

**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.)	

**INTERLOCUTORY APPEAL,
REQUEST FOR CERTIFICATION TO FULL COMMISSION,
AND
APPLICATION FOR REVIEW
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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In the interest of fairness and transparency of government processes, the Office of the Ohio Consumers' Counsel ("OCC") submits this Interlocutory Appeal¹ to the Public Utilities Commission of Ohio ("PUCO" or "Commission") to seek compliance with Ohio's public records law. This pleading is filed on behalf of the electric customers of the Columbus Southern Ohio Electric Company and the Ohio Power Company ("AEP Ohio" or "Utilities"). OCC respectfully requests the certification of this appeal to the full

¹ The appeal is filed pursuant to Ohio Adm. Code 4901-1-15.

Commission for review and reversal of the Entry that prevents public disclosure of certain records. The records relate to an audit report filed in 2014, involving potential excess charges to customers (noted as up to \$120 million).²

The Interlocutory Appeal should be certified³ for an immediate determination by the Commission because it presents a departure from past precedent and is needed to prevent undue prejudice to Ohio consumers and their representatives. Upon review,⁴ the Commission should reverse the Attorney Examiner's Entry.

The reasons for this Interlocutory Appeal, including the Request for Certification and the Application for Review, are explained in the attached Memorandum in Support.

Respectfully submitted,

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² Entry (Jan. 8, 2016) (hereafter "Entry") (Attachment 1).

³ Ohio Adm. Code 4901-1-15(B).

⁴ Ohio Adm. Code 4901-1-15(C).

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MEMORANDUM IN SUPPORT

I. BACKGROUND

The Office of the Ohio Consumers' Counsel ("OCC") represents approximately 1.3 million residential electric consumers of the Utilities. OCC intervened in this proceeding in which the PUCO ordered an audit to investigate the alleged over-collection of capacity costs associated with the Lawrenceburg and OVEC generating facilities. This proceeding is important to customers who may have been over-charged millions of dollars by the Utilities.

The PUCO selected Baker Tilly Vichow Kraus LLP ("Independent Auditor") to conduct the audit related to overcharges of capacity costs.⁵ 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."⁶ On October 6, 2014, the Independent Auditor filed its final report with the PUCO.

Nearly a year later, on September 15, 2015, OCC hand-delivered a public records request to Ms. Angela Hawkins, Legal Director of the PUCO.⁷ 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.

Two months after the records request, with no response from the PUCO, OCC contacted the PUCO's Legal Director.⁸ 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 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

⁵ Entry (May 21, 2014).

⁶ Entry at III B, Role of the Auditor, RFP (Apr. 16, 2014).

⁷ See Attachment 2.

⁸ 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).

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." OCC filed a Memorandum Contra the Utilities' Motion. The Utilities filed a reply.

On January 7, 2016, the Attorney Examiner issued a ruling that granted the Utilities' request that the designated information not be subject to release.⁹ The Examiner ruled that in the present proceedings the Commission's investigation remains "ongoing," with an evidentiary hearing to be scheduled by future entry. The PUCO concluded that R.C. 4901.16 precludes the release of draft reports and related communications when there is an ongoing investigatory process.

The Attorney Examiner ruled that parties will have an opportunity to present evidence and arguments regarding the audit findings and noted that it is "possible" that the auditor will be called as a rebuttal witness. The Entry claims that the issuance of a final appealable order represents the effective end of the PUCO's investigation. The Examiner ruled that "upon issuance of a final appealable order at the conclusion of the proceedings, the Commission's investigatory process, including the confidentiality afforded by R.C. 4901.16, will be at an end. At that time, the Commission will reconsider OCC's request for draft audit reports and related communications and determine whether they should be further exempted from public disclosure or provided to OCC."¹⁰

⁹ Entry at ¶14 (Jan. 7, 2016).

¹⁰ *Id.*

II. CERTIFICATION OF INTERLOCUTORY APPEAL

The full Commission will review the Attorney Examiner's ruling if the Attorney Examiner (or other PUCO personnel) certifies the Appeal. The standard applicable to certifying this appeal includes that "[a]n immediate determination by the commission is needed to prevent the likelihood of undue prejudice...."¹¹ An immediate determination is needed because the timing of the disclosure of the records is an issue. The requested records are needed sooner rather than later. And that timing is ensured for those making records requests, by Ohio's public records law under R.C. 149.43.

Given the violation of the public records law and the time-sensitivity of the records at issue, the Examiner's ruling also results in "undue prejudice" to OCC and consumers. This undue prejudice is apparent when juxtaposing the promptness required by the public records law with the Examiner's ruling that the records may not be provided until after a final order (if at all). The Examiner's ruling, with its timing, forecloses the use of the records in a case that involves millions of dollars of Ohioans' money. And finally, under Ohio Admin. Code 4901-1-15(B), the ruling is a "departure from past precedent," as explained below.

The Entry determined that a Commission "investigation" is ongoing during the entire period prior to the issuance of a final PUCO order, and thus, under R.C. 4909.16, disclosure of the draft audit (and related documents) is precluded. But this determination conflicts with prior PUCO precedent which permitted the disclosure of draft audit reports and related documents prior to a final order being issued.

¹¹ Ohio Admin. Code 4901-1-15(B).

Most recently, in 2013, an Attorney Examiner released, in response to a public records request (by OCC), a draft audit report and related documents, prior to a final order being issued. That Entry was issued in FirstEnergy's alternative energy resource rider proceeding, Case No. 11-5201-EL-RDR.

In that case, OCC learned that the Commission appointed auditor (Exeter Associates) had provided a draft of an audit report to FirstEnergy, prior to filing the final report with the PUCO. OCC also learned that FirstEnergy had provided edits to the Exeter audit report.¹² OCC then made a public records request to the PUCO for "any and all records that reflect edits or comment on draft version of the Audit Report by employees, outside consultants and/or counsel of [FirstEnergy]."¹³ FirstEnergy filed a motion for protective order, seeking to prevent the Commission from responding to OCC's public records request.¹⁴ FirstEnergy argued, inter alia, that confidential draft documents were not subject to disclosure under a public records request because they were protected under R.C. 4901.16.¹⁵

In the Entry resolving the issue, FirstEnergy was ordered to provide a redacted version of the draft audit report (along with its comments to the draft audit report),

¹² In a DP&L fuel audit proceeding, OCC similarly learned of a draft audit and learned of utility's comments on the draft audit. See *In the Matter of the Application of the Dayton Power and Light Company to establish a Fuel Rider*, Case No. 12-22881-EL-FAC. OCC requested that information from the PUCO Staff. The Utility subsequently, with the Staff's permission, provided the information to the OCC. The information was given to OCC prior to the Auditor testifying at the evidentiary hearing and prior to the final order being issued in the proceeding.

¹³ 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, Memorandum Contra FirstEnergy's Motion for Protective Order by the Office of the Consumers' Counsel at 4.

¹⁴ *Id.*, FirstEnergy Motion for Protection (Dec. 31, 2012).

¹⁵ 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 at ¶10.

consistent with Attorney Examiner's finding that only limited portions of the draft audit contained trade secret information.¹⁶ Notably, despite claims that R.C. 4909.16 prohibited disclosure, the Entry required release of the draft audit report within seven days of the Order, or by February 21, 2013. The Auditor testified at the evidentiary hearing which was conducted over a five-day period beginning on February 19, 2013. A final order in the proceeding was not issued until August 7, 2013, approximately six months after the draft audit report and related documents requested by OCC were released.

There can be no squaring of the Attorney Examiner's ruling in the FirstEnergy case with the ruling issued in the present case. In both cases public records requests were issued by OCC to the PUCO. In both cases the records requests were directed to obtaining copies of draft audit reports (and comments by the utilities) made by a commission appointed independent auditor. In both cases the draft audit report was not filed with the Commission but was provided to both the PUCO staff and the utilities. In both cases, the utilities were given the opportunity (unlike all other parties) to review the draft audit and provide comments to the auditor. In both cases a final audit report was filed at the commission.

The Entry in the FirstEnergy proceeding recognized that R.C. 4909.16 does not preclude information on a draft audit report from being released in a public records request prior to a final order being issued in a proceeding. That Entry properly recognized that R.C. 4909.16 cannot be so broadly construed so as to emasculate the public records

¹⁶ *Id.* at ¶18.

laws of Ohio. Accordingly, the standards in Ohio Admin. Code 4901-1-15(B) are met for certifying the appeal to the full Commission.

III. APPLICATION FOR REVIEW

OCC's Application for Review meets the terms of Ohio Adm. Code 4901-1-1-15(C), because the application has been filed “within five days after the ruling is issued” and the application does “set forth the basis of the appeal and citations of any authorities relied upon.” And the ruling is attached. The PUCO should reverse or modify the Attorney Examiner's Entry, under Ohio Adm. Code 4901-1-15(E).

The Entry should be reversed. The Attorney Examiner's ruling allows R.C. 4901.16 to trump the Ohio Public Records Act. This is contrary to the canons of statutory construction and legislative intent.

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.¹⁷ 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."¹⁸ Accordingly, any exceptions in the law that permit certain types of records to be withheld from disclosure must be narrowly construed.¹⁹

But the Attorney Examiner did not narrowly construe R.C. 4909.16. The Attorney Examiner created a wide open exception allowing a secret process to be protected until (at least) a final order is issued in this case. The Attorney Examiner ruled that the investigation in this proceeding is continuing and thus R.C. 4909.16 precludes disclosure until the investigation is over. The Attorney Examiner then ruled that the investigation was not over until a final order is issued by the PUCO.

¹⁷ 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*.

¹⁸ 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).

¹⁹ *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.")

Wisely, the Commission has consistently declined to accept sweeping claims that would preclude disclosure under R.C. 4901.16.²⁰ The Commission should, consistent with its precedent, reverse the Attorney Examiner's Entry.

But there are other reasons as well that the Attorney Examiner's Entry should be reversed. Ohio's canons of statutory construction justify reversing the Attorney Examiner's Entry. Under Ohio law, "[i]f statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."²¹

This Commission previously recognized the irreconcilable differences that exist between R.C. 4901.16 and R.C. 149.43 when it noted that it "raise[s] a perplexing question." Explaining the conflict, the Commission further explained, "[o]n the one hand, all public records held by our agency must be made available for inspection per Section 149.43, Revised Code," and "[o]n the other hand, Section 4901.16, Revised Code, requires Commission employees to not divulge information acquired with respect to a public utility's business."²²

R.C. 149.43 became effective February 12, 2004, which post-dates the R.C. 4901.16's October 1, 1953 effective date. Under Ohio's canons of statutory construction, because there is an irreconcilable difference between the statutes, the Public Records Act, the statute latest in date of enactment, controls this issue.²³ Therefore, R.C. 4901.16 does

²⁰ 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 10-12 (Jul. 28, 2004); In 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 at ¶10 (Feb. 14, 2013).

²¹ R.C. 1.52.

²² *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, 2004 Ohio PUC LEXIS 271, at 5 (Jul. 28, 2004).

²³ See R.C. 1.52.

not protect the Commission from releasing information in response to a public records request made pursuant to R.C. 149.43.

In addition to the statutory canons of construction, legislative intent also indicates that R.C. 4901.16 is subservient to the Public Records Laws. Creating an exception to the Title 49 public records statutes for materials subject to R.C. 4901.16 is something the Legislature could have done in 1996, when it amended the Title 49 public records statutes. In 1996, the provisions of R.C. 4909.16 were already in place, having been enacted in some form as early as 1911.²⁴ Instead, the Legislature amended the R.C. Title 49 public record statutes to recognize limited exceptions to public records — those that are consistent with the purposes of Title 49 and at the same time recognized under Ohio Public Records law, R.C. 149.43:

Sec. 4901.12 ~~ALL~~ EXCEPT AS PROVIDED IN SECTION 149.43 OF THE REVISED CODE AND AS CONSISTENT WITH THE PURPOSES OF TITLE XLIX OF THE REVISED CODE, ALL proceedings of the public utilities commission and all documents and records in its possession are public records.

Sec. 4905.07. ~~ALL~~ EXCEPT AS PROVIDED IN SECTION 149.43 OF THE REVISED CODE AND AS CONSISTENT WITH THE PURPOSES OF TITLE XLIX OF THE REVISED CODE, 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.²⁵

Had the Legislature intended for R.C. 4901.16 to serve as an exception to the Title 49 public record statutes, it could have done so when it rewrote the Title 49 public

²⁴ See H.B. 325, G.C. 614-11 (1911) (slightly amended and recodified in 1953).

²⁵ See Am Sub. H.B. No. 476 (1996).

records statutes in 1996. However, by deeming it appropriate to amend the Title 49 public records laws to recognize the 1953 Ohio Public Records Law while not addressing the existing R.C. 4901.16, the General Assembly evinced clear legislative intent otherwise.

Reading R.C. 4901.16 as broadly as the Attorney Examiner suggests would be contrary to the manifest intent of the General Assembly to provide for only limited exclusions to the Title 49 public record statutes—those recognized under Ohio’s Public Records Law that are consistent with the purposes of Title 49. For these reasons, this Commission should reverse the Attorney Examiner's Entry.

IV. CONCLUSION

For the reasons set forth above, this Appeal should be certified to the full Commission and the Commission should reverse the Attorney Examiner’s ruling. The PUCO should comply with Ohio's public records law and respect the intended transparency of its processes by releasing the public records now. A transparent public process, involving disclosure of AEP Ohio’s communications with the PUCO, should be conducted in this case where many millions of dollars of AEP Ohio charges to its Ohio customers are under review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Interlocutory Appeal was served by electronic service to the parties listed below this 13th day of January 2016.

/s/ Maureen R. Willis

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ENTRY

The attorney examiner finds:

- (1) Ohio Power Company d/b/a AEP Ohio (AEP Ohio or the Company) is a public utility as defined in R.C. 4905.02 and an electric utility as defined in R.C. 4928.01(A)(11), and, as such, is subject to the jurisdiction of this Commission.
- (2) In Case No. 11-346-EL-SSO, et al., the Commission modified and approved, pursuant to R.C. 4928.143, AEP Ohio's application for an electric security plan, including a fuel adjustment clause (FAC) mechanism under which the Company is intended to recover prudently incurred fuel and fuel-related costs. *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 11-346-EL-SSO, et al., Opinion and Order (Aug. 8, 2012) at 18. In addition, a new alternative energy rider was established to enable AEP Ohio to recover alternative energy costs, which were previously recovered through the FAC. Annual audits are to be performed of AEP Ohio's fuel costs, fuel management practices, and alternative energy costs.

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- (3) On December 4, 2013, in the above-captioned proceedings, the Commission selected Energy Ventures Analysis, Inc. (EVA) to perform the annual audit of AEP Ohio's fuel and alternative energy costs for the 2012, 2013, and 2014 audit periods.
- (4) On May 9, 2014, in Case No. 13-1892-EL-FAC, EVA filed its report regarding the management/performance and financial audits of AEP Ohio's FAC for 2012 and 2013.
- (5) By Entry issued in the above-captioned proceedings on May 21, 2014, the Commission selected Baker Tilly Virchow Krause, LLP (Baker Tilly) to investigate AEP Ohio's alleged double recovery of certain capacity-related costs, and to recommend to the Commission a course of action based on the auditor's findings.
- (6) On October 6, 2014, Baker Tilly filed its audit report addressing AEP Ohio's recovery of certain capacity-related costs.
- (7) By Entry dated January 9, 2015, a procedural schedule was established for these proceedings. Subsequently, the procedural schedule, with the exception of the intervention deadline of January 16, 2015, was suspended.
- (8) On December 9, 2015, AEP Ohio filed, pursuant to Ohio Adm.Code 4901-1-24, a motion for protective order or, alternatively, a request that certain information not be considered public documents for release. AEP Ohio explains that the motion was filed in response to a public records request received by the Commission from the Ohio Consumers' Counsel (OCC), seeking draft audit reports sent to the Company and communications from the Company related to draft audit reports. Noting that a public version of Baker Tilly's final audit report is available to OCC in the Commission's dockets, AEP Ohio argues that OCC nevertheless seeks to use the public records statute to circumvent the Commission's established discovery rules and process, in order to obtain documents that have no relevance to the final audit report. AEP Ohio contends that the draft audit report and comments are part of the confidential audit process pursuant to R.C. 4901.16. AEP Ohio further contends that R.C. 4901.16 provides that

information related to an investigation of the Commission may only be released in a report or through testimony. AEP Ohio maintains that neither situation is satisfied under the circumstances of OCC's public records request. AEP Ohio asserts that the Commission should afford protected status to documents that are part of the investigatory process, as not protecting the documents could result in parties seeking drafts of Staff testimony or even drafts of Commission orders.

AEP Ohio argues further that the documents sought by OCC are not public records, because R.C. 149.43 excludes information that may not be released under state law. Concluding that the disclosure of the documents is barred by R.C. 4901.16 and R.C. 149.43, AEP Ohio asserts that the Commission should grant the Company's motion and afford the documents protected status, because they are part of a confidential investigatory process of the Commission. Alternatively, AEP Ohio claims that, because the documents pertain to confidential discussions between the Company and the auditor, they are not public records subject to disclosure pursuant to a public records request. In further support of its motion, AEP Ohio asserts that OCC's public records request is an attempt to undermine the pending rehearing issues regarding a separate audit report filed in these proceedings, as well as Ohio Adm.Code 4901-1-10(C), which excludes Staff as a party for purposes of discovery. For these additional reasons, AEP Ohio urges the Commission to reject OCC's efforts to circumvent the confidentiality of the Commission's investigations afforded under R.C. 4901.16.

- (9) On December 16, 2015, OCC filed a memorandum contra AEP Ohio's motion. OCC argues that R.C. 149.43 requires the disclosure of the draft audit reports and communications that OCC seeks through its public records request, because the statute allows for limited exceptions to the general requirement that records kept by a public office must be disclosed, none of which apply here, according to OCC. OCC emphasizes that AEP Ohio's position is based solely on its claim that R.C. 4901.16 precludes disclosure of the records. OCC contends that R.C. 4901.16 is inapplicable under circumstances where the draft audit reports in

question were produced by an independent contractor appointed by the Commission, and where the investigation and audit have concluded. OCC asserts that the Commission has previously determined that the statute's restrictions apply only to Staff and only while investigations are ongoing. *In re The Cincinnati Gas & Elec. Co.*, Case No. 00-681-GA-GPS (CG&E Case), Entry (Dec. 17, 2003) at 4. Additionally, with respect to AEP Ohio's request for a protective order, OCC responds that Ohio Adm.Code 4901-1-24, which pertains to such motions, does not apply in this situation, because the records sought by OCC have not been requested pursuant to the Commission's discovery process or filed with the Commission's docketing division, and, in any event, the rule does not supersede R.C. 149.43. OCC concludes that the Commission should reject AEP Ohio's attempts to conflate the rules governing the Commission's process and procedures with the public records statute and that the Commission should promptly release the requested records.

- (10) On December 23, 2015, AEP Ohio filed a reply to OCC's memorandum contra. In its reply, AEP Ohio contends that the Commission has previously determined that R.C. 4901.16 constitutes an exception to the disclosure requirements of R.C. 149.43, specifically in a situation involving an ongoing investigation where Staff had obtained reports from a third-party contractor. *CG&E Case*, Entry on Rehearing (July 28, 2004) at 5-6. AEP Ohio also notes that the Commission's May 21, 2014 Entry, which appointed the auditor in these proceedings, states that the auditor is subject to the Commission's statutory duty under R.C. 4901.16. AEP Ohio argues, therefore, that its motion appropriately seeks a ruling that complies with the Commission's prior directives. Finally, AEP Ohio asserts that the Company properly invoked Ohio Adm.Code 4901-1-24 to ensure protection of confidential information in response to OCC's public records request.
- (11) R.C. 4905.07 provides 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. Further, R.C. 149.43 specifies that the term "public records" excludes information that,

under state or federal law, may not be released. Finally, R.C. 4901.16 states:

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.

- (12) The attorney examiner has thoroughly reviewed and considered AEP Ohio's motion for protective order and its alternate request that the documents sought by OCC not be considered public records subject to release, as well as OCC's memorandum contra the Company's motion.

With respect to the procedural question of whether the filing of a motion for protective order under Ohio Adm.Code 4901-1-24 was proper, the attorney examiner notes that, in order to reconcile the statutory duty found in R.C. 4901.16 with the Commission's obligations under R.C. 149.43, including the duty to protect trade secret information, as defined in R.C. 1333.61, the Commission has engaged in a practice of notifying utility companies of its intent to disclose potential proprietary information and allowing the companies to file a motion for protective order to ensure a fair and equitable process consistent with both statutes. As AEP Ohio discusses in its motion, the Commission expressly recognized this practice when addressing requests for information provided by utilities. *In re Amendment of Ohio Adm.Code Chapters 4901-1, 4901-3, and 4901-9*, Case No. 95-985-AU-ORD, Entry (Mar. 21, 1996) at 10. Additionally, although OCC has argued that motions for protective order are limited to responding to discovery requests, Ohio Adm.Code 4901-1-24(G) provides that the requirements of the rule do not apply to information submitted to Staff, in

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order to facilitate a more transparent process between Staff and utility companies and encourage the sharing of utility-related information. *Id.* Therefore, the attorney examiner finds that AEP Ohio's utilization of Ohio Adm.Code 4901-1-24 was an appropriate means to seek protection of the requested information.

- (13) The attorney examiner notes that, as a potential exception to R.C. 149.43, R.C. 4901.16 should be construed narrowly. Therefore, the attorney examiner finds that R.C. 4901.16 does not preclude the release of draft audit reports and related communications indefinitely. The Commission has determined that R.C. 4901.16 prohibits the release of draft audit reports and related communications concerning an ongoing investigatory process of the Commission. *CG&E Case*, Entry on Rehearing (July 28, 2004) at 5-6. As the Commission expressly noted in its May 21, 2014 Entry, the auditor is an agent of the Commission, subject to the Commission's statutory duty under R.C. 4901.16. Even in the event the Commission had omitted such an instruction, this statutory duty clearly applies to both employees and agents of the Commission. *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm.*, 113 Ohio St.3d 180, 863 N.E.2d 599 (2007). The release of the documents requested by OCC is, therefore, prohibited under state law during the pendency of the Commission's investigation. The attorney examiner also finds that the release of this information would be inconsistent with the purposes of Title 49 of the Revised Code, as well as discourage the sharing of information during pending Commission investigations. *CG&E Case*, Entry on Rehearing (July 28, 2004) at 4-5.
- (14) Accordingly, the attorney examiner finds that AEP Ohio's motion requesting that the designated information not be subject to release should be granted. However, as AEP Ohio acknowledges, the release of a draft audit report upon the conclusion of a contested case is an effective means for the Commission to balance transparency with due regard for the hearing process. The attorney examiner finds that, in the present proceedings, the Commission's investigation remains ongoing, with an evidentiary hearing to be scheduled by future entry. At the hearing, the final audit report will be introduced into evidence and parties to the

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proceedings will have the opportunity to present their evidence and arguments regarding the audit findings for the Commission's consideration. Further, it is possible that the auditor will be called as a rebuttal witness following the presentation of the parties' witnesses. Therefore, the attorney examiner concludes that issuance of a final appealable order represents the effective end of the Commission's investigation. Thus, upon the Commission's issuance of a final appealable order at the conclusion of the proceedings, the Commission's investigatory process, including the confidentiality afforded by R.C. 4901.16, will be at an end. At that time, the Commission will reconsider OCC's request for draft audit reports and related communications and determine whether they should be further exempted from public disclosure or provided to OCC.

It is, therefore,

ORDERED, That AEP Ohio's motion be granted to the extent set forth in this Entry. It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Sarah Parrot

By: Sarah J. Parrot
Attorney Examiner

JRJ/sc

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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: Attorney Examiner Entry granting AEP Ohio's motion to the extent set forth in this Entry. - electronically filed by Sandra Coffey on behalf of Sarah Parrot, Attorney Examiner, Public Utilities Commission of Ohio



Office of the Ohio Consumers' Counsel

September 15, 2015

VIA HAND DELIVERY

Ms. Angela Hawkins, Director
Legal Department
The Public Utilities Commission of Ohio
180 E. Broad St., 12th 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 records¹ 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.

¹ 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. 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

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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: Request Interlocutory Appeal, Request for Certification to Full Commission, and Application for Review by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.