

**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)	
Edison Company for Authority to)	Case No. 12-1230-EL-SSO
Establish a Standard Service Offer)	
Pursuant to R.C. § 4928.143 in the Form)	
of an Electric Security Plan.)	

**REPLY MEMORANDUM
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

On August 30, 2012, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Strike the Memorandum Contra filed on August 27, 2012, by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "FirstEnergy" or "Companies"). FirstEnergy's Memorandum Contra (in response to OCC's July 17, 2012 Motion to Take Administrative Notice and a separate request for administrative notice¹) was filed five days after the filing deadline.² Accordingly, the Public Utilities Commission of Ohio ("Commission" or "PUCO") should grant OCC's Motion to Strike. In the meantime, OCC takes this opportunity to respond to the arguments raised in FirstEnergy's Memorandum Contra.

¹ OCC/CP's Application for Rehearing at p. 22 note 72.

² See Entry at ¶7 (Apr. 19, 2012).

II. ARGUMENT

On July 17, 2012, OCC filed and served a Motion to Take Administrative Notice of certain materials³ (related to FirstEnergy's portfolio energy and demand savings) that were part of the record in the *Peak Demand Cases*, proceedings closely related to this case.⁴ Additionally, OCC requested in its Application for Rehearing that the Commission take administrative notice of information contained in the Exeter Management Performance Audit Report ("Performance Audit") and information contained in the Goldberg Schneider Financial Audit ("Financial Audit") filed in a case where the subject is a review FirstEnergy's alternative energy resource costs.⁵ FirstEnergy opposed both of OCC's separate requests, in a Memorandum Contra that it filed on August 27, 2012.

A. OCC's Requests for Administrative Notice Are Timely

FirstEnergy claims that OCC's requests "are made over two months after the record in this case was closed" and that "[f]or this reason alone, the Commission should deny the requests for administrative notice."⁶ FirstEnergy is wrong. First, under subsection (F) of Rule 201 of the Ohio Rules of Evidence, "Judicial notice may be taken at any stage of the proceeding." 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

³ The Motion to Take Administrative Notice was for certain documents compiled by FirstEnergy.

⁴ *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.

⁵ *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, Exeter Report and Financial Audit Report (August 15, 2012).

⁶ FirstEnergy Memorandum Contra at 2.

applications for rehearing are being filed.⁷ OCC's request is timely, especially considering that the documents from the *Peak Demand Cases* were filed on July 31, 2012, and the Exeter Report and the Financial Audit were filed just two days before OCC's request.

Second, OCC's requests for administrative notice were not "made over two months after the record in this case was closed."⁸ OCC's requests were made on August 17, 2012. The last public hearing was held on June 12, 2012.⁹ The transcript for the June 4th and June 12th local public hearings were not even filed in this case until July 17, 2012.¹⁰ OCC's requests were not made "over two months after the record in this case was closed" as FirstEnergy wrongfully alleges.¹¹ We also note that, had this case not been rushed at FirstEnergy's request, there would have been ample time to consider the information earlier in the course of the case process.

Furthermore, FirstEnergy characterizes the eight documents containing information that OCC seeks to be administratively noticed as "voluminous."¹² But these documents are not voluminous. Attachments A-C from the *Peak Demand Cases* are simply five charts for each of the electric distribution utilities showing summaries of the Companies' portfolio energy and demand savings.¹³ The Exeter Report consists of 46 pages while the Financial Audit is just 33 pages docketed with the Commission.

⁷ *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).

⁸ FirstEnergy Memorandum Contra at 2.

⁹ July 18, 2012 Opinion and Order at 6.

¹⁰ See Docket for Case No. 12-1230-EL-SSO.

¹¹ FirstEnergy Memorandum Contra at p. 2.

¹² FirstEnergy Memorandum Contra at p. 6.

¹³ See Attachments A-C to OCC's August 17, 2012 Motion to Take Administrative Notice.

B. The Administrative Notice Sought in OCC's Motion Should Be Granted Because FirstEnergy Does Not Dispute the Summaries of the Companies' Portfolio Energy and Demand Savings That They Produced (Attachments A-C).

FirstEnergy states that the "Companies must be provided the opportunity to investigate the basis of OCC/CP's calculation, explain documents and rebut any arguments made by OCC/CP relying on those calculations."¹⁴ Although FirstEnergy did have an opportunity to explain the documents and rebut any arguments made by OCC/CP in its Memorandum Contra to OCC's and CP's Application for Rehearing,¹⁵ FirstEnergy is mistaken in its belief that it must be permitted the opportunity to explain documents and rebut any arguments made by OCC. The standard for granting judicial notice is that the complaining party has knowledge of and an opportunity to rebut the materials judicially noticed.¹⁶

FirstEnergy does not want to rebut Attachments A-C nor does it dispute the information contained in Attachments A-C. FirstEnergy produced these documents (Attachments A-C) in the *Peak Demand Cases*. And as FirstEnergy acknowledges in its Memorandum Contra, these documents simply contain summaries of the Companies' portfolio energy and demand savings.¹⁷ OCC, an opposing party, is asking the Commission to administratively notice the facts contained in these documents for the purposes of this proceeding.

FirstEnergy had control over the content of these documents. FirstEnergy had incentive and the opportunity to ensure the accuracy of the documents and to compile the

¹⁴ See FirstEnergy Memorandum Contra at 6.

¹⁵ FirstEnergy filed a Memorandum Contra the OCC/CP Application for Rehearing on August 27, 2012.

¹⁶ *Allen v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184, 185-186.

¹⁷ See FirstEnergy Memorandum Contra at 6.

data to put its case in the best light possible. Since FirstEnergy will not be prejudiced by the introduction of this evidence, the PUCO should fulfill its public duty and grant the requested administrative notice regarding Attachments A-C.¹⁸

C. The Administrative Notice Sought in OCC's Motion Should Be Granted Because FirstEnergy Had a Duty to Produce Information Regarding the 2013-2015 Lost Distribution Revenues Associated with Energy Efficiency in Discovery.

As explained in OCC's Motion to Take Administrative Notice, OCC was prejudiced when OCC did not receive the information contained in Attachments A-C (regarding the 2013-2015 lost distribution revenues associated with energy efficiency) when originally requested by OCC or under the Companies' continuing duty to supplement discovery responses under Ohio Adm. Code 4901-1-16(D)(3). OCC relied on the response of FirstEnergy that an estimation of the lost distribution revenue for 2013-2015 (based on the energy efficiency and demand reduction) was unavailable because the energy efficiency measures for that period were currently being planned.¹⁹ Under Ohio Adm. Code 4901-1-16(E), FirstEnergy had a duty to provide OCC with the requested information when the new information became available.

The information that FirstEnergy fails to provide in the Memorandum Contra is more important than the information that it does provide. First, FirstEnergy fails to provide any law, rule or case precedent that supports its allegation that the duty to supplement its discovery responses ended on June 8th—the last date of the hearing.²⁰ Second, and more importantly, FirstEnergy avoids identifying the date when the data

¹⁸ *Allen*, 40 Ohio St.3d at 185-186, citing *County Commrs. Assn. v. Pub. Util. Comm.* (1980), 63 Ohio St.2d 243, 247.

¹⁹ See Attachment 1 to OCC's Motion to Take Administrative Notice.

²⁰ See FirstEnergy Memorandum Contra at 8.

included in Attachments A-C was compiled. And five days from that date—the date that the information was discovered by FirstEnergy—a date still unknown to OCC—was when that information should have been provided to OCC. But FirstEnergy does not identify that date. (The Commission could certainly inquire as to when FirstEnergy actually did have the information that it did not earlier provide to OCC on discovery.) Instead, FirstEnergy makes a meaningless statement that “[t]his information was not published at the time of the hearing in this matter, which was held on June 4 through June 8, 2012.”²¹ Nowhere in Ohio Adm. Code 4901-1-16(D) is the word “published” found. FirstEnergy is concocting standards rather than complying with the Commission’s rules. Only FirstEnergy knows when the information contained in those documents was discovered and the Companies are keeping that information to themselves.

Allowing administrative notice of Attachments A-C will partly address OCC not receiving information responsive to OCC’s discovery request. Because OCC did not receive an estimation of lost distribution revenue for 2013-2015 (based on the energy efficiency and demand reduction plan), OCC (and by implication the trier of fact, the PUCO) had access to an incomplete set of data regarding FirstEnergy’s Electric Security Plan.

In order for the Commission to make an informed decision in this case, it must have adequate information regarding the impact of FirstEnergy’s Electric Security Plan.²² Without the information that OCC seeks to have administratively noticed, any

²¹ FirstEnergy Memorandum Contra at 8.

²² *In the Matter of the Application of Columbus Southern Power Company and Ohio Power 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. 11-346-EL-SSO, et al, Entry on Rehearing at 11 (February 23, 2012).

Commission decision would be based on inadequate information. The Commission should thus grant OCC's Motion to Take Administrative Notice.

D. The Issue of the Administrative Notice Sought in OCC's Application for Rehearing²³ Can be Satisfied by the Commission Granting OCC's Rehearing Request and Allowing the Parties (Including FirstEnergy) to Present Evidence on the Performance and Financial Audits as They Relate to the Issues in this Case.

The information contained in the Performance and Financial Audits is important information that the Commission should consider in determining whether it should adopt the Stipulation resolving this case. These Audits regarding FirstEnergy were not filed with the Commission until August 15, 2012. For the reasons contained in OCC's Application for Rehearing,²⁴ the issue of the administrative notice sought in OCC's application for rehearing (at note 72) can be satisfied by the Commission granting OCC's rehearing request and allowing the parties (including FirstEnergy) to present evidence on the Performance and Financial Audits as they relate to the issues in this case.

III. CONCLUSION

The Commission should grant OCC's Motion to Take Administrative Notice of Attachments A-C that simply contain summaries of the Companies' portfolio energy and demand savings compiled by FirstEnergy. FirstEnergy's arguments against OCC's Motion to Take Administrative Notice are flawed. Furthermore, the Commission should grant rehearing on the matters identified in OCC/CP's Application for Rehearing.

²³ OCC/CP's Application for Rehearing at p. 22 note 72.

²⁴ See OCC/CP's Application for Rehearing at pp. 21-24.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Reply Memorandum by the Office of the Ohio Consumers' Counsel* was served via electronic mail upon the following persons on this 30th day of August 2012.

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