

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Review of Ohio Edison)
Company, The Cleveland Electric Company,)
and The Toledo Edison Company's) Case No. 17-0974-EL-UNC
Compliance with R.C. 4928.17)
)**

**REPLY IN SUPPORT OF THE MOTION OF OHIO EDISON COMPANY, THE
CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON
COMPANY FOR A PROTECTIVE ORDER REGARDING THE OFFICE OF THE
OHIO CONSUMERS' COUNSEL'S REQUEST FOR PUBLIC RECORDS**

I. INTRODUCTION

The memorandum filed by the Office of the Ohio Consumers' Counsel ("OCC") in opposition to the instant protective order motion filed by the Companies¹ is as overwrought as it is wrong. OCC's claims that the Companies seek to "thwart transparency and fairness" or to "block the release of...records...about whether the [Companies] are complying with the laws of Ohio ..." are obviously and demonstrably false. Through discovery in this case, OCC has already obtained information responsive to 236 of 250 data requests submitted by the Commission's auditor Sage Management Consultants, LLC ("Sage"). The only material provided by the Companies to Sage that OCC did not get was information that was, as the Companies have previously demonstrated,² plainly irrelevant to Sage's findings, conclusions and recommendations.

¹ The Companies are Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

² See generally Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Supplemental Memorandum Contra the Motion to Compel of the Office of the Ohio Consumers' Counsel (Oct. 1, 2018).

Notably, OCC chose not to contest the lack of relevance of the materials that have not been produced and that they seek now. OCC withdrew its motion to compel discovery of these materials after the Companies demonstrated the materials' irrelevance. OCC utterly fails to address the relevance of these materials in its memorandum contra the instant motion. Thus, one is left to wonder: how does not getting documents that are wholly irrelevant to the auditor's report "thwart" anything relating to the audit? Similarly, one must ask: given that the disputed material is irrelevant to the auditor's findings, conclusions and recommendations on the Companies' compliance with Ohio law on corporate separation, how does OCC's inability to have those documents preclude OCC—or anyone else—from knowing anything about the Companies' compliance with Ohio law on corporate separation?

Further, as even OCC's authorities show, OCC's suggested blanket rule that anything given in a Commission audit is subject to public records disclosure will lead to more difficulty in future Commission audits or investigations. If OCC were correct, Commission orders that companies shouldn't object to staff or auditor data requests will fail to achieve their intended purpose – the expeditious and liberal transmission of information to the staff and auditors. If OCC were correct, notwithstanding such Commission orders, companies will be forced to make relevance objections and withhold confidential materials. If OCC were correct, companies would have no choice but to act in such fashion because, to do otherwise, they would face disclosure of irrelevant or confidential materials on the basis that such materials constitute public records.

Of course, the Ohio General Assembly foresaw that neither the Commission nor the companies that it regulates be put in such a bind. R.C. 4901.16 provides that documents provided in confidence should not be publicly disclosed.

OCC's overheated rhetoric is a tactical choice to divert attention from their thin arguments on the merits. As shown below, at every turn, OCC's assault on R.C. 4901.16 runs directly into either the plain language of the statute or is contrary to Commission precedent. Consequently, OCC's arguments should be rejected and the Companies' motion for a protective order should be granted.

II. ARGUMENT

A. Section 4901.16 of the Ohio Revised Code Prohibits the Disclosure of the Documents Given to the Auditor In Confidence.

There is no dispute that if R.C. 4901.16 applies to the documents at issue, no public records request could mandate their disclosure. The public records statute expressly excludes releasing records "prohibited by state law."³ OCC contends that R.C. 4901.16 does not apply for two reasons: (1) the statute only applies to Commission staff;⁴ and (2) the statute only applies to documents provided during ongoing investigations.⁵ As demonstrated below, OCC's arguments fail because they are contrary to the plain language of R.C. 4901.16 and are unsupported by the Commission's prior interpretation of R.C. 4901.16.

1. R.C. 4901.16 is intended to protect confidential business records provided to Commission staff and agents.

According to the Ohio Supreme Court, R.C. 4901.16 "imposes a duty of confidentiality on [Commission] employees and agents...."⁶ Indeed, the plain language of R.C. 4901.16 states that no Commission "employee *or agent*...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*."⁷ Here, Sage was acting as the Commission's agent for purposes

³ R.C. 149.43.

⁴ Memo. contra at 6.

⁵ *Id.*

⁶ *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 191 (2007).

⁷ R.C. 4901.16 (emphasis added).

of the audit.⁸ Therefore, the Companies provided the documents at issue to a Commission agent, triggering R.C. 4901.16. In fact, the Commission explicitly recognized that, as an agent, Sage was “subject to the Commission’s statutory duty under Section 4901.16....”⁹

OCC makes the puzzling argument that, although R.C. 4901.16 applies to Commission staff, the statute does not apply to the Commission.¹⁰ This is nonsense. For purposes of receiving documents, the staff and the Commission are the same. OCC’s argument is akin to saying that giving a document to an attorney during discovery somehow does not give that document to the attorney’s firm. That just isn’t so.

The two cases OCC cites in support of its proposition don’t change this reality. The first case¹¹ did not involve a public records request or, in fact, any document request to the Commission or the staff. That case was a rate case in which a party filed a motion to compel *production by a utility* of a utility’s response to Commission staff’s data requests. In any event, the opinion OCC cites does not stand for the proposition that R.C. 4901.16 is inapplicable to the Commission. Instead, the attorney examiner held “[n]othing in [Section 4901.16] prevents the *company* from providing information to the parties in a case.”¹² Thus, that case is inapposite to the instant motion; R.C. 4901.16 was not applicable because the information was sought from a company, not the Commission.

⁸ *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case No. 11-5906-EL-FAC, Entry (Jan. 8, 2016) at ¶ 13 (“[An] auditor is an agent of the Commission....”).

⁹ Entry at ¶ 9 (July 5, 2017).

¹⁰ Memo contra at 6.

¹¹ *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service*, Case No. 91-418-EL-AIR, 1991 Ohio PUC LEXIS 1033 (Aug. 23, 1991).

¹² *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service*, Case No. 91-418-EL-AIR, 1991 Ohio PUC LEXIS 1033 (Aug. 23, 1991) at ¶ 5 (emphasis added).

The second case cited by OCC for the proposition that R.C. 4901.16 is inapplicable to the Commission *actually supports the application of R.C. 4901.16*. In *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* (“CG&E”), Case No. 00-681-GA-GPS, Cincinnati Gas & Electric (“CG&E”) shared several confidential reports with Commission staff as part of a Commission investigation. Importantly, the reports were “provided to Commission staff on the condition that their contents would remain confidential.”¹³ A third-party filed a public records request on the theory—much like OCC’s theory in the present matter—that once the “reports were in the possession of the Commission, they became public records and are subject to disclosure pursuant to the Public Records Act.”¹⁴ Notably, the Commission ultimately rejected that theory and ordered the “staff abide by Section 4901.16,” and not provide the reports pursuant to the public records request.¹⁵

OCC’s attempt to distinguish *CG&E* is unavailing. OCC argues that R.C. 4901.16 somehow only applies to documents provided to the staff voluntarily. OCC offers no support in the statute for its interpretation. Indeed, there is none; OCC’s interpretation directly conflicts with the plain language of the statute: “no employee or agent...shall divulge *any* information....”¹⁶ OCC’s assertion that the importance of free and open sharing of information between utilities and the Commission—while vital in voluntary exchanges—“is greatly diminished in matters that are formal”¹⁷ defies logic. If the Companies’ submissions to Sage had been voluntary, the Companies could have vetted their submissions and withheld

¹³ *CG&E*, Entry (Dec. 17, 2003) at ¶ 4.

¹⁴ *Id.* at ¶ 6.

¹⁵ *Id.*, Entry on Rehearing (July 28, 2004) at ¶ 13.

¹⁶ R.C. 4901.16 (emphasis added).

¹⁷ Memo Contra at 8.

responses to requests that were irrelevant or called for confidential information. Instead, the Companies were mandated to submit “any and all documents or information requested,” and were afforded no opportunity to object to Sage’s requests.¹⁸ Therefore, given that the Companies did not have the ability to protect confidential information (i.e., by not producing it), the need to protect confidential information that is involuntarily submitted – by precluding it from being publicly produced by the Commission, as envisioned by R.C. 4901.16 – is more compelling. According to OCC, an errant request from an auditor automatically thrusts sensitive business documents into the public domain. R.C. 4901.16 protects against such a paradigm.

2. R.C. 4901.16 is not limited to ongoing investigations.

OCC’s contention that R.C. 4901.16 is limited to “ongoing” Commission investigations does not fare any better. The plain language of the statute contains no such limit. And OCC’s attempt to limit R.C. 4901.16 is unsupported even by their own cited authority.¹⁹ None of these cases limit R.C. 4901.16 to ongoing investigations. Indeed, doing so would run afoul of the statute’s plain language.

B. The Commission has the Authority to Issue Protective Orders to Prevent Disclosure of Confidential Information Requested Through Public Records Requests.

As an apparent make weight argument, OCC argues that the Commission does not have the authority to issue protective orders to prevent disclosure of information requested through a public records request.²⁰ OCC claims the Commission can never issue a protective order to

¹⁸ Entry at (July 5, 2017) ¶ 10.

¹⁹ *CG&E*, Entry on Rehearing (July 28, 2004) at 11; *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case No. 11-5906-EL-FAC, Entry (Feb. 3, 2016) at 6; *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR, Entry (Feb. 14, 2013) at ¶ 10.

²⁰ Memo contra at 9.

prevent disclosure from a public records request.²¹ This is simply untrue. In fact, an attorney examiner—reviewing this exact issue—determined that the “utilization of Ohio Adm. Code 4901-1-24 [is] an appropriate means to seek protection [from a public records request].”²² The Commission itself, in promulgating the rule, said “4901-1-24...seeks to strike a reasonable and appropriate balance between the legitimate interests of a company in keeping...proprietary information confidential and not subject to public disclosure, and the obligations of the Commission relative to the full disclosure requirements mandated by Ohio law and public policy.”²³ Indeed, the Commission has exercised its authority under Ohio Adm. Code 4901-1-24 to prevent disclosure of confidential information requested through a public records request in prior cases.²⁴ The Companies have requested the proper relief and a protective order should be granted.²⁵

III. CONCLUSION

For these reasons and as set forth in the Memorandum in Support of the Companies’ Motion for a Protective Order Regarding the OCC’s Request for Public Records, the Commission should grant the Companies’ Motion for a Protective Order and bar the dissemination of the Companies’ confidential responses to certain audit requests in response to OCC’s public records request.

²¹ *Id.* (“Ohio Adm. Code 4901-1-24...cannot be used to invalidate Ohio’s public records law.”)

²² *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case No. 11-5906-EL-FAC, Entry (Jan. 8, 2016) at ¶ 12.

²³ *In the Matter of the Amendment of Chapters 4901-1, 4901-3 and 4901-9*, Case No. 95-985-AU-ORD, Entry (March 21, 1996) at ¶ 8.

²⁴ *See In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR, Entry (Feb. 14, 2013) at ¶ 17.

²⁵ At bottom, OCC’s argument exalts form over substance. If, in the unlikely event the Commission ignores its rules and precedent and determines that a motion for a protective order is not the appropriate procedure to preclude disclosure of documents sought in a public records request, then the Companies request that the Commission treat the instant motion as a motion to quash, deny or otherwise hold as unmeritorious OCC’s public records request as applied to the responses to the fourteen data requests at issue.

Respectfully submitted,

/s/ David A. Kutik

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on November 20, 2018. The PUCO's e-filing system will electronically serve notice of the filing of this document on all parties of record.

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NAI-1505574758v1

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in

Case No(s). 17-0974-EL-UNC

Summary: Reply in Support of the Motion for a Protective Order regarding the Office of the Ohio Consumers' Counsel's Request for Public Records electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company