

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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

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

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

**OHIO POWER COMPANY'S REPLY TO THE OFFICE OF THE CONSUMERS'
COUNSEL MEMORANDUM CONTRA THE MOTION FOR PROTECTIVE ORDER
OR ALTERNATIVELY THAT THE INFORMATION NOT BE CONSIDERED PUBLIC
DOCUMENTS FOR RELEASE**

Filed December 23, 2015

Table of Contents

I.	Introduction.....	1
II.	Reply	2
	OCC’s arguments against issuance of a protective order are all premised on OCC’s refusal to recognize first, that there are valid exceptions to disclosure enumerated in R.C. 149.43 and, second, that the Commission has authority to determine that its rules, statutes and precedent concerning the ongoing draft process of a Commission audit qualify for one of those exceptions.	
A.	The Commission already determined that R.C. 4901.16 Can serve as an exception to the disclosure requirements of R.C. 149.43	2
B.	Complying with the law and Commission directives is Appropriate	7
C.	O.A.C. 4901-1-24 is an appropriate method to ensure protection in response to an improper public records request served on the Commission.....	8
III.	Conclusion	9

I. Introduction

OCC's memorandum contra appears stuck in a tunnel vision that any response other than they are entitled to anything they want at any time is an unlawful conspiracy. OCC's inflammatory oversimplification fails to apply the entirety of the law. The disclosure requirements of Ohio's public records law have many enumerated exceptions that are equally valid laws, including items barred from disclosure under state law. As discussed by the Commission previously, R.C. 4901.16 serves as one of those exceptions. The Company asks that the Commission focus on and apply the law and ignore the flowery rhetoric provided by OCC.¹ The iterations and interactions that occur in the context of a Commission audit are part of its ongoing process protected under R.C. 4901.16. This is a definitive statute with serious consequences for violation. The public disclosure of the contents of that process are protected as an exception to the public records statute and in this particular case are not even considered public documents. OCC's attempt to circumvent the Commission's regulatory process is without merit and should be denied through the issuance of a protective order or denial of release of the documentation.

¹ The Commission should strike OCC's improper caption to its filing. The Company filed a motion for a protective order. OCC filed a memorandum captioned "Memorandum Contra the Motion AEP Filed to Thwart Transparency and Fairness Regarding the PUCO's Audit of Millions of Dollars of AEP Charges to Consumers by the Office of the Ohio Consumers' Counsel." Technically, OCC did not respond to the Company's motion as OCC's caption replies to some other document not filed by the Company. OCC's recasting of the caption only reflects OCC's inability to weigh the application of the law objectively, as the Commission must do to give meaning to R.C. 4901.16.

II. Reply

OCC's arguments against issuance of a protective order are all premised on OCC's refusal to recognize first, that there are valid exceptions to disclosure enumerated in R.C. 149.43 and, second, that the Commission has authority to determine that its rules, statutes and precedent concerning the ongoing draft process of a Commission audit qualify for one of those exceptions.

A. The Commission already determined that R.C. 4901.16 can serve as an exception to the disclosure requirements of R.C. 149.43.²

The Commission previously considered R.C. 4901.16 as an exception to the public-release provisions of R.C. 149.43. In the *CG&E case*, the Staff acquired third-party reporting between a utility and its third-party contractor investigating potential causes of gas explosions at gas distribution risers. The Staff acquired the Battelle lab reports confidentially as part of their investigatory duties under R.C. 4901.16. The Commission received a public-record request from a company that produced risers and who had a competitive interest in seeing the research done by Battelle for CG&E. Initially, the Commission determined that the information was not a trade secret and should be shared. However, upon further consideration on rehearing, the Commission recognized the delicate balance between the public's general right to access and the importance of the Commission's duty to gather and protect information under R.C. 4901.16, as regulator in the industry. The *CG&E case* reflects that a determination about what to do with documents in the possession of the Commission through its Staff is not as cut-and-dry as the OCC's colorful rhetoric would suggest. Compliance with all provisions of the law, including statutory exemptions to the Public Records Act, should not be attacked as "thwarting transparency" or perpetuating a secret process.

² *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, 00-681-GA-GPS (Entry on Rehearing, July 28, 2014 at ¶ 11) ("*CG&E case*").

The Commission, in the *CG&E* Entry on Rehearing, described the natural tension between R.C. 149.46 and R.C. 4901.16 as a perplexing question.³ The Commission then considered the issues, stating, on one hand, that R.C. 4901.16 requires Commission employees not to divulge information acquired with respect to a public utility except in a report or when called to testify or in a Court or Commission proceeding, versus a strict standard that would arguably preclude the disclosure of anything in the possession of Staff that relates to a utility.⁴ The Commission weighed the need for public access to documentation against the importance of not discouraging utilities from sharing information with Staff for fear that it would be considered public and disclosed upon request. The Commission plainly indicates that the concern for disclosure is likely the purpose of R.C. 4901.16.⁵

In its discussion in the *CG&E* case, the Commission weighed the equally important statutory right of public access to public documents and the statutory requirement for Commission confidentiality during its interactions with utilities. The Commission determined that R.C. 4901.16 can apply to require protection from public disclosure. Specifically, The Commission determined that the reports provided to CG&E from its third party were public records, but that they were shared as part of Staff's ongoing activities with the situation it was reviewing with CG&E and therefore R.C. 4901.16 was triggered.⁶

OCC appears unwilling to consider that R.C. 4901.16 could serve as a valid exception under R.C. 149.46. OCC argues that R.C. 4901.16 is not applicable because the public record

³ *CG&E* case, Entry on Rehearing, at page 5.

⁴ *Id.*

⁵ *Id.*

⁶ *CG&E* case, Entry on Rehearing, at ¶8.

request is to the Commission and not Staff.⁷ OCC also argues that the statute only applies to requests sought during the time of the investigation.⁸ OCC's arguments fail to read the statutes as complimenting each other and OCC's arguments misapply the Commission's precedent on "ongoing process" as discussed in the *CG&E case*.

The information sought by OCC is the information related to the auditor, acting as Staff, as ordered by the Commission. The Commission approved the auditor on May 21, 2014 and enumerated the scope of the auditor's involvement and the confidential nature of the auditor's work under R.C. 4901.16.⁹ The process documentation that OCC seeks in the public records request is the documentation from that staff investigation. OCC's analysis would eviscerate the meaning of R.C. 4901.16. There is no point to R.C. 4901.16, which prohibits the release of any documentation in the hands of any employee of Staff relating to a utility, other than in the prescribed manner, by statute if there is a more general statute (such as the Public Records Act) that will be used to trump this specific duty solely because the documentation is in the possession of an employee of the Commission. OCC's attempt to read the statutes in isolation and not in tandem, and OCC's failure to recognize the general nature of the public records section and the specific nature of R.C. 4901.16, leads OCC to a misapplication of the law.

OCC also fails to properly apply the guidance provided by the Commission relating to the application of R.C. 4901.16 to the ongoing nature of Staff investigations as discussed in the *CG&E case*. The rationale behind the Commission's decision to apply R.C. 4901.16 in that case is even more appropriate in the present situation. Here, the information sought by OCC concerns the ongoing interactions and iterations of an investigation that led to a final, publicly filed report.

⁷ OCC's Memorandum Contra at page 7.

⁸ *Id.*

⁹ May 28, 2014 Entry at ¶8.

That final report is available in the Commission docket as a public record. However, the iterations and discussions to *get to that final report* encompass the “ongoing activities” of a Commission audit or investigation by the Staff, which are clearly protected by R.C. 4901.16. Notably, OCC failed to respond to the Company’s point that if OCC is allowed in this instance to access the audit process documents, next will surely come requests for drafts of Commission orders and drafts of Staff Reports prior to the final versions. The audit sought here is a draft version of a Staff audit and deserves the same level of confidential treatment.

OCC tries to raise the language of R.C. 4905.07 to support disclosure of the process documents it seeks, but fails to apply the entirety of that statute.¹⁰ In fact, the Company also raises this statute in its initial motion, pointing out that all facts and information in the possession of the Commission shall be public, **except as provided in R.C. 149.43**, and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43(v) specifies that the term “public records” excludes information which, under state or federal law, may not be released. As discussed above, R.C. 4901.16 bars disclosure of these documents under state law, therefore application of the law and Commission precedent properly applies the law and precludes release of the information sought here by OCC.

The facts of this case even provide an opportunity for the Commission to issue a narrower ruling than that provided in the *CG&E case*. In the *CG&E case*, the Commission found the documents in question triggered R.C. 4901.16 even though they were technically public documents.¹¹ However, the nature of the documents requested in this case (process documents) allows the Commission to go beyond the *CG&E case* and identify the items at issue in this case as not qualifying as public records. As discussed above, the documents involved in

¹⁰ OCC Memorandum Contra at page 6.

¹¹ *CG&E case*, Entry on Rehearing, at page 6.

this current controversy amount to preliminary steps in the audit process (between the Auditor/Staff and the Company as the auditee). In the *CG&E case* the documents were actual third-party documents provided to the utility, who in turn provided the documents to Staff. The items in this case, in contrast, are drafts of the investigatory report and work associated with producing a final product. The official report is publicly available. R.C. 4901.16 provides for disclosure of relevant items related to a Staff investigation through a report and as provided in testimony. Therefore, the items at issue in this request are not public records, they are elements of an investigatory product protected as confidential under R.C. 4901.16 from public disclosure, except as outlined in the statute.

OCC further argues that any exception to the public records law should be narrowly construed. That fact does not make the application of R.C. 4901.16 null and void. In fact, one of the cases cited by OCC in support of its contention is analogous to the exception provided by R.C. 4901.16. In the *State ex. rel Mahajan* case, cited by OCC in footnote 12, the Court determined that information protected by a statute as part of an investigation would not be considered a public document under R.C. 149.43(v). Specifically, the Court cited the plain language of R.C. 4731.22(F)(5) -- protecting information received by a board in an investigation -- as a clear legislative directive that the information received by the Board was confidential. *State ex. rel Mahajan* at ¶35, citing *State Med. Bd. of Ohio v. Murray* (1993), 66 Ohio St.3d 527, 536.

In any case, the Commission should determine here that the investigation is ongoing and defer any disclosure of the draft report until after the litigation is concluded. AEP Ohio's concern here centers around OCC's attempt to circumvent the Commission's discovery rules for the purpose of the hearing process. Such concerns are diminished upon completion of the

litigation. While R.C. 4901.16 arguably continues to apply, release of the draft report upon conclusion of the litigation would be an effective way to balance transparency with due regard for the hearing process.¹²

B. Complying with the law and Commission directives is appropriate.

OCC argues that the Company's reliance on R.C. 4901.16, the Ohio Administrative Code and past precedent amounts to a request for some nefarious, private process that OCC repeatedly calls secret.¹³ Yet the Commission previously declared that the audit process would be conducted pursuant to the Commission's statutory authority, *including the confidential protection afforded by R.C. 4901.16*. Specifically, the Commission May 21, 2014 Entry¹⁴ appointing the Auditor states:

Baker Tilly will 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. Baker Tilly is also subject to the Commission's statutory duty under R.C. 4901.16, which provides:

Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities 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 acting in any other capacity under the appointment or employment of the commission.

This notice by the Commission was relied upon by the Company that its participation and interaction as the auditee would be protected under R.C. 4901.16 and that the publicly available

¹² Any disclosure of the documentation prior to the conclusion of the case would need the requisite moniker that the information is not relevant to the proceeding, as discussed in the Company's August 31, 2015 Memorandum Contra to OCC's Application for Rehearing of the Order approving the Auditor in this case.

¹³ OCC Memorandum at page 7-8.

¹⁴ May 21, 2014 Entry at ¶8.

scope of the audit would consist of the report filed with the Commission and the testimony concerning that report. OCC seeks improperly to erase the structure set up by the regulator to ensure a proper audit, and to relabel the Commission's process. While utilities will always cooperate with the Commission in its audits and investigations, the disclosure of the ongoing discussions and iterations of an audit investigation leading to a final report will discourage utilities from sharing information at the same level as has been enjoyed in the past. The process will change, as feared by the Commission, out of concern that the process previously held confidential will be considered a public record that must be disclosed upon request. The Commission should not reach a conclusion that discourages utilities from sharing information with the Commission Staff, or one that effectively negates R.C. 4901.16.

C. O.A.C. 4901-1-24 is an appropriate method to ensure protection in response to an improper public records request served on the Commission.

OCC claims that the Company improperly mixes the Commission's regulatory authority with the Commission's responsibility as a state office and that Commission rules cannot be used to invalidate Ohio public records law.¹⁵ OCC also asserts that the rule governing protective orders only applies to discovery disputes.¹⁶ OCC's arguments ignore the Commission's promulgation of its rules, the application of administrative rules by the Court in public-records disputes, and persuasive authority from the Ohio Attorney General.

The adoption of the rule provides guidance into the scope of the rule and shows that it is intended to apply to all documents in the Commission's possession. As stated by the Commission in its Entry amending the relevant portions of the Ohio Administrative Code, O.A.C. 4901-1-24(G) facilitates the submission of confidential materials to Staff in this manner

¹⁵ OCC Memorandum Contra at 8.

¹⁶ OCC Memorandum Contra at 8.

by providing that a utility need not apply for a protective order over such documents.¹⁷ In that Entry the Commission found, “Ohio Edison is correct in stating that this provision of the rule means that a utility submitting confidential information directly to the staff may do so without first filing a motion for protective order.” The Commission thus expressly recognized the confidential nature of utility documents submitted to Staff when adopting the rule. The Commission went on to tie this to R.C. 4901.16:¹⁸

Ohio Law will continue to place a duty on its staff not to divulge any information provided by a utility except in a staff report or in testimony in a proceeding. Staff will also continue to notify the company of its intent to disclose confidential information obliging the company to seek a protective order if it sees fit to do so.

As discussed above, the audit report in this case was processed under the protection of 4901.16, as outlined by the Commission in its May 21, 2014 Entry approving the auditor. The utilization of O.A.C. 4901-1-24 is the appropriate path for entities seeking to enforce the law and preclude disclosure of documents not subject to release, unless the Commission’s determination is to deny the request outright without a protective order.

OCC’s assertion downplaying the role of the Commission’s rules also dismisses the importance of the administrative code. Ohio courts have concluded that a properly promulgated administrative rule can provide the basis to preclude public disclosure under the Public Records

¹⁷ *In the Matter of the Amendment of Chapters 4901-1, 4901-3 and 4901-9*, Case No. 95-985-AU-ORD, 1006 Ohio PUC Lexis 153, *18 (March 21, 1996 Entry)

¹⁸ *Id.*

Act's "state or federal law" catch-all exception.¹⁹ As the Ohio Attorney General explains in the regularly updated *Sunshine Laws* manual²⁰:

The first type of exception prohibits a public office from releasing specific records or information to the public. Such records are prohibited from release in response to a public records request, often under civil or criminal penalty, and the public office has no choice but to deny the request. These mandatory restrictions are expressly included as exceptions to the Ohio Public Records Act by what is referred to as the "catch-all" exception in R.C. 149.43(A)(1)(v): "records the release of which is prohibited by state or federal law." These laws can include constitutional provisions, statutes, common law, or authorized state or federal administrative codes.

Accordingly, it is misleading for OCC to suggest that the Commission's properly promulgated administrative rules cannot form the basis of an exemption from disclosure under the Public Records Act.

Finally in this regard, the Company's motion also requested relief by asking for a determination that the requested information associated with the draft report be deemed to not be a public record. This alternative relief provided an independent basis beyond the protective order provisions of O.A.C. 4901-1-24 upon which to trigger a Commission ruling.

¹⁹ *E.g.*, *State ex rel. Lindsay v. Dwyer*, 108 Ohio App.3d 462 (10th Dist. 1996) (STRS properly denied access to beneficiary form pursuant to Ohio Administrative Code).

²⁰ Ohio Attorney General, *Ohio Sunshine Laws: An Open Government Resource Manual* (2013) at 26 (emphasis added; citing *Dwyer*; other internal citations omitted).

III. Conclusion

Simply applying the Ohio Revised Code compels the protection of the Commission's audit process from disclosure in response to a public records request. The need for disclosure of items in a case before the Commission can be determined in the docket under the Commission's normal rules and a determination concerning the relevance of the process. However, for purposes of OCC's particular request, the question is limited to the application of R.C. 4901.16 and O.A.C 4901-1-24 as a valid exception to the public-records statute. The Company respectfully requests that the Commission grant the Company's motion for protective order to trigger protection under R.C. 4901.16 and further declare that iterations and interactions related to audits performed under this enumerated statute are not public documents subject to release.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the parties of record in these proceedings by electronic service this 23rd day of December, 2015.

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12/23/2015 1:46:16 PM

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: Reply to OCC's Memorandum Contra the Motion for Protective Order or
Alternatively that the Information Not be Considered Public Documents for Release
electronically filed by Mr. Matthew J Satterwhite on behalf of Ohio Power Company