

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) Case No. 10-388-EL-SSO
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.)

ENTRY ON REHEARING

The Commission finds:

- (1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company (FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.
- (2) On October 20, 2009, FirstEnergy filed an application, in Case No. 09-906-EL-SSO (hereinafter, *MRO Case*), for its standard service offer (SSO) commencing June 1, 2011, pursuant to Section 4928.141, Revised Code. This application was for a market rate offer (MRO) in accordance with Section 4928.142, Revised Code. The Staff filed comments regarding the application on November 24, 2009; in its comments, Staff recommended that FirstEnergy consider a new electric security plan (ESP) for its SSO rather than the proposed MRO. The hearing in this proceeding commenced on December 15, 2009, and concluded on December 22, 2009.
- (3) Subsequently, on March 23, 2010, FirstEnergy filed an application, pursuant to Section 4928.141, Revised Code, for a SSO for the period between June 1, 2011, and May 31, 2014. This application is for an ESP, in accordance with Section 4928.143, Revised Code, and the application includes a stipulation (Joint Stipulation) agreed to by various parties regarding the terms of the proposed ESP. FirstEnergy states in the application that, since the directive by the Commission in the *MRO Case* for Staff to submit comments

related to FirstEnergy's proposed SSO or alternative SSOs and Staff's recommendation to consider an ESP, FirstEnergy and numerous parties have engaged in a wide range of discussions over several months regarding various aspects of an ESP, all of which culminated in the filing of the proposed ESP.

- (4) In addition, FirstEnergy requested that the Commission take administrative notice of the record in the *MRO Case* for purposes of this proceeding. No memoranda contra were filed opposing FirstEnergy's request. Subsequently, by Entry issued on April 6, 2010, the Commission granted FirstEnergy's request. All testimony and exhibits which were admitted into evidence in the *MRO Case* were admitted into the evidentiary record of this proceeding. The evidentiary hearing in this proceeding commenced on April 20, 2010.
- (5) Moreover, on March 24, 2010, FirstEnergy filed a motion for waivers of certain procedural requirements for electric security plans contained in Rule 4901:1-35-03, O.A.C., and a request for expedited consideration.
- (6) On March 26, 2010, Citizen Power, Citizens Coalition, Ohio Consumers' Counsel, Natural Resources Defense Council, Northwest Ohio Aggregation Coalition, Northeast Ohio Public Energy Council and the Ohio Environmental Council (Ohio Consumer and Environmental Advocates or OCEA) filed a joint memoranda contra the motion for waivers.
- (7) In the April 6 Entry, the Commission granted FirstEnergy's motion for waivers, in part, and denied FirstEnergy's motion, in part. Specifically, the Commission waived paragraphs (C)(4), (C)(5), (C)(6), (C)(7), (C)(8), (F), and (G) of Rule 4901:1-35-03, O.A.C., as well as paragraph (B) of Rule 4901:1-04, O.A.C.
- (8) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

- (9) On April 20, 2010, EnerNOC, Inc., (EnerNOC) filed an application for rehearing in this proceeding, alleging that the Commission's April 6 Entry violated EnerNoc's due process rights under Ohio and Federal law. Further, on April 19, 2010, OCEA (with the addition of the Environmental Law and Policy Center) filed an application for rehearing, alleging that the April 6 Entry was unreasonable and unlawful on three separate grounds.
- (10) On April 26, 2010, Nucor Steel Marion, Inc., (Nucor) filed a memorandum contra the applications for rehearing. Further, FirstEnergy filed memoranda contra the applications for rehearing on April 29, 2010.
- (11) In its assignment of error, EnerNOC claims that taking administrative notice of the record in the *MRO Case* violated EnerNOC's due process rights under Ohio and Federal law. Similarly, in its first assignment of error, OCEA argues that the Commission's April 6 Entry is unreasonable and unlawful because the Commission is not permitted to take administrative notice of the record in the pending *MRO Case*.

In support of its assignment of error, EnerNOC argues that the Commission may not take administrative notice of the record in the *MRO Case* because disputed facts exist. EnerNOC states that it was not a party to the *MRO Case*; thus, EnerNOC did not have knowledge of, or an adequate opportunity to explain or rebut, any evidence that was incorporated into the record in this proceeding. *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1, 8 (citing *Allen v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184, 186).

Similarly, in its first assignment of error, OCEA alleges that the Commission's April 6 Entry is unreasonable and unlawful because the Commission is not permitted to take administrative notice of the record in the pending *MRO Case*. OCEA notes that the Supreme Court has held that "consolidation of cases and the exchange of testimony is impermissible where it eliminates a portion of a party's burden of proof." *Canton Storage* at 9. OCEA contends that FirstEnergy

intends to rely upon the record in the *MRO Case* to meet its burden of proof regarding its proposal to conduct a competitive bidding process as part of the proposed ESP. OCEA alleges that the effect of taking administrative notice of the record in the *MRO Case* is to eliminate a portion of FirstEnergy's burden of proof.

- (12) In its memorandum contra, Nucor argues that the Commission correctly extended and applied administrative notice to the record in the *MRO Case*. Nucor argues that the case law cited by EnerNOC actually establishes that taking administrative notice of the record in another proceeding is permissible. Nucor claims that, under *Allen*, the Commission may take administrative notice of the record in an earlier proceeding, subject to review on a case-by-case basis. Further, parties to the prior proceeding presumably have knowledge of, and an adequate opportunity to explain and rebut, the evidence. Moreover, prejudice must be shown before an order of the Commission will be reversed. *Allen*, 40 Ohio St.3d at 185-186.

Nucor also argues that EnerNOC's claim that the Commission cannot take administrative notice of the record in a prior proceeding because the record may contain disputed facts is without merit. Nucor claims that 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 are part of the record and that this is not an impediment to administrative notice nor an endorsement of both sides of a factual issue.

In addition, Nucor disputes EnerNOC's claims that its due process rights were violated. Nucor notes that, although EnerNOC was not a party to the *MRO Case*, EnerNOC had notice of the proceeding and an opportunity to participate in the case. Further, Nucor claims that EnerNOC knew or should have known that the future of FirstEnergy's interruptible tariffs, which EnerNOC claims are germane to its business, were a potential issue in the *MRO Case*, particularly after intervenors filed expert testimony recommending the continuation of the interruptible tariffs. Thus, Nucor argues that EnerNOC made a conscious and

informed decision not to intervene in the MRO case and that EnerNOC's failure to protect its interests does not create a violation of its due process rights.

Nucor further argues that the Commission acted in a timely fashion in response to the request made in FirstEnergy's application to take administrative notice of the record in the *MRO Case*. Nucor notes that OCEA does not claim that they were unaware of the request and that they could have responded in opposition to the request in the 15-day period between the filing of FirstEnergy's application and the Commission's April 6 Entry.

Moreover, Nucor argues that OCEA's arguments regarding the burden of proof and administrative notice do not apply in this proceeding. Nucor argues that burden of proof issues are not raised by taking administrative notice but only in a narrow range of cases where taking administrative notice of the record in another case permits a party to circumvent legal requirements as to how the burden of proof must be met. Nucor states that the Commission, in accordance with the principles of administrative economy, properly incorporated the record of a recent proceeding that dealt with essentially identical issues and parties as the present proceeding.

Nucor claims that neither EnerNOC nor OCEA were prejudiced by administrative notice because they have had an ample opportunity to explain and rebut the facts administratively noticed through discovery or testimony presented in this proceeding. Nucor adds that both EnerNOC and OCEA either actually participated or could have participated in the *MRO Case*. On the other hand, Nucor claims that the failure of EnerNOC and OCEA to timely object to the taking of administrative notice of the evidence in the record of the *MRO Case* has the potential to prejudice Nucor, which prepared its case in reliance upon the Commission's April 6 Entry.

- (13) In its memorandum contra EnerNOC's application for rehearing, FirstEnergy argues that the Commission properly took administrative notice of the record in the *MRO Case*.

FirstEnergy states that no "fact" from the MRO Case is conclusive in this proceeding. The Commission did not decide any issue or weigh the credibility of opposing testimony; instead, the Commission simply re-admitted the *MRO Case* record in this proceeding. Further, FirstEnergy claims that, because EnerNOC had had a full opportunity to highlight and challenge any part of the record from the *MRO Case* with which it disagrees, EnerNOC has suffered no prejudice. Finally, FirstEnergy argues that EnerNOC had prior notice that the interruptible tariffs were at issue in the *MRO Case* and an opportunity to intervene to explain its position.

In its memorandum contra OCEA's application for rehearing, FirstEnergy claims that OCEA undeniably had prior notice of the *MRO Case* record and the opportunity to explain and rebut it. Further, FirstEnergy contends that OCEA has suffered no prejudice from administrative notice of the *MRO Case* record.

- (14) The Commission notes that the Supreme Court has held that there is neither an absolute right for nor a prohibition against the Commission's taking administrative notice of facts outside the record in a case. Instead, each case should be resolved on its facts. The Court further held that 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* at 8.

The Commission finds that EnerNOC and OCEA have had an ample opportunity to prepare and respond to the evidence administratively noticed in the record of the *MRO Case*. Specifically, EnerNOC and OCEA have had the opportunity to: conduct discovery on the parties in the *MRO Case* regarding any evidence presented in that proceeding; request that parties specifically identify the evidence in the record of the *MRO Case* that the parties intend to rely upon in this proceeding; request a subpoena to compel witnesses from the *MRO Case* to appear for further cross-examination at hearing; cross-examine the witnesses at the hearing regarding any issues in the *MRO Case* which

were proposed to be resolved by the Joint Stipulation filed in this proceeding; and present testimony at hearing in this proceeding to explain or rebut evidence in the record of the *MRO Case*. Moreover, the Commission finds that neither EnerNOC nor OCEA have demonstrated that they were prejudiced by the taking of administrative notice of the evidence in the *MRO Case*.

With respect to the concerns raised by OCEA that taking administrative notice of the record in the *MRO Case* somehow eliminates a portion of FirstEnergy's burden of proof in this proceeding, the Commission notes that no decision has been reached in that proceeding; thus, the Commission will not rely upon any findings of facts previously determined in that case, as was the case in *Allen*. Moreover, although OCEA relies heavily upon the Court's holding in *Canton Storage*, the circumstances in this proceeding are not remotely analogous to those in *Canton Storage*. In *Canton Storage*, the Court determined that the Commission "never expressly took administrative notice of any testimony below." *Canton Storage* at 8. Further, *Canton Storage* involved separate applications by 22 motor carriers seeking statewide operating authority rather than three affiliated utilities filing a single application for an electric security plan. In *Canton Storage*, the Commission relied upon shipper testimony as a whole to support the applications rather than on testimony related to the individual applicants, which the Court rejected as an elimination of a portion of the applicant's burden of proof. *Canton Storage* at 8-10.

Further, we note that, pursuant to Section 4928.143(C)(1), Revised Code, the burden of proof is on FirstEnergy in this proceeding, and the Commission neither intended to nor eliminated any portion of that burden of proof on FirstEnergy in the April 6 Entry. However, FirstEnergy, as well as every other party in this proceeding, is entitled to rely upon the evidence admitted into the record in the *MRO Case* to meet its burden of proof. As we detailed above, all parties to this proceeding have had a full and fair opportunity to explain or rebut any evidence administratively noticed from the record in the *MRO Case*,

and the Commission may rely upon evidence admitted into the record in the *MRO Case* in reaching our decision in this case.

Accordingly, the Commission finds that rehearing on EnerNOC's assignment of error and OCEA's first assignment of error should be denied.

- (15) In its second assignment of error, OCEA alleges that the April 6 Entry is unreasonable and unlawful because the Commission granted, in part, FirstEnergy's motion for waivers after concluding that the application was the culmination of a lengthy process involving other cases. OCEA claims that the Commission has allowed the filings made in the *MRO Case* to replace the filings required in the ESP case and that, as OCEA alleged above, the Commission may not rely upon the record in the *MRO Case*. OCEA also claims that the General Assembly provided 275 days for a full review or information in support of any ESP application.

The Commission finds that rehearing on this assignment of error should be denied. As the Commission discussed above, OCEA's broad claim that the Commission has improperly taken administrative notice of the record in the *MRO Case* is not supported by Supreme Court precedent. Further, with respect to the 275-day timeframe provided by the General Assembly, Section 4928.143(C), Revised Code, states that the Commission shall issue an order on a proposed ESP "*not later than*" 275 days after the application's filing date. In fact, the Commission approved FirstEnergy's current ESP 34 days after the ESP was filed, and OCC, OEC, NOPEC, NOAC, Citizens Coalition, NRDC and Citizen Power all agreed to the provision of the Stipulation filed in the ESP proceeding requesting that the Commission approve the ESP within that time period. *In re FirstEnergy*, Case No. 08-935-EL-SSO, et al., Second Opinion and Order (March 25, 2009) at 6, 7.

- (16) In its third assignment of error, OCEA claims that the April 6 Entry is unreasonable and unlawful because the Commission failed to require a showing of good cause for the waivers requested.

OCEA claims that the April 6 Entry did not properly recognize the standard of review regarding the waiver requests. OCEA argues that the Commission failed to determine whether the information subject to the waiver request was necessary for an efficient and effective investigation.

In its memorandum contra OCEA's application for rehearing, FirstEnergy argues that the Commission properly waived certain filing requirements in light of its administrative notice of the record in the *MRO Case*. FirstEnergy claims that there was good cause for the Commission to approve the waiver requests because the information contemplated by the filing requirements already was provided in the *MRO Case*.

The Commission finds that OCEA has raised no new issues in their application for rehearing and that the Commission fully considered these arguments in the April 6 Entry. Therefore, rehearing on this assignment of error should be denied.

- (17) Nonetheless, based upon the comments received during the local public hearings held in this proceeding, the Commission believes that additional information regarding the impact of the proposed ESP on customer's bills is necessary before we can consider the Joint Stipulation. Therefore, pursuant to Rule 4901-1-34, O.A.C., the Commission directs that the evidentiary hearing in this proceeding resume on June 17, 2010, at 10:00 a.m. at the offices of the Commission, 180 E. Broad Street, 11th Floor, Hearing Room 11-A Columbus, Ohio. Further, the Commission directs its Staff to present a detailed analysis of the impact of the proposed ESP on customer's bills. Staff's testimony regarding the analysis should be pre-filed seven days prior to the hearing.

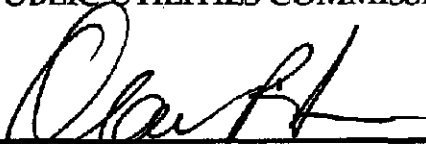
It is, therefore,

ORDERED, That the applications for rehearing filed by EnerNOC and OCEA be denied. It is, further,

ORDERED, That an evidentiary hearing be scheduled for June 17, 2010, at 10:00 a.m. at the offices of the Commission, 180 E. Broad Street, 11th Floor, Hearing Room 11-A, Columbus, Ohio. It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record in this proceeding.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



Paul A. Centolella



Valeria A. Lemmie



Steven D. Lesser

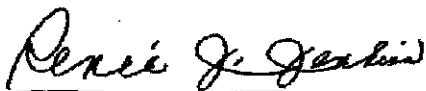


Cheryl L. Roberto

GAP/sc

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Renee J. Jenkins

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Secretary