

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of the	)	Case No. 11-5906-EL-FAC
Fuel Adjustment Clauses for Columbus	)	
Southern Power Company and Ohio	)	
Power Company and Related Matters.	)	

In the Matter of the Fuel Adjustment	)	Case No. 12-3133-EL-FAC
Clauses for Columbus Southern Power	)	
Company and Ohio Power Company.	)	

In the Matter of the Fuel Adjustment	)	Case No. 13-572-EL-FAC
Clauses for Ohio Power Company.	)	

In the Matter of the Fuel Adjustment	)	Case No. 13-1286-EL-FAC
Clauses for Ohio Power Company.	)	

In the Matter of the Fuel Adjustment	)	Case No. 13-1892-EL-FAC
Clauses for Ohio Power Company.	)	

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**OHIO POWER COMPANY’S MEMORANDUM CONTRA THE OFFICE OF THE  
OHIO CONSUMERS’ COUNSEL APPLICATION FOR REHEARING**

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August 31, 2015

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**I. Introduction**

The Office of the Ohio Consumers’ Counselor (OCC) bases its rehearing request on a false premise - that it is entitled to infringe on the Commission’s investigation/audit phase of a fuel adjustment clause (FAC) proceeding and that portions of the audit prior to the final audit report being finalized have any relevance. OCC’s assumptions are incorrect, which leads it to make a number of incorrect assertions about the audit process and expected rights for OCC that do not exist. In short, the FAC audit ordered by the Commission is its audit or investigation of the facts involved in the Company’s fuel clause. The Commission—as it has before—first orders an independent auditor to send a draft audit report to Staff and the Company so that

inaccurate and confidential information can be removed prior to a final report's rendering in the public domain. Only the final audit report is thereafter considered by the Commission. Thus, not only are the drafts inherently unreliable, they are irrelevant for purposes other than procedural assurances of the final report's quality and accuracy.

OCC has no right to assert extraordinary rights during this preliminary investigatory step of the Commission that is only a part of the overall FAC review. Nothing precludes OCC from conducting its own analysis or investigation. OCC has a right to participate in the hearing process and develop its own arguments. However, OCC does not have a right to pierce the veil of a Commission investigation done pursuant to Commission rules and governing statutes. OCC's request for rehearing should be denied.

## **II. Background**

On August 21, 2015, OCC filed an application for rehearing of the Commission's July 22, 2015 Entry establishing the Commission's process to conduct an audit of the 2014 FAC of AEP Ohio. In its application for rehearing, OCC asserts two arguments that the Entry is unreasonable and unlawful: 1) a fairness argument based on the fact that AEP Ohio will see a copy of the report in draft form and 2) an argument that if AEP Ohio has a chance to communicate with the auditor about the audit then the auditor is no longer independent. OCC's arguments are without merit because it is based on an inaccurate understanding of the audit and the proceeding.

### **III. Law and Argument**

#### **A. The Audit Report ordered by the Commission is a Commission investigation being performed pursuant to the Commission's investigatory powers. (R.C. 4903.02, 4903.03, 4905.06, 4905.15, 4905.16 and 4901.16).**

The audit being performed by the Auditors in this case is being done pursuant to the statutory authority of the Commission in its role as regulator. This process inherently involves the auditor, as overseen by Staff, and the auditee- the Company. OCC's request improperly seeks to elevate itself to either the Commission Staff's status as auditor or the Company's role as the auditee. That is not OCC's role. OCC has all rights provided under Chapter 49 to challenge matters in proceedings before the Commission and on a limited basis in other venues. That authority does not allow OCC to infringe upon the statutory authority of the Commission to conduct investigations and the duties against disclosure when the Commission is conducting such investigations.

OCC challenges a Commission Entry that clearly states that the audit is being performed and shall be executed under the Commission's statutory authority. . (Entry at ¶9) Specifically, the Entry states:

EVA (Auditor) shall execute its duties pursuant to the Commission's statutory authority to investigate and acquire records, contracts, reports, and other documentation under R.C. 4903.02, 4903.03, 4905.06, 4905.15, and 4905.16.

(Id.) Those statutory provisions encompass the Commission's oversight responsibility as the regulator appointed by the General Assembly to oversee the public utility industry. R.C. 4903.02 and 4903.03 governs the Commission's, including its agents', general right to examination of company employees of regulated the utilities' records. R.C. 4905.06 enumerates the

Commission's general supervision over regulated utilities with statutory rights to stay aware of the general condition of the companies and their books and actions. R.C. 4905.15 and 4905.16 call for regulated utilities to furnish accounts, reports and information required by the Commission including the filing of agreements between regulated utilities. Each of these provisions relied upon by the Commission to conduct the FAC audit has the common theme of creating a relationship of communication between the regulated utility and the regulator- the Commission. None of these enumerating statutes include a provision to allow OCC to insert itself into a Commission audit or investigation absent the Commission providing the OCC that right.

The Commission Entry goes on to state that the auditor is also subject to the Commission's statutory duty under R.C. 4901.16, to not disclose any of the information discovered in the audit except for in the actual report. (Entry at ¶9) Specifically, R.C. 4901.16 states:

Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utility commission, no employee or agent referred to in Section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent. Whoever violates this section shall be disqualified from acting as agent, or action in any other capacity under the appointment or employment of the commission.

Thus, the auditor is barred from sharing information, including draft reports of its investigations, with parties outside the utility under review and the Commission Staff that are overseeing the processing of the investigation.

The logic behind R.C. 4901.16 is well placed and integral to the balanced regulation of the Commission in this industry. As required by statute, a regulated utility provides the

Commission access to all of its relevant operations, accounts and practices as part of its oversight when the Commission is conducting an audit or investigation. This creates an important relationship and responsibility to ensure that the result of any work done by the Commission when exercising this duty is accurate. An auditor and Commission Staff require the interaction with a regulated utility to perform an effective Commission audit. The review of a draft audit is to verify that confidential information is protected, ensure the accuracy of the information relied upon and to ensure that there are no misunderstandings between the Commission's agent and the regulated utility that might lead to an error in application. This is all part of the audit process. OCC's role is in the adjudication of the case on its own arguments and arguments related to the final audit report. Once the Commission's report becomes docketed, then and only then is the report relevant to the proceeding and the only relevance is that final report.

OCC argues incorrectly that the Commission's Entry produces an uneven playing field in these cases and it denies them a meaningful process contrary to their rights. (OCC Application at 4-5.) The adversarial proceeding provides OCC the rights it seeks in the rehearing application. In fact, OCC may conduct its own audit of the fuel adjustment clause. However, it has no statutory right to insert itself in the Commission's audit process and micromanage the Commission's agents. OCC's claim that it is being denied any rights in this case ignores the clear authority cited by the Commission to govern its audit process and the prohibition against disclosure of utility information. OCC can point to no statutory language that would allow it to intrude upon this Commission's mandate or require the Commission to provide for OCC's unauthorized request in this rehearing.

The authority OCC refers to as support for its position involves the right to obtain discovery of relevant information. OCC's arguments are without merit. First, the auditor is

acting as Commission Staff in this proceeding and Staff is not a party under the rules for purposes of discovery. (O.A.C. 4901-1-10(C) excludes Commission Staff as a party for purposes of discovery in Commission proceedings). Second, the Commission is conducting the investigation pursuant to its statutory authority and as discussed above, R.C. 4901.16 prohibits the disclosure of information as part of an investigation except in the report. The draft report sought by OCC would not be the actual report filed with the Commission, but instead is only a draft that may have confidential, incomplete and inaccurate information that must be addressed to finish the audit process, including checking for accuracy with the audited party.

The other OCC arguments are based on the Commission's process for consideration of the FAC and general discovery rights. OCC's arguments do not apply to drafts or reports because drafts are not relevant prior to a final report or equally after a final report is published. The final report that the Commission provides in the docket is the only relevant matter for purposes of the Commission decision. The Ohio Power Siting Board faced a similar situation when a party sought disclosure of a draft Staff Report of Investigation.<sup>1</sup> The Board weighed the discovery rights directly against the production of draft applications of the Company and drafts of the Staff Report and determined such drafts are not relevant for purposes of its proceedings. *In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN,

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<sup>1</sup> RC.4906.12 orders the OPSB to follow the procedures of the Public Utilities Commission. The statute incorporates a number of specific Commission statutes including R.C. 4903.02 and 4903.03, two of the statutes the Commission included in its Entry to authorize the audit in this case.



Opinion and Order May 28, 2013 (“*2013 Wind Order*”).<sup>2</sup> In that case, the Opinion and Order stated:

While UNU is correct that **Section 4903.082, Revised Code, provides parties with ample rights of discovery, under Ohio Civ.R. 26(B)(1), these rights extend only to matters that are relevant to the subject matter involved** in the pending action. As Section 4906.10, Revised Code, sets forth, the Board's responsibility is to render a decision upon the record either granting or denying the application as filed, or modifying and granting the application. The sole consideration of the Board is on the application as filed. Accordingly, **the admission of any drafts, whether it be an application or staff report, will not make it more or less probable that Champaign's application meets or does not meet the requirements of Section 4906.10, Revised Code.** Therefore, UNU's requests to be provided with drafts of the Staff Report and the application should be denied.

**Emphasis added. (2013 Wind Order at 9-10).** In the *Wind Order* proceeding, the Board was focused on the applications and staff report that was final and at issue in the proceeding. The Board determined that drafts of those documents were not relevant and even with the ample rights of discovery that they did not extend to these drafts. As this case shows, despite OCC's argument<sup>3</sup> that changes could be “highly relevant,” the fact is that such items in a draft of a document are not relevant. The Commission is vested with broad discretion to manage its dockets, including the discretion to decide, how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay, and eliminate unnecessary duplication of effort. *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util.*

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<sup>2</sup>2013 WL 2446463 (Ohio P.S.B.)

<sup>3</sup> See OCC Application at 5.

*Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982) . The Commission could use this discretion to ensure irrelevant matters are not entered into the proceeding that could cause a distraction or undue delay.

OCC also misapplies Commission language arguing that the Commission is being inconsistent with prior orders. OCC points out language from an April 16, 2014 Entry that indicated that “any conclusions, results, or recommendations formulated by the auditor may be examined by any participant to these proceedings.” (OCC Application at 5 citing April 16<sup>th</sup> Entry). OCC then asserts that this language is now being violated by the Commission’s audit process. (Id.) However, the Commission’s Entry in this case is consistent with this 2014 Entry. As the Commission indicated in its prior Entry, the actual conclusions, results and recommendations formulated by the auditor will be available in this proceeding. Those items do not exist until the auditor’s work is done and has reached the actual conclusions, results and recommendations. The draft stage of the audit is still an important part of the process and comes before the aforementioned conclusions, results and recommendations are made. The final report is the only relevant conclusion for purposes of review and the exact documentation referred to by the Commission in the April 16<sup>th</sup> Entry. The Commission language is consistent and OCC’s argument should be denied.

Consistent with the Request for Proposal issues by the Commission and the Entry that sets up the process in this case, the auditor is treated as an agent of Staff and performs its role under the supervision and direction of Staff. The initial audit phase of the case is distinct from the subsequent adjudication process that permits intervenors to participate by doing discovery, presenting testimony, and participating in the evidentiary hearing and briefing process. OCC has a role in the latter component of this proceeding but has no role in the former. And there is no

harm to OCC by not participating in the audit process. Similar to a Staff report under R.C. 4909.19 in a traditional rate case, the Audit Report in a fuel cost review case does present specific issues for Commission resolution in the case and, in that sense, helps to define the scope of the proceeding. But OCC and other intervenors are not limited to those issues and can conduct discovery on other topics and present their own issues for Commission decision. In any case, OCC's role is simply not equal or even comparable to Staff's or the Auditor's and there is no telling where it ends if the Commission allows OCC to inject themselves into the Audit process. Should OCC be permitted to sit in on interviews when the Auditor asks Company officials to discuss new coal contracts that may have been signed during the audit period, so as to monitor and critique any explanation given by the Company and defend the Auditor's independence? Should OCC have access to communications back and forth with the Auditor when Staff is supervising and directing the Auditor's work, to ensure that OCC is satisfied with the activities and direction of the investigation? Should OCC have the ability to access draft data requests that the Auditor plans to send the Company in case OCC thinks better of the questions? Of course, these rhetorical questions deserve a resounding negative response and are designed to expose the flawed premise of OCC's application for rehearing that assumes there is a role for OCC in the audit process. There has never been a need for that in the past and starting down that path in the final FAC audit is completely unwarranted and would be a big mistake.

**B. The Auditor is working at the direction of the Commission Staff as an independent auditor.**

OCC again relies on its misunderstanding of the audit process and the Commission's statutory authority to make the argument that the presentation of the draft report to the Staff and auditee (AEP Ohio), prior to finalizing the report, undermines the independence of the auditor. (OCC Application at 7-9.) OCC repeats many of the arguments raised in the prior section of its

application for rehearing on fairness. AEP Ohio refers the Commission to where those arguments are addressed above in the document. AEP Ohio will focus its response in this area on OCC's attack on the Auditor, the Commission Staff and the incorrect characterization of the normal audit process as an appearance of impropriety.

OCC's argument mistakenly confuses an auditor's duty to ensure the accuracy of its report and protection of highly confidential information with a surrender of auditor independence. It would be irresponsible and against the standards followed by auditors to issue an audit report without ensuring the accuracy of the contents. Auditors are subject to certain standards that they must adhere to ensure the accuracy and respect for the product of an audit. One such set of standards is the Standards for Audit of Governmental Organizations, Programs, Activities, and Functions by the Comptroller General of the United States.<sup>4</sup> These standards make clear the importance of the accuracy of the final audit report and how a single mistake can call into question the authenticity of the entire report. Specifically the standards state:

59. Accuracy requires that the evidence presented be true and that findings be correctly portrayed. The need for accuracy is based on the need to assure readers that what is reported is credible and reliable. One inaccuracy in a report can cast doubt on the validity of an entire report and can divert attention from the substance of the report. Also, inaccurate reports can damage the credibility of the issuing audit organization and reduce the effectiveness of reports it issues.

60. The report should include only information, findings, and conclusions that are supported by competent and relevant evidence in the auditor's working papers. That evidence should demonstrate the correctness and reasonableness of the matters reported. Correct, portrayal means describing accurately the audit scope and methodology, and presenting findings and conclusions in a manner consistent with the scope of audit work.

Reporting Standards for Performance Audits Chapter 7 at ¶¶ 59-60.

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<sup>4</sup>See GAO website for standards at <http://www.gao.gov/products/136670>

There are also standards established by the American Institute of Certified Public Accountants (AICPA) that guide practitioners performing audits.<sup>5</sup> These standards also include ensuring the accuracy of information and engaging with the regulator and company on specific regulatory matters:

.48 The practitioner should apply procedures to provide reasonable assurance of detecting material noncompliance. Determining these procedures and evaluating the sufficiency of the evidence obtained are matters of professional judgment. When exercising such judgment, practitioners should consider the guidance contained in paragraphs .51–.54 of section 101 and AU-C section 530, *Audit Sampling*. [Revised, December 2012, to reflect conforming changes necessary due to the issuance of SAS Nos. 122–126.]

.49 For engagements involving compliance with regulatory requirements, the practitioner's procedures should include reviewing reports of significant examinations and related communications between regulatory agencies and the entity and, when appropriate, making inquiries of the regulatory agencies, including inquiries about examinations in progress.

Statements on Standards for Attestation Engagements, Obtaining Sufficient Evidence at ¶¶ .48-

.49. Both sets of standards also govern the independence of an auditor, but leave the method upon which to gain the information to ensure a full and accurate job open to discretion.

The assurance that an auditor will protect the confidential nature of the information provided in an audit is also a concern that the audit industry must ensure is addressed when performing audits. The FAC involves significant dollars and a significant amount of confidential values and documents related to the industry and the operations of the Company. The final audit report is docketed in the public docket and the Company must have the opportunity to ensure the confidential information is properly redacted. The filing of an unredacted or improperly redacted report done without the oversight of the Company would undermine the audit process and violate

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<sup>5</sup>See standards at <http://www.aicpa.org/Research/Standards/AuditAttest/Pages/SSAE.aspx>

the protections provided a utility by statute and expected when sharing information with its regulator.

Ultimately, the mere interaction between the auditor and auditee does not surrender the independent nature of the audit. In fact, a lack of interaction could call into question the authenticity of the audit because of a concern about likely inaccuracies. This interaction cannot be limited to a review for trade secrets or correcting math as referenced by OCC. (OCC Application at 8.) The vetting of assumed facts and the accuracy of the audit reports involve a review by the Company upon who the auditor relies upon for information. OCC also seems to discount or leave out of the fact that the Commission Staff is also involved in the process. The Commission Staff regularly interacts with Company personnel and maintains its independence. Indeed, the RFP and the Entry appointing the Auditor made it clear that the Staff would oversee and direct the Auditor's work. In that role, Staff can verify the authenticity and independence retained by the auditor during and after the review of the draft report as part of the Commission enumerated process.

OCC cites an approved settlement agreement from 1989 as evidence that there is Commission precedent on sharing copies of draft audit reports. (OCC Application at 8.) OCC's argument is flawed. Settlements are not precedent setting. According to OCC, the case upon which it relies deals with the Commission's approval of a settlement agreement, where the parties agreed to provide drafts of an audit report to resolve the matters at issue in that case. The Opinion and Order cited by OCC does not order the sharing of draft audit report as represented. The decision refers to six pages of audit parameters agreed to by the parties that the Commission approves. Nowhere in the order is there any indication that that if a draft is required to be shared

that it was anything more than a negotiated term of parties in the overall balance of a stipulation.<sup>6</sup> OCC does not provide any precedent where a draft report was ordered by the Commission to be provided. OCC fails to include an applicable citation to its statement that “[p]roviding the draft audit to all interested parties at the same time is also consistent with the fundamental requirement for procedural fairness to all parties.” (Id.) The citation OCC does provide to this statement is to a case discussing the receipt of the actual audit report, not drafts of an audit. As discussed at length above, the audit does not result in an actual report until the audit is complete and the final audit report is provided. The review of the draft by the Commission Staff and Company is just another part of the auditor’s process to finalize the audit report.

OCC’s argument amounts to a misplaced distrust of the auditor, the Commission Staff and the Company. OCC’s solution is to insert itself in the process in an attempt to put itself in the shoes of the Commission Staff or the Company/auditee. The audit process works because an independent auditor follows their industry standards to remain independent while ensuring the accuracy of the data to provide a proper report. That report is then put in the record by the Commission for use by all parties in its docket. Allowing intervenors access to draft reports that could be inaccurate undermines the audit process and risks the disclosure of correctible errors that if shared could undermine the work done by the auditor and the actual report generated after all the facts are considered.

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<sup>6</sup> *In the Matter of the Application of the Toledo Edison Company for Authority to Amend and to Increase Certain of its Filed Schedule Fixing Rates and Charges for Electric Service. In the Matter of the Investigation into the Perry Nuclear Power Station; In the matter of the Investigation into the Beaver Valley Nuclear Power Station*, Case No. 88-171-EL-AIR, Opinion and Order (Jan. 31, 1989 at 21-22).

#### **IV. Conclusion**

OCC's arguments that its rights to participate are being infringed or that the processing of an audit undermines the independence of an auditor are without merit. The Commission ordered an audit to be performed and is following its normal process to reach a final audit for use in its proceeding to review the fuel adjustment clause. The interaction with the Company as part of that process is a normal and necessary component of the audit process of which the parameters are protected and governed by specific statutes. OCC's assertion that draft reports are relevant to the proceeding is incorrect. OCC's argument that interaction between the auditor and auditee is somehow improper misunderstands audits and ignores the statutory framework governing the Commission. OCC's application for rehearing should be denied and the Commission should make clear the lack of relevance of draft reports in Commission proceedings.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via electronic mail upon the below-listed counsel this 31<sup>st</sup> day of August, 2015.

//s// Matthew J. Satterwhite

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**in**

**Case No(s). 11-5906-EL-FAC, 12-3133-EL-FAC, 13-0572-EL-FAC, 13-1286-EL-FAC, 13-1892-EL-FAC**

Summary: Memorandum Contra the Office of the Ohio Consumers' Counsel Application for Rehearing electronically filed by Mr. Matthew J Satterwhite on behalf of Ohio Power Company