

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

In the Matter of the Application of)	
Columbus Southern Power Company and)	Case No. 11-349-EL-AAM
Ohio Power Company for Approval of)	Case No. 11-350-EL-AAM
Certain Accounting Authority.)	

**MOTION TO STRIKE FIRSTENERGY SOLUTIONS' MEMORANDUM
CONTRA OCC/APJN MOTION TO TAKE ADMINISTRATIVE NOTICE
AND LIMITED REPLY¹**

**BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
THE APPALACHIAN PEACE AND JUSTICE NETWORK**

The Office of the Ohio Consumers' Counsel and the Appalachian Peace and Justice Network (collectively "OCC/APJN") move to strike FirstEnergy Solutions' ("FES") Memorandum Contra filed in response to OCC/APJN's July 20, 2012 Motion to take Administrative Notice. FES' Memorandum Contra was filed seventeen calendar days after the OCC/APJN Motion, which is late (by twelve days) according to the procedural deadlines set in this proceeding by the Attorney Examiner.²

The reasons for granting OCC/APJN's Motion to Strike are more fully explained in the attached Memorandum in Support.

¹ Due to the fact that FES filed a late Memorandum Contra, and the fact that the PUCO is expected to rule on this case tomorrow, OCC has presented a limited reply.

² See Entry at ¶10 (Apr. 2, 2012).

Respectfully submitted,

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**On Behalf of the Appalachian Peace and Justice
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On April 2, 2012, the Attorney Examiner issued an Entry establishing a procedural schedule for this proceeding. Among other things, the Entry set deadlines for pleadings which required that any memoranda contra to motions be filed within five calendar days after service of such a motion.³ On July 20, 2012, OCC/APJN filed and served a Motion to Take Administrative Notice of certain materials that were part of the record in the AEP-Ohio capacity charge case. On August 6, 2012, FES filed a Memorandum Contra OCC/APJN's motion.

II. ARGUMENT

A. FES' Memorandum Contra Should Be Stricken.

First, FES' Memorandum is not timely. Second, FES fails to show good cause as to why it should be permitted to file a late response to OCC/APJN's Motion. Third, the

³ Id.

untimely response by FES leaves little to no time for the PUCO to actually consider OCC's reply prior to the Commission Order in this proceeding, expected tomorrow.

First, FES' Memorandum Contra was filed 12 days late. According to the Attorney Examiner's Entry the Memorandum Contra OCC/APJN's Motion was due on or before July 25, 2012. This procedural schedule has been in effect for months, and it has applied to all parties and all pleadings filed in this proceeding.

Second, FES offered no explanation as to why it could not comply with the procedural schedule that required its pleading to be filed in five calendar days. Thus, there was no good cause shown for why the Commission should accept and consider FES' late pleading.

Third, permitting FES to submit this late pleading, on the eve of the Commission's decision in this case, leaves little time for the PUCO to consider OCC's reply before ruling. Moreover, the filing of pleadings, out of time, on the eve of the Commission's decision, is disruptive of the orderly schedule established in this proceeding and followed by OCC/APJN and others.⁴ It makes it difficult, if not impossible, for the PUCO to consider the last-minute arguments made on a very important issue—an issue that centers upon who should pay hundreds of millions of dollars for deferred capacity costs.

⁴ AEP Ohio filed a timely Memorandum Contra OCC/APJN's Motion. OCC/APJN was able to respond to that pleading within the procedural timeframe established by the Attorney Examiner.

B. Brief Response to FES Substantive Claims

FES claims that OCC/APJN's Motion is improper, unfair, untimely and unnecessary.⁵ These arguments will be briefly addressed seriatim.

FES claims that OCC/APJN's Motion is improper because it prevents other parties from contesting the administratively noticed materials through cross examination or contrary evidence.⁶ FES is mistaken in its belief that it must be permitted the opportunity to cross examine or submit contrary evidence. The standard is that the complaining party has knowledge of and an opportunity to rebut the materials judicially noticed.⁷ FES was given that opportunity to cross-examine and introduce evidence in the capacity case.

FES claims that there is no justification for taking administrative notice of portions of the record because they are subject to reasonable dispute.⁸ The fact that testimony was given and briefs were filed is not subject to dispute. The fact of the matter is that the testimony was given in writing and on cross examination. While there may be issues pertaining to the credibility and weight to be afforded the testimony, these should not preclude offering of such evidence through administrative notice. Indeed the Court and the Commission has not precluded administrative notice of expert testimony on the basis that it reflects opinion and not fact testimony. For example, the PUCO granted FirstEnergy's own motion for administrative notice in a case this year, over OCC and

⁵ FES Memo Contra at 2.

⁶ Id.

⁷ *Allen v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184, 185-186.

⁸ FES Memo Contra at 3.

others' objections.⁹ Since administrative notice was taken on FirstEnergy's own motion when it favored FirstEnergy earlier this year, FirstEnergy's affiliate should not be heard to complain now that OCC and APJN are seeking notice.

FES argues that it is unfair to allow only part of the evidentiary record from the capacity charge case in since it will present a misleading factual scenario to the Commission to the prejudice of other parties who have no ability to contest or put the evidence in context.¹⁰ This claim belies fact and is inconsistent with PUCO precedent. FES, like OCC and APJN, could have sought administrative notice of the capacity charge materials but did not. It chose not to exercise that option and its unwillingness to act is not an excuse to deny OCC/APJN's motion. Again, FES has had the ability to contest the testimony and put evidence into context. It had the opportunity in the capacity case and could do so through the timely filing of a Memorandum Contra. Moreover, the PUCO has not required the entire record of proceedings to be administratively noticed. Indeed it has chosen not to take notice of the entire record in FirstEnergy's electric security plan proceeding.¹¹

FES claims that there will be no prejudice to OCC/APJN if their motion is denied. FES is mistaken that OCC/APJN must show prejudice before their motion can be

⁹ 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 18-21 (finding that the Court has placed no restrictions on taking administrative notice of expert opinion testimony, and that it declined to impose such restrictions).

¹⁰ FES Memo Contra at 3.

¹¹ *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).

granted. Prejudice only comes into play if complaining parties are not given the opportunity to rebut the evidence sought to be noticed. And as explained above, FES had that opportunity.

III. CONCLUSION

The Memorandum Contra of FES should have been filed within five calendar days of the OCC/APJN Motion, on or before July 25, 2012. It was not filed until August 6, 2012. It was untimely and FES offered no good cause as to why the Commission should consider its late pleading. By filing on the eve of the Commission's order, FES has effectively precluded the Commission from considering OCC/APJN response to FES' Memorandum Contra.

Moreover, the information that OCC/APJN seeks to administratively notice 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/APJN present to create a more complete record by taking administrative notice of relevant record information.

The Commission should strike the Memorandum Contra and grant OCC/APJN's Motion to Take Administrative Notice.

Respectfully submitted,

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**On Behalf of the Appalachian Peace and Justice
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike was served by electronic mail to the persons listed below, on this 7th day of August 2012.

/s/ Maureen R. Grady

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Summary: Motion Motion to Strike FirstEnergy Solutions' Memorandum Contra OCC/APJN
Motion to Take Administrative Notice and Limited Reply by the Office of the Ohio Consumers'
Counsel and the Appalachian Peace and Justice Network