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 Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan	Case No. 14-1297-EL-SSO

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S REPLY TO THE MEMORANDUM CONTRA OF DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC

I. INTRODUCTION

Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company (collectively, "the Companies") have moved to strike the entirety of footnote 3 ("Footnote 3") from page 6 of the initial post-rehearing brief of Direct Energy Services, LLC and Direct Energy Business, LLC ("Direct"). In the footnote, Direct improperly cites to and relies upon portions of the Staff Report from Case No. 07-551-EL-AIR ("Staff Report") (the Companies most recent distribution rate case) and certain data related to treasury yields on 10- and 30-year bonds and related websites. None of this information is contained in the record for this proceeding. Indeed, Direct apparently accessed the treasury data in Footnote 3 on August 15, 2016 – some two weeks after the record on rehearing closed and the date that initial post-rehearing briefs were due.

In its Memorandum Contra the Companies' Motion to Strike ("Memo Contra"), Direct blithely claims that there is nothing improper about Footnote 3. Direct contends that the

Commission is free to administratively notice material "at any stage of the proceeding."[1] Direct, however, ignores Ohio Supreme Court and Commission precedent that precludes taking administrative notice of material introduced for the first time on brief and after the rehearing record has closed. The rule and its rationale – that it is simply unfair to introduce new evidence after the close of the hearing – apply with full force here. Accordingly, the Commission should grant the Companies' motion to strike Footnote 3.

II. LAW AND ARGUMENT

A. Ohio Law Limits The Use Of Administrative Notice In Commission Proceedings, Particularly After The Record Has Closed.

Under Ohio law, the Commission only may take administrative notice of certain alleged facts if a party opposed to such notice has had an opportunity to respond to and rebut such facts, and that party is not prejudiced by their introduction into the record. As the Ohio Supreme Court observed in *Canton Storage & Transfer Co. v. Pub. Util. Comm*., 72 Ohio St. 3d 1, 8 (1995), "[T]he Commission may take administrative notice of facts if the complaining parties have had an opportunity to prepare and respond to the evidence, and they are not prejudiced by its introduction."

Previously, in *Forest Hills Utility Co. v. Pub. Utility Comm*., 39 Ohio St. 2d 1(1974), the Court held that the Commission erred by taking administrative notice of certain cost information that had not been admitted at hearing. The Commission argued that "an administrative agency can take administrative notice of facts gathered from its own records for the purpose of weighing or checking evidence that was otherwise properly introduced."[2] The appellant utility countered

[1] Memo Contra, pp. 6; 7.

[2] 39 Ohio St. 2d at 3.

that it "had no opportunity to examine the cost analyses made by the commission" and thereby this was a "denial of due process."[3] The Court agreed with the utility:

> This court agrees with the appellant that the commission erred in this respect. In an annotation in 18 A. L. R. 2d 552, the following statement appears at page 562: 'Even though an administrative authority has statutory power to make independent investigations, it is improper for it to base a decision or findings upon facts so obtained, *unless such evidence is introduced at a hearing or otherwise brought to the knowledge of the interested parties prior to decision, with an opportunity to explain and rebut*.'[4]

For precisely the concerns raised in *Forest Hills*, the Commission regularly refrains from administratively noticing materials subsequent to the closing of the record in a Commission proceeding. For example, *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, 2013 Ohio PUC LEXIS 259 (Nov. 13, 2013), the Commission denied a request by the Office of the Ohio Consumers' Council ("OCC") to administratively notice certain materials from the utility's website that OCC "incorporated…into its post-hearing brief" after the close of hearing.[5] OCC, like Direct, tried to rely on Rule 201 of the Ohio Rules of Evidence to argue that administrative notice "may be taken at any stage of a proceeding."[6] OCC further argued that because the utility had the opportunity to respond to such material in its reply brief, the utility could not claim prejudice by the taking of administrative notice under such circumstances.[7] In response, and relying on *Forest Hills*, the utility argued that even though the documents at issue were posted on

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[3] *Id.*

[4] *Id.* at 4 (emphasis added).

[5] 2013 Ohio PUC LEXIS 259 at *13.

[6] *Id.* at *14.

[7] *Id.*

the utility's own website, OCC could have attempted to offer them into evidence at hearing.[8] Had OCC properly done so, the utility noted it could have offered rebuttal testimony, an option that was foreclosed because the record was closed; thereby the utility was prejudiced.[9] *Id.*

The Commission rejected OCC's request and agreed with the utility:

> Upon consideration of OCC's motion for administrative notice and the responsive pleadings, the Commission finds that it should be denied….For OCC to now attempt to utilize this information to discredit the sworn testimony of witnesses that OCC had ample opportunity to depose and cross-examine, at this late date, is inappropriate. *OCC's argument that [the utility's] due process rights are protected by merely affording [the utility] the opportunity to respond to the late-filed website documents in its reply brief is weak, at best*….Thus, absent well-substantiated arguments to reopen these proceedings in order to provide [the utility] the opportunity to respond, which, as [the utility] notes, OCC did not request, the information cannot be admitted into the record. Accordingly, OCC's motion for administrative notice should be denied.[10]

The Commission subsequently struck the information at issue from OCC's post-hearing briefing.[11]

Time and again, the Commission has declined to take administrative notice following the close of the record, where the party requesting administrative notice had an opportunity to put the information in evidence before the record was closed:

- The Commission finds that OCC's motion to take administrative notice should be denied. [The utility] correctly points out that the timing of OCC's request is troublesome and problematic [because the record is closed]. While the Commission has broad discretion to take administrative notice, it must be done in a manner that does not harm or prejudice any other parties that are participating in these proceedings. Were the Commission to take notice of this narrow window of information [select pages of documents from Case

[8] *See id.* at *15.

[9] *Id.*

[10] *Id.* at *17-18 (emphasis added).

[11] *Id.* at *18-19.

No. 10-2929-EL-UNC], we would be allowing a party to supplement the record in a misleading manner.[12]

- The Commission agrees that it is improper to take administrative notice of the press releases and newspaper article at this time; the [utilities'] earnings and the purchase of a generating facility are issues that could have been addressed during the hearing. Accordingly, Direct's request for administrative notice is denied.[13]

- [Intervenor] had an opportunity to attempt to introduce into the record [the utility's] responses in the 2005 [Long-Term Forecast Report ("LTFR")] before the closing of the record. Therefore, the Commission finds that it is improper to take administrative notice of the Companies' responses in the [the utilities'] 2005 LTFR, at this point in the proceeding. Accordingly, [Intervenor's] request for administrative notice is denied.[14]

The Commission also refrains from administratively noticing information that is irrelevant to a proceeding.[15]

Direct tries unsuccessfully to compensate for its lack of authority here by baldly asserting: "And regardless, administrative notice is appropriate at any stage of a proceeding, not just hearing."[16] This, however, flies in the face of settled Commission precedent in which the

[12] *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, 2012 Ohio PUC LEXIS 738, *27-28 (Aug. 8, 2012).

[13] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generating Facility*, Case No. 05-376-EL-UNC, 2006 Ohio PUC LEXIS 249, *11-12 (April 10, 2006).

[14] I*n the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Ultimate Construction and Operation of an Integrated Gasification Combined Cycle Electric Generating Facility*, Case No. 05-376-EL-UNC, 2006 Ohio PUC LEXIS 372, *8-9 (June 28, 2006).

[15] *See, e.g., In the Matter of the Complaint of Andrew Hehemann v. Ohio American Water Company*, Case No. 05-1275-WW-CSS, 2008 Ohio PUC LEXIS 250 at *7 (April 23, 2008) (denying request for administrative notice in part because "the Commission finds that the documents from the prior rate case for which [the respondent] sought administrative notice are not relevant to our decision today" but further noting that "nothing precludes a party in a Commission proceeding from citing to a previous Commission order").

[16] Memo Contra, p. 6.

Commission denied administrative notice of materials once a hearing had come to a close.[17] Moreover, given that, prior to post-rehearing briefing, the Companies had no chance to respond to the portions of the Staff Report contained in Direct's rehearing brief through rebuttal testimony, Direct's subsequent post-hearing insertion into the record on brief is prejudicial to the Companies.[18]

B. There Is No Legal Basis For Taking Administrative Notice Of The Material Contained In Footnote 3 And Doing So Would Prejudice The Companies.

1. The Commission should strike Direct's reference to and reliance upon the Staff Report.

In Footnote 3, Direct cites to the Staff Report – notwithstanding the fact that the Attorney Examiners expressly declined to take administrative notice of this material during the hearing on rehearing when requested to do so by OCC. The Attorney Examiners ruled as follows: "We are going to deny the motion at this time. That is because no questions were asked regarding those documents or any references made to them."[19] Thus, acting pursuant to their discretion under Rule 4901-1-27, O.A.C., the Attorney Examiners saw fit to exclude such material as irrelevant to the proceeding at hand.[20] Notably, Direct raised no objection to the denial of OCC's request to take administrative notice of the Staff Report nor did Direct in any way seek the admission of the Staff Report, or any portion thereof, during the course of the hearing on rehearing.

Citing no Commission or Ohio Supreme Court authority, Direct claims, "There is no basis to distinguish the Staff Report in Case No. 07-551 from any of the orders [the Companies]

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[17] *See In the Matter of the Application of Duke Energy Ohio*, at *17-19; *In the Matter of the Application of Columbus Southern Power*, 2012 Ohio PUC LEXIS 738 at *27-8; *In re Integrated Gasification*, 2006 Ohio PUC LEXIS 249, *11-12; 2006 Ohio PUC LEXIS 249, *11-12.

[18] *See Forest Hills* at 4; *Canton Storage* at 8; *In re Duke* at *17-18.

[19] Rehearing Tr. Vol. X, p. 1580; *see also* Rehearing Tr. Vol. IX, pp. 1508-1512.

[20] *See In re Hehemann* at *7.

cite[].”[21] Not true. Putting aside the fact that a Staff report is akin to a pleading from a party and not a Commission order, the Commission itself has made such a distinction. For example, the Commission refused to take administrative notice of various irrelevant materials from a utility’s prior rate case, while permitting citation to the Commission’s Order from that case.[22] Moreover, Direct ignores the Commission’s edict from its Opinion and Order *in this proceeding* (the “March 31 Order”) that “new information should not be introduced after the closure of the record.” [23]

2. The Commission should strike Direct’s reference to and reliance upon the treasury data and related weblinks.

Direct also seeks the wholesale importation into the record of certain treasury yields obtained from a website accessed on August 15, 2016 – two weeks after the record on rehearing closed.[24] Relying exclusively on Rule 201 of the Ohio Rules of Evidence and federal case law, Direct claims that administrative notice of this material is proper because “the accuracy of the sources cited for treasury yields cannot be reasonably questioned.”[25] Direct further argues that the Companies’ “ability to respond” to such information “in [their] reply brief forecloses any claim of prejudice.”[26] Direct is wrong on all counts.

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[21] Memo Contra, p. 5.

[22] *See In re Hehemann* at *7; *see also In the Matter of the Application of Columbus Southern Power*, 2012 Ohio PUC LEXIS 738 at *27-8.

[23] March 31 Order, p. 37. Further, Direct’s misplaced claims notwithstanding, *(see* Memo Contra, p. 7), *In the Matter of FAF, Inc*., Case No. 06-786-TR-CVF (Nov. 21, 2006) remains applicable here as it stands for the proposition that material not part of the record cannot be introduced for the first time on brief.

[24] *See* Memo Contra, p. 1, n., 1.

[25] Memo Contra, p. 6.

[26] Memo Contra, p. 7.

Following *Forest Hills* and *Canton Storage*, the introduction of this material for the first time on brief deprived the Companies of any "opportunity to explain or rebut" such material.[27] Had Direct properly introduced this material at hearing, the Companies would have had the opportunity to engage, analyze, explain and rebut such data through, e.g., rebuttal testimony, or, at the very least, on the stand through redirect examination of a Company witness.[28] Notably, Direct could have sought to introduce such evidence at the hearing on rehearing by either sponsoring a witness to that effect or seeking administrative notice in a timely fashion such that the Companies had an opportunity to explain or rebut. Direct chose neither option and instead improperly introduced this information for the first time on brief.[29] Seeking to introduce these materials at this late hour after the closure of the record amounts to little more than an attempt to supplement the record on rehearing "in a misleading manner."[30]

In turn, depriving the Companies of a proper means to comprehensively explain or rebut the reference to the treasury yields allegedly accessed by Direct on August 15, 2016 – the date of the filing of initial post-rehearing briefs – clearly prejudices the Companies. Given that the rehearing record is closed, there simply is no way, short of reopening the record, that the Companies would have an adequate means to address such treasury data, how it allegedly impacts the rehearing proposals (both the Companies' and Staff's) currently pending before the Commission, and how Direct's attempt to use the treasury data misstates the facts and incorrectly

[27] *Forest Hills* at 4; *Canton Storage* at 8.

[28] *See In re Duke* at *17-18.

[29] *See In re Integrated Gasification*, 2006 Ohio PUC LEXIS 249, *11-12; 2006 Ohio PUC LEXIS 249, *11-12.

[30] *In the Matter of the Application of Columbus Southern Power*, 2012 Ohio PUC LEXIS 738 at *28.

combines unrelated concepts.[31] Indeed, the Commission has explicitly rejected Direct's claim that a supposed opportunity to respond to material in a reply brief is sufficient to preclude prejudice, describing such a putative option as "weak, at best."[32] Hence, Direct's claim of no prejudice falls flat and the Commission should rule accordingly.

III. CONCLUSION

For the reasons stated above, and in the Companies' Motion to Strike, the Commission should strike the entirety of Footnote 3 from Direct's initial post-rehearing brief.

[31] *See In re Duke* at *17-18. For example, Direct's claim of a "stipulated return of 10.88 percent" is substantively incorrect. The Third Supplemental Stipulation did not include a specific return on equity ("ROE") figure, rather, it specified that the ROE for grid modernization investment recovered *under Rider AMI* would earn an ROE equal to ATSI's ROE of 10.38% plus an additional 50 basis points. *See* Third Supplemental Stipulation, p. 10 (Dec. 1, 2015). This rate of return could change during the term of ESP IV if the FERC-approved ROE for ATSI changed. *See id.* Further, comparing this ROE to a distribution case ROE is misleading. The 10.88% ROE that Direct cites has nothing to do with base distribution rates or the base distribution rate freeze. As the Third Supplemental Stipulation makes clear, the 10.88% ROE *is specific to Rider AMI*. *See id.* Still further, the reference to Treasury yields is misleading given that it is only one component of one method to derive estimates of ROEs. Yet even further, Direct shows a misunderstanding of the ESP's terms when Direct claims that "the ESP ensures that the FirstEnergy utilities will recover their SSO cost of service, including a return on equity (ROE) derived from the return authorized in FirstEnergy's 2007 distribution rate case…." Memo Contra, p. 2. SSO service is retail electric service provided to nonshopping customers; the Companies earn *no* return on the cost of providing such service. In any event, by Direct's failure to seek administrative notice in a timely manner, the Companies were deprived of the opportunity to address these issues fully through testimony.

[32] *See In re Duke* at *18.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the above was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 13th day of September, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, a courtesy copy has been served upon parties via electronic mail.

/s/ David A. Kutik
One of the Attorneys for the Companies

Summary: Reply of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to the Memorandum Contra of Direct Energy Services, LLC and Direct Energy Business, LLC electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company