

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke     )  
Energy Ohio for Approval of the Fourth     )  
Amended Corporate Separation Plan         ) Case No. 15-441-EL-UNC  
Under Section 4928.17, Revised Code and     )  
4901:1-37 Ohio Administrative Code.         )

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**MOTION TO TAKE ADMINISTRATIVE NOTICE  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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This case involves whether the fifth amended corporate separation plan of Duke Energy Ohio Inc. (“Duke”) complies with Ohio’s corporate separation law set forth in R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37. The Office of the Ohio Consumers’ Counsel (“OCC”), an intervenor on behalf of Duke’s approximately 615,000 residential utility customers,<sup>1</sup> submits this Motion to take administrative notice of a status report letter filed in Case No. 14-841-EL-SSO.<sup>2</sup> In that letter Duke advises the Public Utilities Commission of Ohio (“PUCO”) that it “is not now in the process of attempting to divest its interest in OVEC.”<sup>3</sup>

Duke’s statement is relevant to this corporate separation compliance case because Duke expressly states its intention not to comply with the PUCO’s Order in the SSO Case. The record in this proceeding should be expanded to incorporate the administratively noticed material so that the PUCO can have before it a more complete record on these issues that could affect customers’ rates.

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<sup>1</sup> OCC filed a Motion to Intervene in this case on June 12, 2015.

<sup>2</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer*, Case Nos. 14-481-EL-SSO and 14-842-EL-ATA (“SSO Case”).

<sup>3</sup> *Id.*, Status Report Letter (June 30, 2015).

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

Respectfully submitted,

BRUCE J. WESTON (0016973)  
OHIO CONSUMERS' COUNSEL

/s/ Jodi Bair  
Jodi Bair (0062921), Counsel of Record  
Terry L. Etter (0067445)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
(614) 466-95559 – Bair  
(614) 466-7964 – Etter  
[jodi.bair@occ.ohio.gov](mailto:jodi.bair@occ.ohio.gov)  
(willing to accept email service)  
[Terry.etter@occ.ohio.gov](mailto:Terry.etter@occ.ohio.gov)  
(willing to accept email service)

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

Ohio law requires electric utility companies to separate their distribution, transmission, and generation services.<sup>4</sup> Duke owns a nine percent interest in OVEC, a corporation that exists to generate and sell electricity.<sup>5</sup> And because Duke has an interest in OVEC, Duke must abide by the corporate separation laws set forth in R.C. 4928.17.

After being ordered to file a status report regarding the transfer or divestiture of the OVEC asset, Duke told the PUCO that the PUCO cannot dictate Duke's investment in OVEC and that Duke was *not* in the process of attempting to divest its interest in OVEC.<sup>6</sup> Duke filed this statement in its SSO docket; however because OVEC is a part of Duke's Fifth Amended Corporate Separation Plan, and the subject of this docket, the record in this case should accurately reflect the status of Duke's efforts to follow Ohio corporate separation laws.

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<sup>4</sup> R.C. 4928.17.

<sup>5</sup> See Case No. 15-441-EL-UNC, Duke Reply Comments (July 10, 2015) at 2.

<sup>6</sup> SSO Case, Letter (June 30, 2015) (emphasis added).

## II. ARGUMENT

### A. **The PUCO can take administrative notice of facts that are not subject to reasonable dispute and if parties have an opportunity to rebut the evidence**

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 PUCO taking administrative notice of facts outside the record in a case.<sup>7</sup> The Court has held that the PUCO may take administrative notice of the record of an earlier proceeding, subject to review on a case-by-case basis.<sup>8</sup> 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.<sup>9</sup> In this case, all parties to the SSO Case have received a copy of the letter, and Duke itself filed the letter in the public docket of the SSO Case. Hence parties have an opportunity to rebut the statements made by filing responses.

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<sup>7</sup> 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.

<sup>8</sup> *Allen*, 40 Ohio St.3d at 185-186.

<sup>9</sup> See, e.g., *id.*, 40 Ohio St.3d at 186.

The PUCO itself has recognized that it may take administrative notice of adjudicative facts,<sup>10</sup> cases,<sup>11</sup> entries,<sup>12</sup> expert opinion testimony, and briefs and other pleadings filed in separate proceedings.<sup>13</sup> The PUCO has also taken administrative notice of the entire record<sup>14</sup> and evidence presented in separate cases.<sup>15</sup> 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.”<sup>16</sup> Additionally, the Commission has

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<sup>10</sup> *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).

<sup>11</sup> *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).

<sup>12</sup> *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).

<sup>13</sup> 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”).

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

<sup>15</sup> *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 (May 12, 1992) at 6 (taking administrative notice of entire record of Zimmer Restatement Case).

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

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.<sup>17</sup>

**B. Facts sought to be administratively noticed.**

OCC seeks administrative notice of materials submitted as part of the record in Duke's SSO Case, Case No. 14-841-EL-SSO. Ohio Adm. Code 4901:1-35-03(C)(4) expressly requires that an SSO application discuss the status of the utility's current corporate separation plan. In Duke's SSO Case, the PUCO directed "Duke to pursue transfer of the OVEC contractual entitlement or to otherwise pursue divestiture of the OVEC asset."<sup>18</sup> In addition to directing Duke to transfer any interest that it has in OVEC, the PUCO ordered Duke to file a status report regarding the transfer or divestiture of the OVEC asset by June 30, 2015.<sup>19</sup>

On June 30, 2015, Duke filed a letter in the SSO Case refusing to follow the PUCO's Order. Duke stated that "[b]ecause Duke Energy Ohio believes that the Commission cannot dictate its investment in, or contractual relationship with OVEC and future litigation may result so as to resolve the scope of the Commission's authority in this regard, Duke Energy Ohio is not now in the process of attempting to divest its interest in OVEC."<sup>20</sup>

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<sup>17</sup> *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).

<sup>18</sup> SSO Case, Opinion and Order at 48 (Apr. 2, 2015).

<sup>19</sup> *Id.* at 48.

<sup>20</sup> *Id.*, Status Report Letter (June 30, 2015).

### III. CONCLUSION

For these reasons, OCC believes that Duke's statement in its SSO docket speaks directly to the issues in this corporation separation case and therefore there is good cause for the PUCO to administratively notice the material requested herein. Taking administrative notice will provide information for consideration in these cases related to how the PUCO's Opinion and Order in this corporate separation case may affect charges to customers in this case.

Respectfully submitted,

BRUCE J. WESTON (0016973)  
OHIO CONSUMERS' COUNSEL

/s/ Jodi Bair

Jodi Bair (0062921), Counsel of Record  
Terry L. Etter (0067445)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485

(614) 466-9559 – Bair

(614) 466-7964 – Etter

[jodi.bair@occ.ohio.gov](mailto:jodi.bair@occ.ohio.gov)

(willing to accept email service)

[terry.etter@occ.ohio.gov](mailto:terry.etter@occ.ohio.gov)

(willing to accept email service)

## **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 21<sup>st</sup> day of August 2015.

/s/ Jodi Bair  
Jodi Bair  
Assistant Consumers' Counsel

## **PARTIES SERVED**

Jeanne Kingery (Counsel of Record)  
Amy Spiller  
Duke Energy Ohio, Inc.  
155 E Broad St., 21<sup>st</sup> Fl.  
Columbus, Ohio 43215  
[Jeanne.kingery@duke-energy.com](mailto:Jeanne.kingery@duke-energy.com)  
[Amy.spiller@duke-energy.com](mailto:Amy.spiller@duke-energy.com)

Katie Johnson  
Attorney General's Office  
Public Utilities Commission of Ohio  
180 E. Broad St., 6<sup>th</sup> Fl.  
Columbus, Ohio 43215  
[Katie.johnson@puc.state.oh.us](mailto:Katie.johnson@puc.state.oh.us)

Joseph M. Clark  
Direct Energy  
21 E. State St., 19<sup>th</sup> Fl.  
Columbus, Ohio 43215  
[Joseph.clark@directenergy.com](mailto:Joseph.clark@directenergy.com)

Joseph Olikier  
IGS Energy  
6100 Emerald Parkway  
Dublin, Ohio 43016  
[joliker@igsenergy.com](mailto:joliker@igsenergy.com)

M. Howard Petricoff  
Stephen M. Howard  
Vorys, Sater, Seymour  
and Pease LLP  
P.O. Box 1008  
Columbus, Ohio 43215  
[mhpetricoff@vorys.com](mailto:mhpetricoff@vorys.com)  
[smhoward@vorys.com](mailto:smhoward@vorys.com)

Attorney Examiners:  
[Christine.pirik@puc.state.oh.us](mailto:Christine.pirik@puc.state.oh.us)  
[Nicholas.walstra@puc.state.oh.us](mailto:Nicholas.walstra@puc.state.oh.us)



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