BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters.	))))	Case No. 11-5906-EL-FAC
In the Matter of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company.	)))	Case No. 12-3133-EL-FAC
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 MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO FULL COMMISSION, AND APPLICATION FOR REVIEW

Filed January 19, 2016

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I. Introduction

In a well-reasoned Entry dated January 8, 2016, the Attorney Examiner, faced with Ohio Consumers' Counsel (OCC)'s public-records request for a *draft* audit report and the utility's *confidential* comments on that draft, carefully balanced the requirements of Ohio's Public Records Act against the strict non-disclosure requirements of R.C. 4901.16, which serve as an exception from disclosure under that Act. The Attorney Examiner found, correctly, that R.C. 4901.16 prohibits the release of draft audit reports and related communications concerning an ongoing investigatory process such as this one. She also expressly found, however, that public release of the draft audit report *upon conclusion of the proceeding* would be an "effective means for the Commission to balance transparency with due regard for the hearing process." This is a reasonable and appropriate approach under R.C. 4905.07, which requires the Commission to apply the Public Records Act "as consistent with the purposes of Title XLIX [49] of the Revised Code."

With its procedurally improper interlocutory appeal from that Entry, OCC seeks to disrupt the careful balance achieved by the Attorney Examiner and to demand immediate public release of confidential information that is barred from disclosure by R.C. 4901.16 – a statute that must be read *in pari materia* with the Public Records Act, as mandated by R.C. 4905.07. In doing so, OCC also seeks to achieve an impermissible end-run around issues it previously placed before the Commission on rehearing in this very case. For these and other reasons described below, Ohio Power Company (AEP Ohio) vigorously opposes OCC's procedurally and substantively baseless interlocutory appeal, which injects needless delay into these proceedings in an attempt to undermine the critical relationship of trust and confidence that must, as both a

practical and legal matter, exist between an auditor and its auditee as the auditor's final report is being developed. While such documents might be subject to review under the Public Records Act at the appropriate time, they are not pertinent to the pending investigation proceedings and would, indeed, be disruptive and distracting to be released at this time. The Commission should promptly reject OCC's interlocutory appeal and confirm the careful balance achieved in the Attorney Examiner's January 8 Entry.

II. Background

A. The EVA and Baker Tilly audits.

In August 2012, the Commission modified and approved AEP Ohio's second ESP (*ESP II).*[1] In doing so, the Commission approved a fuel adjustment clause mechanism pursuant to which AEP Ohio may recover fuel and fuel-related costs, subject to annual audits. In December 2013, the Commission selected Energy Ventures Analysis, Inc. (EVA) to perform the annual audit of AEP Ohio's fuel and alternative energy costs for 2012-2014. The Commission also noted that certain intervenors in AEP Ohio's competitive bid procurement process (*CBP Case*) had alleged that the Company was double-recovering certain capacity-related costs.[2] So the Commission ordered EVA to investigate the double-recovery allegations as part of its audit.

AEP Ohio objected to EVA's review of the double-recovery allegations, though, in light of EVA's submission of expert testimony on Staff's behalf in the Company's *Capacity Case,*[3] which established the Company's capacity charge to competitive retail electric service providers. To avoid a conflict of interest, the Commission's Entry on Rehearing in the *CBP Case* noted that

[1] *In re Ohio Power Company*, Case No. 11-346-EL-SSO et al., Opinion and Order (Aug. 8, 2012).

[2] *In re Ohio Power Company*, Case No. 12-3254-EL-UNC, Opinion and Order (Nov. 13, 2013) at 15, 16.

[3] *In re Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC.

Staff had been directed to issue a supplemental request for proposal (RFP) with respect to the investigation of double-recovery allegations.[4]

In April 2014, the Commission issued an Entry in these cases directing Staff to issue RFP No. EE14-CCRR-1 to investigate the Company's alleged double-recovery of certain capacity related costs. On May 21, 2014, the Commission selected Baker Tilly Virchow Krause, LLP (Baker Tilly) to conduct the audit pursuant to a contract to be executed between Baker Tilly and the Company. Notably, in its May 21 Entry, the Commission expressly noted that Baker Tilly was "subject to the Commission's statutory duty under R.C. 4901.16, which provides:

> Except in his report to the [Commission] or when called on to testify in any court or proceeding of the [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."[5]

The Commission's May 21 Entry appointing Baker Tilly also permitted the Company to mark documents given to Baker Tilly as "confidential" if the Company believed the information should be deemed as such, provided that notice would be given to the Company before any disclosure of same, and provided that the Company could request a protective order.[6] Baker Tilly's final report was filed on October 6, 2014 and has been publicly available since that time on the Commission's docket, without redaction.

In a July 22, 2015 Entry, the Commission established the schedule for EVA's second audit of the FAC and AER for 2014 and the final reconciliation and true-up of the FAC,

[4] *CBP Case*, Entry on Rehearing (Jan. 22, 2014), at 10.

[5] *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC et al. (*FAC Case*), Entry (May 21, 2014) at ¶ 8 (Emphasis added).

[6] *Id.* at ¶ 9-10.

excluding the double-recovery issues addressed in Baker Tilly's audit.[7] The Commission directed EVA to "present its draft audit report to Staff and AEP Ohio by November 9, 2015, with the final audit report filed with the Commission by November 30, 2015."[8] This reference to EVA's draft audit report being provided to Staff and AEP Ohio (but not other parties) – an instruction fully consistent with longstanding past practice in Commission audits and investigations – prompted OCC to seek rehearing.

B. OCC seeks and obtains rehearing of the Commission's Entry concerning EVA's draft audit.

In its Application for Rehearing of the July 22, 2015 Entry, OCC challenged the Commission's longstanding (and entirely appropriate) practice of providing the auditee and Staff the opportunity to review (in confidence) the auditor's draft report and to provide comments (again, in confidence) to the auditor.[9] OCC did so even though the confidentiality of this *preliminary* exchange encourages full and frank disclosure of critical information between the auditor and auditee and thereby enhances the accuracy and reliability of the auditor's final (*and publicly available*) work product. Specifically, OCC contended that the Commission created an "uneven playing field" by allowing only the auditee and Staff to review the draft audit.[10] And OCC complained that doing so was inconsistent with the Commission's entry stating that the "conclusions, results, or recommendations" formulated by the auditor could be examined by

[7] *Id.*, Entry (July 22, 2015) at ¶ 8.

[8] *Id.*

[9] *Id.*, OCC App. for Rehearing (Aug. 21, 2015).

[10] *Id.* at 5.

"any participant."[11] OCC also complained that the Commission "sanctioned a process" that "undermines the independence of the auditor."[12]

In response, AEP Ohio noted that the purpose of ordering the independent auditor to send a draft to Staff and the Company for confidential review and comment is to promote the uninhibited exchange of information between the auditor and auditee, as well as the removal of inaccurate and confidential information before a final report is filed on the publicly available docket.[13] AEP also noted that, by seeking to pierce the veil of the preliminary audit process, OCC was improperly seeking to infringe upon the statutory authority of the Commission to conduct investigations – despite the Commission's express statutory duty under R.C. 4901.16 to not disclose any information discovered in the audit except for the contents of the final report.[14]

AEP Ohio also noted that OCC's reference to the right to obtain discovery was misplaced. As AEP Ohio explained, because the auditor is acting as Commission Staff, and because Staff is not a party under the Commission's discovery rules (O.A.C. 4901-1-10(C)), there is no "discovery right" possessed by OCC to obtain and review the draft audit or the related comments.[15] AEP Ohio also explained that precluding disclosure of the draft audit report would be consistent with precedent from the Ohio Power Siting Board when it faced a party seeking disclosure of a draft Staff Report of Investigation.[16] And as for OCC's argument that disclosure was required by the Commission's prior entry stating that the "conclusions, results, or

[11] *Id.*

[12] *Id.* at 7.

[13] *Id.*, AEP Ohio Mem. Contra (Aug. 31, 2015), at 1-2.

[14] *Id.* at 3-4.

[15] *Id.* at 6.

[16] *Id.*, citing *In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN, Opinion and Order (May 28, 2013) at 9-10.

recommendations" formulated by the auditor could be examined by "any participant," AEP Ohio noted that "the actual conclusions, results and recommendations formulated by the auditor will be available in this proceeding. Those items do not exist until the auditor's work is done and has reached the actual conclusions, results and recommendations."[17] As AEP Ohio concluded,

> OCC's argument amounts to a misplaced distrust of the auditor, the Commission Staff and the Company. OCC's solution is to insert itself in the process in an attempt to put itself in the shoes of the Commission Staff or the Company/auditee. The audit process works because an independent auditor follows their industry standards to remain independent while ensuring the accuracy of the data to provide a proper report. That report is then put in the record by the Commission for use by all parties in its docket. Allowing intervenors access to draft reports that could be inaccurate undermines the audit process and risks the disclosure of correctible errors that if shared could undermine the work done by the auditor and the actual report generated after all the facts are considered.[18]

Upon review of OCC's Application for Rehearing and the Company's response, the Commission granted rehearing for further consideration of the matters presented.[19]

C. Having obtained rehearing for further consideration of its complaints about access to the draft EVA audit, OCC pursues a public-records request for the draft Baker Tilly audit.

On September 15, 2015, one day before the Commission granted OCC's rehearing application to further consider OCC's request for drafts of EVA's audit, OCC hand-delivered a public-records request to Angela Hawkins, Director of the Commission's Legal Department, for drafts of the Baker Tilly audit. Invoking the Ohio Public Records Act, R.C. 149.43 *et seq.*, OCC demanded the following documents from the Commission related to the Baker Tilly audit:

> (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

[17] *FAC Case*, *supra*, AEP Ohio Mem. Contra (Aug. 31, 2015) at 8.

[18] *Id.* at 13.

[19] *Id.*, Entry on Rehearing (Sept. 16, 2015), at 3.

> (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.[20]

Once notified of OCC's public-records request for the confidential Baker Tilly drafts and Company comments, AEP Ohio promptly filed a Motion for Protective Order or, Alternatively, that the Information Not be Considered Public Documents for Release (MPO).[21]

In its MPO, AEP Ohio argued that OCC was trying to use Ohio's Public Records Act to circumvent the Commission's long-established practices and procedures with respect to audits and investigations, and that release of the information requested by OCC would violate R.C. 4901.16. As AEP Ohio noted, under that statute, "items involved in an investigation may be released in a report or when called to testify. Neither situation is satisfied with this request."[22] AEP Ohio urged the Commission, pursuant to O.A.C. 4901-1-24(D), to issue an order necessary to protect the confidentiality of the information sought by OCC.[23] To rebut OCC's invocation of the Public Records Act, AEP Ohio noted that the Act itself specifies that the term "public records" excludes information precluded from release under state or federal law, and that R.C. 4901.16 was just such a state law precluding disclosure.[24] AEP Ohio reiterated the point it had raised to oppose OCC's Application for Rehearing concerning the EVA audit, which is that OCC seeks what amounts to be impermissible discovery on Staff, which is not a party under the Commission's discovery rules.[25] And AEP Ohio further explained how OCC's public-records

[20] OCC Public Records Request Letter (attached to OCC's Dec. 16, 2015 Mem. Contra AEP Ohio's Motion for Protective Order).

[21] *FAC Case*, *supra*, AEP Ohio Motion for Protective Order or Alternatively That the Information Not be Considered Public Documents for Release (December 9, 2015).

[22] *Id.* at 2.

[23] *Id.* at 4.

[24] *Id.* at 6-7, citing R.C. 149.43(A)(1)(v).

[25] *Id.* at 7, citing O.A.C. 4901-1-10(C).

request for the draft Baker Tilly audit was but a new and improper approach – in conjunction with its pending Application for Rehearing concerning the draft EVA audit – to undermine and pierce the confidentiality provided to Commission investigations by R.C. 4901.16.[26]

In response to AEP Ohio's MPO, OCC filed a Memorandum Contra. The over-the-top, needlessly argumentative caption[27] on OCC's filing betrayed OCC's reliance on rhetoric rather than sound legal principles. In its Memorandum Contra, OCC declared that R.C. 4901.16 is "inapplicable in this situation."[28] OCC posited that the records it sought were produced by an auditor "who functioned as an independent contractor, not an employee" bound by R.C. 4901.16's disclosure restrictions[29] -- a puzzling contention to make, in light of the fact that the Commission's Entry appointing Baker Tilly expressly made the auditor bound by R.C. 4901.16.[30] OCC also complained that R.C. 4901.16 "is applied to prevent disclosure of information when PUCO investigations are ongoing; the statute is not applied to information that relates to completed investigations."[31] This, too, was a puzzling assertion, given that this proceeding (as the Attorney Examiner expressly found in the Entry appealed here) remains ongoing and there has been no final appealable order. OCC also quibbled with AEP Ohio's invocation of O.A.C. 4901-1-24 as the procedural means to seek a protective order.[32]

In its reply supporting entitlement to a protective order, AEP Ohio disputed OCC's dismissive treatment of R.C. 4901.16 by explaining that the Commission previously considered

[26] *Id.* at 8.

[27] OCC captioned its Memorandum Contra as one filed against "The Motion AEP Filed to Thwart Transparency and Fairness Regarding the PUCO's Audit of Millions of Dollars of AEP Charges to Consumers." *Id.*, Memorandum Contra (Dec. 16, 2015).

[28] *Id.* at 6.

[29] *Id.* at 7.

[30] *Supra* n. 5 and accompanying text.

[31] *FAC Case*, OCC Mem. Contra (Dec. 16, 2015) at 7.

[32] *Id.* at 8-9.

that very statute as a meaningful exception to the public-release requirements of R.C. 149.43, *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*, 00-681-GA-GPS (Entry on Rehearing, July 28, 2004) (*CG&E Case*).[33] In that case, AEP Ohio explained the Commission "recognized the balance between the public's general right to access and the importance of the Commission's duty to gather and protect information under R.C. 4901.16, as regulator in the industry."[34] AEP Ohio also explained that, if accepted by the Commission, OCC's position about R.C. 4901.16 would render it meaningless in the context of any public-records request, which surely could not have been the General Assembly's intent.[35] AEP Ohio urged the Commission to defer any disclosure of the draft Baker Tilly report until after litigation is concluded, such that OCC's public-records request could not be used to circumvent the Commission's discovery rules.[36]

D. The Attorney Examiner appropriately balances the demands of the Public Records Act against the prohibitions on disclosure in R.C. 4901.16, as is required by R.C. 4905.07.

Just as the Commission did in the *CG&E Case* cited by AEP Ohio in support of its requested protective order, the Attorney Examiner here carefully balanced the requirements and policy goals of Ohio's Public Records Act and R.C. 4901.16. In the Entry appealed here, the Attorney Examiner first determined a threshold procedural issue, concluding that AEP Ohio's invocation of O.A.C. 4901-1-24 was "an appropriate means to seek protection" of the information OCC requested in its public-records letter.[37] Next, the Attorney Examiner

[33] *Id.*, AEP Ohio Reply (Dec. 23, 2015), *passim*.

[34] *Id.* at 2.

[35] *Id.* at 4.

[36] *Id.* at 6.

[37] *Id.*, Entry (Jan. 8, 2016) at ¶ 12.

concluded that R.C. 4901.16 is a state law that may establish an exception to the Public Records Act's disclosure requirements, and that the auditor is an agent of the Commission which is subject to the statutory non-disclosure duties imposed by R.C. 4901.16.[38] Finally, the Attorney Examiner concluded that (in light of the requirement to construe narrowly any exceptions to the Public Records Act), release of the draft report upon the conclusion of a contested case could be "an effective means for the Commission to balance transparency with due regard for the hearing process."[39] She reasoned:

> 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 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.[40]

This approach is inconsistent with R.C. 4905.07, which requires that the Commission administer the Public Records Act "as consistent with the purposes of Title XLIX [49] of the Revised Code."

Unsatisfied with the Attorney Examiner's decision, which does not foreclose OCC's opportunity to review the requested draft audit and comments at an appropriate time, OCC filed the instant interlocutory appeal. For the following reasons, however, the Commission should either dismiss OCC's appeal pursuant to O.A.C. 4901-1-15(E)(2) due to its glaring procedural

[38] *Id.* at ¶ 13.

[39] *Id.*, ¶ 13-14.

[40] *Id.*, ¶ 14.

deficiencies, decline to certify for consideration, or affirm the Attorney Examiner's decision on the merits pursuant to O.A.C. 4901-1-15(E)(1).

III. Law and Argument

A. OCC's interlocutory appeal is procedurally improper because it violates the Commission's rules pertaining to such appeals, contains arguments not properly presented to the Attorney Examiner, and seeks an untimely end-run around the Commission's determination of OCC's own prior rehearing request and the parameters of Baker Tilly's audit process.

There are multiple procedural defects with respect to OCC's interlocutory appeal that justify the Commission's dismissal of the appeal under O.A.C. 4901-1-15(E)(2). AEP Ohio shall discuss these procedural deficiencies in turn.

1. OCC is not adversely affected by the Attorney Examiner's Entry, nor did the Entry do any of the four things listed in O.A.C. 4901-1-15(A)(1)-(4) that justify interlocutory appeal.

Because interlocutory appeals interrupt ongoing proceedings and can result in piecemeal litigation, rules of practice and procedure in judicial and quasi-judicial forums routinely and closely circumscribe the circumstances under which interlocutory appeals may be taken. *E.g.*, R.C. 2505.02 (setting forth the limited circumstances justifying interlocutory appeals in matters pending before Ohio's common-pleas courts). The Commission's rules are no different. O.A.C. 4901-1-15 provides just two potential pathways for interlocutory appellants to follow, in sections (A) and (B) of the rule. Both pathways are closed to OCC.

The first pathway in section (A) of the rule requires that the ruling being appealed adversely affect the appellant and do one of the following things:

> (1) Grants a motion to compel discovery or denies a motion for a protective order.
>
> (2) Denies a motion to intervene, terminates a party's right to participate in a proceeding, or requires intervenors to consolidate their examination of witnesses or presentation of testimony.

(3) Refuses to quash a subpoena.

(4) Requires the production of documents or testimony over an objection based on privilege.

O.A.C. 4901-1-15(A) (Emphasis added). Because the Attorney Examiner's January 8, 2016 Entry being appealed here does not deny, but instead grants AEP Ohio's motion for protective order, subsection (A)(1) of the interlocutory appeal rule does not apply; nor do any of the other three subsections. *In the Matter of the Complaint of David Wellman v. Ameritech Ohio*, Case No. 99-768-TP-CSS, Entry (July 17, 2002). In *Wellman*, the attorney examiner assigned to the matter issued an entry denying a motion to compel discovery requested by the complainants. When the complainants sought to certify the issue for interlocutory appeal, the attorney examiner noted that "the complainants' appeal does not meet any of the four conditions specified above. Indeed, the Wellmans are appealing a motion to compel discovery that was denied, not a motion to compel discovery that was granted." *Id.* at ¶ 4. In light of the fact that section (A) of O.A.C. 4901-1-15 is inapplicable on its face in these circumstances, it is perhaps not surprising that OCC specifically cites only section (B) of the interlocutory appeal rule in their request.[41] For the reasons described next, however, section (B) is also not an appropriate procedural pathway justifying OCC's interlocutory appeal here.

2. OCC's appeal should not be certified to the Commission under O.A.C. 4901-1-15(B).

Interlocutory appellants such as OCC who cannot satisfy the requirements of O.A.C. 4901-1-15(A) must meet the certification requirements in section (B) of the interlocutory appeal rule. Because interlocutory appeals are by their very nature disruptive and disfavored, section

[41] *FAC Case*, OCC Interlocutory Appeal (Jan. 13, 2016) at 2, n. 3 (citing section (B)); *see also id.*, Mem. in Supp. at 4, n. 11 (also citing section (B)).

(B) imposes an appropriately high standard, which precludes certification unless the legal director, deputy legal director, attorney examiner, or presiding hearing officer finds that:

> the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

O.A.C. 4901-1-15(B). For the following reasons, OCC cannot meet the "new or novel/departure from past precedent" prong of this subsection; nor can OCC credibly argue that it will suffer undue prejudice or expense if the Commission should ultimately reverse the ruling in question.

a. There is nothing novel about the Attorney Examiner's decision to apply R.C. 4901.16 in this context.

Here, OCC's interlocutory appeal presents no novel question, nor is it taken from an entry representing any meaningful divergence from past precedent. Instead, OCC's interlocutory appeal presents a repetitive challenge to a longstanding Commission practice regarding the preliminary, drafting stage of the audit process, and to a statute (R.C. 4901.16) precluding disclosure of certain information that has been on the books for decades in order to safeguard information shared with Commission Staff (or its agents) during the investigatory process.

As AEP Ohio demonstrated in its briefing in support of the protective order granted by the Attorney Examiner, the Commission has previously considered R.C. 4901.16 as an exception to the public-release provisions of R.C. 149.43 and entered an appropriate order balancing the public's general right of access against the critical (and equally statutory) Commission duty under R.C. 4901.16 to protect information gathered in investigations as regulator in the industry. *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*, 00-681-GA-GPS, Entry on Rehearing (July 28, 2014) at ¶ 11. There, as the Attorney Examiner did here, the

Commission described the tension between the Public Records Act and R.C. 4901.16, and weighed the need for public access to documentation against the equally compelling need not to discourage utilities from sharing information with Staff, for fear that it would be considered public and disclosed upon request. Moreover, R.C. 4905.07 requires a balance between the Public Records Act and the purposes of R.C. Title 49; an investigation covered by R.C. 4901.16 and the Commission's adjudication and procedural control of the investigation under R.C. 4901.13 are plainly substantive and important purposes of R.C. Title 49.

As such, OCC's interlocutory appeal presents nothing new or novel justifying certification under O.A.C. 4901-1-15(B). *See, e.g., In the Matter of the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI, Entry (Aug. 20, 2001), at 5 (declining to certify interlocutory appeal raising issues "similar, if not identical, to issues already decided"); *In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 89-1001-EL-AIR, Entry (April 25, 1990), at 5 ("The Attorney Examiner's ruling accords with prior precedent. Accordingly, IEC's appeal does not present a new or novel question of interpretation, law, or policy, and should not be certified to the Commission."); *In the Matter of the Complaint of the River Gas Company v. Halwell Limited Partnership and Geological Consultants, Inc.*, Case No. 87-232-GA-CSS, Entry (Oct. 2, 1989), at 3 (interlocutory appeal from decision granting motion for protective order presents no new or novel question). For this reason, OCC cannot satisfy the prerequisites for certification under O.A.C. 4901-1-15(B).

b. Regardless, no immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the Commission ultimately reverse the Attorney Examiner's decision on AEP Ohio's Motion for Protective Order.

Even if the Attorney Examiner's Entry could somehow be characterized as new or novel, which it should not be for the reasons just described, to obtain certification of its interlocutory appeal, OCC still must demonstrate that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the Commission ultimately reverse the ruling in question. O.A.C. 4901-1-15(B).

OCC simply cannot satisfy this criterion with a straight face, particularly in light of the fact that the Attorney Examiner Entry being appealed here expressly preserves OCC's request to see the draft Baker Tilly audit report and related communications upon entry of a final order in this proceeding.[42] Indeed, OCC only feebly tries to meet the "prejudice" requirement in its interlocutory appeal brief, saying only that "[t]he Examiner's ruling, with its timing, forecloses the use of the records in a case that involves millions of dollars of Ohioans' money."[43] OCC does not elaborate on this generally-worded concern, which is not surprising. OCC makes no proffer about how "use of the records" it has requested in contravention of R.C. 4901.16 is in any way connected to OCC's goals or participation in this proceeding. As the Attorney Examiner explained in her Entry:

> [t]he 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 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.[44]

[42] *FAC Case*, Entry (Jan. 8, 2016) at 7.

[43] *Id.*, OCC Interlocutory Appeal (Jan. 13, 2016) at 4.

[44] *FAC Case*, Entry (Jan. 8, 2016) at 6-7.

As such, the Attorney Examiner's merely temporary restriction on disclosure of the draft audit report (a restriction consistent with the express statutory duty of nondisclosure in R.C. 4901.16) simply does not prejudice OCC's involvement in these proceedings, nor does it cause undue prejudice or expense to any other party. The Commission's decision to provide access at an appropriate time so as to not interrupt or distract from the focus of the pending investigation does not harm OCC's interests or diminish the public-records access that will be provided. Just because the ruling frustrates OCC's desire to access to the records earlier and its attempt to improperly use them in the investigative phase of the proceeding, that does not constitute harm. OCC will get to fully litigate the audit report and challenge the Auditor through cross examination; further, OCC has already done extensive discovery on the Company regarding the double-recovery issues. Moreover, as a party to the Commission proceeding, OCC is free to do its own analysis and prepare its own report on the issues involved in the case. The Commission's filed audit report is just one part of the proceeding overseen by Commission Staff. The processing of that filed report does not impact intervening parties' right or ability to prepare an independent case – there is no harm. Most importantly, the ruling provides that OCC will get access to the records it seeks upon conclusion of the investigation. The ruling does not prejudice to OCC.

3. OCC presents issues and arguments in its interlocutory appeal that were not presented to the Attorney Examiner.

OCC's certification request focuses primarily on a 2013 entry by a different attorney examiner in a different proceeding, *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR, Entry (Feb. 14, 2013).

For the reasons described *infra* in Part IIIB2, this prior entry should not and does not predetermine the Commission's determination here, in an entirely different proceeding in which the Attorney Examiner more appropriately balanced the interests protected by the Public Records Act and R.C. 4901.16. In any event, OCC failed to bring this Entry or argument to the attention of the Attorney Examiner here in its brief opposing AEP Ohio's Motion for Protective Order.[45] Accordingly, the argument is waived.

As many administrative boards and courts have recognized, interlocutory appellants – just like appellants from final judgments – are procedurally barred from presenting arguments not presented below, which arguments could have been addressed before interlocutory appeal was taken. *E.g.*, *Estate of Sandra G. Bodendick*, Department of the Interior, Board of Indian Appeals, Docket No. IBIA 11-123, 2012 I.D. LEXIS 88 (Sept. 7, 2012) (Board of Indian Appeals, in interlocutory appeal from Administrative Law Judge's order, declining to address argument not raised in proceedings before the ALJ); *Sickles v. Jackson Cty. Highway Dept.*, 196 Ohio App. 3d 703, 2011-Ohio-6102, ¶ 6 (Ohio's Fourth Appellate District declining to address statutory immunity arguments raised in interlocutory appeal but not presented to trial court). The same waiver principle applies in interlocutory appeals from orders on motions to compel or motions for protective orders. *In re Estate of Hohler v. Hohler*, 197 Ohio App.3d 237, 2011-Ohio-5469, ¶ 18 (Ohio's Seventh Appellate District declining to address arguments concerning assertion of work-product privilege in interlocutory appeal from decision granting motion to compel); *Shaffer v. OhioHealth Corp.*, 10th Dist. Franklin No. 03AP-102, 2004-Ohio-63, ¶ 13 (Ohio's Tenth Appellate District declining to address merits of privilege issues "quite comprehensively briefed" in an interlocutory appeal from a decision on a motion for protective

[45] *See generally id.*, OCC Mem. Contra (Dec. 16, 2015).

order because they were neither raised before the trial court nor considered by the trial court in addressing the motion).

OCC's misplaced statutory-interpretation argument, relying on R.C. 1.52 and comparing (incorrectly) the enactment dates of R.C. 149.43 and R.C. 4901.16 to justify OCC's erroneous contention that the former statute "trumps" the latter,[46] suffers from the same procedural flaw – it was never presented by OCC to the attorney examiner below[47] and thus should not be considered by the Commission in an interlocutory appeal.

4. OCC's interlocutory appeal improperly seeks an untimely end-run around the Commission's determination of OCC's own prior rehearing request concerning the draft EVA audit.

As noted above in Part IIB, it has now been nearly six months since the Commission, in its July 22 Entry in these proceedings, determined that the draft EVA report would (consistent with longstanding practice) be submitted to Staff and AEP Ohio for review and comment, not to OCC.[48] The Commission granted OCC's request for rehearing on that issue[49] but further consideration of those issues remains pending before the Commission and should not be short-circuited by the instant interlocutory appeal. Moreover, OCC has simply waited too long to challenge the manner in which the Baker Tilly audit would be conducted *between the auditor, Staff, and the Company* until release of the auditor's final report. The terms of the RFP issued by the Commission made the structure and participation concerning the Baker Tilly audit crystal clear back in April 2014, saying:

[46] *FAC Case*, OCC Interlocutory Appeal (Jan. 13, 2016) at 9-10.

[47] *Id.*, OCC Mem. Contra (Dec. 16, 2015).

[48] *Id.*, Entry (July 22, 2015), at 4.

[49] *Id.*, Entry (Sept. 16, 2015), at 3.

C. Commission Staff Supervision

> Staff will oversee the project. Staff personnel shall be informed of all correspondence between the auditor selected and the Companies, and shall be given at least three working days' notice of all meetings and interviews with the Companies to allow Staff the opportunity to attend. The auditor shall meet with Staff no less than once a week through the duration of the audit. These meetings may occur via telephone.[50]

These supervision provisions of the RFP make no reference to the sharing of drafts and comments with OCC or other parties. Instead, they confirm the longstanding practice of the Commission's audit drafting process as being a process undertaken between Staff, the auditor, and the Company until submission and filing of the final report. With respect to the circulation of drafts of the Baker Tilly audit, the RFP also expressly provided in the "Timeline" that the Draft audit report would be presented "to Staff" -- not to OCC or other parties to this proceeding.[51] And the RFP expressly provided in the "Deliverables" provisions that "Staff or the auditor selected shall not publicly disclose any document marked 'confidential' by the Companies, except upon three days prior notice of intent to disclose served upon the Company's counsel."[52] If OCC had quarrels with the (routine) auditing process established nearly two years ago in the RFP relating to Baker Tilly's engagement, it has waited far too long to raise them. *See In the Matter of the Petition of Shayen George and Numerous Other Subscribers of the Hubbard Exchange of Ameritech Ohio v. Ameritech Ohio*, Case No. 92-43-TP-PEX, Entry (April 4, 1995), at 7 (rejecting interlocutory appeal, noting that "the issue MCI seeks a Commission ruling on, requiring a full month's worth of calling data, is not a recent development in this proceeding and should have been raised previously.")

[50] *Id.*, Entry (April 16, 2014), Request for Proposal No. EE14-CCRR-1 at 3.

[51] *Id.*, RFP at 4.

[52] *Id.*

B. OCC's interlocutory appeal is substantively deficient because the Attorney Examiner, consistent with R.C. 4905.07, achieved the appropriate balance between the requirements of Ohio's Public Records Act and the prohibitions in R.C. 4901.16 by withholding public release of the confidential draft audit report and related comments until the issuance of a final appealable order at the conclusion of these proceedings.

Even putting aside the many procedural shortcomings associated with OCC's interlocutory appeal, the appeal fails on the merits for compelling reasons that justify the Commission's affirmance of the Attorney Examiner's Entry under O.A.C. 4901-1-15(E)(1). Put simply, the Attorney Examiner appropriately balanced and applied (1) the requirements of Ohio's Public Records Act; against (2) the nondisclosure requirements of R.C. 4901.16, which serves as an exception to the Public Records Act by precluding disclosure of information gained by Commission employees during the course of Commission investigations, except in testimony or a final report. Both of these statutes can and must be applied *in pari materia* to vindicate two compelling interests expressly recognized by the General Assembly: (1) the public's right to transparency in government; balanced against (2) the critical and confidential relationship between an auditor and its auditee during the drafting process that leads to a final (and publicly available) audit report.

1. The Attorney Examiner appropriately balanced the requirements of Ohio's Public Records Act and R.C. 4901.16, consistent with R.C. 4905.07. The Entry appealed here does not "trump" the Act as alleged by OCC. Nor are there "irreconcilable differences" between R.C. 4901.16 and R.C. 149.43 that justify OCC's misplaced statutory interpretation arguments.

OCC's Application for Review proceeds from the mistaken premise that "[t]he Attorney Examiner's ruling allows R.C. 4901.16 to trump the Ohio Public Records Act."[53] This assertion is false on two levels. First, the Ohio Public Records Act expressly acknowledges that its

[53] *FAC Case*, OCC Interlocutory Appeal (Jan. 13, 2016) at 7.

disclosure requirements may be – in OCC's parlance – "trumped" by other, conflicting requirements of state or federal law that preclude disclosure of certain information. The Public Records Act makes this acknowledgement within the very definition of "public record," which excludes from the purview of the Act's requirements "records the release of which is prohibited by state or federal law." R.C. 149.43(A)(1)(v). If that were not enough, the General Assembly enacted a specific statute to bridge the Public Records Act and R.C. Title 49: R.C. 4905.07.

As the Attorney General has explained, the state or federal laws referenced in R.C. 149.43(A)(1)(v)'s exclusion "can include constitutional provisions, statutes, common law, or authorized state or federal administrative codes." Ohio Attorney General, *Ohio Sunshine Laws: An Open Government Resource Manual* (2013) at 26 (internal citations omitted). R.C. 4901.16 is precisely the type of state law that prohibits the release of certain records – records acquired by Commission employees (or agents) "in respect to the transaction, property, or business of any public utility" – except in testimony or a final report. Second, the Attorney Examiner's ruling hardly allows R.C. 4901.16 to "trump" the Public Records Act as a practical matter. The ruling appealed here merely defers disclosure of the requested records until the appropriate time, after a final, appealable order in the proceeding sufficiently abates the need for ongoing confidentiality between the auditor and auditee concerning the drafts and communications exchanged before submission of the auditor's final report.[54]

OCC also goes off the rails when asserting that "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."[55] Again, there are two fundamental problems with this assertion by OCC. For one, the Attorney Examiner did

[54] *FAC Case*, Entry (Jan. 8, 2016) at 6-7.

[55] *Id.*, OCC Interlocutory Appeal (Jan. 13, 2016) at 8.

expressly acknowledge the need to narrowly construe R.C. 4909.16, saying "as a potential exception to R.C. 149.43, R.C. 4901.16 should be construed narrowly."[56] The temporal restriction she placed on her order granting AEP Ohio's Motion for Protective Order, and her finding that R.C. 4901.16 "does not preclude the release of draft audit reports and related communications indefinitely"[57] are evidence of her narrow construction. More fundamentally, OCC's reference to a "secret process" is hardly fair. This proceeding is not a "secret process"—there are nearly 100 publicly available items on this now five-year-old docket undercutting OCC's claim of "secrecy." The Baker Tilly audit conducted within this proceeding is not a "secret process" either -- the auditor's (unredacted) findings and recommendations are already a matter of public record for all the world to see.[58] The yet-to-be held evidentiary hearing in this proceeding will not be a "secret process." And a company's submission of confidential information to Staff or its agent is not a "secret process" any more than any routine scenario in which a regulated entity obtains a legitimate protective order to preclude public disclosure of confidential or trade-secret information that may be critical to a regulator's investigation, but equally critical to the ongoing business operations or competitive interests of the business being investigated. In its May 21, 2014 Entry appointing Baker Tilly, the Commission expressly stated that the auditor would be subject to the nondisclosure requirements of R.C. 4901.16,[59] and AEP Ohio relied upon that assurance during its participation in the audit. It would be inappropriate and unfair to allow OCC, through the instant interlocutory appeal, to effectively re-write the Entry pursuant to which the audit was conducted.

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[56] *Id.*, Entry (Jan. 8, 2016) at 6 (emphasis added).

[57] *Id.*

[58] *Id.*, Baker Tilly Final Report of Investigation (Oct. 6, 2014).

[59] *Id.*, Entry (May 21, 2014) at 3.

As AEP Ohio demonstrated in its Reply Brief below, filed in support of its requested protective order, even OCC's own cited cases acknowledge that statutes such as R.C. 4901.16 can indeed act as exceptions to the disclosure requirements of Ohio's Public Records Act. In the *State ex rel. Mahajan* case cited in footnote 12 of OCC's brief opposing the protective order,[60] the Court determined that information protected by a statute as part of an investigation would not be considered a public record under R.C. 149.43(A)(1)(v). Specifically, the Supreme Court cited the plain language of R.C. 4731.22(F)(5) – protecting information received by a board in an investigation – as a clear legislative directive that the information received by the Board was confidential. *State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, ¶ 35, citing *State Med. Bd. of Ohio v. Murray*, 66 Ohio St.3d 527, 536 (1993). The Supreme Court's decision in *Mahajan* confirms that, as the Attorney Examiner here concluded, a statute such as R.C. 4901.16 can indeed impose reasonable limits upon the broad disclosure requirements of the Public Records Act.

In its interlocutory appeal, OCC tries to assert inapplicable issues of statutory construction allegedly supporting its position. Specifically, OCC invokes R.C. 1.52 for the proposition that "[i]f statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails."[61] For the reasons described above in Part IIIA3, OCC waived this argument by failing to invoke R.C. 1.52 anywhere in its Memo Contra AEP Ohio's Motion for Protective Order. In any event, the argument is baseless. There are no "irreconcilable" conflicts between the Public Records Act and R.C. 4901.16, because the Public Records Act itself acknowledges (in R.C. 149.43(A)(1)(v)) that other state laws can and do prohibit disclosure of certain information – with such information then deemed excluded from

[60] *Id.*, OCC Mem. Contra (Dec. 16, 2015), at 6, n.12.

[61] *Id.*, OCC Interlocutory Appeal (Jan. 13, 2016) at 9 (quoting R.C. 1.52)

the definition of "public records" that are subject to the Act's disclosure requirements. Because there is no irreconcilable conflict, there is simply no relevance to OCC's assertion that "R.C. 149.43 became effective February 12, 2004, which post-dates the R.C. 4901.16's October 1, 1953 effective date."[62] Ohio's Public Records Act has been around for far longer than 2004, and the Act has also included an exclusion for records "the release of which is prohibited by state or federal law" far longer than 2004. *E.g.,* 1993 Ohio H.B. 152, Section 149.43(A)(1). The Public Records Act has long included that exclusion precisely because the General Assembly understands that there are many circumstances under which confidentiality has benefits as or more compelling than the benefits of public disclosure. R.C. 4901.16 is a reflection of the General Assembly's understanding and intent in the precise context applicable here, and must not be cast aside as OCC wishes.

2. The cited *FirstEnergy* and *Dayton Power & Light* proceedings do not compel reversal of the Entry appealed here.

As noted *supra* in Part IIIA3, OCC waived reliance upon its cited 2013 Entry from the *FirstEnergy* proceeding by failing to bring that Entry to the Attorney Examiner's attention before she ruled on AEP Ohio's Motion for Protective Order. Regardless, the *FirstEnergy* and *Dayton Power & Light* proceedings do not compel reversal of the Attorney Examiner's Entry here.

There is no conflict between the *FirstEnergy* case and this case. The *FirstEnergy* case was a multi-layered review including questions involving market pricing and the identity of suppliers. The Entry by the Examiner in the *FirstEnergy* case addressed the trade-secret information and the balance of the public records statute and the Commission's investigatory statutes. In the present case the Examiner is focused on the question of R.C. 4901.16 and its balance with public-record access in a context that does not implicate the market pricing and

[62] *Id.*

supplier issues present in the *FirstEnergy* case. The fuller consideration and development of the balance between the Commission public records statutes occurred in the *CG&E Case* cited by AEP Ohio, where the full Commission weighed the issues in an Entry on Rehearing.[63] The Examiner in this case relied upon this Commission Entry on Rehearing analysis to balance the statutes involved to provide for the release of the information upon completion of the case.[64] The Examiner's balance is consistent with the governing statutes and the precedent provided by the Commission.

OCC's reliance upon what occurred in a DP&L fuel audit proceeding is also without merit, for as OCC acknowledges in a footnote, the utility provided the information to OCC before the auditor testified.[65] Here, in contrast, AEP Ohio has not shared the draft Baker Tilly audit or its comments on that draft with OCC and does not intend to do so until the Attorney Examiner, as she indicated in the Entry appealed here, revisits OCC's public-records request after a final appealable order is entered in this proceeding.

IV. Conclusion

For the foregoing reasons, and for the reasons AEP Ohio briefed to the Attorney Examiner in support of its requested Protective Order, the Commission should promptly dismiss OCC's procedurally improper interlocutory appeal, or reject the legally baseless appeal on the merits and affirm the Attorney Examiner's January 8, 2016 Entry. And for the reasons previously stated in AEP Ohio's August 31, 2015 Memorandum Contra OCC's Application for Rehearing, the Commission should also deny OCC's related rehearing request pertaining to the draft EVA audit and continue to adhere to its longstanding practice of ensuring, pursuant to R.C.

[63] *See generally CG&E Case*, Entry on Rehearing (July 28, 2004).

[64] *FAC Case*, Entry (Jan. 8, 2016) at ¶ 13 (citing *CG&E Case*, Entry on Rehearing (July 28, 2004) at 5-6).

[65] *FAC Case*, OCC Interlocutory Appeal at 5, n. 12, citing *In the Matter of the Application of the Dayton Power & Light Company to Establish a Fuel Rider*, Case No. 12-22881-EL-FAC.

4901.16, the full, fair, and confidential exchange of sensitive information between auditors, auditees, and Staff before submission of the auditors' final reports or testimony.

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 19th day of January, 2016.

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Summary: Memorandum Contra OCC's Interlocutory Appeal, Request for Certification to Full Commission, and Application for Review electronically filed by Mr. Matthew J Satterwhite on behalf of Ohio Power Company