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April 19, 2010

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VIA FEDERAL EXPRESS

Public Utilities Commission of Ohio
Docketing Division
Attention: Renee Jenkins
180 East Broad Street, 13th Floor
Columbus, Ohio 43215

Re: Case No. 10-388-EL-SSO, 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 R.C. § 4928.143 in the Form of an Electric Security Plan

Dear Docketing Clerk:

Enclosed are an original and twenty (20) copies of the EnerNOC, Inc.'s Application for Rehearing From Commission's April 6, 2010 Entry.

If you have any questions, please let me know.

Very truly yours,

D Jeffrey Ireland by Stephen Weigand

D. Jeffrey Ireland

DJI/slr
Enclosures

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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 Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan	)	Case No. 10-388-EL-SSO

ENERNOC, INC.'S APPLICATION FOR REHEARING FROM COMMISSION'S APRIL 6, 2010 ENTRY

Pursuant to Ohio Rev. Code § 4903.10, EnerNOC, Inc. ("EnerNOC") applies for rehearing from the Commission's April 6, 2010 Entry, in which the Commission took administrative notice of Case No. 09-906-EL-SSO. Administrative notice is improper because (1) factual issues are disputed from Case No. 09-906-EL-SSO, and (2) the taking of administrative notice violates EnerNOC's due process rights under Ohio and federal law.[1]

The Commission entered an Order on April 6, 2010 ("Order"), and found: "In addition, FirstEnergy requested that the Commission take administrative notice of the record in Case No. 09-906-EL-SSO for purposes of this proceeding. The Commission finds that FirstEnergy's request is reasonable and should be granted. All testimony and exhibits which were admitted into evidence in Case No. 09-906-EL-SSO shall be admitted into the evidentiary

[1] EnerNOC incorporates by reference all arguments set forth in the Motion of EnerNOC, Inc. to Vacate Attorney Examiner's Entry of March 24, 2010, and if Denied, Joint Interlocutory Appeal, Motion for Certification to Full Commission and Application for Review, which was filed with the Commission on April 16, 2010 ("Motion to Vacate").

record of this proceeding. Further, all briefs and other pleadings filed in Case No. 09-906-EL-SSO may be used for any appropriate purpose in this proceeding." Order, pp. 2-3.

This Order was based on FirstEnergy's[2] request in its Application: "The Companies further request that the Commission take administrative notice of the evidentiary record established in the Market Rate Offer ('MRO') filed by the Companies, Case No. 09-906-EL-SSO, and thereby incorporate by reference that record for the purposes of and use in this proceeding." Application, p. 3.

The Order of April 6, 2010 attempts to take administrative notice of facts from Case No. 09-906-EL-SSO that are disputed. For example, EnerNOC disagrees with and contests FirstEnergy's assertions relating to the propriety of extending Riders ELR and OLR (which FirstEnergy proposed to extend for the very first time on the record in its Stipulation); thus, any administrative notice taken of evidence introduced in support of such an extension would prejudice EnerNOC. In addition, the Order violates Ohio and federal law, to the extent that the Order permits the Commission to take administrative notice of any adjudicated facts from a separate proceeding in which EnerNOC (and other parties) were not parties to Case No. 09-906-EL-SSO. This administrative notice would constitute a separate violation of EnerNOC's due process rights, in addition to those addressed in EnerNOC's Motion to Vacate.

EnerNOC was not a party to Case No. 09-906-EL-SSO. As explained in the Motion to Vacate, the genesis of this proceeding to adopt a Stipulation and Recommendation ("Stipulation") was negotiated by FirstEnergy and a number of other parties. The Commission

[2] FirstEnergy Service Company refers collectively to Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company. The Stipulation was filed on March 23, 2010.

should modify its Order of April 6, 2010, and deny FirstEnergy's request to take administrative notice.

I. ADMINISTRATIVE NOTICE OF CASE NO. 09-906-EL-SSO VIOLATES ENERNOC'S DUE PROCESS RIGHTS UNDER OHIO AND FEDERAL LAW

A. The Commission May Not Take Administrative Notice of the Record in Case No. 09-906-EL-SSO Because Disputed Facts Exist

FirstEnergy impermissibly asks the Commission to take administrative notice of the evidentiary record in Case No. 09-906-EL-SSO. The propriety of multiple issues included within the Stipulation, including but not limited to the proposed extension of Riders ELR and OLR, are disputed subjects that are not the proper subject of administrative notice from Case No. 09-906-EL-SSO. This Commission, in determining whether to take administrative notice, applies the same guidelines in Ohio R. Evid. 201. In the Matter of the Regulation of the Elec. Fuel Component Contained within the Rate Schedule of the Ohio Edison Co. (Aug. 3, 1983), No. 82-164-EL-EFC, 1983 Ohio PUC LEXIS 49, at *24:

> "The rule provides that 'a judicially noticed fact must be one 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 reasonably be questioned.'"

Further, Ohio courts, in applying Ohio R. Evid. 201, recognize this principle:

> "For a matter properly to be a subject of judicial notice it must be 'known,' [i.e.,] well established and authoritatively settled. Matters of which a court will take judicial notice are necessarily uniform or fixed and do not depend upon uncertain testimony, for as soon as a matter becomes disputable, it ceases to fall under the head of common knowledge and so will not be judicially recognized."

McCoy v. Gilbert (Madison Cty. 1959), 110 Ohio App. 453, 463, 169 N.E.2d 624, 632-33 quoting from 21 O. Jur. (2d), 40, Evid., § 20; Polivka v. Cox (Aug. 19, 2003), Franklin App. No. O2AP-1364, 2003 Ohio 4371, at ¶ 26).

Federal law is similar: "Under Rule 201(b) of the Federal Rules of Evidence, judicial notice of adjudicative facts is limited to facts that are 'not subject to reasonable dispute.'" Banks v. Schweiker (9th Cir. 1981), 654 F.2d 637, 639.[3] Moreover, "limitation upon taking judicial notice is to further the tradition that extreme caution should be used in taking notice of adjudicative facts." Id. (emphasis added).[4] "The reason for this tradition is the belief that the taking of evidence, subject to established safeguards, is the best way to resolve controversies involving disputes of adjudicative facts." Id.

Since there is disparity of viewpoints among the parties to this proceeding concerning the propriety of numerous issues, including Riders ELR and OLR, these subjects are disputable and cannot be administratively noticed.

B. Administrative Notice Would Violate EnerNOC's Due Process Rights

Not only is administrative notice improper because the issues involved are disputed, but administrative notice is also improper because it violates EnerNOC's due process rights under Ohio law and federal law. "[The] 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." Canton Storage and Transfer Co. v. PUCO

[3] "While [Fed. R. Evid. 201] does not apply directly to administrative proceedings, it plainly reflects the general principle concerning administrative notice." Cribbs v. Astrue (M.D. Fla. Dec. 20, 2008), No. 8:07-CV-1745, 2008 U.S. Dist. LEXIS 105515, at *7.

[4] "Basic consideration of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. . . . And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely." Fed. R. Evid. 201, advisory committee's note.

(1995), 72 Ohio St. 3d 1, 8, 647 N.E.2d 136, 143. However, administrative notice of facts may not be taken where an entity was not a party to prior proceedings and did not have "knowledge of, and an adequate opportunity to explain and rebut, the evidence." Allen v. PUCO (1988), 40 Ohio St. 3d 184, 186, 532 N.E.2d 1307, 1310 (finding that notice was proper because the parties who were objecting to administrative notice (unlike here) were "parties to the . . . proceeding [of which notice was taken] and, as such, arguably had knowledge of, and an adequate opportunity to explain and rebut, the evidence.").

To determine if the Commission's taking of administrative notice is proper, the Ohio Supreme Court stated: "[T]he factors we deem significant include whether the complaining party had prior knowledge of, and had an adequate opportunity to explain and rebut, the facts administratively noticed." Canton Storage, 72 Ohio St. 3d at 8, 647 N.E.2d at 143 (quoting Allen v. PUCO (1988), 40 Ohio St. 3d 184, 186, 532 N.E.2d 1307, 1310).

Similarly, due process is required under federal law when an agency takes administrative notice. "[W]hen an agency takes official or administrative notice of facts, a litigant must be given an adequate opportunity to respond." Heckler v. Campbell (1983), 461 U.S. 458, 469, 103 S.Ct. 1952, 1958. "[A]dministrative notice, based upon 'routinely offered' . . . expert testimony in similar cases . . . without consulting the . . . or any other source of information, and without affording Plaintiff the opportunity to object to the use of such notice, was error." Bronson v. Barnhart (E.D. Pa. June 10, 2003), No. 02-3724, 2003 U.S. Dist. LEXIS 12201, at *17-18. "This is because a plaintiff must be given the opportunity to challenge the evidence and assumptions upon which" administrative notice is taken. Id. at *18. "An adjudicative fact is a fact 'concerning the immediate parties -- who did what, where, when, how, and with what motive or intent." Doty v. State Farm Fire and Cas. (9th Cir. Jan. 22, 1993), No.

91-16381, 1993 U.S. App. LEXIS 1439, at *9 (emphasis in original). "[T]estimony offered in other cases [is] not generally known or capable of accurate and ready determination." Id. at *9-10 (citing Sartain v. SEC (9th Cir. 1979), 600 F.2d 733, 739).

Here, EnerNOC (as explained in its Motion to Vacate) was not a party to the MRO proceeding. Thus, EnerNOC did not have knowledge of, or an adequate opportunity to explain or rebut, any evidence that is being administratively noticed in this proceeding. Multiple issues within the Stipulation that refer to issues addressed in Case No. 09-906-EL-SSO are in dispute. For example, EnerNOC disagrees with FirstEnergy's reasons for extending Riders ELR and OLR. To the extent that any evidence was offered in support of such an extension, such cannot properly be an "adjudicated fact" upon which the Commission may take administrative notice. Not only are issues that were the subjects of a separate proceeding involved, EnerNOC, as a non-party to the separate proceeding, did not have an "opportunity to prepare and respond to the evidence." Canton Storage, 72 Ohio St. 3d at 8, 647 N.E.2d at 143. Thus, the taking of administrative notice here violates EnerNOC's due process rights under both Ohio law and federal law, and unduly prejudices EnerNOC.

II. CONCLUSION

The Commission's Order of April 6, 2010 improperly takes administrative notice of Case No. 09-906-EL-SSO. Administrative notice is improper here because the separate proceeding (from which administrative notice is being taken) involves issues that are in dispute. In addition, the Commission's taking of administrative notice constitutes another denial of EnerNOC's due process rights under Ohio and federal law. The Commission should modify its Order of April 6, 2010, and deny FirstEnergy's request to take administrative notice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of EnerNOC, Inc.'s Application for Rehearing From Commission's April 6, 2010 Entry was served electronically to the counsel identified on the attached Service List this 19th day of April, 2010.

D. Jeffrey Ireland by Stephen Vigil

D. Jeffrey Ireland

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