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. 12-1230-EL-SSO

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA THE CONSUMER ADVOCATES' INTERLOCUTORY APPEAL FROM THE JUNE 6, 2012, RULING REGARDING ADMINISTRATIVE NOTICE

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ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

I. INTRODUCTION

The Northeast Ohio Public Energy Council ("NOPEC"), Northwest Ohio Aggregation Council ("NOAC"), and the Ohio Office of Consumers' Counsel ("OCC") (collectively referred to as the "Consumer Advocates") seek an interlocutory appeal of the Attorney Examiner's June 6, 2012, decision to take administrative notice of records from the Companies' prior electric security plan ("ESP") and market rate offer ("MRO"). An interlocutory appeal is improper because these parties cannot show that they can satisfy the requirements to certify such an appeal. Simply put, the Attorney Examiner's decision at issue does not involve a novel question of interpretation and policy nor is it a departure from precedent.

The contested ruling mirrors a ruling made by the Attorney Examiner in the Companies' prior ESP application case ("ESP 2," Case No. 10-388-EL-SSO). In that matter, the Attorney Examiner took administrative notice of the *entire record* in the Companies' prior MRO case ("MRO Case," Case No. 09-906-EL-SSO). In making that ruling, the Attorney Examiner found that the parties there "had an ample opportunity to prepare and respond to the evidence administratively noticed in the record of the MRO Case" through discovery, subpoenas, cross examination, and testimony at hearing. This ruling was upheld on rehearing. (ESP 2, Case No. 10-0388-EL-SSO, Entry on Rehearing dated May 13, 2010, p. 6.)

Moreover, administrative notice is permissible as long as: (1) the parties had prior knowledge of and an opportunity to rebut the facts administratively noticed and (2) the parties will not suffer undue prejudice. *See Allen v. Pub. Util. Comm.* (1988), 40 Ohio St. 3d 184, 185–86 (noting that propriety of administrative notice is determined "based on the particular facts presented"). Here, the Consumer Advocates had knowledge that the Companies planned to administratively notice records from ESP 2 and the MRO Case from the moment the Companies

filed their Application. The Consumer Advocates have had repeated opportunities to explain and rebut the facts and evidence that was administratively noticed—first as intervenors in ESP 2 and the MRO Case and then again during the hearing in this case. The Consumer Advocates will also not suffer any prejudice because of the administrative notice. It does not alter the Companies' burden of proof in this case. Instead, the notice merely permits the Companies to meet their burden by relying in part on records from ESP 2 and the MRO Case. Moreover, the Attorney Examiner did not accept any disputed facts when he took notice; any disputes will be resolved when this case is decided on the merits.

The Consumer Advocates' request for an interlocutory appeal should be denied.

II. BACKGROUND

A. During The ESP 2 Proceedings, The Attorney Examiner Took Administrative Notice Of The Record In The MRO Case.

On October 20, 2009, the Companies filed an Application for an MRO (Case No. 09-906-EL-SSO). Hearing in that matter began December 15, 2009, and lasted for seven days. The Companies, Commission Staff and at least twenty-two other parties (including all three of the Consumer Advocates here) were actively involved in the litigation. During the hearing, the Commission heard testimony from sixteen witnesses and received over thirty-five exhibits. (MRO Case, Case No. 09-906-EL-SSO, Tr. Vols. I-VII.)

In connection with the MRO Case, Staff filed comments recommending that the Companies consider an ESP rather than an MRO. (MRO Case, Case No. 09-906-EL-SSO, Comments Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio dated Nov. 24, 2009.) The Companies responded by filing an Application for an ESP (Case No. 10-0388-El-SSO) on March 23, 2010. The Application was accompanied by a Stipulation. The Stipulation, as supplemented, was agreed to by various parties (*including NOPEC and NOAC*).

In the Application, the Companies asked the Commission to take administrative notice of the record in the MRO Case for purposes of the ESP 2 proceeding. (ESP 2, Case No. 10-0388-El-SSO, Application dated March 23, 2010, p. 3.) The Attorney Examiner granted the Companies' request. (ESP 2, Case No. 10-0388-El-SSO, Opinion and Order dated April 6, 2010.) Hearings regarding the Joint Stipulation, as supplemented, were held April 20–23 and July 29, 2010. The Companies, Staff, twenty-two intervenors from the MRO Case and ten additional parties participated. (ESP 2, Case No. 10-0388-El-SSO, Opinion and Order dated Aug. 25, 2010, p. 5.) Testimony from eleven witnesses was offered and twenty-eight exhibits were presented. (ESP 2, Case No. 10-0388-El-SSO, Tr. Vols. I–IV.)

Following the ESP 2 hearing, EnerNOC, Inc. ("EnerNOC") and a group of parties referred to as the Ohio Consumer and Environmental Advocates ("OCEA")[1] filed applications for rehearing, arguing, among other things, that the Attorney Examiner in ESP 2 should not have taken administrative notice of the record in the MRO Case. (ESP 2, Case No. 10-0388-El-SSO, Applications for Rehearing dated April 19, 2010 (EnerNOC and OCEA).) The Commission denied both applications for rehearing, finding that the Commission may take administrative notice of facts outside the record in a case "if the complaining parties have had an opportunity to prepare and respond to the evidence and they are not prejudiced by its introduction." (ESP 2, Case No. 10-0388-El-SSO, Entry on Rehearing dated May 13, 2010, ¶ 14.)

Specifically, the Commission found that EnerNOC and OCEA had "an ample opportunity" to respond to the evidence that was administratively noticed, including the ability 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

[1] OCEA included Citizen Power, Citizens Coalition, OCC, Environmental Law & Policy Center, Natural Resources Defense Council, NOPEC, NOAC, and the Ohio Environmental Council.

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 hearing regarding any issues in the MRO Case which were proposed to be resolved by the [ESP 2 Joint Stipulation]; and present testimony at hearing in this proceeding to explain or rebut evidence in the record of the MRO case." (*Id.*) The Commission also found that EnerNOC and OCEA were not prejudiced by administrative notice of the MRO record. (*Id.*)[2]

B. The Attorney Examiner Here Followed Suit By Taking Administrative Notice Of Selected Records From ESP 2 And The MRO Case.

The Companies filed their Application and Stipulation in this case on April 13, 2012. Given that this ESP 3 is essentially an extension of the current ESP, the Companies requested in their Application that the Attorney Examiner take administrative notice of the record in ESP 2, which, in turn, incorporated the record from the MRO Case. (*See* Application dated Apr. 13, 2012.) On June 4, 2012, the Attorney Examiner instructed the Companies to specify which documents it requested to be administratively noticed. (Tr. Vol. I at 29.) The Companies provided a "List of Documents for Administrative Notice" at hearing on June 6, 2012. (*See* Tr. Vol. III at 10-12.) The list included documents from ESP 2 and its foundational MRO Case.

The Consumer Advocates objected to the Companies' requested administrative notice. The Attorney Examiner took administrative notice of the items requested by the Companies. (Tr. Vol. III at 170-173.) The Attorney Examiner cited and approved the reasoning from the May 13, 2010 Entry on Rehearing in ESP 2. (*Id.* at 171–172.) He further found that the parties would not suffer any prejudice. (*Id.* at 171.) On June 11, 2012, the Consumer Advocates filed a

[2] OCEA sought rehearing on this issue again. (ESP 2, Case No. 10-388-EL-SSO, OCEA's Application for Rehearing dated September 24, 2010, p. 15–17.) That Application was also denied. (ESP 2, Case No. 10-388-EL-SSO, Entry on Rehearing dated Feb. 9, 2011, ¶ 12.)

request for an interlocutory appeal from the Attorney Examiner's decision to take administrative notice of the items requested by the Companies. (Interlocutory Appeal 1–2.)

III. ARGUMENT

Under Ohio Administrative Code Rule 4901:1-15(B), a party may only take an interlocutory appeal from a ruling issued by an attorney examiner if the appeal is certified to the Commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer. Those persons "shall not certify such an appeal unless [they find] that:

(1) the appeal presents a new or novel question of interpretation, law, or policy; or

(2) is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties[.]"

Ohio Admin. Code. Rule 4901:1-15(B). The decision to take administrative notice of the items requested by the Companies does not present a new or novel question, is not a departure from past precedent, and does not prejudice the parties. Accordingly, the Consumer Advocates' request should be denied.

A. The Attorney Examiner's Decision Is Not Novel.

The Attorney Examiner's decision to take administrative notice of the items requested by the Companies does not raise any novel questions. Indeed, this same ground was tread in the ESP 2 case, where the Attorney Examiner took administrative notice of the MRO record because "EnerNOC and OCEA . . . had an ample opportunity to prepare and respond to the evidence administratively noticed" through discovery, subpoenas, cross examination, and testimony. (ESP 2, Case No. 10-0388-El-SSO, Entry on Rehearing dated May 13, 2010, p. 6.) The Commission has already granted the type of request at issue. Granting administrative notice of records from ESP 2 and the MRO Case is not novel.

The Consumer Advocates claim that this case involves a novel question because "the breadth of the use of administrative notice in this case" is unprecedented. As the above recitation of the procedural history in the ESP 2 case demonstrates, this claim is flat wrong. In ESP 2, the Attorney Examiner took administrative notice of the *entire record from the MRO Case*. In short, there is precedent for taking broad administrative notice of records from prior relevant cases before the Commission. Indeed, the records being administratively noticed in this case are much more limited than what was similarly noticed in the ESP 2 matter. Only the items specified by the Companies were administratively noticed. Certainly if the entire MRO Case record could be administratively noticed, the eighteen items so noticed here may be as well.

B. The Attorney Examiner's Decision Is Not A Departure From Precedent.

The Attorney Examiner's decision is entirely consistent with precedent. The Consumer Advocates do not—and cannot—cite any Commission rules or decisions that foreclose administrative notice of evidence from prior Commission cases. Indeed, as demonstrated above, the Commission has already dealt with the exact issue proposed to be raised for appeal here.

Without reference to the ESP 2 matter, the Consumer Advocates claim that administrative notice cannot be reconciled with the Supreme Court's decision in *Allen*. But that case supports the outcome here. *See* 40 Ohio St. 3d at 185–86. In *Allen*, the Court held that when deciding whether administrative notice of a Commission record is appropriate:

> The 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. Moreover, prejudice must be shown before we will reverse an order of the Commission.

Id. See also Canton Storage and Transfer Co. v. Pub. Util. Comm. (1995), 72 Ohio St. 3d 1, 8.

Citing *Allen* and *Canton Storage*, the Consumer Advocates assert that: (1) they lacked prior notice of the facts administratively noticed; (2) they had no opportunity to rebut the ESP 2

and MRO Case records; and (3) they will suffer prejudice if the Attorney Examiner's decision is not reversed. The record demonstrates otherwise.

1. The parties were aware of the materials the Companies sought to administratively notice when the Application was filed.

The Consumer Advocates claim they "did not have knowledge of the documents to be administratively noticed until the close of the evidentiary hearing on June 6, 2012." (Interlocutory Appeal p. 9–10.) That is not true. The parties were put on notice that portions of the ESP 2 and MRO Case records might be relied on when the Application was filed on April 13, 2012. In the Application, the Companies clearly requested "that the Commission take administrative notice of the evidentiary record established in the Companies' current ESP, Case No. 10-388-EL-SSO, and thereby incorporate by reference that record for the purposes of and use in this proceeding." (ESP 3, Application dated April 13, 2012, p. 5.) The Companies intended to seek administrative notice of both ESP 2 and foundational MRO Case records.

2. The Consumer Advocates have had repeated opportunities to explain and rebut the materials administratively noticed from ESP 2 and MRO Cases.

The Consumer Advocates also assert that they "were not (and have not) been provided with an opportunity to explain and rebut" the administratively noticed evidence. (Interlocutory Appeal p. 9–10.) That too is not true. All three of these parties were intervenors in ESP 2 and the MRO Case. (*See* MRO Case, Case No. 09-906-EL-SSO, Mots. to Intervene dated Oct. 22, 2009 (OCC), Oct. 27, 2009 (NOPEC), Nov. 16, 2009 (NOAC); ESP 2, Case No. 10-0388-El-SSO, Opinion and Order dated Aug. 25, 2010, p. 5–6.) They were permitted to cross examine witnesses at the hearings and to file post-hearing briefs. (*See* MRO Case, Case No. 09-906-EL-SSO, Post-Hearing Brs. Dated Jan. 8, 2010; ESP 2, Case No. 10-0388-El-SSO, Post-Hearing Brs. Dated April 30, 2010.) Thus, the Consumer Advocates *actively participated in creating the*

records in ESP 2 and the MRO Case. In fact, *NOPEC and NOAC even signed on to the Joint Stipulation in ESP 2.* Having helped create the records (and in the case of NOPEC and NOAC, having helped create the ESP 2 Joint Stipulation that underpins the Stipulation in this case), the Consumer Advocates cannot now claim that they did not have a chance to rebut the evidence that was administratively noticed. *See Allen,* 40 Ohio St. 3d at 186 (affirming administrative notice of prior proceedings where appellants were parties to the proceedings); *County Commissioners' Assoc. of Ohio v. Pub. Util. Comm.* (1980), 63 Ohio St. 2d 243, 247 (affirming administrative notice of investigative proceeding where challenging parties also were parties to that proceeding). Even if that were not true, the Consumer Advocates had every opportunity to present evidence contrary to the documents specified by the Companies here or introduce other portions of the ESP 2 or MRO Case record at the hearing in this case. As noted, the Companies, in their Application, advised that they intended to seek administrative notice of the record in ESP 2. (This made sense given that ESP 3 is effectively an extension of ESP 2.) The Companies orally moved for administrative notice on the first day of hearing, only to be instructed by the bench to specify the exact portions of the ESP 2 case record for which administrative notice was sought. At no time during the hearing (or since) have the Consumer Advocates sought to designate their own portions of the ESP 2 record. In sum, the failure of the Consumer Advocates to take full advantage of the opportunity to respond to the administratively noticed material does not mean that these parties were not afforded a chance to explain and rebut ESP 2 and the MRO Case.

3. The Consumer Advocates will not suffer prejudice because of the administrative notice.

According to the Supreme Court, the Commission may take administrative notice of facts and evidence as long as prejudice will not result. *Allen,* 40 Ohio St. 3d at 185–86; *Canton*

Storage, 72 Ohio St. 3d at 8. *See also Ohio Edison Co. v. Pub. Util. Comm.* (1992), 63 Ohio St. 3d 555, 560 (affirming administrative notice of utility's stock price, where no showing of prejudice); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (1984), 12 Ohio St. 3d 280, 285 (affirming administrative notice of industry standard reflected in Federal Communications Commission order pertaining to utility's test year, where no prejudice to utility).

Despite notice and repeated opportunities to rebut the administratively noticed evidence, the Consumer Advocates maintain they will be prejudiced by the Attorney Examiner's ruling. They vaguely claim that "such a ruling drastically reduces [the Companies'] burden of proof in this case." (Interlocutory Appeal p. 6.) They also assert that they are prejudiced because the administrative notice improperly accepts disputed facts. (*Id.* at 12–13.) Both contentions fail.

(a) The Companies' burden has not been changed.

The key question in any ESP is whether the proposed ESP is "more favorable in the aggregate as compared to the expected results" of an MRO and consistent with state policy. *See* Ohio Rev. Code. §§ 4929.02(A), 4928.143(C)(1); Ohio Admin. Code Rule 4901:1-35-06(A).[3] The Companies have the burden of satisfying that question in this case; the administrative notice does not alter that fact. In his oral decision granting administrative notice, the Attorney Examiner did not rule on whether the proposed ESP is more favorable in the aggregate or is consistent with state policy. Indeed, he did not make any substantive determinations of any kind. Instead, he simply permitted the Companies to meet their burden by relying in part on documents from ESP 2 and the MRO Case.

[3] Because approval of ESP 3 is being sought as part of a Stipulation, the Companies must also show that the Stipulation meets the "three-prong" test set forth in *Industrial Energy Consumers of Ohio Co. v. Public Utilities Commission* (1994), 68 Ohio St. 3d 559.

The Consumer Advocates cite *Canton Storage*, 72 Ohio St. 3d at 6, in an effort to establish that the Companies' burden has been lowered by the "back door" admission of the documents that were administratively noticed. (*See* Interlocutory Appeal p. 8–9.) But *Canton Storage* is inapposite. There, twenty-two shipping carriers applied for certificates of public convenience and necessity, with most carriers either filing testimony from one supporting witness or not filing testimony. *Id.* at 6. The Commission, allowing the carriers to rely on testimony filed by other carriers, granted the certificates. *Id.* at 6. On appeal, the Supreme Court reversed, noting its long-standing rule that a carrier seeking a certificate of public convenience and necessity must file testimony from at least two witnesses claiming a need for the carrier's services. *Id.* at 6, 7. By permitting carriers to bootstrap their claims onto the testimony presented by other parties in other proceedings, the Commission eliminated a portion of each carrier's burden of proof. *Id.* at 8-9. Moreover, the Commission never expressly took administrative notice of the supporting testimony, which denied the parties an opportunity to challenge it. *Id.* at 8.

The facts here are different. For starters, the Commission here has explicitly taken administrative notice of the documents specified by the Companies. The Consumer Advocates participated in ESP 2 and the MRO Case and, thus, had an opportunity to challenge the evidence that was administratively noticed. And, most importantly, the Companies' burden of proof here is unchanged by the decision to take administrative notice of portions of ESP 2 and the MRO Case. (*See* ESP 2, Case No. 10-0388-El-SSO, Entry on Rehearing dated May 13, 2010, at p. 7 ("the circumstances in this proceeding are not remotely analogous to those in *Canton Storage* . . . which the Court rejected as an elimination of a portion of the applicant's burden of proof.").)

(b) The Attorney Examiner has not accepted disputed facts.

Under Ohio Rule of Evidence 201(B), administrative notice may be taken of a fact that is "not subject to reasonable dispute." Seizing upon that language, the Consumer Advocates claim that the Attorney Examiner accepted disputed facts from ESP 2 and the MRO Case when he granted administrative notice of the documents on the Companies' list. Not so. The Attorney Examiner did not find that any facts from ESP 2 or the MRO Case are conclusive here. He did not decide any issue, weigh the credibility of testimony, or rule on the validity of any ESP 2 or MRO Case evidence. To the extent the record contains disputed evidence, those disputes will be decided when the Commission renders its final decision. As a result, administrative notice in this case was appropriate.

IV. CONCLUSION

For the foregoing reasons, the Consumer Advocates' request that the Legal Director, Deputy Legal Director, or Attorney Examiner certify an interlocutory appeal should be denied.

Dated: June 14, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra the Consumer Advocates' Interlocutory Appeal from the June 6, 2012, Ruling Regarding Administrative Notice was sent to the following by e-mail this 14th day of June, 2012:

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