

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke
Energy Ohio, Inc., for an Increase in Gas
Rates.

Case No. 12-1685-GA-AIR

In the Matter of the Application of Duke
Energy Ohio, Inc., for Tariff Approval.

Case No. 12-1686-GA-ATA

In the Matter of the Application of Duke
Energy Ohio, Inc., for Approval of an
Alternative Rate Plan for Gas
Distribution Service.

Case No. 12-1687-GA-ALT

In the Matter of the Application of Duke
Energy Ohio, Inc., for Approval to
Change Accounting Methods.

Case No. 12-1688-GA-AAM

**DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA
MOTION BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL TO TAKE
ADMINISTRATIVE NOTICE AND MOTION TO STRIKE FROM INITIAL
BRIEF**

I. Introduction

A. Statement of Facts

Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) initiated these proceedings with the filing of a Notice of Intent on June 7, 2012. The Application was submitted on July 9, 2012. On January 10, 2013, the Attorney Examiner issued a procedural schedule setting forth dates for, *inter alia*, the filing of objections, testimony, a prehearing conference and a hearing. The hearing commenced on March 29, 2013, and concluded on April 3, 2013. The Attorney Examiner ordered a briefing schedule that directed the

parties to file initial briefs on June 6, 2013, and reply briefs on June 20, 2013. On June 6, 2013, thirty-six days after the conclusion of the hearing, the Office of the Ohio Consumers' Counsel (OCC) submitted a motion to take administrative notice, seeking to offer entirely new evidence into the record that was closed at the conclusion of the hearing. The OCC claims, in tabloid-like fashion, that it has discovered "evidence" contrary to the record presented by the Company at hearing. The information that OCC seeks now to have admitted has been available since at least the time when the Company's Application was submitted and was actually referenced in the Company's Direct Testimony in these proceedings.¹ The information offered by the OCC from the Duke Energy website does not conflict with the testimony submitted. For the reasons set forth below, OCC's motion must be denied and the Commission should strike any reference to this information from Briefs submitted by OCC.

II. Argument

A. The Information contained on the Duke Energy website should not be admitted outside of the record.

OCC seeks to introduce evidence into a record that has been closed since April 3, 2013, more than a month ago. At the conclusion of the hearing, the Attorney Examiner explicitly questioned if there were any other questions to be addressed before the record was closed. Hearing none, the Attorney Examiner closed the record.² The OCC did not request a reopening of the record in its motion, but rather proceeded to argue that the Public Utilities Commission of Ohio (Commission), should take administrative notice of

¹ Bednarcik Direct Testimony at p. 11 (East End) and p.16 (West End).

² Tr. Vol.IV at p.1012.

information that OCC deems incorrectly to be an admission against interest outside of the record.

The Ohio Supreme Court has affirmed the Commission's ability to take administrative notice of matters outside of the record, when the information involved consists of its own case records. In *Schuster v. Pub. Util. Comm.*, the Court affirmed an order in which the Commission stated that it would have been derelict in its duty to the public not to have taken judicial notice of its own record.³ Likewise, in *Canton v. Pub. Util. Comm.*, the Court held that the Commission's reference to a prior Commission case was not improper.⁴ However, the Court has also held that the Commission may not take administrative notice of matters outside of the record, in particular, where the matter sought to be admitted is not the Commission's own record.⁵ The Court concluded, in *Forest Hills* that evidence must be introduced at hearing or otherwise brought to the knowledge of the interested parties prior to decision with an opportunity to explain and rebut.⁶ Of importance to the Court is "*whether the complaining parties have had an opportunity to prepare and respond to the evidence, and they are not prejudiced by its introduction.*"⁷ However, in these cases, the question revolved around taking administrative notice, during the hearing and of matters otherwise before the Commission or in the Commission's own record.⁸ None of the cases cited by OCC in support of its Motion involve matters not otherwise within the Commission's own record. None involved the admission of evidence one month after the hearing is closed and with respect

³ *Schuster v. Pub. Util. Comm.* (1942), 139 Ohio St. 458, at 461, 40 N.E. 2d 930.

⁴ *Canton v. Pub. Util. Comm.* (1980), 63 Ohio St.2d 76,at footnote 1, 407 N.E. 2d 9.

⁵ *Forest Hills Util. Co., v. Pub. Util. Comm.* (1974), 39 Ohio St. 2d 1, 313 N.E. 2d 801.

⁶ *Allen, D.B.A. J&M Trucking, et al., v. Pub. Util. Comm.*, (1988), 40 Ohio St. 3d 184, at p. 185,1988 Ohio LEXIS 439.

⁷ *Canton v. Pub. Util. Comm.*, supra.

⁸ *Id.*

to information that was publicly and conspicuously available during the pendency of the case. Again, the Court's concern is whether a party is prejudiced and whether or not that party has an opportunity to respond.⁹ Here, OCC alleges that the Company may respond to its offered late filed evidence in this Reply Brief. However, had the OCC offered this evidence at hearing, the Company may well have offered rebuttal testimony. The Company no longer has this option and would indeed be unfairly prejudiced by the admission of evidence at this late date, particularly where the evidence was available all along. Reference to the website was provided by Duke Energy Ohio witness Jessica L. Bednarcik in her Direct Testimony filed with the Application in these proceedings on July 9, 2012.¹⁰

B. There is nothing in the information that is new or contrary to the Company's testimony.

With respect to the information contained on the Duke Energy website that OCC characterizes as an "admission," this information is not in any respect new information. It was on the Company's website with East End at least since 2009, and with respect to West End, since 2010. Thus, OCC could have easily presented this information at hearing. Rather, OCC seeks to continue to litigate its case long after the record has closed. The information is not new and it is not contrary to any information presented in the case. The Commission should not condone this late filing of information that OCC now claims as relevant and references to such late-offered information should be stricken from the OCC's Initial and Reply Briefs.

OCC seeks to have additional information admitted into the now closed record, claiming that it is contrary to the claims of the Company made at hearing. This mischaracterizes

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¹⁰ Bednarcik Direct Testimony at p. 11 (East End) and p.16 (West End).

both the information provided by Duke Energy Ohio witnesses in the proceedings and the information from the website. As noted above, Duke Energy Ohio witness Jessica L. Bednarcik discussed the Duke Energy Ohio website and the existence of the FAQs in her Direct Testimony. Ms. Bednarcik's testimony points out the following:

With respect to East End;

Duke Energy Ohio held a community open house, developed a website (*www.duke-energy.com/eastend*) and fact sheets, and held meetings with a number of potential additional stakeholders, including but not limited to the Cincinnati City Manager and Assistant City Manager, the Cincinnati Health Department, the Hamilton County Department of Environmental Services, the East End Community Council, concerned and interested neighbors, and the Ohio EPA.¹¹

and with respect to West End;

A communications plan was developed, which included a website (*www.duke-energy.com/westend*) and the distribution of facts sheets to surrounding businesses. Permits were obtained from Ohio EPA, the city of Cincinnati, and other agencies.¹²

Indeed, OCC admits in its Motion that the information was posted in the Company's website. Additionally, the Company's responses to Staff data requests were also served upon the OCC. Staff referred to the websites in Staff Data Requests DR-97-001 and DR-97-002.¹³ Thus, the information that OCC now claims is new, has in fact been in the OCC's hands since July of 2012. OCC cannot now seek to include this information as new information that should be accepted despite the closing of the record. If the Commission were to accept such late filed information that has in fact been available to OCC for almost a year, Duke Energy Ohio and other Parties would undoubtedly be unfairly prejudice.

¹¹ Direct Testimony of Jessica L. Bednarcik at p. 11.

¹² *Id.* at p. 16.

¹³ Copies of both data request responses are attached hereto.

C. **Rule 201 only allows judicial notice of an adjudicative fact that is not subject to reasonable dispute.**

OCC seeks to misuse Rule 201, Ohio Rules of Civil Procedure in this instance. OCC correctly notes in its Motion that judicial notice may only be taken of a fact *not subject to reasonable dispute* in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

The information set forth in the FAQ's on the website is designed to explain to the public what it might expect during the remediation phase. While it is certainly true as stated that the contamination at the site was at that time, not harmful to the public in the neighboring community, this is not the same as stating that the toxic material in the ground was not mobile and would not pose a risk to human health and the environment if left *in situ*. Duke Energy Ohio's decision to remediate the MGP sites due to the risk of health to the public is precisely what OCC contests in these proceedings. Thus, the evidence OCC seeks to have admitted goes to the heart of the dispute.

As explained by Duke Energy Ohio witnesses Bednarcik, and Shawn S. Fiore, the changes in land use adjacent to the East End and West End sites, cause the need to remediate in order to protect human health and the environment. Duke Energy Ohio's environmental experts and outside consultants remediated the MGP sites by methods which OCC deems excessive. The necessity and methodology of the remediation has been contested by OCC and thus, the evidence OCC seeks to have admitted related directly to these matters. The admission of such evidence would be contrary to Rule 201 and should not be permitted.

III. Conclusion

OCC had more than ample opportunity to bring this information to the Commission's attention during the pendency of these proceedings but failed to do so before the record was closed. For the reasons set forth above, OCC's Motion to Take Administrative Notice must be denied and reference to the document offered by OCC should be stricken from OCC's Initial and Reply Briefs.

Respectfully submitted,



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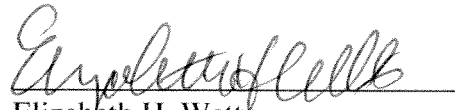
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 11th day of June, 2013, by U.S. mail, postage prepaid, or by electronic mail upon the persons listed below.


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Summary: Memorandum DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA
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