.com"
<mhpeticoff@vorys.com>, "Mike.Lavanga@bbrslaw.com" <Mike.Lavanga@bbrslaw.com>,
"MKurtz@bkllawfirm.com" <MKurtz@bkllawfirm.com>, "mparke@firstenergycorp.com"
<mparke@firstenergycorp.com>, "murraykm@mwncmh.com" <murraykm@mwncmh.com>,
"MWarnock@Bricker.com" <MWarnock@Bricker.com>, "Ray.Strom@puc.state.oh.us"
<Ray.Strom@puc.state.oh.us>, "ricks@ohanet.org" <ricks@ohanet.org>,
"TOBrien@Bricker.com" <TOBrien@Bricker.com>, "trent@theOEC.org"
<trent@theOEC.org>, "VLeach-Payne@mwncmh.com" <VLeach-Payne@mwncmh.com>,
"burkj@firstenergycorp.com" <burkj@firstenergycorp.com>, "jpmeissn@lasclev.org"
<jpmeissn@lasclev.org>, "robert.fortney@puc.state.oh.us" <robert.fortney@puc.state.oh.us>,
"McBride, Laura" <LMcBride@Calfee.com>, "doris.mccarter@puc.state.oh.us"
<doris.mccarter@puc.state.oh.us>, "Ccunningham@Akronohio.Gov"
<Ccunningham@Akronohio.Gov>, "rkelter@elpc.org" <rkelter@elpc.org>,
"joliker@mwncmh.com" <joliker@mwncmh.com>, "dsullivan@nrhc.org"
<dsullivan@nrhc.org>, "callwein@wamenergylaw.com" <callwein@wamenergylaw.com>,
"lmcaster@bricker.com" <lmcaster@bricker.com>, "matt@matthewcoxlaw.com"
<matt@matthewcoxlaw.com>, "greg.lawrence@cw.com" <greg.lawrence@cw.com>,
"cathy@theoec.org" <cathy@theoec.org>, "Tammy.Turkenton@puc.state.oh.us"
<Tammy.Turkenton@puc.state.oh.us>, "teresa.ringenbach@directenergy.com"
<teresa.ringenbach@directenergy.com>, "ray.strom@puc.state.oh.us"
<ray.strom@puc.state.oh.us>, "robinson@citizenpower.com" <robinson@citizenpower.com>,
"ricks@ohanet.org" <ricks@ohanet.org>, "myurick@taftlaw.com" <myurick@taftlaw.com>,
"nolan@theOEC.org" <nolan@theOEC.org>, "sam@mwncmh.com" <sam@mwncmh.com>,
"smhoward@vorys.com" <smhoward@vorys.com>, "steven.huhman@morganstanley.com"
<steven.huhman@morganstanley.com>, "Thomas.McNamee@puc.state.oh.us"
<Thomas.McNamee@puc.state.oh.us>, "jmclark@vectren.com" <jmclark@vectren.com>,
"gpoulos@enernoc.com" <gpoulos@enernoc.com>, "cmooney2@columbus.rr.com"
<cmooney2@columbus.rr.com>, "RHorvath@city.cleveland.oh.us"
<RHorvath@city.cleveland.oh.us>, "christopher.miller@icemiller.com"
<christopher.miller@icemiller.com>, "asim.haque@icemiller.com"

<asim.haque@icemiller.com>, “vparisi@igsenergy.com” <vparisi@igsenergy.com>,
“sauer@occ.state.oh.us” <sauer@occ.state.oh.us>, “etter@occ.state.oh.us”
<etter@occ.state.oh.us>, “yost@occ.state.oh.us” <yost@occ.state.oh.us>,
“leslie.kovacik@toledo.oh.gov” <leslie.kovacik@toledo.oh.gov>, “trhayslaw@gmail.com”
<trhayslaw@gmail.com>, “Judi.sobecki@dplinc.com” <Judi.sobecki@dplinc.com>,
“Randall.Griffin@dplinc.com” <Randall.Griffin@dplinc.com>, “Jkyler@bkllawfirm.com”
<Jkyler@bkllawfirm.com>, “tsiwo@bricker.com” <tsiwo@bricker.com>,
“jeanne.kingery@duke-energy.com” <jeanne.kingery@duke-energy.com>,
“dorothy.corbett@duke-energy.com” <dorothy.corbett@duke-energy.com>,
“jejadwin@aep.com” <jejadwin@aep.com>, “mdortch@kravitzllc.com”
<mdortch@kravitzllc.com>, “mjsatterwhite@aep.com” <mjsatterwhite@aep.com>,
“stnourse@aep.com” <stnourse@aep.com>, “sandy.grace@exeloncorp.com”
<sandy.grace@exeloncorp.com>, “stephen.bennett@exeloncorp.com”
<stephen.bennett@exeloncorp.com>, “lkalepsclark@vorys.com” <lkalepsclark@vorys.com>,
“wtppmlc@aol.com” <wtppmlc@aol.com>, “BarthRoyer@aol.com” <BarthRoyer@aol.com>,
“robb.kapla@sierraclub.org” <robb.kapla@sierraclub.org>, jvickers@elpc.org
jvickers@elpc.org, dstahl@eimerstahl.com

/s/ David A. Kutik

An Attorney for Ohio Edison Company, The
Cleveland Electric Illuminating Company,
and The Toledo Edison Company

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/27/2012 4:34:16 PM

in

Case No(s). 12-1230-EL-SSO

Summary: Memorandum Contra to Motion to Take Administrative Notice by the Office of the Ohio Consumer's Counsel electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company