

**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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**REPLY TO DUKE’S MEMORANDUM CONTRA OCC’S MOTION TO TAKE  
ADMINISTRATIVE NOTICE  
BY  
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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**I. INTRODUCTION**

In this case, Duke Energy Ohio Inc. (“Duke”) proposes new charges and terms of service for residential customers who opt out from having an advanced electric meter installed at their homes.<sup>1</sup> The advanced meters were deployed as part of Duke’s grid modernization, or “SmartGrid,” program.<sup>2</sup> One issue in this case is whether Duke’s alleged costs associated with opt-out should be examined as part of the distribution rate case to be filed after Duke’s SmartGrid has been fully deployed.<sup>3</sup>

On November 19, 2015, the Office of the Ohio Consumers’ Counsel (“OCC”) filed a Motion asking 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 (“Determination”).<sup>4</sup> There, the PUCO Staff declared that Duke’s SmartGrid

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

<sup>2</sup> See Tr. at 24.

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

<sup>4</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 22, 2015).

program has been fully deployed. Under the stipulation in that case, Duke now must file an electric distribution rate case within one year.<sup>5</sup>

On December 4, 2015, Duke filed a memorandum contra OCC's Motion. Duke makes four assertions in its memorandum contra. One, Duke claims that administrative notice is improper because the record of this proceeding has been closed since October 15, 2015.<sup>6</sup> Two, Duke argues that the Motion is actually an effort by OCC to reargue its position outside the briefing schedule.<sup>7</sup> Three, Duke asserts that OCC's Motion is similar to requests for administrative notice that the PUCO has denied in the past.<sup>8</sup> And four, Duke contends it will be prejudiced if administrative notice of the PUCO Staff's Determination is taken. Duke is wrong on all four points. The PUCO should grant OCC's Motion.<sup>9</sup>

## **II. DISCUSSION**

### **A. The record in this proceeding has not been closed.**

The Attorney Examiner did not close the record at the end of the hearing, and nothing has been docketed to close the record.<sup>10</sup> Hence the record in this proceeding remains open, and OCC need not ask that the record be reopened to include the PUCO

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<sup>5</sup> OCC Ex. 2 (Stipulation and Recommendation, Case No. 10-2326-GE-RDR (September 24, 2012)) at 6, n. 4.

<sup>6</sup> Memorandum Contra at 3.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 2-3.

<sup>9</sup> OCC files this Reply pursuant to Ohio Adm. Code 4901-1-12(B)(2).

<sup>10</sup> *See* Tr. at 239.

Staff's Determination.<sup>11</sup> Duke's assertion regarding the propriety of OCC's Motion is misplaced.

**B. OCC is not rearguing its position; rather, OCC is drawing the PUCO's attention to relevant information docketed in another case.**

OCC is not rearguing its position concerning the forthcoming base rate case. Instead, by seeking administrative notice OCC is merely bringing to the PUCO's attention the fact that the PUCO Staff's Determination – which was discussed at hearing as a possible future event<sup>12</sup> – has now occurred. This has a bearing on this case.

Further, it is disingenuous of Duke to now claim that the PUCO Staff's Determination is irrelevant to this case.<sup>13</sup> As Duke acknowledges, testimony filed by both OCC and the PUCO Staff addressed the fact that costs associated with Duke's SmartGrid program would be incorporated into base rates after the PUCO Staff determined that Duke's SmartGrid was fully deployed.<sup>14</sup> Duke did not challenge the relevance of the issue, such as by moving to strike testimony regarding the issue. In addition, the issue was discussed at hearing.<sup>15</sup> But Duke did not challenge the relevance of the issue during the hearing. Duke's brief, filed on November 30, 2015, also did not claim that the issue is irrelevant. Duke has had ample opportunity in this proceeding to object to the relevance of the determination that its SmartGrid program is fully deployed, but failed to do so in each instance. Duke has waived its right to object now.

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<sup>11</sup> Even so, Ohio Adm. Code 4901-1-34(A) allows the Attorney Examiner to reopen the record, on his own motion, at any time prior to the issuance of a final order.

<sup>12</sup> Tr. at 14-18, 184-185.

<sup>13</sup> Memorandum Contra at 3.

<sup>14</sup> See OCC Ex. 3 (Williams Testimony) at 6-7; PUCO Staff Ex. 2 (Rutherford Testimony) at 8.

<sup>15</sup> Tr. at 14-18, 184-185.

Further, Duke will have an opportunity to air its views regarding the PUCO Staff's Determination. Both OCC and the PUCO Staff discussed the issue in their initial briefs in this case.<sup>16</sup> Hence, Duke has prior knowledge of and an opportunity to rebut the materials to be judicially noticed.<sup>17</sup>

**C. The case law on which Duke relies is inapposite.**

The cases Duke cited in support of its position are inapposite here. Duke first cited the PUCO's decision in the AEP Ohio Long-Term Forecast case,<sup>18</sup> where the PUCO denied a post-hearing motion for administrative notice.<sup>19</sup> In that case, however, the party filed its motion more than nine months after the hearing addressing the issue ended, and long after briefing of the case had concluded.<sup>20</sup> By contrast, in this case OCC's Motion was filed about one month after the hearing and even before initial briefs were filed.

Ironically, Duke also cites to the PUCO's decision to deny a motion for administrative notice in the AEP Ohio SSO case.<sup>21</sup> As Duke mentioned, the PUCO denied the motion in that case because the information in question was not filed until after the reply brief was filed and thus prevented other parties from challenging the information.<sup>22</sup> But in this proceeding, briefing has not concluded; reply briefs are to be

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<sup>16</sup> OCC Initial Brief at 22; PUCO Staff Initial Brief at 5, 7.

<sup>17</sup> *Allen v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184, 186.

<sup>18</sup> *In the Matter of the 2010 Long Term Forecast Report of the Ohio Power Company and Related Matters*, Case No. 10-501-EL-FOR, et al., Opinion and Order (January 9, 2013).

<sup>19</sup> Memorandum Contra at 2.

<sup>20</sup> The initial hearing in that case was held in March 2012 and the motion for administrative notice was filed in January 2013. See Case No. 10-501-EL-FOR, et al., Opinion and Order at 2-3, 13. Briefing of that portion of the case occurred in April and May of 2013. *Id.* at 3.

<sup>21</sup> Memorandum Contra at 3, citing *In the Matter of the Application of Columbus Southern Power for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, et al., Opinion and Order (October 3, 2011).

<sup>22</sup> *Id.*

filed on December 15, 2015.<sup>23</sup> Hence, Duke still has an opportunity in this proceeding to present its position concerning the PUCO Staff's Determination.

Duke also cites to the PUCO's decision in a gas case where an OCC motion to take administrative notice was denied.<sup>24</sup> There, OCC had filed a motion asking the PUCO to take administrative notice of two documents from Duke's website containing frequently asked questions and answers about manufactured gas plant sites that were at issue in the case.<sup>25</sup> In opposing OCC's motion in the gas case, Duke argued, among other things, that the website documents in question had been available on Duke's website since the time the application was filed in the case.<sup>26</sup> Duke also asserted that the documents had been referenced in testimony filed by Duke in that case as well as in PUCO Staff data requests that were served on OCC.<sup>27</sup> It was for these reasons – and these reasons alone – that the PUCO denied OCC's motion in that case:

As pointed out by Duke, the website documents are not new documents recently posted by Duke on its website; rather, they have been on Duke's website for at least three years and, in fact, the website has been referenced in discovery and testimony in these cases.<sup>28</sup>

In this proceeding, however, the PUCO Staff's Determination had not yet been docketed in Case No. 10-2326-GE-RDR when the hearing concluded on October 15, 2015. Hence, although the issue had been discussed at hearing, the PUCO Staff's

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<sup>23</sup> See Tr. at 239.

<sup>24</sup> Memorandum Contra at 3-4, citing *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates*, Case No. 12-1685-GA-AIR, et al., Opinion and Order (November 13, 2013).

<sup>25</sup> See *id.* at 6.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 8. The PUCO also noted that administrative notice of the documents would be used to discredit the sworn testimony of witnesses whom parties had ample opportunity to depose and cross-examine. *Id.* That is not the purpose of OCC's Motion in this case.

Determination is a new fact that is relevant to this case. And, unlike the gas case discussed above, Duke still has an opportunity to present its views regarding the PUCO Staff's Determination in this case in its reply brief.

**D. Duke is not prejudiced by the PUCO taking the requested administrative notice.**

To be clear, OCC offered into evidence in this proceeding the stipulation and recommendation approved by the PUCO in Case No. 10-2326-GE-RDR.<sup>29</sup> The stipulation, approved by Opinion and Order of June 13, 2012, provided that Duke would file a base distribution rate case within one year after the PUCO Staff determined that Duke's SmartGrid hardware and systems had been fully deployed.<sup>30</sup> Duke was a signatory to the stipulation and, thus, agreed to the process that would trigger its filing of a base distribution case. Duke did not object to the admission of the stipulation into evidence in this proceeding.<sup>31</sup>

All that OCC is seeking is that the PUCO take notice of the PUCO Staff's Determination – which has not been filed in the docket in this proceeding. Duke cannot contest that it has been given notice of the PUCO Staff's Determination. Nor can it credibly argue that it does not have an opportunity to rebut the fact that the PUCO Staff has made its Determination. Theoretically, Duke could rebut that the PUCO Staff made its Determination through filings in its initial or reply brief.<sup>32</sup> However, practically, the fact that the PUCO Staff made the Determination (which is all that is needed to trigger Duke's obligation) cannot be debated. The Determination was filed with the PUCO in

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<sup>29</sup> OCC Ex. 2.

<sup>30</sup> Id., at 6, n. 4, and 7, paragraph d.

<sup>31</sup> Tr. at 126.

<sup>32</sup> In addition, it has been almost two months since the PUCO Staff docketed its Determination and Duke has not challenged the Determination in Case No 10-2326-GE-RDR.

Case No. 10-2326-GE-RDR. It is an undisputable fact for which the doctrine of administrative notice was created.

### **III. CONCLUSION**

Duke's arguments against OCC's Motion are unfounded. OCC has shown good cause for the PUCO to take administrative notice in this proceeding of the PUCO Staff's Determination in Case No. 10-2326-GE-RDR. The PUCO should grant OCC's Motion.

Respectfully submitted,

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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 11<sup>th</sup> day of December 2015.

/s/ Terry L. Etter

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Summary: Reply Reply to Duke's Memorandum Contra OCC's 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.