BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan.	))))))	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	))))	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM

REPLY TO MEMORANDUM CONTRA
MOTION TO TAKE ADMINISTRATIVE NOTICE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
THE APPALACHIAN PEACE AND JUSTICE NETWORK

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of Ohio Power Company's 1.2 million residential utility customers, and the Appalachian Peace and Justice Network ("APJN"), a not for profit organization whose members include low-income customers in southeast Ohio (together, "Movants"), jointly submit this Reply to Ohio Power Company's ("OP" or "Company") Memorandum Contra the Motion to Take Administrative Notice filed by Movants on July 20, 2012.

Movants requested that the Public Utilities Commission of Ohio ("PUCO" or "Commission") take administrative notice of limited materials from the record in the

Capacity Charge Case,[1] including excerpts from two OP witnesses' pre-filed testimony,[2] hearing transcript excerpts (totaling five pages) of cross-examination,[3] and the briefs filed by the Company.[4] Movants' request was made in light of the Commission's determination -- *after the hearing and the Initial briefs in the above-captioned cases* -- that it would "establish the appropriate recovery mechanism for such deferred costs [capacity costs] and address any additional financial considerations in the 11-346 proceeding."[5]

In its Memorandum Contra, the Company indicates it does not support the Movants' request because it is "inappropriate, raises due process concerns, and fails to recognize that the present proceeding has already been submitted to the Commission for decision."[6] These arguments should be rejected and, for the good cause shown by Movants, administrative notice should be taken.

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[1] *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC ("*Capacity Charge Case*").

[2] Testimony of Munczinski (Mar. 23, 2012), pages 3, 9-12, (OP Ex. 101); Testimony of Allen (May 11, 2012), pages 19-20 (OP Ex. 142).

[3] Transcript Excerpts of the Cross-examination of Expert Witness Ringenbach (Tr. IV at 815); Transcript Excerpts of the Cross-examination of Expert Witness Pearce (Tr. II at 304; 348-350).

[4] The Company's Initial Post-Hearing Brief (May 23, 2012) and the Company's Reply Post-Hearing Brief (May 30, 2012). The Company contends that these briefs are arguments made to the Commission and not adjudicative facts. OP Memorandum Contra at 4. It believes that OCC "overextends" the Commission's holding in Case No. 10-388-EL-SSO. Id. The Company seems to disregard the recent ruling of the Commission that it may take administrative notice of opinions and that narrow construction of Rule 201 is not consistent with standards for Commission proceedings. See *In the Matter 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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No, 12-1230-EL-SSO, Opinion and Order at 19 (July 18, 2012).

[5] *Capacity Charge Case*, Opinion and Order at 23 (July 2, 2012) ("*Capacity Charge Order*").

[6] OP Memorandum Contra at 1.

I. ADMINISTRATIVE NOTICE IS APPROPRIATE.

The Company seems to allege that the request is "inappropriate" because the Movants' notion of what should be administratively noticed "is not the point of view relevant at this point in the proceeding."[7] The Company alleges that Movants "should not place itself [sic] in the shoes of the Commission and determine that only the small subset of items it [sic] highlights are appropriately noticed."[8]

This argument seems to misunderstand the concept of administrative notice. It is not an unusual or novel concept that administrative notice may be requested by parties. It goes without saying that parties requesting administrative notice will seek to include in the record materials that they believe are relevant to the proceeding. Once such a request is made, it then becomes a matter for the Commission to decide. A party requesting administrative notice is not stepping on the toes of the Commission. Rather, it is exercising its right to bring relevant information forward to the Commission in a legitimate and legally recognized fashion.

The relevant information Movants seek to be administratively noticed is directly tied to the Commission's stated intent to establish an appropriate recovery mechanism for the deferrals. The information is not, as alleged by the Company, "an attempt to reargue points in these dockets."[9] Rather the information is directed to the issue of who will ultimately pay for the newly created capacity deferrals and what amount should be paid.

The evidence sought to be administratively noticed goes to these exact issues. Movants do not support thrusting additional costs of capacity (the deferrals) onto

[7] Id. at 3.

[8] Id.

[9] Id.

standard service offer ("SSO") customers. The Movants' position springs from a number of legal bases. Part of the legal argument is that to charge non-shopping customers the deferred capacity costs, which are a subsidy to competitive retail electric service ("CRES") providers,[10] creates unfair competition and non-comparable rates.[11] This same perspective was espoused by others in the information that Movants seek to be administratively noticed. In particular, it is found in the cross-examination of Witness Ringenbach and in the filed testimony of OP Witness Munczinski. It is also extensively explained by the Company in its Initial and Post Hearing Briefs.

The Movants' legal arguments also have a factual premise that is established through the information sought to be administratively noticed. That information is found in the written testimony of Company Witness Allen and the cross-examination of Company Witness Pearce. The information sought to be administratively noticed establishes, beyond a doubt,[12] that standard service offer customers already pay the Company's full cost of capacity as part of the embedded non-fuel generation rate. The Company has indicated that it believes that the full cost of capacity is $355/MW-day. Thus, charging SSO customers for the deferred capacity charges, when they already pay full capacity charges, will result in non-comparable rates between shopping and non-shopping customers, and double payments. This is unjust, unreasonable, and unlawful.

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[10] A subsidy has been created since the Commission determined that the cost of AEP Ohio's capacity is $188/MW-day and CRES providers will only be charged RPM-based rates, which are much lower than the capacity charge approved by the Commission. See *Capacity Charge Order* at 23.

[11] Unless the non-fuel generation rates of standard service offer customers are reduced to at least $188.88/MW-day, capacity rates paid by shoppers and non-shoppers will be remain non-comparable, violating R.C. 4928.141 and 4928.02(A).

[12] At the oral argument in this case, several parties, including OCC, the Retail Electric Suppliers Association, Ohio Energy Group, and the Company, made differing representations as to whether the record in 11-346 establishes that SSO customers pay the Company's full cost of capacity. Taking administrative notice of the materials requested should resolve the disparate claims of the parties.

II. THE MOTION FOR ADMINISTRATIVE NOTICE IS TIMELY.

The Company objects to the timing of Movants' motion. OP argues that the timing is "awkward,"[13] and that the request is "ill-timed"[14] and "untimely."[15] The Company maintains that Movants seek to add documents "at this late stage when there is no place for further action by OCC/APJN."[16] The true gravamen of OP's objection is that OCC/APJN failed to be sufficiently prescient to both anticipate that the Commission would create deferrals in one case and then find that the mechanism for dealing with the deferrals should be addressed in another case, where the hearing had already occurred, and initial briefs had been filed.

But what the Company fails to recognize is that the timing of the Movants' request was merely the result of the Commission's July 2, 2012 ruling in the *Capacity Charge Order*. There the PUCO determined to authorize deferrals and shifted issues from the *Capacity Charge Case* into the ESP case when it ruled that it would "establish the appropriate recovery mechanism for such deferred costs [capacity costs] and address any additional financial considerations in the 11-346 proceeding."[17] By doing so the Commission created an evidentiary problem because the 11-346 proceeding had concluded two weeks earlier, and initial briefs had already been filed. And the record in the 11-346 proceeding is devoid of any evidence under which one could determine an appropriate recovery mechanism for the newly created deferrals. Granting Movants' motion would assist the PUCO in developing a record for purposes of determining an

[13] OP Memorandum Contra at 2.

[14] Id.

[15] Id. at 3.

[16] Id. at 2.

[17] Id.

appropriate recovery mechanism. Movants' request is not untimely, but is an appropriate and timely response to the PUCO's *Capacity Charge Order*.

Moreover, as indicated in Movants' motion, administrative notice may be taken at any stage of the proceeding -- even after the evidentiary hearing, briefs, and a decision of the PUCO.[18] This is consistent with the Ohio Rules of Evidence, Rule 201(F), which establishes that judicial notice may be taken at any stage of the proceeding.

The key point that the Company seems to ignore is that while timing may be important, in this case it is altogether mitigated by the fact that the parties had knowledge of and an adequate opportunity to explain and rebut the evidence. While the Company, almost in passing, indicates that there was "no opportunity for opposing parties to test that additional evidence," such a claim is specious. The Companies had knowledge of the evidence as it was evidence (in large part) that they themselves put into the record in the *Capacity Charge Case*. The Company also had the opportunity to test the evidence within the context of the *Capacity Charge Case*.[19] And the Company had the additional opportunity to explain and rebut the evidence in its Memorandum Contra, but chose not to. Accordingly, there will be no prejudice[20] to the Company if the Commission takes administrative notice of the materials.

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[18] *Cincinnati Bell Telephone Company v. Pub. Util. Comm.* (1984), 12 Ohio St.3d 280, 284-285 (Supreme Court upheld administrative notice taken through an application for rehearing).

[19] See *Allen v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184, 186 (finding that there was nothing improper in the PUCO taking administrative notice of the record in a prior proceeding because the complaining party was a party to that prior proceeding and had an adequate opportunity there to have explained or rebutted the evidence).

[20] Nor does the Company make a claim that taking the administrative notice will prejudice it. The term "prejudice" is conspicuously absent from the Company's Memorandum Contra.

III. THE MOTION FOR ADMINISTRATIVE NOTICE DOES NOT VIOLATE DUE PROCESS.

The Company's final argument appears to be an objection to the scope of the evidence sought to be administratively noticed. The Company alleges that there is "an inherent risk or harm in taking notice of limited documents post hearing."[21] Yet, the risk or harm is not self-evident. The Company does not dispute the validity of the evidence, but seems to believe that additional evidence, which it does not identify and does not seek to administratively notice, ought to be noticed. It avers that "[d]ue process requires notice of the complete record or providing other parties the opportunity to provide the relevant portions."[22]

It is not surprising that the Company cannot cite to a single case, rule, or legal authority for its novel argument. The truth of the matter is that the Company is just plain wrong. Due process does not require notice of the complete record of any proceeding.[23] Parties have had the opportunity to seek administrative notice of materials in their own right, and nothing that Movants have done, in filing their motion, prevents this.

Due process defined in terms of administrative notice means that the parties have knowledge of, and an adequate opportunity to explain and rebut the evidence. [24] OP had both. OP knew of the evidence. Indeed, it was evidence and legal argument that (in large part) was created by OP itself, through the presentation of filed testimony and briefs.

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[21] OP Memorandum Contra at 3.

[22] OP Memorandum Contra at 5.

[23] See, e.g. *In the Matter 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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No, 12-1230-EL-SSO, Opinion and Order at 17-21 (affirming the Attorney Examiner's ruling at the evidentiary hearing that administrative notice be taken of only parts of the record, even though the Company originally requested notice of the entire record) (July 18, 2012).

[24] See *Allen v. Pub. Util .Comm.* (1988), 40 Ohio St.3d 184, 186.

Moreover, the Company does not dispute it knew of the information sought to be noticed. OP also had the opportunity in the *Capacity Charge Case* to explain and rebut the evidence. And OP had the opportunity to explain and rebut the evidence when it filed its Memorandum Contra. Yet it chose not to explain or rebut the evidence (or request other evidence be noticed) despite the opportunity to do so. Due process will not be violated here.

IV. THE COMMISSION SHOULD ADMINISTRATIVELY NOTICE THE IDENTIFIED MATERIALS.

As the Company acknowledges,[25] the Commission has broad discretion to determine if it needs to recognize portions of the *Capacity Charge Case* record. That discretion should be exercised here in order to assist the Commission in developing a record to determine a recovery mechanism for the deferred capacity costs. Movants have demonstrated good cause for granting this Motion. The materials Movants seek to be administratively noticed are relevant and appropriate and will assist the Commission in addressing a mechanism that may recover the newly created deferred capacity charges.

While the motion for administrative notice was made after the evidentiary hearing, briefs, and oral argument, its timing hinged upon the July 2, 2012 *Capacity Charge Order*. It was only then that the Commission created a new issue (deferred charges) from that case and indicated it would resolve in this case how such charges might be collected. Thus the relevance of this information was not apparent until the PUCO decided, in its July 2, 2012 *Capacity Charge Order* that the collection of the deferrals would be addressed in this case for the ESP. Contrary to OP's assertions

[25] OP Memorandum Contra at 2.

otherwise,[26] Movants have not been dilatory in bringing this issue before the Commission.

Administrative notice can be taken of the materials requested because there will be no prejudice to OP and others. OP had knowledge of the evidence and had the opportunity to explain and rebut it in the *Capacity Charge Case*. It had an additional opportunity to rebut and explain the evidence in its Memorandum Contra -- yet it chose not to. Considering that a significant part of the noticed material contains the Company's own words, there is not much else that it could explain.

The information that Movants seek to be administratively noticed goes to the recently created and suddenly important issue of how massive amounts of deferrals will be collected from Ohio customers or others. With hundreds of millions of dollars at stake, the Commission should take the opportunity that OCC presents to create a more complete record by taking administrative notice of relevant record information. Residential customers' rates are on the line.

[26] OP Memorandum Contra at 2.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply has been served electronically upon those persons listed below this 27th day of July 2012.

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Summary: Reply Reply to Memorandum Contra Motion to Take Administrative Notice by the Office of the Ohio Consumers' Counsel and the Appalachian Peace and Justice Network electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.