

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**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

**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

In its Memorandum Contra the Motion of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the “Companies”) for a Protective Order, the Office of Ohio Consumers’ Counsel (“OCC”) makes arguments that ignore the record of this proceeding, the plain language of the Ohio Public Records Law, and the Attorney Examiner’s November 20, 2012 Order. These arguments are thus without merit and the Companies’ motion to protect the draft and other reports from public disclosure should be granted.

OCC argues Ohio Revised Code Section 4901.16 is inapplicable to its public records request for documents that reflect the Companies’ comments on a confidential draft of the Final Report/Performance Audit of the Alternative Energy Resource Rider (Rider AER) of FirstEnergy Ohio Utility Companies for October 2009 through December 31, 2011 (the “Confidential Draft Documents”). OCC bases this argument on its incorrect contention that the Confidential Draft Documents were filed with the Commission. Not so. As part of the audit and as specifically contemplated by the request for proposal (“RFP”) process set forth by the Commission, the

Companies shared the Confidential Draft Documents with Staff with the understanding that the documents would be kept confidential. These documents have not been filed with the Commission. The Confidential Draft Documents thus fall within the ambit of Section 4901.16 and are not subject to disclosure under a public records request. Further, in its January 18, 2012, the Commission specifically ruled that information provided as part of the audit was subject to Section 4901.16.

Worse, OCC asks the Commission to ignore Section 4901.16 based on alleged “irreconcilable differences” between Section 4901.16 and Ohio’s public records statute, Ohio Revised Code Section 149.143. But the two statutes are not in conflict. Instead, it is OCC’s argument that conflicts with the plain language of the Ohio’s public records statute. Section 149.43(v) expressly excludes from the definition of a “public record” those “records the release of which is prohibited by state or federal law.” The prohibition of disclosure of documents provided to Staff under Section 4901.16 thus falls within this exclusion. The Commission can and should thus easily read the two statutes in harmony. Moreover, even if there was a conflict, OCC’s statutory interpretation would be incorrect because it would render Section 4901.16 a nullity and thus contrary to a basic rule of statutory construction. *See* R.C. § 1.51.

OCC also argues that the Companies failed to show that the Confidential Draft Documents either contain trade secret information or that such information needs protection from disclosure. These arguments, however, ignore that the Attorney Examiner has already held that information on renewable energy credit (“REC”) supplier pricing and identities that is contained within the Confidential Draft Documents is confidential trade secret information and protected from public disclosure. OCC’s arguments to the contrary are thus moot.

II. ARGUMENT

A. Section 4901.16 Of The Ohio Revised Code Prohibits The Disclosure Of The Confidential Draft Documents.

In its Memorandum Contra, OCC argues that Section 4901.16 does not prevent the disclosure of the Confidential Draft Documents because these documents have been filed with the Commission. (Mem. Contra. at 11.) OCC also argues that even if Section 4901.16 applies that “Ohio’s canons of statutory construction” require the Commission to deny the Companies’ motion. (*Id.* at 12.) As set forth below, OCC’s arguments necessarily fail because they are unsupported by both the facts of this proceeding, the plain language of Ohio’s public records statute, and basic rules of statutory construction.

1. The Confidential Draft Documents have not been filed with the Commission.

OCC incorrectly contends that the Confidential Draft Documents have been filed with the Commission. (Mem. Contra. at 4.) They have not; these documents have only been shared with Staff. (Mem. Supp. at 6.) OCC’s arguments that Section 4901.16 does not apply because the Confidential Draft Documents were filed with the Commission must be rejected.

To the extent that OCC seeks to infer that the Companies should not have had an opportunity to comment on the draft reports (Mem. Contra at p. 1), OCC also is incorrect. In its January 18, 2012 Entry, the Commission held that information that the Companies provided as part of the audit would be subject to Section 4901.16. (Case No. 11-5201, Entry, at pp. 2-3 (Jan. 18, 2012).) As part of that entry, the Commission included a RFP process that set forth the requirements for the audit. (*Id.* at p. 1.) The RFP specifically allowed the Companies to have the opportunity to comment on draft reports. (*Id.* at Attachment at pp. 6-7.) The Confidential

Draft Documents thus are part of the audit process and subject to the Commission's order that Section 4901.16 protects these documents.

Indeed, the case cited by OCC supports the application of Section 4901.16 to the Confidential Draft Documents. 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*, Case No. 00-681-GA-GPS, 2005 Ohio PUC LEXIS 104, *8 (March 2, 2005 Entry) cited by OCC (Mem. Contra at 11), the Commission found that “[t]here is a distinction between staff-acquired information and Commission-ordered documents filed with the Docketing Division . . . [and] Section 4901.16, Revised Code, does not relate to the latter.” *Id.* In the *CG&E* proceeding, the Commission applied that distinction. On the one hand, the Commission found that the final version of a report that CG&E provided to the Commission Staff and filed with the Commission's Docketing Division was not subject to the protection under Section 4901.16. 2005 Ohio PUC LEXIS 104, *7-8 (emphasis added). On the other, the Commission found that Section 4901.16 prohibited disclosure of a draft report that CG&E had informally shared with Staff. *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*, Case No. 00-681-GA-GPS, 2004 Ohio PUC LEXIS 271, *11 (July 28, 2004 Entry).

Similarly, in this case, the Confidential Draft Documents have not been filed with the Commission. Instead, these documents were informally shared with Staff with the express understanding that they would be kept confidential. (Mem. Supp. at 6.) Thus, Section 4901.16 prohibits their disclosure.

2. The prohibition of the disclosure of documents provided to Staff under Section 4901.16 falls within an exception to the Ohio public records law.

OCC also contends that, even if Section 4901.16 applies, “Ohio’s canons of statutory construction” require the Commission to read Section 4901.16 off the books. (Mem. Contra at 12.) But OCC’s argument is based on an incorrect assumption that “irreconcilable differences [] exist” between Section 149.143 (the Ohio public records statute) and Section 4901.16. OCC’s interpretation of the two statutes is flat out wrong.

The plain language of Section 149.43(v) excludes from the definition of public records those records that are prohibited from disclosure by Ohio law. Specifically, Section 149.143 provides, “Public record does not mean any of the following: . . . (v) Records the release of which is prohibited by state or federal law.” The prohibition on disclosure of documents acquired by Staff under Section 4901.16, *i.e.*, the release of documents prohibited under state law, thus plainly falls within the definition of documents that are not public records under Section 149.143.

Indeed, the exclusion of documents that are not defined as “public records” under Section 149.43 is also recognized in the public records statutes specifically applicable to the Commission, Section 4901.12 and Section 4905.07 of the Ohio Revised Code. Section 4901.12 provides that “[e]xcept as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX [49] of the Revised Code, all proceedings of the public utilities commission and all documents and records in its possession are public records.” Similarly, Section 4905.07 provides that “[e]xcept as provided in section 149.43 of the Revised code . . . facts and information in the possession of the public utilities commission shall be public.” Accordingly, there is no irreconcilable difference between either Section 4901.16 and Section

149.143 or between Section 4901.16 and the public records statutes applicable to the Commission.

Not surprisingly (and despite OCC's arguments), the Commission did not recognize an irreconcilable difference between Section 149.143 and Section 4901.16 in the *CG&E* case. (*See* Mem. Contra at 12.) Instead, in that case, the Commission applied Section 4901.16 and prohibited the disclosure of a draft report that CG&E had informally shared with Staff. *In the Matter of the Investigation of The Cincinnati Gas & Electric Company*, 2004 Ohio PUC LEXIS 271, at *11.

OCC also is wrong about the effect of "Ohio's canons of statutory construction" on Section 4901.16. Ohio's rules of statutory construction hold that if possible, a court must interpret two conflicting statutes to give effect to both. *State v. Cook* (2010), 128 Ohio St. 3d 120, 127 ("R.C. 1.51 directs us to first construe conflicting statutory provisions, where possible, to give effect to both."). Thus, even if the Commission found a conflict between Section 4901.16 and Section 149.43, the Commission should read Section 4901.16 as an exception to the more general statute, Section 149.43. *See* R.C. § 1.51. Here, that construction is unnecessary; the two statutes can easily be read in harmony.

Accordingly, the Commission should apply the protections set forth under Section 4901.16 and prohibit the disclosure of the Confidential Draft Documents.

B. The Commission Has Already Held That Pricing and Supplier-Identifying Information Is A Trade Secret And Protected From Disclosure.

OCC argues that the Companies failed to meet their burden of demonstrating trade-secret information or that the information requires protection. OCC ignores, however, that the Attorney Examiner has already held that information on renewable energy credit ("REC") supplier pricing and identities contained within the final version of the management/performance audit report by

Exeter Associates is a trade secret and protected from public disclosure. As set forth in the Companies' Memorandum in Support, the Confidential Draft Documents contain that same information. (Mem. Supp. at 8-9.) OCC's arguments are thus moot.¹

Indeed, OCC argues out of both sides of its mouth. OCC argues that the Confidential Draft Documents do not contain trade secrets and therefore the Commission should produce an unredacted version of the documents. (Mem. Contra at 7.) But OCC also argues that "any trade secret information should be redacted from the Draft Report in the same way it was redacted from the Final Report. . ." (*Id.* at 10.) And OCC acknowledges that the Commission is prohibited from releasing trade secrets as part of a public records request. (*Id.* at 6.) OCC thus recognizes that disclosure of the Confidential Draft Documents, which contains trade secrets, would, at a minimum, require redaction of trade-secret protected information.

Here, the Confidential Draft Documents contain trade-secret information that the Attorney Examiner has already found as protected from disclosure. The Confidential Draft Documents are thus not subject to a public records request. The Commission should protect these documents from disclosure.

C. Public Policy Favors Application of Section 4901.16.

In a last ditch attempt to avoid the plain language of Section 4901.16 and the Attorney Examiner's November 20, 2012 Order, OCC argues that the public's interest in disclosure outweighs the Companies' and Staff's interest in maintaining confidentiality of the Confidential Draft Documents. (Mem. Contra. at 15.) To accept this argument, however, the Commission

¹ OCC also overstates the standard of review for a protective order and the burden applicable to the Companies. (See Mem. Contra at 6-9.) OCC made these same exaggerated arguments in OCC, Sierra Club and the Office of Ohio Environmental Council's Memorandum Contra to FirstEnergy's Motion for a Protective Order, which the Commission rejected by granting the Companies' motion. Those arguments also fail for the same reasons set forth in the Companies' Reply in Support of its Protective Order, which is hereby incorporated into this Reply.

must overlook the plain language of Section 4901.16 and the Attorney Examiner's November 20, 2012 order. The Companies are not aware of any Commission precedent that holds that public interest can overcome statutory law and an order of an Attorney Examiner.² The Commission should thus reject OCC's argument.

Instead, public policy favors the application Section 4901.16 to protect the Confidential Draft Documents from disclosure. The Companies provided these documents, which contain trade secrets and other highly confidential information, to Staff with the understanding that they would be kept as confidential, non-public documents. (Mem. Supp. at 6.) Rule 4901-1-24(G) of the Ohio Administrative Code facilitates the submission of confidential materials to Staff in this manner by providing that a utility need not apply for a protective order over such documents. *In the Matter of the Amendment of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 95-985-AU-ORD, 1996 Ohio PUC LEXIS 153, *18 (March 21, 1996 Entry) (finding "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."). Indeed, when adopting that rule, the Commission also recognized the confidential nature of a utility's submission of documents to Staff:

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

² The case cited by OCC in support of this argument does not hold that issue of whether a protective order should be granted turns on whether public interest outweighs a moving party's interest in non-disclosure. (See Mem. Contra at 15 citing *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, 1990 Ohio PUC Lexis 1138 (Oct. 18, 1990 Opinion and Order).) Instead, that case found that the joint applicants failed to show that the information for which they sought a protective order was a trade secret or otherwise confidential or how disclosure of that information would cause harm. 1990 Ohio PUC Lexis 1138, at *5-7. The Commission found that much of the information was already on the public record. *Id.* at *6. Therefore, the Commission found that "any interest which the joint applicants might have in maintaining confidentiality of this information is outweighed by the public's interest in full disclosure." *Id.* at *7. Unlike that case, the Confidential Draft Documents are not part of the public record and the Commission has already found that information contained within the Confidential Draft Documents to be trade secrets.

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.

Id.

Disclosing the Confidential Draft Documents that were shared confidentially with Staff as the result of a public records request stands contrary to this policy. It also would have the impact of discouraging utilities from freely sharing information with Staff. This result stands contrary to the purpose of Section 4901.16. *See In the Matter of the Investigation of The Cincinnati Gas & Electric Company*, 2004 Ohio PUC LEXIS 271 at *9-10 (noting that refusing to follow Section 4901.16 “would have the impact of discouraging utilities from sharing information with the staff for fear that it will be considered to be a public record that must be disclosed upon request (contrary to the likely purpose of Section 4901.16, Revised Code)”).

Accordingly, the Commission should apply the protection provided by Section 4901.16 and prohibit the disclosure of the Confidential Draft Documents.

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 Confidential Draft Documents in response to OCC's public records request.

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Respectfully submitted,

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Summary: 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 Ohio Consumers' Counsel's Request for Public Records electronically filed by MR. DAVID A KUTIK on behalf of The Cleveland Electric Illuminating Company and The Toledo Edison Company and Ohio Edison Company