

**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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**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**

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**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel ("OCC") represents approximately 1.3 million residential electric consumers of the Columbus Southern Power Company and Ohio Power Company ("Utilities" or “AEP”). OCC files this Memorandum Contra the Utilities' motion where they seek a protective order from the PUCO to block the release of public records to OCC in this case involving many millions of dollars of consumers’ money.

This information OCC sought, that is now in the possession of Ohio state government (the PUCO), constitutes a public record under Ohio law. The records at issue are records that the Utilities provided to the PUCO and its Independent Auditor regarding the Independent Audit. Any person can request public records. These requests can be made for any purpose. The purpose for a request is not relevant under Ohio records law. And contrary to the Utilities' assertions otherwise,<sup>1</sup> litigants are permitted to use the Ohio Public Records Act regardless of the existence of a discovery process.<sup>2</sup>

This Memorandum Contra is filed because AEP filed its motion, but in making this filing we nonetheless reject AEP's efforts to mix the separate Ohio law of public records with the law and rules of the PUCO's processes.

The Utilities' Motion should be denied. The PUCO should immediately release the information to OCC, which OCC requested under Ohio's public records law more than three months ago.

## **II. PROCEDURAL BACKGROUND**

In a proceeding to establish AEP Ohio's competitive bid process ("CBP Case") for selling electricity to standard service offer consumers,<sup>3</sup> intervening parties alleged that AEP Ohio was over-collecting the capacity costs associated with the Lawrenceburg and OVEC generating facilities. These allegations caused the PUCO to order an audit in the instant Fuel Audit Case to investigate the alleged over-collection.

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<sup>1</sup> Utilities' Motion at 8 (arguing that 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.")

<sup>2</sup> *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 661-662, 2004-Ohio-7108.

<sup>3</sup> *In the Matter of Ohio Power Company to Establish a Competitive Bidding Process for Procurement of Energy to Support its Standard Service Offer*, Case No. 12-3254-EL-UNC.

The PUCO selected Baker Tilly Vichow Kraus LLP ("Independent Auditor") to conduct the audit.<sup>4</sup> As part of the PUCO's competitive bid process, it issued a request for proposal ("RFP") for an Auditor. In that RFP the PUCO required a draft audit report to be presented (not filed) to the Staff, with the final audit report filed with the PUCO two weeks later. The request for proposal also stated that "[a]ny conclusions, results, or recommendations formulated by the auditor may be examined by any participant to the proceeding for which the audit report was generated."<sup>5</sup> On October 6, 2014, the Independent Auditor filed its final report with the PUCO.

On September 15, 2015, OCC hand-delivered a public records request to Ms. Angela Hawkins, Legal Director of the PUCO.<sup>6</sup> In its public records request to the PUCO, OCC sought records related to the Independent Auditor's draft audit report that were submitted to the PUCO Staff.

In the Ohio Attorney General's public records compendium, "prompt production of records is required and copies are to be made available in a reasonable amount of time." This timeline has been interpreted by the courts as being "without delay" and "with reasonable speed." (Ohio Attorney General; *Ohio Sunshine Laws 2015: An Open Government Resource Manual* at 15).

Two months after the records request, with no response from the PUCO, OCC contacted the PUCO's Legal Director. OCC then was advised, on November 22, 2015, that the PUCO was working on the request and hoped to have a response in early December. On December 7, 2015, OCC advised the PUCO it had received no response

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<sup>4</sup> Entry (May 21, 2014).

<sup>5</sup> Entry at III B, Role of the Auditor, RFP (Apr. 16, 2014).

<sup>6</sup> See Attachment A.

and was prepared to proceed to the next records process step of mandamus action per R.C. 149.43(C)(1). Subsequently, on December 9, 2015, nearly three months after OCC sent the records request, the PUCO's Legal Director conveyed that the Utilities would be filing a motion concerning the public records request. That day the Utilities filed their "Motion for protective order or alternatively that the information not be considered public documents for release."

### **III. ARGUMENT**

#### **A. The Utilities' argue—mistakenly—for secrecy and against transparency in PUCO processes.**

The Utilities argue that OCC's public records request relates to information that cannot be divulged by the PUCO.<sup>7</sup> The Utilities derive their argument from the catch-all exemption from disclosure that is contained in R.C. 149.43(A)(1)(v).<sup>8</sup> There, "records the release of which is prohibited by state or federal law" are excluded from the definition of a public record. The Utilities assert that R.C. 4901.16 is a state law that requires secrecy from the public in certain of the Utilities' dealings with the PUCO Staff and the PUCO auditor and prevents the release of the information requested by OCC.<sup>9</sup>

The information that the Utilities want to be secret and kept from the public includes:

- (1) all drafts of Baker Tilly audit reports that the PUCO (and any organizations working on the PUCO's behalf, including Baker Tilly and the Ohio Attorney General's office) provided to Ohio Power regarding PUCO Case No. 11-5906-EL-FAC et al. and (2)
- all communications by Ohio Power to the PUCO (and to any

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<sup>7</sup> Utilities' Motion (Dec. 9, 2015).

<sup>8</sup> Id. at 1.

<sup>9</sup> Id. at 5-7.

organizations working on the PUCO's behalf, including Baker Tilly and the Ohio Attorney General's office) in memorialized form regarding drafts of audit reports by Baker Tilly in connection with PUCO Case No. 11-5906-EL-FAC et al.

The Utilities also argue that alternatively the PUCO should grant a motion for a protective order so as to preclude OCC from obtaining the public records it requested, leaving that aspect of the PUCO's audit process as a secret between the utility, the PUCO Staff and the Independent Auditor. As discussed below, the PUCO should reject the Utilities' arguments. The PUCO's provision of the public records is months overdue and the records should be provided to OCC immediately.

**B. Ohio's public records law requires disclosure of the records involving AEP, as the law contains only limited exceptions to the general requirement for disclosure by a public office such as the PUCO.**

Ohio's public records law, for transparency in the operations of government, is found at R.C. 149.43. Ohio's state and local government offices must follow Ohio's Public Record Act. Under that law public scrutiny of state and local government records is permitted. Any person may request to inspect or obtain copies of public records from a public office that keeps those records. A public office must organize and maintain its public records in a manner that meets its duty to respond to public records requests, and must keep a copy of its records retention schedule at a location readily available to the public. When it receives a proper public records request, and unless part or all of a record is exempt from release, a public office must provide inspection of the requested records promptly and at no cost, or provide copies at cost within a reasonable period of time.



The PUCO is even subject to additional requirements for public records.<sup>10</sup> Under R.C. 4901.12, "all proceedings of the public utilities commission and all documents and records in its possession are public records." Additionally, under R.C. 4905.07, "all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys." These public records statutes that are specifically applicable to the PUCO "provide a strong presumption in favor of disclosure."<sup>11</sup> Accordingly, any exceptions in the law that permit certain types of records to be withheld from disclosure must be narrowly construed.<sup>12</sup>

R.C. 149.43 is Ohio's Public Records Law. It broadly defines public records to include records kept at any state office but excludes or exempts from the definition of public records those records "whose release is prohibited by state or federal law." Thus, the issue that the Utilities have placed before the PUCO is whether the release of the information to OCC is prohibited by state or federal law. The Utilities have identified only one law that applies here: R.C. 4901.16. And that law is inapplicable in this situation.

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<sup>10</sup> These statutes also recognize that there are few exceptions to the Commission's open records policy: those that are established under another section of the Revised Code, R.C. 149.43, and at the same time, are consistent with the purposes of Title 49.

<sup>11</sup> See for example, *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, Opinion and Order at 5-6 (October 18, 1990).

<sup>12</sup> *State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, ¶ 21; *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶ 17; *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, ¶ 30 ("Insofar as Akron asserts that some of the requested records fall within certain exceptions to disclosure under R.C. 149.43, we strictly construe exceptions against the public records custodian, and the custodian has the burden to establish the applicability of an exception.").

**C. Contrary to AEP's assertions for secrecy, the PUCO's disclosure of the records is not prohibited by R.C. 4901.16.**

AEP justifies the secret process it wants by claiming that R.C. 4901.16 precludes the PUCO from divulging records acquired “in respect to the transaction, property, or business of any public utility”<sup>13</sup> while acting as an agent or employee of the PUCO. Under case law, the PUCO has strictly limited the application of that statute in two ways. First, the statute is understood to place limitations on the PUCO Staff, but not on the Commission itself.<sup>14</sup> Second, the statute is applied to prevent disclosure of information when PUCO investigations are ongoing; the statute is not applied to information that relates to completed investigations.<sup>15</sup>

Here, the public records sought are those pertaining to draft reports produced by a PUCO-appointed auditor, who functioned as an independent contractor, not an employee.<sup>16</sup> And the information relates to an investigation that has concluded. The final audit report was docketed with the PUCO over a year ago. R.C. 4901.16 does not prohibit the release of the information regarding Baker Tilly, the PUCO-appointed independent contractor, who completed its audit of the Utilities.

The Utilities' want a ruling that sanctions a private PUCO process involving interactions by utilities and independent PUCO auditors, essentially a case within a case

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<sup>13</sup> R.C. 4901.16 (Emphasis added).

<sup>14</sup> See *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, Entry (Dec. 17, 2003).

<sup>15</sup> See *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 Entry on Rehearing at 11 (July 28, 2004).

<sup>16</sup> See RFP.

that is held secret from the public. There is no law that allows for that secrecy; there are several laws that prohibit that secrecy.

**D. The PUCO should reject AEP's assertion that the secrecy it seeks in its dealings with the PUCO can be preserved by trumping the Ohio public records law with a PUCO rule for protective orders.**

The Utilities argue alternatively that the PUCO can maintain the secrecy of AEP's dealings with the Independent Auditor through a protective order. They rely upon the PUCO's rule in Ohio Adm. Code 4901-1-24 for the secrecy they seek, so that the PUCO does not release information to OCC in response to OCC's public records request. But the Utilities are mistaken in their belief that the PUCO has authority under that rule to prevent disclosure of information requested through a public records request. Ohio Adm. Code 4901-1-24 does not provide such authority and cannot be used to invalidate Ohio's public records law.

The Utilities are inappropriately mixing the PUCO's regulatory authority with the PUCO's responsibility as a state office under Ohio's public records law. Ohio Adm. Code 4901-24 (A), (B), and (C) relate solely to a motion for protection from *discovery*. Subsection (A) clearly states: "*Upon motion of any party or person from whom discovery is sought* the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Subsections (B) and (C) refer back to subsection (A), and merely explain the requirements of a motion for protection and the PUCO's ability to deny the motion in whole or part. OCC's public records request is not discovery. Ohio Adm. Code 4901-1-24 (A)-(C) do not cloak in secrecy the public records that are sought under the public records law.

Also, subsection (D) of Ohio Adm. Code 4901-1-24 does not apply. Subsection (D) relates to seeking protection against the *filing of a document* with the PUCO's docketing division related to a case before the commission. It reads: "Upon motion of any party or person with regard to the *filing of a document with the commission's docketing division* relative to a case before the commission, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect the confidentiality of information contained in the document." The documents requested by OCC do not pertain to the filing of a document with the PUCO. The draft audit report and its related documents were not filed with the PUCO. Even if they were, this PUCO rule does not invalidate the Ohio public records law to which the PUCO is subject.

#### **IV. CONCLUSION**

Contrary to the mistaken direction where AEP would lead the PUCO, the PUCO should comply with Ohio's public records law and respect the intended transparency of its processes by releasing the public records now. The PUCO should reject AEP's attempts for secret PUCO processes instead of lawful public processes, in this case where many millions of dollars of AEP charges to its Ohio customers are under scrutiny. The PUCO should release the information that is long overdue under Ohio's public records law.

Respectfully submitted,

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OHIO CONSUMERS' COUNSEL

/s/ Maureen R. Willis

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum Contra** by the Office of the Ohio Consumers' Counsel was served via electronic transmission, to the persons listed below, on this day 16th of December, 2015.

/s/ Maureen R. Willis

Maureen R. Willis

Assistant Consumers' Counsel

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## Office of the Ohio Consumers' Counsel

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September 15, 2015

*VIA HAND DELIVERY*

Ms. Angela Hawkins, Director  
Legal Department  
The Public Utilities Commission of Ohio  
180 E. Broad St., 12<sup>th</sup> Fl.  
Columbus, Ohio 43215

Re: Public Records Request

Dear Ms. Hawkins:

Thank you for your assistance with the following. The Office of the Ohio Consumers' Counsel ("OCC") requests copies of public records that the Public Utilities Commission of Ohio ("PUCO") possesses. The authority for this request is R.C. 149.43 et seq.

As background, the PUCO selected Baker Tilly Virchow Krause, LLP ("Baker Tilly") to investigate and audit AEP Ohio's double recovery of certain capacity-related costs. On October 6, 2014, the final audit report of Baker Tilly was filed at the PUCO. That final report was docketed in PUCO Case No. 11-5906-EL-FAC, et al.

Please provide the following public records<sup>1</sup> to OCC: (1) all drafts of Baker Tilly audit reports that the PUCO (and any organizations working on the PUCO's behalf, including Baker Tilly and the Ohio Attorney General's office) provided to Ohio Power regarding PUCO Case No. 11-5906-EL-FAC et al. and (2) all communications by Ohio Power to the PUCO (and to any organizations working on the PUCO's behalf, including Baker Tilly and the Ohio Attorney General's office) in memorialized form regarding drafts of audit reports by Baker Tilly in connection with PUCO Case No. 11-5906-EL-FAC et al.

Please provide these records in an electronic format if electronic versions are available. If there are any fees for these records, please inform me if the cost to OCC will exceed \$400. Please respond promptly to this request. If the PUCO expects a delay (of more than seven days) in responding to this request, please contact me with information about when copies will be provided.

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<sup>1</sup> Public records are as defined by R.C. 149.43.

Ms. Angela Hawkins, Director  
September 15, 2015  
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If the PUCO denies any portion of this request, in part or whole, please cite each Public Records Act exemption (or other law) that applies for each record, or portion thereof, that is withheld. If records responsive to this request existed but no longer exist, please explain.

If you have any questions, please contact me at (614) 466-9567 or by email at:  
[Maureen.grady@occ.ohio.gov](mailto:Maureen.grady@occ.ohio.gov). Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Maureen R. Grady". The signature is fluid and cursive, with the first name being the most prominent.

Maureen R. Grady  
Assistant Consumers' Counsel



**This foregoing document was electronically filed with the Public Utilities**

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**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 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 electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.