

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke )  
Energy Ohio, Inc. for Approval of a Grid ) Case No. 14-1160-EL-UNC  
Modernization Opt-Out Tariff and for a ) Case No. 14-1161-EL-AAM  
Change in Accounting Procedures Including )  
a Cost Recovery Mechanism. )

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**MOTION TO TAKE ADMINISTRATIVE NOTICE  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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This case involves the proposal of Duke Energy Ohio Inc. (“Duke”) regarding new charges and terms of service for residential customers who do not want an advanced electric meter installed at their homes.<sup>1</sup> The Office of the Ohio Consumers’ Counsel (“OCC”), an intervenor on behalf of Duke’s approximately 700,000 residential utility customers,<sup>2</sup> submits this Motion for the Public Utilities Commission of Ohio (“PUCO”) to take administrative notice of the PUCO Staff’s Notice of Determination in Case No. 10-2326-GE-RDR (“Mid-deployment Review Case”).<sup>3</sup> In that filing, the PUCO Staff declared that Duke’s SmartGrid program has been fully deployed. Under the stipulation in that case, Duke now must file an electric distribution rate case within one year.

The PUCO Staff’s Determination is relevant to this case because both the PUCO Staff and OCC have argued that costs associated with Duke’s proposed opt-out program

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<sup>1</sup> See Application (June 27, 2014) at 1.

<sup>2</sup> OCC’s Motion to Intervene was granted by Entry dated August 5, 2015.

<sup>3</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2010 SmartGrid Costs and Mid-Deployment Review*, Case No. 10-2326-GE-RDR, Notice of Staff Determination (October 15, 2015).

should be examined in Duke's next electric distribution rate case.<sup>4</sup> If the alleged costs associated with customer opt-outs are reviewed in Duke's next distribution rate case, then there is no need to implement a tariff in the interim to charge customers for these costs. The record in this proceeding should be expanded to incorporate the administratively noticed material so the PUCO can have before it a more complete record on these issues that could affect customers' rates.

There is good cause for granting this motion, as explained in the following memorandum in support. No parties will be prejudiced by taking administrative notice of this document because the parties to the Mid-deployment Review Case have knowledge of and have an adequate opportunity to explain and rebut this evidence in that case.

Respectfully submitted,

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<sup>4</sup> See OCC Ex. 3 (Williams Testimony) at 6-7; PUCO Staff Ex. 2 (Rutherford Testimony) at 8.

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

This case involves an examination of Duke’s costs when residential customers opt out from having an advanced electric meter. One issue raised in this case is that under the terms of a stipulation in the Mid-deployment Review Case, Duke must begin a base distribution rate case within one year after the PUCO Staff determines Duke’s SmartGrid to be fully deployed.<sup>5</sup> Both OCC and the PUCO Staff have argued that costs associated with Duke’s proposed opt-out service should be examined as part of Duke’s next distribution base rate case.<sup>6</sup>

On October 15, 2015, in the Mid-deployment Review Case, the PUCO Staff docketed its Determination that Duke’s SmartGrid is fully deployed. The PUCO Staff’s Determination stated that under the terms of the stipulation in the Mid-deployment Review Case, Duke is obligated to file an electric distribution rate case within one year of the date the notice was filed (i.e., by October 15, 2016).

The PUCO Staff’s filing occurred after the hearing in this case, but before briefing is to begin. Because the PUCO Staff’s Determination in the Mid-deployment

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<sup>5</sup> See OCC Ex. 3 (Williams Testimony) at 6.

<sup>6</sup> *Id.* at 6-7; PUCO Staff Ex. 2 (Rutherford Testimony) at 8.

Review Case is pertinent to issues raised in this proceeding, the record in this case should accurately reflect the deadline by which Duke must file its next electric distribution rate case.

## II. DISCUSSION

### A. **The PUCO can take administrative notice of facts that are not subject to reasonable dispute and if parties have an opportunity to rebut the evidence.**

Under Rule 201 of the Ohio Rules of Evidence, judicial notice may be taken of any adjudicative fact that is not subject to reasonable dispute. This rule permits courts to fill gaps in the record. Accordingly, courts have judicially noted documents filed, testimony given, and orders or findings. Subsection (F) of Rule 201 states: “Judicial notice may be taken at any stage of the proceeding.”

The Supreme Court of Ohio has held that while there is no absolute right for the taking of administrative notice, there is no prohibition against the PUCO taking administrative notice of facts outside the record in a case.<sup>7</sup> The Court has held that the PUCO may take administrative notice of the record of an earlier proceeding, subject to review on a case-by-case basis.<sup>8</sup> The important factors for applying administrative notice, according to the Court, are that the complaining party has prior knowledge of and an opportunity to rebut the materials judicially noticed.<sup>9</sup> All parties to this proceeding also were parties to the Mid-deployment Review Case. Each party explicitly agreed in the Mid-deployment Review Case stipulation that Duke would be required to file an

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<sup>7</sup> See *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1, 17-18, citing to *Allen v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184, 185.

<sup>8</sup> *Allen*, 40 Ohio St.3d at 185-186.

<sup>9</sup> See, e.g., *id.*, 40 Ohio St.3d at 186.

electric distribution rate case within one year of the date the PUCO Staff files its Notice of Determination.<sup>10</sup> Hence all parties to this proceeding have notice and an opportunity to rebut Duke’s obligation to file a distribution rate case within one year of Staff’s filing its Notice of Determination. The criteria under which the PUCO may take administrative notice are satisfied.

The PUCO itself has recognized that it may take administrative notice of adjudicative facts,<sup>11</sup> cases,<sup>12</sup> entries,<sup>13</sup> expert opinion testimony, and briefs and other pleadings filed in separate proceedings.<sup>14</sup> The PUCO has also taken administrative

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<sup>10</sup> See Tr. at 16.

<sup>11</sup> *In the Matter of the Review of the Interim Emergency and Temporary PIP Plan Riders Contained in the Approved Rate Schedules of Electric and Gas Companies*, Case No. 83-303-GE-COI, Entry (February 22, 1989) at ¶6 (administrative notice taken of facts adduced at hearing in another investigation, information compiled by Staff from the 1980 Census Report, and customer information reported pursuant to the Ohio Administrative Code).

<sup>12</sup> *In the Matter of the Amendment of Chapter 4901:1-13, Ohio Administrative Code, to Establish Minimum Gas Service Standards*, Case No. 05-602-GA-ORD, Entry on Rehearing (May 16, 2006) at 33 (administrative notice taken of case filed where utility presented problems with remote technology, and sought to discontinue new installation of remote meters).

<sup>13</sup> *In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of Its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 89-1001-EL-AIR, Opinion and Order (August 19, 1990) at 110 (administrative notice taken by the Attorney Examiner of entries and orders issued in an audit proceeding and an agreement filed in the audit docket).

<sup>14</sup> 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 (July 18, 2012) at 19-21 (finding that the Court has placed no restrictions on taking administrative notice of expert opinion testimony, and that it declined to impose such restrictions); *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 Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Entry (April 6, 2010) at ¶6, *aff’d* by Entry on Rehearing (May 13, 2010) at ¶14 (both Entries allowing the entire record of a prior proceeding to be administratively noticed in the ESP proceeding and ruling that all briefs and pleadings “may be used for any appropriate purposes”).

notice of the entire record<sup>15</sup> and evidence presented in separate cases.<sup>16</sup> And the PUCO, in taking administrative notice of the entire record of a prior proceeding in a FirstEnergy Electric Security Plan proceeding, allowed all briefs and other pleadings administratively noticed to be “used for any appropriate purposes.”<sup>17</sup> Additionally, the PUCO has followed Rule 201(F) and has permitted administrative notice to be taken at any time, and as late as the time when applications for rehearing are being filed.<sup>18</sup>

**B. Facts sought to be administratively noticed.**

OCC seeks administrative notice of the PUCO Staff’s Determination filed in the Mid-deployment Review Case. The PUCO Staff’s Determination was made in compliance with a stipulation in the Mid-deployment Review Case. The PUCO approved the stipulation in an Opinion and Order dated June 13, 2012. In the Opinion and Order, the PUCO noted that “[t]he point in time when full deployment occurs or has been achieved shall be determined by Staff based on information provided by Duke.”<sup>19</sup> Hence the PUCO Staff’s Determination was made per the stipulation in the Mid-deployment Review Case and in accordance with the PUCO’s Opinion and Order in that case.

OCC’s witness and a PUCO Staff witness in this case have recommended that the costs and rate structure for Duke’s opt-out tariff be reviewed in Duke’s next base rate

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<sup>15</sup> Case No. 10-388-EL-SSO, Entry (April 6, 2010) at ¶6, aff’d by Entry on Rehearing (May 13, 2010) at ¶14.

<sup>16</sup> *Id.*; *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Electric Rates in its Service Area*, Case No. 91-410-EL-AIR, Opinion and Order (May 12, 1992) at 19 (administrative notice taken of the record in the Zimmer restatement case and evidence presented in the case); *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service.*, Case No. 91-418-EL-AIR, Opinion and Order (May 12, 1992) at 6 (taking administrative notice of entire record of Zimmer Restatement Case).

<sup>17</sup> Case No. 10-388-EL-SSO, Entry (April 6, 2010) at ¶6, aff’d by Entry on Rehearing (May 13, 2010) at ¶14.

<sup>18</sup> *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).

<sup>19</sup> Case No. 10-2326-GE-RDR, Opinion and Order (June 13, 2012) at 14.

case.<sup>20</sup> The PUCO Staff's Determination that Duke's SmartGrid is fully deployed was also discussed at hearing.<sup>21</sup> The PUCO Staff's Notice of Determination triggers the requirement in the stipulation in the Mid-deployment Review Case that Duke file a distribution rate case within one year (i.e., by October 15, 2016). The PUCO Staff's Determination is relevant to issues in this proceeding.

### III. CONCLUSION

The PUCO Staff's Determination filed in the Mid-deployment Review Case speaks directly to the issues in this case. Thus there is good cause for the PUCO to administratively notice the material requested herein. Taking administrative notice will provide information related to how the PUCO's decision in this case may affect charges to residential customers who do not want an advanced meter. If the alleged costs associated with customer opt-outs are reviewed in Duke's next distribution rate case, then there is no need to implement a tariff in the interim to charge customers for these costs.

Respectfully submitted,

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OHIO CONSUMERS' COUNSEL

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<sup>20</sup> See OCC Ex. 3 (Williams Testimony) at 6-7; PUCO Staff Ex. 2 (Rutherford Testimony) at 8.

<sup>21</sup> Tr. at 14-18, 184-185.



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Take Administrative Notice has been served electronically upon those persons listed below this 19<sup>th</sup> day of November 2015.

*/s/ Terry L. Etter*

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Summary: Motion Motion to Take Administrative Notice by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.