

**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 MOTION FOR PROTECTIVE ORDER OR  
ALTERNATIVELY THAT THE INFORMATION NOT BE CONSIDERED PUBLIC  
DOCUMENTS FOR RELEASE**

Pursuant to Ohio Administrative Code (“O.A.C.”) Rule 4901-1-24, Ohio Power Company d/b/a AEP Ohio (“Company”) hereby moves for a protective order regarding draft audit information that the Office of the Ohio Consumers’ Counsel (OCC) has sought to request through a public record request.<sup>1</sup> Alternatively, if the Commission determines that a protective order is not in order, then it can determine that the documents requested by OCC do not qualify as records or public documents for release under R.C. 149.43(v).

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<sup>1</sup> OCC already intervened as a party to the proceeding and is using the public records request as a way around Commission policies and practice.

AEP Ohio, as an entity involved in the audit performed on Company operations, was informed of the public record request sought by OCC, the party seeking draft copies and communications dealing with a draft audit report being performed confidentially pursuant to R.C. 4901.16. The draft report and comments to it are part of a confidential audit process with an expectation of confidentiality. The public document becomes the report filed in the docket. OCC's request seeks to use the public records law to circumvent the procedural process at the Commission and should be denied. A public version of the Audit Report is on file with the Commission in the docket. Release of the documents requested by OCC in its public record request would violate R.C. 4901.16 because it is releasing the documentation outside of the method prescribed in the statute. Under R.C. 4901.16, items involved in an investigation may be released in a report or when called upon to testify. Neither situation is satisfied with this request.

OCC seeks to use the public records law to turn this interaction on its head. Once the Commission's report becomes docketed, then and only then is the report relevant as a public document and the only relevance is that final report. The Commission should afford the documentation protected status because it is all parts of an investigatory process of the Commission. The process used by OCC in this instant has a perverse impact. In this case OCC seeks to treat the audit process, protected by statute, as a document for disclosure in a public record request. The next time the Commission faces this tactic it could be as OCC or another party to an active proceeding, seeks drafts of Staff testimony in a case or even drafts of Commission Opinion and Orders and intrude on the process to generate opinions. These would not be provided as documents to a public record requests and neither should parts of the confidential investigatory audit.

As further discussed in the following memorandum in support, the information included in the Audit Report constitutes confidential discussions between the Company and auditor that merits protection from disclosure as part of the audit process. These are not records or public documents subject to disclosure in such a request. Therefore the Commission could deny the public records request outright even without the protective agreement.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

### **I. Introduction**

OCC seeks to participate as a party in Commission proceedings assumedly to operate and practice within the rules of the venue, but at the same time seeks a public record request that eviscerates the confidentiality promised in R.C. 4901.16. AEP Ohio cooperated with Commission appointed auditors, provided information for the audit and provided guidance on the accuracy of the information reviewed by the auditors. That interaction and basis of trust inherent in the Commission's audit process is now challenged by OCC's attempt to circumvent the Commission's process and invoke a public records request to seek what it has previously been unable to obtain due to a pending Commission ruling on rehearing. These communications and drafts of Commission audit reports are protected by statute and therefore AEP Ohio seeks a protective order barring disclosure under OCC's public record request.

Rule 4901-1-24(D), O.A.C., provides that the Commission or certain designated employees may issue an order which is necessary to protect the confidentiality of information contained in documents filed with the Commission's Docketing Division to the extent that state or federal law prohibits the release of the information and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. The Commission should exercise that right and determine the documents sought by OCC are protected, or alternatively declare they are not a record or not public documents subject to release under a public records request.

## II. Law and Argument

### A. The documentation sought in the public record request is protected by R.C. 4901.16 and therefore not a public record for disclosure.

The documents sought by OCC through its public record request do not qualify as public records. Under R.C. 4905.07, 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. Section 149.43(v), Revised Code, specifies that the term “public records” excludes information which, under state or federal law, may not be released. R.C. 4901.16 bars disclosure of these documents under state law.

The documents being sought by OCC, an intervening party in this case, are protected as documents from a Commission investigation by Ohio Revised Code. The Commission notified the public to this fact in its May 21, 2014 Entry appointing the auditor. The Entry states that the audit is being performed and shall be executed under the Commission’s statutory authority.

(May 21, 2014 Entry at ¶8) Specifically, the Entry 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.

The statutory bar from disclosure is enumerated in R.C. 4901.16. This statute does not allow the Commission to disclose any information discovered in the audit except for in the actual report or when called upon to testify. The public record request is neither an expression by the auditor of the official report nor is it a call to testify in court. In a case before the Commission, if such a document was requested in discovery, the discussion would move to whether the information is relevant (see AEP Ohio's August 31, 2015 Memo Contra OCC's Rehearing Application, for a discussion on how drafts from the audit process are not relevant to a proceeding). However, that is not the issue in this filing. R.C. 4901.16 bars the release of these parts of the audit process as public records. OCC's public record request seeks to undermine this statute.

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 the report. The iterations are part of a process. That process is what is being requested by OCC. The steps of that process are not public documents, they are iterations of an investigation protected by R.C. 4901.16. The Company

provides the Auditor with information and communications with the expectation that its communications are protected under R.C. 4901.16.

Alternatively, the fact that the documents are not properly considered public documents under R.C. 149.43(v) provides the Commission an opportunity to deny the public records request and leave OCC to deal with the merits of the case, as an intervening litigant, in the confines of the proceeding. The issue then properly is determined by the Commission in what is protected by statute and what is relevant for purposes of proceedings at the Commission.

**B. OCC's public record request is an attempt to undermine O.A.C. 4901-1-10(C),  
barring discovery on Staff.**

The Staff is not a party under the rules for purposes of discovery in cases before the Commission. O.A.C. 4901-1-10(C) excludes Commission Staff as a party for purposes of discovery in Commission proceedings. This rule fits in sync with the fact that the audit report and related information is gathered while conducting the investigation pursuant to its statutory authority and as discussed above in R.C. 4901.16. The statute prohibits disclosure of information as part of an investigation except in a report or when called upon to testify. Drafts of the report and supporting documentation sought by OCC in its public record request are not the actual report filed with the Commission, but instead a draft and correspondence of the auditor in seeking to finalize the draft into the document that is publicly available in the docket.

OCC seeks, outside the confines of the case in a public record request, access to what amounts to be discovery on the Staff. OCC seeks access to the confidential building of audit report and interaction with the Staff and its auditor as it finalized the report. This is akin to seeking prior drafts of a Staff Report in a rate case to see what positions Staff may have considered but found to be factually wrong or not fitting within the scope of the case. This

attempt to circumvent the rule is inappropriate and violates the bar against seeking discovery on Staff.

**C. OCC's public record request is also an attempt to undermine the pending rehearing issues in this case.**

The attempt by OCC to seek access to draft audit reports and the communications is only OCC's latest attempt to pierce the confidentiality provided to Commission investigations by R.C. 4901.16. As the Commission is aware, OCC previously sought rehearing in this case concerning access to draft communications between the Company and Auditor, as the Auditor completed the final draft of an audit report. The Company opposed that application for rehearing for a variety of reasons that can be found in its August 31, 2015 Memo Contra filed in this docket.

OCC now seeks a new approach to gain access by filing a public record request of this other audit report. While this is a narrower question than the rehearing, this request still deals with the same basic principle and undermines the Commission's authority to rule on its dockets and is an attempt to avoid the Commission's pending ruling on the rehearing request still pending in this docket. The Commission should not allow a party to ignore its party status and seek measures outside of the Commission process to gain access to documents of the like that the Commission is currently determining the right of OCC to have as a litigant in these cases.

**III. Conclusion**

OCC is a party to the case and has certain rights and responsibilities as a party. Seeking to abandon that status and seek documentation not available in discovery, and similar information at the root of a pending rehearing application in this same docket, as part of a public records request is a blatant disrespect for the Ohio Commission's rules and process. It also is a clear attempt to circumvent Commission rules against performing discovery on Commission

Staff. 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. The documentation is subject to protection under a state statute, R.C. 4901.16. This makes it an exception to the public records request and available for protection by the Commission under R.C. 4901-1-24. AEP Ohio respectfully requests that the Commission grant the motion for a protective order and maintain the balance between Commission investigations and proceedings before the Commission or in the alternative determine that the information is not a public document or not a record subject to disclosure under R.C. 149.43.

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 9<sup>th</sup> day of December, 2015.

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Summary: 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