

**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.)	

**DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA
THE MOTION TO TAKE ADMINISTRATIVE NOTICE BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

On June 27, 2014, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) initiated the above-captioned proceeding to implement a new service to allow residential customers to take service through traditional meters instead of the advanced meters provided by the Company. The case was filed pursuant to the Commission's rule requiring each electric utility to file a proposed tariff that offers customers the option to remove an installed advanced meter and replace it with a traditional meter.¹

Subsequent to filing the application, the Office of the Ohio Consumers' Counsel (OCC), intervened in the proceeding.² A procedural schedule directed the parties to submit testimony, and a hearing was held on October 15, 2015. During the hearing, on multiple occasions, various witnesses were questioned about or otherwise referred to the fact that Duke Energy Ohio would be required to file a rate case after completing deployment of its SmartGrid.³ Additionally, OCC witness James D. Williams made it abundantly clear in his direct testimony that OCC believes that opt-out costs should be reviewed in a rate case proceeding and that proposed changes should

¹ Rule 4901:1-10-05(J) (5) (a), O.A.C.

² Ohio Partners for Affordable Energy also intervened.

³ See for example, Transcript p.16, 18, 78, 121, 151, 185, 200, 209. See also, direct testimony of James D. Williams, OCC Exh. at p.6.

not be implemented until that time. Mr. Williams stated that his understanding was that smart grid deployment would be completed in the middle of 2015, and that the Company would be required to file an electric distribution rate case in the first year after completing deployment.⁴

Despite the fact that the discussion about the upcoming rate case was repeatedly mentioned at hearing, OCC now improperly seeks to reargue its position by spuriously contending that the Public Utilities Commission of Ohio (Commission) should take administrative notice of a filing by its own Staff in a different case. OCC's motion does not add value to the record in this case and represents a thinly veiled effort to reargue its position outside of the current briefing schedule. The purported evidence offered by OCC is at best, cumulative, and at worst, prejudicial. This is an improper use of the administrative notice provisions in the law and should be rejected by the Commission.

The Commission has recognized and the Supreme Court of Ohio 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.⁵

The Commission has denied such late requests for administrative notice in the past. For example, in *In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters*,⁶ the Commission denied a post-hearing request for administrative notice, stating:

The Commission finds that it would be improper to take administrative notice or otherwise consider the information offered by IEU-Ohio at this late stage in the proceedings. It is necessary to establish some reasonable cut-off point for purposes of our consideration of the stipulation, and we do not find it unreasonable to confine our analysis to the data that is already reflected in the record.⁷

⁴ Testimony of James D. Williams, OCC Exhibit 3 at p.6.

⁵ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan, et al.*, Case No.12-426-EL-SSO, Opinion and Order, (September 4, 2013) at p.10.

⁶ Case No. 10-501-EL-FOR; Case No. 10-502-EL-FOR, 2013 Ohio PUC LEXIS 3 (PUCO; Jan. 9, 2013)

⁷ *Id.* at *28.

Similarly, in *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*,⁸ the OCC and others argued that it would be inappropriate to take administrative notice of certain information after the record was closed, as that would deny them the opportunity to explain and rebut the information, contrary to Ohio Supreme Court and Commission precedent. The Commission agreed that the objecting parties should have been afforded the opportunity to challenge the information during the hearing and that "it would be improper to take administrative notice of the information at this stage in the proceedings."⁹ The Commission concluded: "We find that it is improper to take administrative notice of the information in question, which was not presented until the reply brief was filed and thus foreclosed the intervenors from challenging the information."¹⁰ Based on the facts of this particular case, the Commission should deny OCC's motion. The acceptance of evidence after a record is prejudicial.

OCC seeks to introduce evidence into a record that has been closed since October 15, 2015, more than two months ago. OCC did not request a reopening of the record in its motion, but rather proceeded to argue that the Commission, should take administrative notice of information that OCC incorrectly deems to be relevant to this proceeding. Moreover, OCC seeks to reintroduce evidence that has already been made abundantly clear in the record. Thus, there is no need for the Commission, in this instance to take administrative notice.

In a previous case where OCC sought to improperly introduce evidence it had not raised at hearing, the Commission denied its motion and held that "absent well-substantiated arguments to re-open these proceedings in order to provide Duke the opportunity to respond, which, as

⁸ Case No. 08-917-EL-SSO; Case No. 08-918-EL-SSO, 2011 Ohio PUC LEXIS 1084 (PUCO; Oct. 3, 2011)

⁹ *Id.* at *20.

¹⁰ *Id.* at *22.

Duke notes, OCC did not request, the information cannot be admitted into the record.”¹¹ Here, OCC again seeks to introduce evidence that has in fact already been discussed at hearing and that OCC was given opportunity and latitude to develop prior to the close of the record. And again, OCC did not request that to reopen the proceedings.

For these reasons, there is no proper cause for the Commission to take administrative notice and OCC’s motion should be denied.

WHEREFORE, Duke Energy Ohio respectfully requests that the Commission deny OCC’s motion to take administrative notice in this proceeding.

Respectfully submitted,
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¹¹ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates, et. al.*, Case No. 12-1685-GA-AIR, Opinion, (November 13, 2013) at p.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail, on this 4th day of December, 2015, to the following parties.


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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/4/2015 4:15:04 PM

in

Case No(s). 14-1160-EL-UNC, 14-1161-EL-AAM

Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra the Motion to Take Administrative Notice by the Office of the Ohio Consumers' Counsel electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Watts, Elizabeth H.