BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application 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 R.C. 4928.143 in the Form of an Electric Security Plan.	))))))))	Case No. 14-1297-EL-SSO

MEMORANDUM CONTRA MOTION TO STRIKE A PORTION OF THE POST-HEARING BRIEF OF DIRECT ENERGY SERVICES, LLC AND DIRECT ENERGY BUSINESS, LLC

The Commission may take administrative notice of the U.S. Treasury yields cited in footnote 3 of Direct Energy's initial brief, *regardless* of whether the sources cited for this information are part of the evidentiary record. FirstEnergy's motion to strike is baseless and should be denied.

No one disputes that the approved ESP ensures the FirstEnergy utilities will recover their SSO cost of service, including a return on equity (ROE) derived from the return authorized in FirstEnergy's 2007 distribution rate case, Case No. 07-551-EL-AIR. The distribution rate "freeze" allows FirstEnergy to lock-in an ROE authorized almost a decade ago, when U.S. Treasury yields supported a much higher cost of equity than today.[1] This is not a major point in

[1] Footnote 3 states:

> The stipulated return of 10.88 percent is far higher than the utilities could reasonably expect to receive in a distribution rate case. (*See* March 31, 2016 Order at 22-23.) The stipulated return is based on the return authorized in the utilities' 2007 distribution rate case. That return was based on financial models that relied on U.S. Treasury yields, which are the time ranged from 4.76% for 10-year bonds and 4.94% for 30-year bonds. *See* Case No. 07-551-EL-AIR, Staff Report at 17. The Commission may take administrative notice that 10-year treasuries currently yield 1.46% and 30-year treasuries 2.18%. See https://www.treasury.gov/resource-center/data-chartcenter/interest-

the case (hence the reason for raising it in a footnote), but it is a valid one. FirstEnergy's motive for "accepting" a rate "freeze" is not as altruistic as it suggests; a rate "freeze" allows FirstEnergy to maintain rates that reflect an ROE much greater than any ROE it could reasonably expect the Commission to authorize if it filed a rate case under current market conditions.

FirstEnergy argues that footnote 3 should be stricken because "it relies upon material that is not in the evidentiary record and it is, in fact, information of which the attorney examiners expressly declined to take administrative notice." (Mem. Supp. at 1.) While not entirely clear, FirstEnergy seems to argue that because the sources for the Treasury yields presented in footnote 3 are not in the record, the Commission may not consider what U.S. Treasuries were yielding in 2007 or what they yield today.

Implicit in FirstEnergy's argument is that a party may not cite or rely on information as a "fact" unless the information was admitted at hearing through testimony or documents. This is just wrong. Testimony and documents are valid means of establishing facts, but they are not the exclusive means. Administrative notice is also a valid means of establishing facts. And the whole point of administrative notice is to allow the fact-finder to consider information outside the record but "not subject to reasonable dispute" because the information is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ohio Evid. R. 201(B)(2). Direct Energy cited the Staff Report from the 2007 rate case and U.S. Treasury website because the accuracy of these sources cannot reasonably be questioned in establishing the Treasury yields considered in the 2007 rate case and current Treasury yields.

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rates/Pages/TextView.aspx?data=yield (visited Aug. 15, 2016.) It is beyond dispute that the cost of capital generally, and FirstEnergy's specifically, is far lower now than it was in 2007. The continuing distribution rate "freeze" approved in the ESP benefits FirstEnergy greatly.

The reliability of these sources is the very reason they do not need to be part of the evidentiary record—just as the numerous Commission proceedings cited by FirstEnergy are not in the record, either.

An additional and independent basis for denying its motion is that FirstEnergy has also failed to explain how it is unfairly prejudiced by the information or argument contained in footnote 3. *See Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 12 Ohio St.3d 280, 285 (1984) (Commission properly exercised administrative notice where party claiming a lack of opportunity to respond "was not shown to have been prejudiced thereby.")

ARGUMENT

Administrative notice is the same concept as "judicial notice" under Ohio Evidence Rule 201, and provides a means for establishing facts "not subject to reasonable dispute." Ohio Evid. R. 201(B). A fact is not subject to reasonable dispute if it is "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id*. Administrative notice may be taken "whether requested or not" and not only in the hearing room, but "*at any stage of the proceeding*." *Id*. at (C), (F) (emphasis added). As applicable to the Commission, there is "neither an absolute right to nor prohibition against the commission's authority to take administrative notice. Each case has been resolved based on the particular facts presented." *Allen v. Pub. Util. Comm.,* 40 Ohio St.3d 184, 185 (1988).

A. Treasury yields are a proper subject of administrative notice.

Federal courts interpreting language identical to Ohio Rule 201 have routinely found that published and publicly-available financial data, including Treasury yields and interest rates, are particularly suited for judicial notice (and by implication, administrative notice). *See, e.g., Transorient Navigators Co., SA v. M/S Southwind*, 788 F.2d 288, 293 (5th Cir. 1986)("The

district court may properly take judicial notice of prevailing interest rates."); *In re Kiethley Instruments, Inc, Sec. Litig*., 268 F.Supp. 2d 887, 896 n.6 (N.D. Ohio 2002) ("This court takes judicial notice of these stock prices and market indices."); *George's Radio & Television Co. v. Insurance Co. of North America*, 536 F. Supp. 681, 684 (D. Md. 1982) ("Other possible measures of a reasonable rate of return are the yields from government and corporate securities. No testimony was presented concerning market rates of return, but this Court may take judicial notice of this kind of fact, Fed.R.Evid. 201(b)(2), at any stage of a proceeding, *id*. 201(f), even though not requested to do so, *id*. 201(c).").

Administrative notice reflects the common-sense notion that strict evidentiary requirements should be relaxed in the circumstances described in Rule 201. "The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite." Fed. Evid. R. 201, Committee Notes. Direct Energy did not sponsor a witness or document to establish Treasury yields for the relevant time periods because it did not need to under Rule 201.

B. The accuracy of the sources cited for Treasury yields cannot reasonably be questioned.

The accuracy of the Staff Report and Treasury Department website cannot be reasonably disputed for the purpose these materials are cited. These sources do not require corroboration through testimony or documents for the very reason that their "accuracy cannot reasonably be questioned." Evid.R. 201(B)(2).

1. The 2007 Staff Report

The Commission's ability to take administrative notice of publicly available information within its own docket is so firmly established that no case citations are necessary. FirstEnergy

would presumably agree, since its own initial and reply briefs contain at least 53 citations to Commission orders and other docketed items that are not part of the evidentiary record.[2]

There is no basis to distinguish the Staff Report in Case No. 07-551 from any of the Commission orders FirstEnergy cites. The proceedings FirstEnergy cites certainly involved contested issues, but the Commission's findings cannot reasonably be disputed; the findings are verifiable by checking the orders cited in FirstEnergy's brief. The Staff Report generally addresses contested issues as well, but the Treasury yields Staff considered cannot reasonably be disputed, and are also verifiable by reviewing the Staff Report. It is not necessary to sponsor a witness to tell the Commission something that it is perfectly capable of verifying for itself by examining its own docket. And just as FirstEnergy did not ask the Commission to take administrative notice of its entire docket generally or the cited orders specifically, there was no requirement for Direct Energy to formally seek administrative notice during the evidentiary rehearing. *See* Ohio Evid. R. 201(C) and (F).

The denial of OCC's request for administrative notice of the entire Staff Report (along with FirstEnergy's application and the Commission's final order) is of no moment. The hearing examiners denied OCC's request "because no questions were asked regarding those documents or any references made to them." (Tr. Vol. X at 1580.) Direct Energy is not seeking admission into the record of the entire Staff Report or even the page cited in footnote 3 of its brief. The Staff Report need not be in evidence for the Commission to rely on it as a confirming source for the Treasury yields Staff examined when considering FirstEnergy's ROE. In denying OCC's motion, the hearing examiners simply recognized the prejudice inherent in admitting into the

[2] *See* FirstEnergy initial brief at footnotes 68, 118, 133, 199, 243; reply brief at footnotes 28, 33, 35, 63, 83, 99, 102, 252, 254, 256, 278, 279, 330, 342, 356-358, 362, 367, 399-402, 579-581, 583, 608, 640-644, 655, 670, 673, 677-685, 734, 742, 754.

record a voluminous pile of documents without adequate explanation of the underlying facts for which admission was being sought. Direct Energy is not using the Staff Report this way, or in any way even remotely similar. And regardless, administrative notice is appropriate at any stage of a proceeding, not just at hearing.

2. The Treasury Department website

Direct Energy cited the U.S. Treasury Department as the source for Treasury yields as of August 15, 2016. Surely the official website of the official government agency that issues Treasury securities is a "source[] whose accuracy cannot reasonably be questioned" for reliable information about current yields on U.S. Treasury instruments. Indeed, a federal district court abuses its discretion by *not* taking judicial notice of publicly available information in official government websites. *See, e.g.*, *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (collecting and citing cases).

If the Commission wishes to know something about current Treasury yields, it does not need to subpoena a senior Treasury Department official from Washington D.C., nor fill out a form to order a notarized document bearing a Treasury Department stamp. These are precisely the formalities that Rule 201 seeks to avoid. The Commission may verify Treasury yields by checking the Treasury department's website. And it may do so regardless of whether "the information had been presented at rehearing in connection with any witness' testimony," as FirstEnergy mistakenly contends. (Mem. Supp. at 2.) To require a print-out of the Treasury Department website and foundation for the paper document through a sponsoring witness is, again, the very exercise that Rule 201 seeks to avoid.

C. Footnote 3 presents an argument properly raised in brief.

Direct Energy is not attempting to "supplement" the evidentiary record and is not thumbing its nose at a prior evidentiary ruling. Footnote 3 simply makes an argument: that Treasury yields point to a lower cost of capital today than when FirstEnergy's authorized ROE was established almost a decade ago. The Treasury yield information supplies the facts for this argument. Because the Treasury yields are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," the Commission may consider an argument based on these facts. FirstEnergy has not argued that the Treasury yield information is inaccurate, and its ability to respond to Direct Energy's argument in its reply brief forecloses any claim of prejudice.

FirstEnergy does not even address Rule 201, but instead cites a case having nothing to do with administrative notice. (*See* Mem. Supp. at 2.) In Case No. 06-786-TR-CVF, a transportation forfeiture docket, the Commission refused to consider the post-hearing affidavit of a witness who did not appear at hearing. A post-hearing affidavit submitted in lieu of live testimony quite obviously cannot address facts "not subject to reasonable dispute," and the prejudice of allowing a witness to testify to disputed facts while avoiding cross examination is obvious. That is not what is happening here.

Likewise, the passage in the March 31, 2016 Order in this case stating, "new information should not be introduced after the closure of the record (Mem. Supp. at 2, *quoting* Mar. 31, 2016 Order at 37) simply recognizes that disputed facts should not be supplemented by more disputed facts after the record closes. But facts that are the proper subject of administrative notice are, by definition, "not subject to reasonable dispute." Ohio Evid. R. 201(B). Rule 201 specifically *permits* consideration of facts that cannot be reasonably disputed "at any stage of the proceeding." Evid. R. 201(F).

Briefs are for argument, and footnote 3 makes an argument based on facts that cannot reasonably be disputed. That FirstEnergy may not have anticipated this argument is no reason to strike it from the briefs. The Commission, not the Attorney Examiner, should give this argument whatever weight the Commission believes it deserves.

CONCLUSION

Rule 201 plainly allows the Commission to take administrative notice of the Treasury yield information cited in footnote 3 of Direct Energy's initial brief. The motion to strike should be denied.

Dated: September 7, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served by electronic mail this 7th day of September, 2016, to the following Parties of Record.

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Summary: Memorandum Contra FirstEnergy's Motion to Strike a Portion of Direct Energy's Post-Hearing Brief electronically filed by Ms. Rebekah J. Glover on behalf of Direct Energy Services, LLC and Direct Energy Business, LLC