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

MEMORANDUM CONTRA OF NUCOR STEEL MARION, INC. TO APPLICATIONS FOR REHEARING OF ENERNOC, INC. AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, ET AL.

Nucor Steel Marion, Inc. ("Nucor") hereby responds in opposition to the April 19, 2010, Application for Rehearing by The Office of the Ohio Consumers' Counsel, Citizen Power, Citizens Coalition, Environmental Law & Policy Center, Natural Resources Defense Council, Northeast Ohio Public Energy Council, Northwest Ohio Aggregation Coalition, and The Ohio Environmental Council (collectively, "Consumer Applicants"), and to the Application for Rehearing filed by EnerNOC, Inc. ("EnerNOC") on April 19, 2010.

Nucor specifically addresses herein the claims of EnerNOC and the Consumer Applicants (collectively, "Complaining Parties") regarding the Commission's decision to take administrative notice of the record in Case No. 09-906-EL-SSO ("MRO proceeding") in its April 6, 2010 Order ("Order"). Nucor focuses on this issue due to the specific harm to Nucor that would result from a decision not to take administrative notice at this late date after Nucor relied upon the Order in preparing its case in this proceeding. However, Nucor's failure to address the waiver issues raised by Consumer Applicants should not be viewed as agreement with them.

I. Introduction

In its Application initiating this proceeding, FirstEnergy requested that the Commission take administrative notice of the evidentiary record established in the pending MRO proceeding and thereby incorporate that record by reference for purposes of and use in the present proceeding.[1] No party objected to this request. On April 6, 2010, the Commission found the request to be "reasonable" and admitted "all testimony and exhibits which were admitted into evidence in Case No. 09-906-EL-SSO" into the evidentiary record of the present proceeding.[2] All briefs and other pleadings filed in the SSO proceeding "may be used for any appropriate purpose in this proceeding."[3]

In reliance on the Commission's decision and the lack of objections to that decision, since Nucor had already sponsored expert testimony in the MRO proceeding on issues of importance to Nucor, Nucor elected not to file additional testimony on the April 15, 2010 due date. The first Nucor learned of any objections to administrative notice came with the applications for rehearing, which were filed on April 19, 2010. The evidentiary hearing in this case began on April 20, 2010. Nucor would be harmed by any reversal of the Commission's decision, since it relied on that decision in not filing additional testimony in this case.

The applications for rehearing stem from the Commission's Order establishing an orderly and administratively economical approach to this ESP proceeding, recognizing that the ESP proceeding is a result of settlement talks in the MRO Proceeding, in which FirstEnergy filed

[1] Application at 3.
[2] Order at 2-3.
[3] *Id.* at 3.

an application for its standard service offer (SSO) commencing June 1, 2011.[4] A hearing was held in the MRO Proceeding December 15-23, 2009, followed by briefs and reply briefs.[5] Several conferences subsequently were held among the parties in an attempt to settle the outstanding issues in the MRO proceeding culminating in the ESP application that initiated the present proceeding.[6] Taking administrative notice of the record in the MRO proceeding permitted the Commission to avoid lengthy and expensive additional hearings to gather the same evidence already collected in the MRO proceeding and will allow the Commission to place the settlement in the context of the issues that were litigated in the MRO proceeding.

EnerNOC complains that factual issues are disputed from the MRO proceeding and that administrative notice violated EnerNOC's due process rights.[7] Consumer Applicants argue that the Commission erred in taking administrative notice of the record in the MRO proceeding "without examination of the applicable law."[8] Their substantive complaint, however, seems to be that administrative notice is improper if it eliminates a party's burden of proof obligations.[9]

The Applications requesting rehearing of the Commission's decision to take administrative notice of the record from the MRO proceeding should be rejected because:

- The Commission correctly took administrative notice of the record in the MRO Proceeding;
- The Complaining Parties had ample opportunity to cure any problems they may have had with the record in the MRO Proceeding;

[4] Order at 1.
[5] Stipulation and Recommendation at 3.
[6] *Id.* at 4.
[7] EnerNOC Application for Rehearing at 1.
[8] Consumer Applicants' Application for Rehearing at 5-6.
[9] *Id.* at 6.

- The Complaining Parties were not prejudiced by incorporation of the record from the MRO Proceeding; and
- The Complaining Parties did not timely object to the Commission's decision to take administrative notice of the record in the MRO Proceeding.

II. The Commission Correctly Extended and Applied Administrative Notice to the Record in Case No. 09-906-EL-SSO.

A. Ohio Case Law Cited by EnerNOC Supports the Commission's Use of Administrative Notice in the Present Proceeding.

Contrary to EnerNOC's argument, the Ohio case law cited by EnerNOC actually establishes that taking administrative notice of the record in another proceeding is permissible. The seminal case on this issue in Ohio case law, *Allen v. Public Utilities Comm'n of Ohio*, [10] illustrates the propriety of the Commission's actions in the present proceeding.[11]

In *Allen*, relied upon as Ohio authority in EnerNOC's Application, an applicant requested a certificate of public convenience and necessity authorizing intrastate transportation of property in vehicles equipped with mechanical refrigeration.[12] Over 70 such certificates had been issued to similar carriers in a proceeding three months earlier, in which the Commission

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[10] *Allen v. Public Utilities Comm'n of Ohio*, 40 Ohio St.3d 184, 532 N.E.2d 1307 (1988).

[11] Consumer Applicants footnote, without context, *State ex rel. Everhart v. Mcintosh*, 115 Ohio St.3d 195, 196, 874 N.E.2d 516, 517 (2007), for the proposition that "trial courts may not take judicial notice of their own proceedings in other cases even when the cases involve the same parties." *See* Consumer Applicants Application at 6 n.20. However, this principle specifically applies only to trial courts and, in fact, the Supreme Court refused to apply this principle in *Everhart*. According to the Court: "The rationale for these holdings is that when judicial notice is taken of prior proceedings, such prior proceedings are not part of the record as defined in App.R. 9, and whether the trial court correctly interpreted such prior proceedings is not reviewable by the appellate court." *Everhart*, 115 Ohio St.3d at 196, 874 N.E.2d at 517-518 (quoting *Phillips v. Rayburn*, 113 Ohio App.3d 374, 379, 680 N.E.2d 1279 n.1). The Supreme Court upheld the right of the Court of Appeals to take judicial notice of its dismissal of Appellant's appeal in a related case, as well of its own right to take judicial notice of the entry in that case. *Everhart*, 115 Ohio St.3d at 197, 874 N.E.2d at 518. In the present proceeding, it is obvious that, as in *Everhart*, the rationale for precluding such notice would not apply since the entire record of the MRO proceeding is part of the record administratively noticed and that record would be included in any appeal permitting anything in that record to be reviewable by an appellate court.

[12] *Allen*, 40 Ohio St.3d at 184, 532 N.E.2d at 1308.

determined "an ongoing, special, state-wide need for transportation service in vehicles equipped with mechanical refrigeration."[13] Seven of the certificate holders from the earlier proceeding filed protests against Allen's application.[14] The Commission incorporated the record from the earlier proceeding and, relying on that record to establish the immediate need for refrigerated transport, granted Allen's motion to dismiss the protests.[15]

The Supreme Court upheld the Commission's decision. The Court framed the case as whether it was "reasonable and lawful for the commission to base its order" on evidence of record obtained in the prior proceeding.[16] The Court noted that there is a long history of Ohio cases illustrating the resolution of administrative notice cases "based on the particular facts presented in each case":

> In *Forest Hills Utility Co. v. Pub. Util. Comm.* (1974), 39 Ohio St.2d 1, 68 O.O.2d 1, 313 N.E.2d 801, we held that it was error for the commission to take administrative notice of an analysis not available at the time of hearing which the appellant had no opportunity to examine. We concluded that evidence must be introduced at a hearing or otherwise brought to the knowledge of the interested parties prior to decision, with an opportunity to explain and rebut. (citation omitted)
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> But in *Schuster v. Pub. Util. Comm.* (1942), 139 Ohio St. 458, 22 O.O. 507, 40 N.E.2d 930, we 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 records, and in *J.V. McNicholas Transfer Co. v. Pub. Util. Comm.* (1975), 44 Ohio St.2d 23, 73 O.O.2d 118, 336 N.E.2d 429, we held that administrative notice of a zone enlargement petition proceeding was reasonable. In *Canton v. Pub. Util. Comm.* (1980), 63 Ohio St.2d 76, 17 O.O.3d 46, 407 N.E.2d 9, we held that the commission's reference to a prior commission case was not improper, and in *County Commrs. Assn. v. Pub. Util. Comm.*

[13] *Id.*
[14] *Id.*
[15] *Id.* at 185, 532 N.E.2d at 1309.
[16] *Id.*

> (1980), 63 Ohio St.2d 243, 17 O.O.3d 150, 407 N.E.2d 534, we concluded that it was not a denial of due process of law for the commission to take administrative notice of an investigative case in the appellants' complaint case.
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> More recently, in *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (1984), 12 Ohio St.3d 280, 12 OBR 356, 466 N.E.2d 848, appeal dismissed (1986), 476 U.S. 1166, 106 S.Ct. 2884, 90 L.Ed.2d 972, we declined to reverse an order of the commission where no prejudice was shown to result from taking administrative notice of a fact without providing the utility an opportunity to present evidence regarding this additional information.[17]

In affirming the Commission, the Court found that "[a]ppellants were parties to the *Continental* proceeding and, as such, arguably had knowledge of, and an adequate opportunity to explain and rebut, the evidence."[18] "[I]t was incumbent upon the appellants, if they had any concerns regarding the *Continental* record or order, to have raised these matters through an application for a rehearing of the earlier order."[19]

Based on our reading of *Allen*, several principles emerge governing the use of administrative notice of the record in a prior proceeding:

- The Commission may take administrative notice of the record in an earlier proceeding, subject to review on a case by case basis;[20]
- Parties to the prior proceeding presumably have knowledge of, and an adequate opportunity to explain and rebut the evidence;[21] and
- Prejudice must be shown before an order of the Commission will be reversed.[22]

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[17] *Allen*, 40 Ohio St.3d at 185-86, 532 N.E.2d 1309-1310.
[18] *Id.* at 186, 532 N.E.2d at 1310.
[19] *Id.*
[20] *Id.* at 185, 532 N.E.2d at 1309.
[21] *Allen*, 40 Ohio St.3d at 186, 532 N.E.2d at 1310.
[22] *Id.*

Under these principles, taking administrative notice of the record in the MRO proceeding was entirely proper.

B. EnerNOC's Claim That The Commission Cannot Take Administrative Notice of The Record in a Prior Proceeding Because the Record May Contain Facts That Were Disputed Is Without Merit.

EnerNOC's claim that the Commission cannot take notice of a record containing disputed facts is without merit. As noted earlier, *Allen* upheld the Commission's decision to take judicial notice of the record in a prior proceeding and the Commission's use of conclusions derived from the record in that case to aid in its decision in the later proceeding. The Court upheld the Commission's summary dismissal of seven protests filed by participants in the earlier case, finding that "the commission did not act unreasonably or unlawfully. . . ."[23] If anything, it appears that *Allen* was more problematic than the current proceeding, since in *Allen* the Court upheld Commission action based on an earlier record without a affording protestants a second hearing (the protests were dismissed) – unlike in the pending case, where Complaining Parties have been permitted a second opportunity to address the issues (including any *evidence from* the MRO case) in the hearings recently held in the ESP case. If the appellants in *Allen* were not prejudiced by the Commission's taking of administrative notice of the record from the earlier proceeding, it is difficult to see how the Complaining Parties would be prejudiced in this case.

Taking administrative notice of the record in an earlier case by its very nature includes factual disputes that took place in the earlier proceeding and that are part of that record. This is not an impediment to administrative notice, nor an endorsement of both sides of a factual

[23] *Id.* At 188, 532 N.E.2d at 1311.

issue. The purpose of taking administrative notice of the record in a prior proceeding is administrative economy – avoiding the introduction of evidence, discovery, and procedural issues in the second case, particularly where the parties participated or had the opportunity to participate fully in both proceedings. If the standard were as EnerNOC claims, the Commission could never take administrative notice of a prior record, which we know from *Allen* is not Ohio law. The Court's approval of the Commission's use of administrative notice in *Allen* demonstrates that administrative notice is proper where the parties are not prejudiced by the Commission's action.

C. EnerNOC's Claims of Violation of Its Due Process Rights Are Without Merit.

EnerNOC complains that administrative notice of the record in the MRO proceeding violates its due process rights.[24] The standard enunciated in *Allen* is "whether the complaining party had prior knowledge of, and had an adequate opportunity to explain and rebut, the facts administratively noticed."[25] EnerNOC states that it "was not a party to the MRO proceeding" and thus "did not have knowledge of, or an adequate opportunity to explain or rebut, any evidence that is being administratively noticed in this proceeding."[26] EnerNOC's claims are without merit in view of its notice of the MRO proceeding and the opportunity to participate.

While EnerNOC chose not to become a party to the MRO proceeding, at the outset of the proceeding EnerNOC knew, or should have known, that issues related to interruptible rates and Rider ELR and OLR specifically, including their possible continuation, could arise in the proceeding. Moreover, had EnerNOC carefully monitored the docket in the MRO proceeding, it

[24] EnerNOC Application at 3.
[25] *Allen*, 40 Ohio. St.3d at 186, 532 N.E.2d at 1310.
[26] EnerNOC Application at 6. It should be noted that the Environmental Law & Policy Center, the only one of the Consumer Applicants that was not a party in the MRO Proceeding, makes no claim of due process violation.

would have known that the issues of continuation of Rider ELR and OLR were the subject of substantial evidence and hearing time as a number of intervenor witnesses and parties advocated for the continuation of Rider ELR and OLR. Nonetheless, EnerNOC made the conscious and informed decision not to participate in the MRO proceeding and cannot now be heard that it is denied due process in the present proceeding because of its own decision.

In its motion to intervene in the present proceeding, EnerNOC characterizes itself as having:

> extensive experience and expertise practicing before state and federal commissions. EnerNOC's intervention will allow for the efficient processing of this case.[27]

EnerNOC therefore portrayed itself as a seasoned veteran of regulatory proceedings when moving to intervene in the present proceeding. It also admits in its later motion to vacate in this proceeding that it was aware of but chose not to intervene and participate in the MRO proceeding:

> because the case, as filed and as repeatedly affirmed by FirstEnergy, did not involve demand response or efficiency issues germane to its business or customers.[28]

It also complained that the Stipulation negotiated in the MRO proceeding:

> has modified and extended the Riders for the ELR and OLR tariffs in a manner that contradicts the Riders as filed originally.[29]

EnerNOC's reasoning continued:

> Since EnerNOC had no notice of the scope of the settlement negotiations, it did not have an opportunity to participate in the negotiations that resolved these issues. Accordingly, EnerNOC

[27] EnerNOC Memorandum in Support of Motion to Intervene (March 29, 2010) at 2.
[28] EnerNOC Memorandum in Support of Motion to Vacate (April 16, 2010) at 1.
[29] *Id.* at 2.

> was not privy to, nor did it have an opportunity to be heard in, the negotiations among parties that led to the Stipulation that is the subject matter of this proceeding."[30]

Incredibly, what EnerNOC asks the Commission to believe is that it was rational for EnerNOC to assume that simply because FirstEnergy did not appear to favor continuation of Riders ELR and OLR in the MRO filing that the issue could not come up in the proceeding and ultimately be addressed and resolved differently than as proposed in FirstEnergy's MRO application through litigation or settlement. Moreover, EnerNOC never explains its failure to attempt to intervene once the issue of continuation of ELR and OLR was joined as a result of expert testimony by other parties in the MRO proceeding. The simple answer is that EnerNOC failed to intervene in the MRO Proceeding to protect its interests and now attempts to correct course by claiming that its own decisions create a due process error. They do not.

As a self-proclaimed sophisticated party, EnerNOC knew or should have known that interruptible rate issues were hotly contested in FirstEnergy's previous MRO filing in 2008 (Case. No. 08-936-EL-SSO) and that the Commission specifically required FirstEnergy in its decision in that case to offer interruptible service options in its MRO.[31] Similarly, interruptible

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[30] *Id.*

[31] In the *Commission's MRO Order, the Commission* stated:

> The Commission notes that the policy of the state, as codified in Section 4928.02, Revised Code, requires the Commission to ensure the availability of unbundled and comparable retail electric service that provides customers with the supplier, term, price, conditions, and quality options they elect to meet their respective needs.... Likewise, the record demonstrates that interruptible rates can be used to reduce generation and transmission capacity needs (Nucor Ex. 1 at 11). Moreover, the Commission notes that FirstEnergy has not demonstrated that time-of-day rates or interruptible rates are impractical or cannot be implemented as part of a competitive bidding process (Tr. I at 159; Tr. V at 21). In fact, the record in this proceeding demonstrates that FirstEnergy included both time-of-day rates and interruptible rates in its prior request, in Case No. 07-796-EL-ATA, for a competitive bidding process (Nucor Ex. 1 at 5, 10). Therefore, because the Commission finds that FirstEnergy has not demonstrated that its proposed rate design advances the state policies enumerated in Section 4928.02, Revised Code, the proposed rate

rate issues (including ELR and OLR) were also vigorously debated in the 2008 ESP case (Case No. 08-935-EL-SSO). In fact, the current ELR and OLR were ultimately a result of the Stipulation in the current 2009 ESP case. Any reasonable effort at research would have made it clear that interruptible rate issues (including the viability of ELR and OLR after Mary 31, 2011) were a potential issue in FirstEnergy's MRO proceeding.

Moreover, a review of the MRO filing by FirstEnergy should have indicated to EnerNOC that the planned expiration of Riders ELR and OLR on May 31, 2011 (and possible responses to expiration, including continuation of the riders in some form) would likely be an issue in the 2009 MRO proceeding. EnerNOC could have reviewed FirstEnergy's application to find reference to the upcoming demise of the riders and FirstEnergy's proposal to replace them with an "interruptible generation service opportunity."[32] FirstEnergy referenced the scheduled May 31, 2011 demise of Riders ELR and/or OLR at pages 24-25 of the MRO Application. The elimination of riders ELR and/or OLR and other resulting changes were also referenced in the direct testimony of FirstEnergy witness Mr. Paganie at 6-7 and Mr. Fanelli at pages 9-10 and 13.

Even if the history of interruptible issues in FirstEnergy proceedings and the introduction of a proposal to replace Riders ELR and OLR did not inspire EnerNOC to intervene in the MRO proceeding to protect its interests, its monitoring efforts should have detected the filing of direct testimony specifically addressing the expiration of Riders ELR and OLR and recommending their continuation by both Nucor witness Dennis W. Goins and Ohio Energy

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design should not be adopted and approved by the Commission.

Case No. 08-936-EL-SSO, Opinion and Order at 24 (November 25, 2008).

[32] Application, Case No. 09-0906-EL-SSO at 24-25.

Group witness Stephen J. Baron. Again EnerNOC either ignored these filings or chose not act to protect its interests.

In short, EnerNOC had, but did not choose to pursue, the "opportunity to prepare and respond to the evidence" in the MRO proceeding.[33] In fact, even if EnerNOC were to be successful in undermining the Stipulation in this proceeding, the Commission still has the opportunity to order the continuation of Riders ELR and OLR as a result of the pending MRO case, which has not yet been decided. In short, EnerNOC cannot bring the present proceeding to a halt by claiming due process violations based on its own conscious and informed decision not to intervene and protect its interests in the MRO proceeding.

D. The Commission Properly Acted In A Timely Fashion in Response to the Request Made in FirstEnergy's Application to Take Administrative Notice.

The Consumer Applicants incorrectly imply or assert that it was somehow improper for the Commission to grant the request made in FirstEnergy's Application to take administrative notice without FirstEnergy having made a separate motion to that effect. As Consumer Applicants state in a footnote:

> FirstEnergy never submitted a motion and supporting argument regarding its requested administrative notice of the record in the pending MRO case. Consequently no opposing arguments were offered in memoranda contra FirstEnergy's proposal. An application for rehearing is the first opportunity for parties to address the proposed procedure.[34]

The Consumer Applicants go on to ascribe a motive to the Commission in granting FirstEnergy's

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[33] *Canton Storage and Transfer Co., Inc. v. Public Utilities Comm'n of Ohio*, 72 Ohio St.3d 1, 8, 647 N.E.2d 136, 143 (1995) ("*Canton Storage*").

[34] Consumer Applicants' Application for Rehearing at 6, n.17.

request by suggesting it was "entirely guided by a desire for rapid approval of the Application."[35] Based on the footnoted argument, it appears that Consumer Applicants seek to justify their decision to wait until the eleventh hour (the day before the hearing and well after testimony was filed) to assert an objection to administrative notice by claiming that they had no duty to assert those claims until the Order was filed on April 6, 2010.

The simple answer is that the Commission properly moved forward on a timely basis with a decision on FirstEnergy's request (which was seconded by the Stipulation filed by all of the Stipulating Parties). The Commission's Order placed all parties on notice well before testimony was to be filed as to what evidence would be in the record due to administrative notice so that the parties could determine what additional testimony and evidence they might need in light of this decision. Moreover, Consumer Applicants point to no authority in their Application for Rehearing stating that a separate motion was required before the Commission could grant FirstEnergy's procedural request. To claim otherwise certainly elevates form over substance. Consumer Applicants certainly cannot (and do not) claim they were unaware of the request, which was clearly set out in its own paragraph in the 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.[36]

By contrast, Consumer Applicants take no issue with the attorney examiner's decision to grant an additional request made in FirstEnergy's Application that all parties to the MRO Proceeding

[35] *Id.* at 6.
[36] First Energy's Application at 3.

be admitted as parties to the present proceeding without having to file additional motions to intervene.[37] If Consumer Applicants were concerned about administrative notice as a matter of timing in this shortened proceeding, they could have responded in opposition to FirstEnergy's request after the Application was filed on March 23, 2010 and certainly within the 15-day period before the Commission's order granting the request was filed on April 6, 2010.

E. Consumer Applicants' Arguments Regarding Burden of Proof and Administrative Notice Do Not Apply to the Present Proceeding.

Consumer Applicants contend, erroneously, that the Commission's decision to take administrative notice of the record in the MRO case raises burden of proof concerns that would violate the principles in two Ohio Supreme Court cases --the *Canton Storage* and *Motor Service* cases.[38] Consumer Applicants make the bold assertion that eliminating FirstEnergy's burden of proof is "apparently the purpose of the administrative notice in this case. As a result, the PUCO's Entry regarding taking administrative notice of the record in the MRO case is unreasonable and unlawful."[39]

As discussed above, the *Allen* standard governs the use of administrative notice of the record from a prior proceeding. As the standard was paraphrased in *Canton Storage,* which was a later decision: "[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."[40] *Canton Storage* does not change the *Allen* standard in any way. *Motor Service* preceded *Allen* and thus cannot be deemed to modify the standard.

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[37] *See* Entry (March 24, 2010) at 2.
[38] *Canton Storage; Motor Service Co., Inc. v. Public Utilities Comm'n of Ohio,* 39 Ohio St.2d 5, 313 N.E.2d 803 (1974) ("*Motor Service*").
[39] Consumer Applicants' Application for Rehearing at 7-8.
[40] *Canton Storage,* 72 Ohio St.3d at 8, 647 N.E.2d at 143.

Thus, *Allen* permits the Commission's use of administrative notice on a case by case basis.[41] Rather than create a new "burden of proof" standard as argued by Consumer Applicants, the *Canton Storage* opinion clearly limits its decision to the "prejudice" prong of the *Allen* standard:

> Administrative notice of the testimony *in this case* prejudiced the protestants because the applicants' burden of proof was reduced by the use of this testimony.[42] (emphasis added)

There is no general standard that administrative notice of the record in a prior proceeding prohibits the use of that record to assist in meeting the burden of proof in the present proceeding. If that were the case, administrative notice would have no value. Indeed, in *Allen*, administrative notice was used not only to help meet the burden of proof, but also to dismiss protesting parties.

It is only in specific cases where administrative notice could be used to reduce or eliminate specific burden of proof requirements, thereby prejudicing other parties' rights, that burden of proof issues trump administrative notice. A look at the facts of *Canton Storage* and *Motor Service* will illustrate the narrow application of burden of proof in cases involving administrative notice of the record in a prior case.

In *Canton Storage*, the Commission consolidated applications by twenty-two motor carriers and granted certificates for authority to transport household goods throughout the State of Ohio with no route limitations.[43] Ninety-nine carriers protested the applications, primarily because carriers normally were given only radial shipping authority to or from

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[41] As the *Canton Storage* Court references at *id.*

[42] *Id.*

[43] *Canton Storage*, 72 Ohio St.3d at 1, 647 N.E.2d at 138.

Columbus, or nonradial authority between two points.[44] Ohio courts historically required more than one supporting witness before the Commission could find a public need for a proposed new service.[45] Although "[e]ighteen of the twenty-two applications were directly supported either by only one shipper witness or none at all,"[46] the Commission "took administrative notice of the shipper testimony supporting the individual applications and used it on a unified basis to support a finding of a public need for all the applications."[47]

Noting that there is "neither an absolute right for nor prohibition against the commission's taking administrative notice of facts outside the record in a case," the Court stated that "[e]ach case was to be resolved on its facts," using the factors set forth in *Allen*.[48] Using that standard, the Court reversed the Commission, stating that the use of administrative testimony of the testimony in this case in cumulative form prejudiced the protestants "because the applicants' burden of proof was reduced by the use of the testimony."[49] The consolidation and use of unified testimony unlawfully allowed the granting of "eighteen applications that should have been rejected for inadequate support."[50]

Administrative notice of the record in *Canton Storage* was improper because it was used to circumvent a specific court-ordered requirement that two supporting shipper witnesses were required to meet the burden of proof. Where parties had the individual burden of proof in carrier cases to produce two witnesses to establish public need, that requirement could not

[44] *Id.* at 1-2, 647 N.E.2d at 138.
[45] *Id.* at 6, 647 N.E.2d at 141.
[46] *Id.*
[47] *Id.* at 8, 647 N.E.2d at 142.
[48] *Id.* at 8, 647 N.E.2d at 143.
[49] *Id.*
[50] *Id.* at 9, 647 N.E.2d at 143.

be circumvented by bootstrapping testimony of witnesses appearing for other parties as to other specific applications. In fact, all of those witnesses, save one, "limited his or her testimony to supporting only a single carrier's application."[51] This is completely unrelated to the present proceeding, which has no such court-ordered requirement for the type and number of party-specific witnesses to be produced to meet burden of proof requirements. *Canton Storage* presents a unique set of facts that prejudiced other shippers, not a general prohibition against the use of administrative notice of the record in another proceeding.

The *Motor Service* case also does not apply to the present proceeding. In that case, parties filed applications in August 1970 for certificates of public convenience and necessity for the transportation of mobile homes to and from 23 to 25 counties in the State of Ohio.[52] Hearings were held October 14, 15, 28 and 29, 1970.[53] Transit Homes filed a similar application on October 23 and moved to consolidate all three applications (and the hearing record for October 14 and 15) at the October 28 hearing.[54] Motor Service was not permitted to cross-examine public witnesses on the Transit Homes application and the motion to consolidate was denied, with Transit Homes barred from participating in the hearing.[55] The Commission issued an entry on November 5, 1970 consolidating the three applications.[56] On March 15, 1971, Transit Homes amended its application to conform to the authority sought by the other two applicants.[57] On November 22, 1972, the attorney-examiner recommended granting all three

[51] *Canton Storage*, 72 Ohio St.3d at 9, 647 N.E.2d at 143.
[52] *Motor Service*, 39 Ohio St.2d at 5-6, 313 N.E.2d at 805.
[53] *Id.* at 6, 313 N.E.2d at 805.
[54] *Id.*
[55] *Id.*
[56] *Motor Service*, 39 Ohio St.2d at 6, 313 N.E.2d at 805.
[57] *Id.* at 7, 313 N.E.2d at 805.

applications, considering the prior testimony sought to be adopted into Transit Homes' record and sustaining the original motion to adopt the testimony.[58] Motor Service, which had been barred from cross-examination of the witnesses at the October 28, 1970 hearing as to Transit Homes' application and now found the testimony used to secure approval of Transit Homes' application, appealed this use of administrative notice to the Supreme Court.

Like *Canton Storage*, the case turned on case-specific issues. The right of cross-examination of public witnesses as they applied to Transit Homes "would have existed had Transit Homes been a party at the time of the proceeding."[59] It was not. The post-facto adoption of testimony by public witnesses applied to the other two applicants into Transit Homes' record "eliminated Transit Homes' burden of proving the inadequacy of the existing service and the ability of Transit Homes to provide it. . . ."[60] Transit Homes did not have to make its own record before the Commission and "deprived motor carriers and the shipping public . . . of the opportunity to protest Transit Homes' application, as it related to them, in direct contravention of the purpose of the notice and publication provisions of R.C. 4921.09."[61] This is a very different set of facts than the present case, where all of the parties submitting testimony in the MRO proceeding are also parties in the present proceeding and where the Complaining Parties either participated in the MRO proceeding or could have done so.

The controlling Ohio cases, taken together, permit the Commission to take administrative notice on a case by case basis. Burden of proof issues are not raised by taking administrative notice, but only in that narrow range of cases where taking administrative notice

[58] *Id.* at 7, 313 N.E.2d at 805-806.
[59] *Id.* at 12, 313 N.E.2d at 808.
[60] *Id.*
[61] *Id.*

of the record in another case permits a party *to circumvent legal requirements* as to how buden of proof must be met. In the present proceeding, which most closely reflects the *Allen* facts, the Commission properly incorporated the record of a recent proceeding that dealt with essentially identical issues and parties as the present proceeding. Principles of administrative economy dictate that this was the proper approach and does not permit any party to avoid statutory, court- or commission-imposed legal requirement.

F. The Complaining Parties Were Not Prejudiced by Administrative Notice Since They Have Had Ample Opportunity to Address Any Issues Raised by Administrative Notice of the Record in the MRO Proceeding.

In raising complaints regarding administrative notice, it should be remembered that all of the Complaining Parties "had an adequate opportunity to explain and rebut, the facts administratively noticed"[62] in this proceeding. First, all of the parties either actually participated or could have participated in the MRO proceeding. Moreover, unlike the cases identified in the Applications for Rehearing, these parties were also given another, second "bite at the apple" in the current proceeding. The Application placed all parties on notice of the administrative notice request at the outset of the hearing and the Commission signaled that the request was granted long before the hearing. If there were any issues raised by the record in the MRO proceeding that required further attention, the Complaining Parties had a full opportunity to explain and rebut any evidence from that docket – the Complaining Parties' options included:

- conducting discovery on the parties participating in the MRO proceeding as to any evidence from that proceeding;

[62] *Allen*, 40 Ohio. St.3d at 186, 532 N.E.2d at 1310.

- requesting that parties identify portions of the MRO record they intended to rely upon in the present proceeding;
- using a subpoena to require witnesses from the MRO proceeding to appear at the ESP hearing for further cross-examination; and
- submitting testimony of their own in this proceeding to explain or rebut any evidence from the MRO proceeding.

As a result, the Complaining Parties were not prejudiced by the decision to take administrative notice and indeed had a reasonable opportunity to cure any problem.

G. As a Matter of Equity, The Complaining Parties Should Not Be Granted The Requested Relief.

The ESP Application, filed by FirstEnergy on March 23, 2010, requested the Commission to take administrative notice of the evidentiary record in Case. No. 09-906-EL-SSO "and thereby incorporate by reference that record for purposes of and use in this proceeding."[63] EnerNOC intervened in this proceeding on March 29, 2010 and The Environmental Law & Policy Center, the only Consumer Applicant not a party in the MRO proceeding, moved to intervene on April 1, 2010. The remaining Consumer Applicants were parties to the proceeding at the outset, having been parties in the MRO proceeding, including its settlement negotiations. All parties were aware of the tight time frames in the case. Since none of the Complaining Parties objected to FirstEnergy's request for administrative notice in the fifteen days between the filing of the Application and the Commission's April 6, 2010 Order, it would be reasonable to conclude that the Complaining Parties waived any right to object. Often, a request for administrative notice

[63] Application at 3.

is first offered at hearing and the parties must object immediately; certainly 15 days provided adequate time to object.

The Complaining Parties compounded their failure to object to the original request for administrative notice by not providing timely notice of their objection after the Commission initially ruled on the issue. The Complaining Parties were well aware of testimony deadlines. They were also aware that the Stipulating Parties were relying on administrative notice (otherwise why request it in the first place). Nonetheless, the Complaining Parties did not provide any notice of any objection to the parties until after all testimony had been filed and specifically on the day before the commencement of the evidentiary hearing in this proceeding.

The Commission timely granted FirstEnergy's request to take administrative notice of the record in the MRO proceeding, giving the Complaining Parties ample opportunity to respond to the Order in preparing their case as well as contest the Order in timely fashion. Regardless of the time frame generally permitted to file applications for rehearing, the decisions by Consumer Applicants and EnerNOC to wait until after intervenor and Staff direct testimony was filed and the hearing about to begin to provide the first indication that they objected to administrative notice (in the form of applications for rehearing) should not be rewarded.

By contrast, Nucor explicitly relied on the Commission's Order in its decision not to submit additional testimony in the present proceeding. Nucor believed that it could rely on the almost 150 pages of testimony and exhibits it sponsored it the MRO proceeding, its cross-examination, and the testimony adduced by other parties, to support its position in the present proceeding. We are reasonably certain that other parties followed the same path. To the

extent that the Complaining Parties truly believe that substantial rights were violated by the issues cited in their applications for rehearing, those parties had a responsibility to raise those issues in a timely manner. Waiting until the day before the hearing began to attempt to throw out the MRO evidentiary record relied upon by the Stipulating Parties, may not violate the Commission's rules per se, but does call into question the credibility of parties who claim that the procedures followed in this case violate due process and/or Ohio law but chose not to provide timely notice of their position. At a minimum, the Complaining Parties could have at least provided some notice to the other parties that they intended to contest the Commission's decision prior to the deadline for filing testimony.

Having relied to its detriment on the Commission's decision and the Complaining Parties' failure to timely object prior to the deadline for filing testimony, Nucor requests that the Commission consider whether to apply the doctrine of laches to both applications for rehearing in denying the requested relief. The elements of laches are: (1) unreasonable delay or lapse of time asserting a right; (2) absence of an excuse for the delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4) prejudice to the other party.[64]

In the present case, the Complaining Parties chose not to alert the Commission or the other parties in the case as to their concerns regarding administrative notice, including filing an application for rehearing, until after testimony was filed and on the eve of the hearing. The Complaining Parties have no excuse for the delay. The Complaining Parties knew full well that by filing an application for rehearing after testimony was due, they potentially prejudiced the rights of other parties to put on a case supporting the Stipulation.

[64] *State ex rel. Polo v. Cuyahoga County Bd. of Elections,* 74 Ohio St.3d 143, 145, 656 N.E.2d 1277, 1279 (1995).

In addition, if the Commission were to reverse course and grant either of the Applications, Nucor expressly requests and believes that fundamental fairness requires that it be given a reasonable opportunity to develop, file and present supplemental testimony and exhibits to replace the evidence it adduced in the MRO proceeding.

III. Conclusion

The Commission acted correctly in taking administrative notice of the record in the MRO proceeding contrary to the claims of EnerNOC and the Consumer Applicants. The Commission should affirm its initial decision on this issue for all the reasons identified above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Memorandum Contra of Nucor Steel Marion, Inc. to Applications for Rehearing of Enernoc, Inc. and the Office of the Ohio Consumers' Counsel, et al.*, was served upon the persons listed below via electronic transmission this 26th day of April, 2010.

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