

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Natural Gas Rates.)	Case No. 22-507-GA-AIR
)	
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Form of Regulation.)	Case No. 22-508-GA-ALT
)	
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In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.)	Case No. 22-509-GA-ATA
)	
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.)	Case No. 22-510-GA-AAM
)	
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**REPLY TO DUKE’S MEMORANDUM CONTRA OCC’S MOTION FOR
ADMINISTRATIVE NOTICE
AND
MEMORANDUM ON DUKE’S ALTERNATIVE MOTION FOR
ADMINISTRATIVE NOTICE
BY
OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

The only issue raised by OCC’s motion for administrative notice is whether the PUCO should administratively notice the PUCO Staff’s Report filed in Case Nos. 21-986-GA-ABN and 21-1035-GA-AAM, on January 6, 2022.¹ The PUCO routinely takes

¹ *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Abandon Certain Propane-Air Facilities*, Case No. 21-1035-GA-AAM et al., Staff Review and Recommendation (Jan. 6, 2022) (“Deferral Staff Report”), Exhibit 1 to OCC’s Motion.

administrative notice of such publicly filed documents, such as adjudicative facts,² cases,³ entries,⁴ expert opinion testimony, and briefs and other pleadings filed in separate proceedings,⁵ and the entire record⁶ and evidence presented in separate cases.⁷ For example, the PUCO has explained that “that the [Ohio Supreme] Court has placed no restrictions on taking administrative notice of expert opinion testimony, and we decline to

² *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 (Feb. 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).

³ *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).

⁴ *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 (Aug. 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).

⁵ *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 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); *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 (Apr. 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”).

⁶ Case No. 10-388-EL-SSO, Entry (Apr. 6, 2010) at ¶ 6, aff’d by Entry on Rehearing (May 13, 2010) at 14.

⁷ *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).

impose such restrictions in this case.”⁸ And the PUCO has taken administrative notice of “[a]ll testimony and exhibits” and “all briefs and other pleadings” from prior cases.⁹

Duke spends most of its time in its Memorandum Contra attempting to rebut the Deferral Staff Report. There is a reason for Duke’s attempted and premature pre-hearing rebuttal. The reason is that the PUCO Staff, in its Deferral Staff Report, gives voice to concerns that OCC is raising regarding the illegality of charging consumers for the propane caverns under the settlement in this case because they were not used and useful on the date certain.

Duke would deny the PUCO Commissioners the “complete record” for their “findings of fact and written opinions,” as required by R.C. 4903.09. That is unlawful and unfair to Duke’s consumers.

And recently the Supreme Court of Ohio, in appeals by OCC and NOPEC, overturned a PUCO order based on an inadequate record. The Court held that the PUCO wrongly granted FirstEnergy Advisors a certificate in the absence of a proper record.¹⁰

Duke can later make arguments for the hearing, cross-examination, and briefing yet to come. But not now. Duke’s arguments are not relevant to whether the PUCO should take administrative notice of the Deferral Staff Report.

OCC has met the governing standard for taking administrative notice. The PUCO should take administrative notice of the Deferral Staff Report.

⁸ 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.

⁹ *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 (Apr. 6, 2010) at ¶ 6, aff’d by Entry on Rehearing (May 13, 2010) at ¶ 14.

¹⁰ *In re Suvon, L.L.C.*, 166 Ohio St.3d 519, 524-530 (2021).

Alternatively, Duke asks the PUCO to take administrative notice of other documents from the Deferral Case. Those documents are Comments of Duke Energy Ohio, Inc. Regarding Staff's Review and Recommendations; Stipulation and Recommendation; Direct Testimony of Sarah Lawler; and Transcript for hearing.¹¹ OCC does not oppose this request by Duke for the PUCO to administratively notice these documents – while taking notice of the complete Deferral Staff Report.¹²

II. RECOMMENDATIONS

A. **OCC has met the standard of Ohio Rule of Evidence 201 (and in other authority) for the PUCO to take administrative notice of the Deferral Staff Report.**

Rule 201 of the Ohio Rules of Evidence provides that judicial notice may be taken of any adjudicative fact that is not subject to reasonable dispute. The Supreme Court of Ohio has held that there is no prohibition against the PUCO taking administrative notice of facts outside the record in a case.¹³ 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.¹⁴ The appropriate scope of notice is broader in administrative proceedings than in trials.¹⁵

¹¹ Memorandum of Duke Energy Ohio, Inc., Contra Motion to Take Administrative Notice and, in the Alternative, Motion of Duke Energy Ohio, Inc. to Take Administrative Notice (May 18, 2022) at 8.

¹² Duke implies that OCC was somehow running away from such documents because it did not ask the PUCO to administratively notice them, too. *See, e.g.*, Duke's Memorandum Contra at 2-3. But in fact, with the exception of the hearing transcript, all of the documents are attached to the Consumer Protection Testimony of Kerry J. Adkins in Opposition to the Stipulation and Recommendation (May 12, 2023) (comments, Lawler testimony) or discussed at great length in the testimony (the settlement in the Deferral Case).

¹³ *See Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1, 17-18 (citing to *Allen, D.B.A. J & M Trucking, et al., v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 184, 185.

¹⁴ *See, e.g., Allen*, 40 Ohio St.3d at 186.

¹⁵ *See Banks v. Schweiker*, 654 F.2d 637, 641 (9th Cir. 1981).

Further, the PUCO should administratively notice the Deferral Staff Report for additional reasons. The PUCO has broad discretion to conduct its own hearings.¹⁶ The PUCO is not stringently confined to the rules of evidence,¹⁷ but is directed by statute to observe the practice and rules of evidence in civil proceedings.¹⁸

What the PUCO Staff says in the Deferral Staff Report is not subject to reasonable dispute. The Deferral Staff Report says what it says. Duke clearly had prior knowledge of the Deferral Staff Report – it was the applicant in the Deferral Case. Duke filed comments in response to the Deferral Staff Report. The Deferral Case and its relation to this case was discussed in the Staff Report in this case.¹⁹ And Duke may attempt to rebut the Deferral Staff Report (the material sought to be judicially noticed in OCC’s motion) in this case.²⁰

Duke critiques OCC’s request for administrative notice of the Deferral Staff Report. It asserts that “admitting the [Deferral Staff] Report would confuse the record here and would be extremely prejudicial, as it would be in the record to the exclusion of all other documents filed in the Deferral Case, including the Company’s response to the Staff recommendations and, ultimately, the Stipulation that resolved the dispute among the parties.”²¹

¹⁶ See, e.g., R.C. 4903.02, 4903.03, 4903.04; O.A.C. 4901-1-27.

¹⁷ See *Greater Cleveland Welfare Rights v. Pub. Util. Comm.* (1982), 2 Ohio St.3d 62.

¹⁸ R.C. 4903.22.

¹⁹ See Staff Report at ¶ 14 (discussing the deferral case and its relation to the current case).

²⁰ See *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase In Its Natural Gas Rates*, Case No. 22-507-GA-AIR et al., Entry (Apr. 28, 2023) at ¶ 6 (stating the May 23, 2023 date for the evidentiary hearing remains unchanged).

²¹ *Id.* at 8.

But, with the exception of the Deferral Case hearing transcript “other, related and relevant documents” as identified by Duke are attached to the May 12, 2023 Consumer Protection Testimony of Kerry J. Adkins or discussed at great length. Duke’s comments and Ms. Lawler’s testimony are attached to Mr. Adkins’ testimony and the settlement is discussed at great length. Duke may discuss them at hearing and ask questions of Mr. Adkins about them.

Duke may also brief issues related to the documents (including the Deferral Staff Report). Further, the PUCO Staff member who signed the Deferral Staff Report (David Lipthrott) is testifying in this case. There simply is nothing to Duke’s assertion that taking administrative notice of the Deferral Staff Report is “prejudicial” or will “create confusion of the issues and muddy the record.” Indeed, it is Duke itself that seeks to sow confusion and muddy the record with its proposal to exclude evidence from the Commissioners’ review per R.C. 4903.09 and other authority.

OCC has met the standard for taking administrative notice of the Deferral Staff Report. The PUCO should take administrative notice of it.

B. In its Memorandum Contra, Duke Wrongly (and Inaccurately) Attempts to Rebut the Deferral Staff Report.

Most of Duke’s Memorandum Contra is not relevant to whether the PUCO should take administrative notice of the Deferral Staff Report. Instead, Duke tries to rebut the Deferral Staff Report. Worse, it does so inaccurately.

Under Ohio Evidence Rule 201, none of Duke’s rebuttals are germane to whether the PUCO should take administrative notice of the Deferral Staff Report, as explained above. But OCC will set the record straight.

First, Duke discusses language from the PUCO's Order in the Deferral Case (calling it "typical for settled cases") quoted by OCC.²² Duke characterizes the quoted language as standing for the proposition that the Deferral Case is not binding precedent. The quoted language from the Deferral Case Order is: "nothing in this Opinion and Order shall be binding upon the Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation."²³ Far from being "typical" language in cases involving settlement about settled cases not being precedent, this language has a special meaning in this base rate case. It affirms the holding in *Elyria Foundry Co., v. Pub. Util Comm.*, 114 Ohio St.3d 305 (2007) that deferrals are not ratemaking. Ratemaking, if any, that is to occur, will occur in this case where parties to the settlement have agreed to amortize the net book value of the Propane Facilities over ten years.

Second, Duke asserts that the Deferral Staff Report is not "relevant to anything."²⁴ It contends that "[t]he [Deferral] Staff Report is simply a recommendation. Staff's opinion may change subsequently, as was the situation in the Deferral Case wherein it settled the matter with the Company, resolving issues as between the parties."²⁵

But as Duke acknowledges in its Memorandum Contra, "[o]ne of the issues [in this case] relates to the recovery of the deferred expenses equating to the costs of decommissioning and unused propane inventories, and an amount equating to the net book value of propane-air facilities"²⁶ The PUCO Staff addressed this very issue and

²² *Id.* at 3.

²³ Deferral Order at ¶ 13.

²⁴ Duke's Memorandum Contra at 4.

²⁵ *Id.*

²⁶ *Id.* at 1-2.

made a recommendation in the Deferral Staff Report. The Deferral Staff Report is relevant. It's unfortunate for Cincinnati-area consumers (who would pay under the Settlement in this case) that the PUCO Staff then diverged from its original consumer protection position when settling with the utility, Duke.

Third, Duke asserts that "OCC is entirely mistaken to use the in-service date of the Central Corridor Pipeline as the abandonment date of the Propane Facilities."²⁷ Unfortunately for Duke, R.C. 4909.15(A)(1), which contains Ohio's mandatory ratemaking formula, does not consider assets' "abandonment date." To be included in rate base, assets must be "used and useful" on the date certain.²⁸ It is Duke that is mistaken in relying on an "abandonment date" rather than the "used and useful" standard. This is highlighted by Duke's Application schedules in this case which show that Duke is retiring the propane caverns and related facilities on the date certain in this case – they are not in rate base.²⁹

Fourth, Duke asserts that "[w]hether or not the amounts were appropriate for deferral, in the opinion of Staff, has exactly zero relevance to the Commission's determination in the current rate case as to whether the filed stipulation is just and reasonable."³⁰ But the PUCO Staff said in the Deferral Staff Report that it "recommend[ed] denial of deferral authority for the [net book value] of the remaining [propane facility] assets, which is primarily based on the fact this would amount to deferral of assets which are no longer used and useful."³¹

²⁷ *Id.* at 5.

²⁸ R.C. 4909.15(A)(1).

²⁹ *See* Schedule B-3.3.

³⁰ Duke's Memorandum Contra at 7.

³¹ Deferral Staff Report at ¶6.

In evaluating the purported justness and reasonableness of the settlement filed in this case, the PUCO considers if the settlement violates any important regulatory principle or practice.³² The “used and useful” standard in R.C. 4909.15(A)(1) is indisputably an important regulatory principle and practice. The PUCO Staff’s recommendation from the Deferral Case is therefore clearly relevant.

We understand that Duke wants to celebrate its settlement with the PUCO Staff in the Deferral Case, where the PUCO Staff diverged (at the expense of consumers) from its earlier Deferral Staff Report. But, as stated above, OCC is entitled under Rule of Evidence 201 and Court and PUCO precedent to adduce evidence about the PUCO Deferral Staff Report.

Fifth, Duke asserts that in the Deferral Case “Staff had no reason to believe that the Propane Facilities were not used and useful at the time it issued the Report.”³³ But this is not true. It cites to the PUCO Staff’s data requests, discusses representations made in Duke’s application, and is a function of interviews with Duke personnel.³⁴ The Deferral Staff Report reflects the results of the PUCO Staff’s investigation into Duke’s application. The PUCO Staff made a recommendation – “denial of deferral authority for the NBV of the remaining assets, which is primarily based on the fact this would amount to deferral of assets which are no longer used and useful.”³⁵ The PUCO Staff concluded that the Propane Facilities were not used and useful.

Duke’s rebuttals to the Deferral Staff Report are inaccurate. And they are not germane to taking administrative notice of the Deferral Staff Report.

³² *Consumers’ Counsel v. Pub. Util. Comm’n*, 64 Ohio St.3d 123, 126 (1992).

³³ Duke’s Memorandum Contra at 7.

³⁴ See Deferral Staff Report at 2.

³⁵ *Id.* at 5.

C. OCC does not oppose Duke’s alternative motion for administrative notice.

Duke asks the PUCO to administratively notice other documents from the Deferral Case: Comments of Duke Energy Ohio, Inc. Regarding Staff’s Review and Recommendations; the Stipulation and Recommendation; Direct Testimony of Sarah Lawler; and the Transcript from the hearing.³⁶ OCC does not oppose this request by Duke for the PUCO to administratively notice these documents – when done along with taking notice of the complete Deferral Staff Report.³⁷

III. CONCLUSION

For the reasons discussed above, the PUCO should grant OCC’s motion for administrative notice.

Respectfully submitted,

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³⁶ Duke’s Memorandum Contra at 8.

³⁷ In fact, with the exception of the hearing transcript, all of the documents are attached to the Consumer Protection Testimony of Kerry J. Adkins in Opposition to the Stipulation and Recommendation (May 12, 2023) (comments, Lawler testimony) or discussed at great length in the testimony (the settlement in the Deferral Case).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Consumer Protection Reply to Memorandum of Duke Energy Ohio, Inc. was served via electronic service upon the parties this 19th day of May 2023.

/s/ William J. Michael

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Summary: Reply Reply to Duke's Memorandum Contra OCC's Motion for Administrative Notice and Memorandum on Duke's Alternative Motion for Administrative Notice by Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of Michael, William J..