

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the 2015 Review of the
Delivery Capital Recovery Rider contained
in the Tariffs of Ohio Edison Company, The
Cleveland Electric Illuminating Company
and The Toledo Edison Company**

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Case No.: 15-1739-EL-RDR

**MEMORANDUM IN OPPOSITION TO THE OFFICE OF THE OHIO CONSUMERS'
COUNSEL'S MOTION TO COMPEL**

I. INTRODUCTION

This matter involves the 2015 annual and routine audit of the Delivery Capital Recovery Rider ("Rider DCR") contained in the tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company ("the Companies"). The Office of the Ohio Consumer's Counsel ("OCC") has intervened in this matter and issued broad discovery to the Companies seeking the entirety of the voluminous confidential, business information shared with Staff and independent auditor, Blue Ridge Consulting Services, LLC ("Blue Ridge") during the Rider DCR audit process. The Companies asserted valid objections to producing such broad categories of non-discoverable information.

In an effort to resolve this discovery dispute, the Companies requested that OCC refine its requests to encompass discoverable information regarding the conclusions, results, or recommendations contained in the filed audit report as it had done in previous Rider DCR annual audits. OCC summarily refused to narrow its requests and instead now seeks an Order from the

Commission compelling production of voluminous documentation that the Companies confidentially shared with Blue Ridge and Staff as part of the audit process.

The OCC should not be permitted unfettered access into the entirety of the Companies' work papers and business records confidentially shared with the Staff pursuant to R.C. 4901.16 as part of the audit process. While the OCC may be entitled to discovery on the conclusions, results, or recommendations of the audit, it is not entitled to wholesale disclosure of business information shared with Staff as part of the DCR audit because such submissions to Staff made under the protections of R.C. 4901.16 are privileged. Requesting documents that are in the Companies' possession simply because the Companies' provided them to Staff during the audit process is not the proper use of discovery. Such discovery tactic essentially seeks to engage in discovery on Staff in violation of Ohio Admin. Code 4901-1-16(I) through requests served upon the Companies. Moreover, the overly broad requests at issue are not tailored to discoverable information concerning the conclusions, results or recommendations of the audit report as required as explained more fully below. Accordingly, the Commission should deny the OCC's Motion to Compel.

II. PROCEDURAL HISTORY

This proceeding arises from a voluntary annual audit process agreed to by the Companies pursuant to a negotiated Stipulation in *In re Application of Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO ("*ESP II Case*") in which only Signatory Parties to the Stipulation, as approved by the Commission, may participate. On August 25, 2010, the Commission issued an Opinion and Order in the ESP II Case approving a combined Stipulation

authorizing the Companies to establish Rider DCR. The Stipulation was extended, with modifications, on July 18, 2012 in Case No. 12-1230-EL-SSO (“*ESP III Case*”).

Under the terms of the Stipulation, the Companies agreed to submit to an annual audit review of Rider DCR. Only Staff and other Signatory Parties have the right to participate in the audit process. (Case No. 10-388-EL-SSO, Opinion and Order, at p. 40 (Aug. 25, 2010)). OCC is not a Signatory Party. (Id.). In upholding this provision conferring a right to participate only upon Staff and Signatory Parties, the Commission rejected OCC’s arguments that excluding it as a non-signatory party violated law or regulatory policy. (Id.).

On November 4, 2015, the Commission directed Staff to issue a request for proposal for audit services related to the 2015 Rider DCR audit. The Commission ultimately selected Blue Ridge as an independent contractor to perform auditing services by Entry dated December 9, 2015. The Commission’s Entries of November 4, 2015 and December 9, 2015 expressly state that only the “conclusions, results, or recommendations formulated by the auditor may be examined by any participant to this proceeding.” (Case No. 15-1739-EL-RDR, Entry, at p. 2 (Nov. 4, 2015); Entry, at p. 2 (Dec. 9, 2015)). The Commission made clear that information shared by the Companies with Staff and the independent auditor is subject to the statutory protections set forth in R.C. 4901.16. (Id.). During the audit process, the Companies shared such information and responded to Staff without asserting the objections that could have been raised on grounds that certain information was irrelevant, inadmissible, privileged, confidential customer information, or critical energy infrastructure information (“CEII”). The Companies did so relying upon the confidentiality protections afforded under R.C. 4901.16.

On March 17, 2016, OCC filed and served Requests for Production of Document Set 1 on the Companies. (Affidavit of Robert Endris, hereinafter “Endris Aff.,” at ¶1)(attached as Exhibit

A). The Companies responded on April 6, 2016, setting forth valid objections to the overly broad and irrelevant requests seeking voluminous categories of confidential information unrelated to any “conclusions, results or recommendations” of independent auditor, Blue Ridge. (Endris Aff., ¶2; see, also, Attachment 1 to OCC’s Motion to Compel). Indeed, at the time that the requests were served on March 17, 2016 and when the Companies responded on April 6, 2016, the final audit report had not yet been filed. (Endris Aff., ¶3).

The final audit report was ultimately filed on April 22, 2016. The OCC continued to insist that the Companies respond to its overly broad discovery seeking all confidential documentation submitted by the Companies to Blue Ridge and Staff under R.C. 4901.16 during the audit process. In an effort to resolve this discovery dispute, Robert Endris participated in a telephone discussion on behalf of the Companies with OCC attorney, Jodi Bair on June 23, 2016. (Endris Aff., ¶4). In that conversation, Mr. Endris explained the Companies’ position that the Stipulation approved in Case No. 10-388-EL-SSO and the Entries in this case only permitted the OCC to seek discovery on the conclusions, results, and recommendations in the audit report. (Id.). The Companies maintained that the OCC had no authority to seek production of the entirety of the work papers and business records confidentially shared with Staff and Blue Ridge during the audit process. (Id.).

Despite the divergent positions on the proper scope of discovery, Mr. Endris, suggested a compromise that the OCC narrow its requests to documents relating to or supporting specific conclusions, results or recommendations in the docketed audit report, reserving the right to make appropriate objections. (Id.). Mr. Endris made this offer knowing that the OCC had issued similar narrowly tailored discovery in past audit proceedings and had filed comments based thereupon. (Id. at ¶5, Ex. 1). Thus, he knew that OCC was familiar with this practice and

thought that this compromise position would provide a valid and reasonable position to resolve the pending discovery. (Id. at ¶5). OCC's attorney, Jodi Bair, summarily rejected Mr. Endris' offer and ended the conversation without further negotiation or counterproposal. (Id.). OCC made no effort to resolve the dispute following Ms. Bair's rejection of the Companies' offer. (Id.).

That same day, the Companies received a proposed Stipulation concerning the audit report via email correspondence from attorney, Steven Beeler. (Id. at ¶7). Counsel for OCC was included on this communication and, therefore, received the proposed Stipulation simultaneously with the Companies. (Id. at ¶7). Thus, the Companies and OCC were given notice of the proposed Stipulation concerning the audit report at the same time. Staff further confirmed to Ms. Bair via email on June 24, 2016 that no negotiations had taken place regarding the proposed Stipulation. Rather, the Companies simply had indicated their willingness to implement all of the recommendations identified in the Auditor's Report. (Id.).

On June 24, 2016, the Companies supplemented their initial responses to Request for Production No. 4 of OCC's discovery requests with copies of all email communications between the Companies and the Commission, Staff, and/or the Commission's Attorney General from December, 2015 through June, 2016. (Id. at ¶6). The Companies preserved their previously asserted objections with respect to the production of memos and draft reports that were also requested in Request for Production No. 4, as well as all relevant objections previously asserted in response to the remaining Requests for Production Set 1. (Id.).

III. LAW AND ARGUMENT

A. OCC FAILED TO UNDERTAKE REASONABLE EFFORT TO RESOLVE THIS DISCOVERY DISPUTE.

As a threshold matter, OCC's Motion to Compel should be denied because it failed to undertake reasonable efforts to resolve this discovery dispute as required under Ohio Admin. Code 4901-1-23. This rule provides that "[n]o motion to compel discovery shall be filed under this rule until the party seeking discovery has exhausted all other reasonable means of resolving any differences with the party or persons from whom discovery is sought." Ohio Admin. Code 4901-1-23(C).

OCC's sole efforts at resolving this discovery dispute were perfunctory. The Companies, through Robert Endris, specifically offered a compromise position to OCC aimed at appropriately focusing its requests to discoverable information related to the conclusions, recommendations, and results of the Rider DCR audit. (Endris Aff., ¶4). The Companies suggested that, if OCC would narrow its requests to documents relating to or supporting specific conclusions, results or recommendations within the audit report, the Companies would then review such narrowed requests and object or respond as appropriate. (Id.). Mr. Endris suggested this compromise knowing that OCC utilized similar, focused discovery on audit conclusions and recommendations in the past. (Id. at ¶5, Ex. 1).

Rather than explore this proposal to ascertain if such a narrowed request would provide the type of information OCC feels is necessary to review the audit report, OCC summarily rejected this reasonable offer of compromise and failed to submit a counter proposal or make any attempt whatsoever to obtain information outside of its all-encompassing requests. (Id. at ¶ 4). Instead it filed the subject Motion to Compel. OCC's intransigent "all or nothing" posture has created the alleged "impasse" cited in their Motion. Accordingly, the Commission should deny OCC's Motion to Compel based upon its failure to show that it "has exhausted all other reasonable means of resolving any differences" with the Companies.

B. THE OCC DOES NOT HAVE A RIGHT TO UNFETTERED ACCESS TO THE COMPANIES' PROPRIETARY BUSINESS INFORMATION UNDER THE GUISE OF DISCOVERY.

The Commission routinely denies motions to compel when the movant seeks the production of irrelevant information, or when the discovery requested is vague, overly broad or otherwise objectionable.¹ Moreover, contrary to OCC's position in its Motion to Compel, the law does not grant unlimited access to the Companies' work papers and confidential business information through the discovery process. Ohio Admin. Code 4901-1-16(B) makes clear that a party to a proceeding may obtain discovery of matters that are "not privileged" and "relevant to the subject matter of the proceeding." The overbroad discovery requests at issue here are not relevant to the subject matter of the proceeding and seek the production of confidential information privileged from disclosure under R.C. 4901.16.

1. Full Participation in the Audit Process Proceeding is Not Available to Any Interested Party.

The Companies' objections to OCC's over-reaching and improper discovery requests were not meritless as the OCC contends. Although the OCC complains that the Companies have "blocked" its participation in the audit process by failing to respond to discovery, the OCC fails

¹ See, e.g., *In the Matter of the Complaint of Brenda Fitzgerald v. Duke Energy Ohio*, Case No. 10-791-EL-CSS, 2011 Ohio PUC LEXIS 415 at *5-13 (April 4, 2011) (denying in part motion to compel where respondent had already provided responses to several discovery requests at issue and the requests otherwise sought irrelevant information); *In the Matter of the Application of Buckeye Wind LLC for a Certificate to Construct Wind-powered Electric Generation Facilities in Champaign County, Ohio*, Case No. 08-666-EL-BGN, 2009 Ohio PUC LEXIS 931 at *8-12 (Oct. 30, 2009) (denying in part motion to compel because several discovery requests were irrelevant, vague and overly broad); *In the matter of the Application of Middletown Coke Co.*, Case No. 08-281-EL-BGN, 2008 Ohio PUC LEXIS 821 at *3-4 (Nov. 4, 2008) (denying motion to compel and holding that irrelevant material was not subject to discovery); *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, 2003 Ohio PUC LEXIS 392 at *34-35 (Sept. 2, 2003) (acknowledging the general rule that discovery is limited to materials "relevant to the subject matter of the proceeding" and denying motion to compel because "the information sought would not be relevant to the determination of [the present] matter"); *In the Matter of the Complaint of Ruth L. Wellman v. Ameritech Ohio*, Case No. 99-768-TP-CSS, 2002 Ohio PUC LEXIS 554 at *2-19 (June 21, 2002) (denying motion to compel where discovery requested was vague, "not imperative to a final in a final determination of [the] matter," overly broad, and because the respondent had already responded to several of the discovery requests at issue); *In the Matter of Bauman v. The Western Reserve Telephone Co.*, Case No. 90-1095-TP-PEX, 1991 Ohio PUC LEXIS 325 at *7-9 (denying a motion to compel discovery because requested information was irrelevant to the proceeding).

to demonstrate that it is entitled to participate in the audit process in the first place. This is an agreed-upon audit process rather than an investigation proceeding initiated by the Commission. As set forth above, the Stipulation bargained for and agreed to by the Companies in *ESP II Case*, and extended in *ESP III Case*, provides that only Signatory Parties may participate in the Rider DCR audit process, and that OCC's participation is restricted to any proceeding *resulting from* the audit process. The Commission has explicitly upheld this term, rejecting OCC's prior contention that excluding it from the audit process as a non-signatory violated law or regulatory policy. (Case No. 10-388-EL-SSO, Opinion and Order, at p. 40 (Aug. 25, 2010)(“ESP II Order”), and Third Entry on Rehearing, at p. 7 (Feb. 9, 2011)). The OCC did not appeal this ruling.

Thus, the Commission has limited OCC's participation as an intervening party, to examination of the “conclusions, results, or recommendations formulated by the auditor.” (Case No. 15-1739-EL-RDR, Entry, at p. 2 (Nov. 4, 2015); Entry, at p. 2 (Dec. 9, 2015)). However, the discovery requests at issue here are far broader and do not relate solely to the conclusions, results, or recommendations formulated by the auditor. Rather, OCC seeks wholesale production of all information the Companies exchanged with Staff and its appointed auditor, Blue Ridge, during the audit process. As a Non-Signatory intervener, the OCC, in effect, seeks to step into the role of the appointed auditor even though it lacks any authority to participate in the audit process as a non-signatory to the Stipulation. Contrary to OCC's assertion that the Commission expressly recognized its rights to conduct the discovery it seeks, those rights to participate and conduct discovery were expressly excluded *during* the audit process and were instead limited to any proceeding *resulting from* the audit process. (ESP II Order at p.40). The Commission has not ordered such a proceeding. Five years after the ESP II Order, OCC now attempts to

eliminate the distinction between the audit process itself and a proceeding resulting from the audit process.²

Moreover, the audit process proceeding simply is not a proceeding subject to OCC's full participation. The Commission has addressed this very issue in *In re Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD. In that case, the Commission addressed comments related to the Commission's procedural rules contained in Chapter 4901-1. OCC requested that the Commission add the definition of "proceeding" to the rules and define it as "any filing, hearing, investigation, inquiry or rulemaking which the Commission is required or permitted to make, hold or rule upon."³ Similar to its arguments in this case, OCC argued that:

By defining a "proceeding" the Commission would ensure that all parties will be permitted to participate fully in all matters before the Commission. Full participation would include, at a minimum, the rights to intervene, to conduct discovery, to examine and challenge evidence that is made a part of the record, and to submit evidence into the record. OCC contends that as currently written, the Commission's rules fail to extend these procedural due process rights to proceedings other than those in which a hearing is held.⁴

The Commission specifically rejected OCC's recommendation and found that the proposed definition was "overly broad and unnecessary." The Commission stated:

If OCC's proposal were adopted, any interested person would have the right to intervene, conduct discovery and present evidence in any Commission case. The Commission does not believe that such rights exist. In addition, OCC's proposed

² In the first annual audit of Rider DCR the distinction was made clear as the Commission considered the audit report, and all comments and reply comments filed in relation thereto, and found that "a hearing process is unnecessary at this time." *In the Matter of the Review of the Delivery Capital Recovery Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5428-EL-RDR, at p. 10 (Aug. 22, 2012).

³ *In re Matter of the Review of Chapter 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at ¶7 (December 6, 2006).

⁴ *Id.*

definition would eliminate the Commission's discretion to conduct its proceedings in a manner it deems appropriate and would unduly delay the outcome of many cases. The request is denied.⁵

Clearly, the Commission does not believe that discovery rights exist in every single Commission case. The Companies' audit process, pursuant to Commission order, does not make a docket a "proceeding" for purposes of intervention, discovery and evidence. In this docket, no such rights exist at this time for Non-Signatory Parties and OCC's Motion must be denied. Indeed, the Commission has specifically excluded the right to participate and conduct discovery *during* the audit process and were instead limited to any proceeding *resulting from* the audit process. (ESP II Order at p.40).

OCC asserts that O.R.C. §4903.082 and Rule 4901-1-16(B), Ohio Administrative Code ("O.A.C.") entitle it to discovery in this docket.⁶ O.R.C. §4903.082 states "all parties and intervenors shall be granted ample rights of discovery...." In a similar case regarding the automatic approval of rider updates, the Commission, on rehearing where OCC argued that the Commission improperly failed to allow discovery, found that a denial of a motion to compel from OCC was proper. In denying the motion to compel, the Commission held that O.R.C. §4903.082 "did not require the Commission to allow for discovery."⁷ The Commission found that approval of the application and denial of OCC's motion to intervene justified denial of the motion to compel. The Commission noted that, although OCC filed a motion to intervene, it was not granted, making O.R.C. §4903.082 inapplicable. As noted by the Commission, O.R.C. §

⁵ *Id.* at ¶ 9 (emphasis added).

⁶ OCC Motion at 2.

⁷ *In re the Matter of the Application of The East Ohio Gas Company dba Dominion Eats Ohio and Columbia Gas of Ohio Inc. for Adjustment of Their Interim Emergency and Temporary Percentage of Income Payment Plan Riders*, Case No. 05-1421-GA-PIP, Entry on Rehearing at ¶8 (March 7, 2006). *See also* Case No. 05-732-EL-MER; Case No. 05-733-EL-AAM; Case No. 05-974-GA-AAM, Entry on Rehearing at ¶ 11 (February 6, 2006).

4903.082 applies to parties and intervenors. OCC is neither a party nor an intervenor to this audit process, although it may submit comments on the Report.⁸ For those reasons, O.R.C. §4903.082 does not require the Commission to permit OCC's discovery in this docket.

Likewise, Rule 4901-1-16(B), O.A.C. is inapplicable. OCC forgets one glaring fact - there is no such proceeding where any discovery would be admissible or not. Also, OCC's assertion that discovery will enable it "thorough and adequate preparation for participation in this proceeding" is incorrect because no such process or proceeding has been developed at this time.⁹ Moreover, although Rule 4901-1-16(H), O.A.C. does permit an entity to conduct discovery even though a motion to intervene has not been granted, because the Commission has not yet determined whether a hearing will be held, the Commission may still deny the motion to compel.¹⁰ Finally, the Commission has further held that:

the Commission's procedural rules and its governing statutes convey significant discretion and flexibility on the governance of its own proceedings. This is particularly so for proceedings where no hearing is required by law. There is no right to an evidentiary hearing in this proceeding or to the full discovery process normally reserved for cases where a hearing is required."¹¹

OCC's assertion that the Companies' audit process in a new docket is a proceeding for purposes of Rule 4901-1-16(B) and requires the Commission to permit discovery is not correct.

⁸ The Commission likewise, should not permit OCC's intervention other than to submit comments on the audit report as in past proceedings and consistent with the Commission's Order in Case No. 10-388-EL-SSO. The Ohio Supreme Court has clearly stated that, under Section 4903.221, there is no right to intervene in a proceeding that does not include a hearing. *Ohio Domestic Violence Network v. PUCO*, 70 Ohio St. 3d 311, 314 (1994). This is not a docket whereby a hearing is required or necessary unless subsequently established by the Commission.

⁹ OCC Motion at 8.

¹⁰ See *Case No. 05-732- et al*, Entry on Rehearing at ¶¶13-14 (December 7, 2005) (noting Rule 4901-1-16(H), O.A.C. but finding that because the Commission has "not yet determined whether a hearing will be held...it is not appropriate to lift the stay on discovery.")

¹¹ *In re Triennial Review Regarding Local Circuit Switching*, Case No. 03-2040-TP-COI, Entry on Rehearing at ¶ 8 (October 28, 2003) (denying OCC and CLEC's application for rehearing claiming that it has full discovery rights in a proceeding).

2. **The OCC's Requests for Production Related to the Audit Process are not Relevant**

The case law cited by OCC in its Motion fails to support its demand for documentation, work papers and other confidential business records submitted to Staff as part of the audit process. The Ohio Supreme Court in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 856 N.E.2d 213, 2006-Ohio-5789, did not recognize an unlimited access to discovery as the OCC suggests. Rather, the Court's decision in *Ohio Consumers' Counsel* addressed the narrow issue of discoverability of undisclosed side agreements between a regulated utility and other *signatories* to a settlement stipulation. *Id.* at ¶¶77. On that issue, the Court concluded that such side agreements were discoverable because they were relevant to the issue of whether the settlement was the product of serious bargaining among capable, knowledgeable parties. *Id.* at ¶¶84-86. The Court in *Ohio Consumers' Counsel* further concluded that such side agreements were not protected from disclosure under a "settlement privilege" based upon analysis of federal and state law regarding privileged settlement communications. *Id.* at ¶¶93-94.

The Court's decision in *Ohio Consumers' Counsel* is clearly distinguishable. First, the underlying case involved a utility's rate stabilization plan for which the Commission had scheduled a hearing process. Second, the discovery sought in *Ohio Consumers' Counsel* did not relate to production of all documents submitted confidentially to Staff under R.C. 4901.16. Rather, the information sought related to the existence of side agreements between the involved utility and third parties. *Id.* at ¶86. In upholding the discovery of such information, the Court in *Ohio Consumers' Counsel* concluded that the existence of concessions or inducements amongst parties to a stipulation could be relevant to a determination that the stipulation was not the product of serious bargaining. *Id.* at ¶¶84-85. However, the Court affirmed its prior decision holding that the existence of side deals is not relevant to the issue of whether the terms of the

Stipulation are reasonable, and thus would not be discoverable without the further purpose of challenging the first prong of the test. *Id.* at ¶80. Thus, the Court in *Ohio Consumers' Counsel* did not recognize an unfettered right to broad discovery as OCC contends but rather recognized that discovery must be geared toward relevant and discoverable information. The OCC fails to show that its overly broad discovery requests meet this relevancy requirement.

Here, the OCC is not a signatory to the Stipulation which conferred the right to participate in the Rider DCR audit process. Nothing within *Ohio Consumers' Counsel* addresses or affords a the right to unfettered access to confidential information exchanged during an independent audit process as OCC maintains. Nor does the decision support the type of unlimited discovery OCC seeks in this case. In fact, the Commission has previously recognized that the discovery rules do not allow the type of broad discovery OCC seeks here. The Commission held as follows:

While rules of discovery have been liberally construed, the scope of discovery, set out in Rule 26(b) of the Federal Rules in substantially the same language as that of proposed Section 4901-1-16(B), Ohio Administrative Code, has been found to be limited to matters pertinent to the issues in the case. The standard of relevancy has been found to be not so liberal as to allow a party "to roam in the shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so."

In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service, Case No. 80-376-EL-AIR, Entry, ¶9 (January 14, 1981)(quoting *Broadway & Ninety Sixth Street Realty Company v. Loew's, Inc.*, 21 F.R.D. 347, 352 (S.D.N.Y. 1958)).

OCC's claim that the Companies "should not be permitted to collect hundreds of millions of dollars annually from its customers, while providing no information or answers to questions about these expenditures" wholly lacks merit. Such argument ignores and belittles the months-

long audit process engaged in by Blue Ridge, the Staff, and the Companies. This audit encompassed more than one hundred thousand records and hundreds of questions related to the Companies' business operations. The audit further resulted in a 125-page report by the Auditor on such operations. Rather than appropriately tailor its requests to the conclusions, recommendations and results set forth in that Report, the OCC seeks to stand in the shoes of the Auditor and require that the Companies provide it with all information submitted to Staff during the audit process so that the OCC can conduct its own, unauthorized audit review. However, the OCC is not the appointed auditor in this matter.

Although OCC contends that its discovery requests are reasonably calculated to lead to the discovery of admissible evidence, it fails to show that its overly broad requests seeking discovery of all information exchanged during the audit process is relevant or germane to the specific conclusions, results or recommendations set forth in the audit report. Accordingly, the OCC's Motion to Compel must be denied.

3. **The Information Sought By OCC is Privileged from Disclosure.**

Title 49, through R.C. 4901.16, protects information and documentation shared with the PUCO, its Staff and its Agents from disclosure related to the business of public utilities. The statute provides as follows,

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.

(Emphasis added). R.C. 4901.16. As the above language makes clear, there are two limited circumstances in which information relating to the transaction, property or business of any public

utility acquired by Staff or its Agents may be disclosed. These circumstances consist of: 1) a Staff or an Agent's report to the public utilities Commission, or 2) when Staff or an Agent is called on to testify in any court or proceeding of the public utilities commission. Neither exception applies here. The Commission's Entry appointing Blue Ridge as Auditor in this matter makes clear that the audit process is subject to the Commission's statutory duty under R.C. 4901.16. Therefore, the Auditor and Staff have the duty to protect information discovered in the audit process from disclosure unless it is contained in the actual report or when called upon to testify. (Case No. 15-1739-EL-RDR, Entry, at p. 2 (Dec. 9, 2015)).

There is no question that the Companies are public utilities for purposes of Title 49. There can likewise be no dispute that the work papers and business records exchanged for the sole purpose of the audit at issue in OCC's request constitute information related to "the transaction, property or business" of public utilities. As such, R.C. 4901.16 protects such business records and work papers submitted in the audit process from disclosure. While the statute is structured as a restriction upon Staff, its function is to protect the utilities' confidential and proprietary business information submitted to the Staff, and to foster open communication and information between a utility and its regulator.

Importantly, the business information at issue was not filed with the Docketing Division. Unlike staff-acquired information, information that the Commission orders to be filed with the Docketing Division is public information to which R.C. 4901.16 does not apply. *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, at p. 5 (Mar. 2, 2005). In contrast, Ohio Admin. Code 4901-1-24(G) recognizes that information submitted to Staff but not filed with the Docketing Division does not constitute a public record

subject to disclosure. It says, in relevant part, that “[t]he requirements of this rule [governing motions for protective orders] do not apply to information submitted to the commission staff.”

Ohio Admin. Code 4901-1-24(G). The Commission explained this distinction as follows:

Proposed Rule 4901-1-24(G), O.A.C., states that the requirements of the rule do not apply to information submitted to the Commission staff. Several commentors [sic] are concerned about Paragraph (G) and their perceived implications relative to the submission of confidential information to the staff. The commentors [sic] seem to believe that information submitted to staff will be treated differently than that submitted as part of the record of a case. Arguably, staff is held to the highest standards with regard to information submitted thereto. **Section 4901.16, Revised Code, prohibits staff from divulging any information it receives. Ohio Edison is correct in stating that this provision of the rule means that a utility submitting confidential information directly to the staff may do so without first filing a motion for protective order. Ohio law will continue to place a duty on its staff not to divulge any information provided by a utility except in a staff report or in testimony in a proceeding.** Staff will also continue to notify the company of its intent to disclose confidential information obliging the company to seek a protective order if it sees fit to do so.

(Emphasis added). *In Matter of the Amendment of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 95-985-AU-ORD, Entry, at p. 10 (Mar. 21, 1996). Consistent with the purpose of Title 49, the Companies’ business and work papers shared with Staff and Blue Ridge in the audit process are clearly privileged.

OCC cannot undermine the clear confidential protections afforded under R.C. 4901.16 and Ohio Admin. Code 4901-1-24(G) by arguing that it seeks documentation from the Companies as opposed to Staff. Notably, on July 14, 2016, prior to filing its Motion to Compel, OCC made a public records request to Staff seeking the same work papers and business records shared with Staff and Blue Ridge in direct contravention of R.C. 4901.16.¹² (Endris Aff., ¶8). Perhaps recognizing that R.C. 4901.16 so clearly prohibits such disclosure, OCC now has attempted an alternative path to obtain the same documents by seeking an Order from the

¹² Such request is currently under review by counsel for the Staff. (Endris Aff., ¶8).

Commission compelling the Companies to produce the very information that the Commission's Staff cannot disclose. The Commission must not allow the OCC to abuse the discovery process or circumvent R.C. 4901.16 in this manner. If the General Assembly intended information provided confidentially to Staff to be publically available and subject to disclosure in the discovery process, then there would be no need for R.C. 4901.16. There would likewise be no need for Ohio Admin. Code 4901-1-24(G) to distinguish between filing documents with the Docketing Division under seal as opposed to submitting documents to Staff without the need to file under seal. The OCC cannot overturn the Revised Code and Commission rules with its "rudimentary discovery." Whether rudimentary or not, the OCC cites to no legal authority requiring that the Companies provide copies of all documents produced to Staff during the course of an independent audit.

In fact, the Commission has previously recognized the importance and role of R.C. 4901.16 in protecting business information shared with Staff as part of an investigatory process and the benefit to the public interest from doing so. In *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, the Commission held that an investigative report shared with Staff by a utility was protected under R.C. 4901.16 and could not be disclosed in response to a public records request. *Id.*, Entry, at p. 5 (July 28, 2004). In so holding, the Commission explained that the protections set forth in R.C. 4901.16 were necessary to foster continued sharing of information by utilities to Staff. *Id.* at p. 5. The Commission further noted that the utility shared the report with Staff as part of the Staff's monitoring activities with respect to a particular safety situation. *Id.* This informal sharing of information

between the utility and Staff triggered R.C. 4901.16 to preclude disclosure. *Id.* at p. 6. The same holds true here irrespective of any other right asserted to the contrary.

Like the utility in *Cincinnati Gas & Electric Company*, the Companies here provided responses to Blue Ridge's numerous audit inquiries without objection to relevance, privilege, admissibility, confidentiality, protection of private customer information or CEII (protected from disclosure under 18 C.F.R. §388.112, set seq.) in full and complete reliance upon the statutory protection against public disclosure set forth in R.C. 4901.16. The balance of trust and candor fostered by R.C. 4901.16 would be subverted if OCC is permitted to obtain access to such confidential business information through discovery by seeking the entirety of all information provided to Staff during the audit process.

An Order granting OCC's Motion to Compel under such circumstances would likewise have a chilling effect on a utility's willingness to bargain for, agree to, and participate in a similar audit process. Indeed, the entire purpose of R.C. 4901.16 would be undermined to the detriment of public utilities, the Commission, and citizens as a whole if third parties who were not a participant in the audit were permitted to use the discovery rules for broad access to voluminous, confidential business information submitted during an audit process. R.C. 4901.16 exists to facilitate the free flow of information between the Commission and regulated utilities and enables Staff to have swift and ready access to more information than would be available if it were a party operating under traditional discovery rules. If OCC is permitted to obliterate the protections provided by R.C. 4901.16 via its Motion to Compel herein, then all public utilities under the Commission's jurisdiction would be forced to assert objections and interpret document requests from Staff more narrowly due to concern that their own proprietary information could

become discoverable or that the shared information would violate their customer's privacy rights.

Therefore, the Commission should deny OCC's Motion to Compel as it improperly seeks the production of privileged information.

IV. CONCLUSION

OCC has failed to demonstrate that an Order to compel is warranted or appropriate. OCC has failed to exhaust all other reasonable means to resolve the subject discovery dispute as required under Ohio Admin. Code 4901-1-23(C). Moreover, OCC does not and cannot show that its overly broad requests seeking discovery of all information exchanged during the audit process is relevant or germane to the specific conclusions, results or recommendations set forth in the audit report. The broad categories of voluminous, confidential business information sought through the discovery requests related to the audit process are also privileged and, therefore, protected from disclosure.

The Companies provided work papers and business information to Staff and Blue Ridge as part of the audit process in this case with the explicit understanding that the information would remain confidential under R.C. 4901.16 and Ohio Admin. Code 4901-1-24(G). An Order compelling the Companies to produce confidential information in response to OCC's requests would violate R.C. 4901.16. The disclosure sought by the OCC is neither the type of report nor testimony authorized under the statute. Further, such disclosure would result in increased objections and redactions to responsive documentation and undermine the balance of trust and candor with the Staff fostered by R.C. 4901.16. It would likewise slow the audit process by hindering the free-flow of information and act as a deterrent to public utility's decision to agree to voluntary audit processes in the future.

Therefore, based upon the foregoing, the Commission should deny OCC's Motion to Compel.

Respectfully submitted,

/s/ Carrie M. Dunn

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Email: ewilcheck@ralaw.com

*Attorneys for Ohio Edison Company, The
Cleveland Electric Illuminating Company,
and The Toledo Edison Company*

CERTIFICATE OF SERVICE

On August 4, 2016, the foregoing document as filed on the Public Utilities Commission of Ohio's Docketing Information System. The PUCO's e-filing system will electronically serve notice of the filing of this document and the undersigned has served electronic copies to the following parties:

Jodi.bair@occ.ohio.gov

Steven.beeler@ohioattorneygeneral.gov

Ajay.kumar@occ.ohio.gov

Natalia.messenger@ohioattorneygeneral.gov

/s/ Emily Ciecka Wilcheck

*One of the Attorneys for Ohio Edison Company,
The Cleveland Electric Illuminating Company
and The Toledo Edison Company*

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2015 Review of the)	
Delivery Capital Recovery Rider)	
Contained in the Tariffs of Ohio Edison)	Case No. 15-1739-EL-RDR
Company, The Cleveland Electric)	
Illuminating Company, and the Toledo)	
Edison Company.)	

AFFIDAVIT OF ROBERT ENDRIS

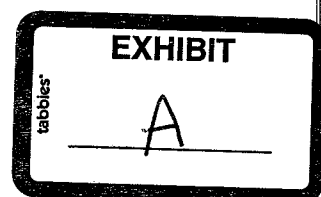
I, Robert Endris, on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company ("the Companies"), being first duly sworn, deposes and states the following with respect to Office of Ohio Consumer's Counsel's ("OCC") Request for Production of Documents Set 1 and Motion to Compel filed in the above-referenced case.

1. On March 17, 2016, OCC filed and served its Request for Production of Documents Set 1 on the FirstEnergy Companies.

2. On April 6, 2016, the FirstEnergy Companies provided responses and objections to the Request for Production of Documents Set 1.

3. When OCC served the Request for Production of Documents Set 1 on March 17, 2016 and the FirstEnergy Companies responded on April 6, 2016, the Blue Ridge Audit Report had not yet been docketed. The audit report was not docketed until April 22, 2016.

4. The Companies have made a good faith effort to resolve this discovery dispute. However, its offer was summarily rejected by the OCC. On June 23, 2016, I participated in a telephone discussion with OCC attorney Jodi Bair concerning the Companies' responses and objections served on April 6, 2016. I explained the Companies' position that the Stipulation in *In*



re Application of Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Case No. 10-388-EL-SSO ("ESP II Case") did not permit the OCC to participate in the audit process. Accordingly, OCC was not entitled to all documentation, work papers, drafts and other records provided by the Companies during the audit process. I nevertheless attempted to resolve and compromise this discovery dispute by suggesting that OCC narrow its requests to issues relating to or supporting specific conclusions, results or recommendations contained in the audit report. I indicated that the Companies would then object or respond to the narrowed requests as appropriate. Jodi Bair responded that she disagreed with the Companies' position, that this offer was not acceptable and ended the conversation, without further negotiation or counterproposal. Her response concluded our efforts to resolve the dispute.

5. I made the offer of compromise set forth in paragraph 4 above with the awareness that information regarding audit conclusions had been requested and provided to OCC by the Companies in discovery during past audit proceedings, and believed the same comported with the Commission's prior orders in Case No. 10-388-EL-SSO as well as the RFP Entry in this case. I felt that this past practice was well known to OCC and was the appropriate approach to resolve issues concerning the pending discovery. I was also aware that the OCC had filed Comments in past proceedings based, in part, upon the Companies' substantive responses to said discovery. True and accurate examples of more narrow discovery requests seeking information concerning audit conclusions, results or recommendations served by OCC upon the Companies in prior Rider DCR audit proceedings are attached hereto as Exhibit 1.

6. On June 24, 2016, the Companies provided supplemental documentation in response to Request for Production No. 4 Set 1. All email communications between the Companies and the Commission, the PUCO and/or the PUCO's Attorney General from December, 2015 through May, 2016 were produced at that time. The Companies preserved its previously asserted objections with respect to production of memos and draft reports that were also requested in Request for Production No. 4. The Companies also preserved all relevant objections previously asserted in response to the remaining Requests for Production Set 1.

7. Contrary to the insinuation in Paragraph 4 of Jodi Bair's Affidavit that stipulation negotiations had taken place without notifying or involving the OCC, it is noted that the Companies received the proposed draft Stipulation concerning the Blue Ridge Audit Report simultaneously along with counsel for OCC on June 23, 2016 via email correspondence from attorney Steven Beeler. Further, on June 24, 2016 Staff confirmed to Ms. Bair that no such prior negotiations had taken place; the Companies simply had indicated their willingness to implement all of the recommendations identified in the Auditor's Report.

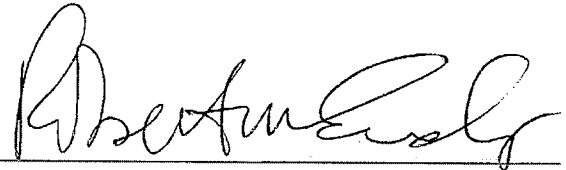
8. OCC's attorney, Jody Bair sent an email to Assistant Attorney General Steven Beeler on July 14, 2016 requesting that Staff provide copies of the FirstEnergy Companies' work papers and business information that was provided to Staff in the audit process. Such request is currently under review by counsel for Staff.

STATE OF OHIO)
COUNTY OF Summit) SS:

The undersigned, being of lawful age and duly sworn on oath, hereby certifies, deposes and state the following:

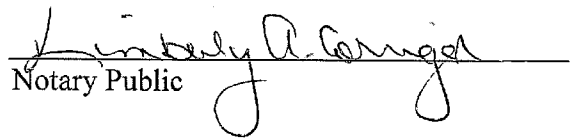
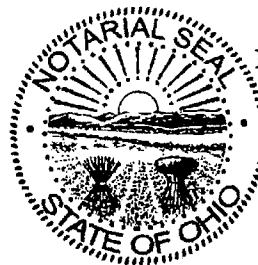
I have caused to be prepared the attached written affidavit for the FirstEnergy Companies in the above referenced cases. This affidavit is true and correct to the best of my knowledge, information and belief.

Further affiant sayeth naught.



Robert Endris, Affiant

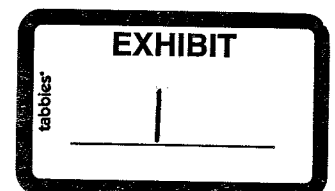
Subscribed and sworn to before me this 3rd day of August, 2016.


Notary Public

KIMBERLY A. CORRIGAN
NOTARY PUBLIC
STATE OF OHIO
Recorded in
Medina County
My Comm. Exp. 1/28/2020

In the Matter of the Delivery Capital)
Recovery Rider Contained in the Tariffs) Case No. 12-2855-EL-RDR
of Ohio Edison Company, The Cleveland)
Electric Illuminating Company, and The)
Toledo Edison Company.)

The Office of the Ohio Consumers' Counsel ("OCC") , in the above-captioned proceedings before the Public Utilities Commission of Ohio, submits the following Interrogatory and Request for Production of Documents pursuant to Sections 4901-1-19, 4901-1-20 and 4901-1-22 of the Ohio Adm. Code for response from the FirstEnergy electric distribution utilities ("FirstEnergy EDUs") within twenty (20) days. An electronic, non-pdf (e.g. Excel) response should be provided to the Office of the Ohio Consumers' Counsel at the following addresses:



Larry S. Sauer
Michael J. Schuler
Assistant Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (T)
sauer@occ.state.oh.us
schuler@occ.state.oh.us

Additionally, the FirstEnergy EDUs must follow the instructions provided herein in responding to the inquiries. Definitions are provided below that are used in the Office of the Ohio Consumers' Counsel's discovery.

DEFINITIONS

As used herein the following definitions apply:

1. "Document" or "Documentation" when used herein, is used in its customary broad sense, and means all originals of any nature whatsoever, identical copies, and all non-identical copies thereof, pertaining to any medium upon which intelligence or information is recorded in your possession, custody, or control regardless of where located; including any kind of printed, recorded, written, graphic, or photographic matter and things similar to any of the foregoing, regardless of their author or origin.

The term specifically includes, without limiting the generality of the following:

punchcards, printout sheets, movie film, slides, PowerPoint slides, phonograph records, photographs, memoranda, ledgers, work sheets, books, magazines, notebooks, diaries, calendars, appointment books, registers, charts, tables, papers, agreements, contracts, purchase orders, checks and drafts, acknowledgments, invoices, authorizations, budgets, analyses, projections, transcripts, minutes of meetings of any kind, telegrams, drafts, instructions, announcements, schedules,

price lists, electronic copies, reports, studies, statistics, forecasts, decisions, and orders, intra-office and inter-office communications, correspondence, financial data, summaries or records of conversations or interviews, statements, returns, diaries, workpapers, maps, graphs, sketches, summaries or reports of investigations or negotiations, opinions or reports of consultants, brochures, bulletins, pamphlets, articles, advertisements, circulars, press releases, graphic records or representations or publications of any kind (including microfilm, videotape and records, however produced or reproduced), electronic (including e-mail), mechanical and electrical records of any kind and computer produced interpretations thereof (including, without limitation, tapes, tape cassettes, disks and records), other data compilations (including, source codes, object codes, program documentation, computer programs, computer printouts, cards, tapes, disks and recordings used in automated data processing together with the programming instructions and other material necessary to translate, understand or use the same), all drafts, prints, issues, alterations, modifications, changes, amendments, and mechanical or electric sound recordings and transcripts to the foregoing. A request for discovery concerning documents addressing, relating or referring to, or discussing a specified matter encompasses documents having a factual, contextual, or logical nexus to the matter, as well as documents making explicit or implicit reference thereto in the body of the documents. Originals and duplicates of the same document need not be separately identified or produced; however, drafts of a document or documents differing from one another by initials, interlineations, notations, erasures, file stamps, and the like

shall be deemed to be distinct documents requiring separate identification or production. Copies of documents shall be legible.

2. “Communication” shall mean any transmission of information by oral, graphic, written, pictorial, or otherwise perceptible means, including, but not limited to, telephone conversations, letters, telegrams, and personal conversations. A request seeking the identity of a communication addressing, relating or referring to, or discussing a specified matter encompasses documents having factual, contextual, or logical nexus to the matter, as well as communications in which explicit or implicit reference is made to the matter in the course of the communication.
3. The “substance” of a communication or act includes the essence, purport or meaning of the same, as well as the exact words or actions involved.
4. “And” or “Or” shall be construed conjunctively or disjunctively as necessary to make any request inclusive rather than exclusive.
5. “You,” and “Your,” or “Yourself” refer to the party requested to produce documents and any present or former director, officer, agent, contractor, consultant, advisor, employee, partner, or joint venture of such party.
6. Each singular shall be construed to include its plural, and vice versa, so as to make the request inclusive rather than exclusive.
7. Words expressing the masculine gender shall be deemed to express the feminine and neuter genders; those expressing the past tense shall be deemed to express the present tense; and vice versa.

8. “Person” includes any firm, corporation, joint venture, association, entity, or group of natural individuals, unless the context clearly indicates that only a natural individual is referred to in the discovery request.
9. “Identify,” or “the Identity of,” or “Identified” means as follows:
 - A. When used in reference to an individual, to state his full name and present or last known position and business affiliation, and his position and business affiliation at the time in question;
 - B. When used in reference to a commercial or governmental entity, to state its full name, type of entity (e.g., corporation, partnership, single proprietorship), and its present or last known address;
 - C. When used in reference to a document, to state the date, author, title, type of document (e.g., letter, memorandum, photograph, tape recording, etc.), general subject matter of the document, and its present or last known location and custodian;
 - D. When used in reference to a communication, to state the type of communication (i.e., letter, personal conversation, etc.), the date thereof, and the parties thereto and the parties thereto and, in the case of a conversation, to state the substance, place, and approximate time thereof, and identity of other persons in the presence of each party thereto;
 - E. When used in reference to an act, to state the substance of the act, the date, time, and place of performance, and the identity of the actor and all other persons present.

- F. When used in reference to a place, to state the name of the location and provide the name of a contact person at the location (including that person's telephone number), state the address, and state a defining physical location (for example: a room number, file cabinet, and/or file designation).
10. The terms "PUCO" and "Commission" refer to the Public Utilities Commission of Ohio, including its Commissioners, personnel (including Persons working for the PUCO Staff as well as in the Public Utilities Section of the Ohio Attorney General's Office), and offices.
11. The term "e.g." connotes illustration by example, not limitation.
12. "OCC" means the Office of the Ohio Consumers' Counsel.
13. "OE" means Ohio Edison Company, "CEI" means The Cleveland Electric Illuminating Company and "TE" means The Toledo Edison Company.
14. "FirstEnergy EDUs" and "the Company" means OE, CEI, and TE collectively.
15. "FirstEnergy Solutions" means the affiliate of OE, CEI, and TE that owns generating plants, some or all of which were formerly owned by the FirstEnergy EDUs.
16. "ATSI" means the American Transmission Service, Incorporated, the affiliate of OE, CEI, and TE that owns transmission facilities located in and around Ohio.
17. "FirstEnergy-Affiliated Companies" means the FirstEnergy EDUs and their affiliated companies (including, but not limited to, FirstEnergy Solutions and ATSI).
18. "Application" means the document, labeled as such, filed in the above-captioned case on April 13, 2012, but not including the attached Stipulation and Recommendation.

19. “Stipulation” means the document, labeled as such, attached as part of the application filed in the above-captioned case on April 13, 2012.
20. “CBP” means the competitive bidding process.
21. “SSO” means standard service offer.
22. “RTO” means regional transmission organization, and includes what have also been called independent system operators (e.g. including by the PJM Interconnection, “PJM,” and the Midwest Independent System Operator, “MISO”).
23. “ESP Proceeding” and means the above-captioned case; “MRO Proceeding” means Case No. 09-906-EL-SSO; and “SSO Proceedings” means these two cases, collectively.
24. “LMP” means the locational marginal price that is defined as the sum of the system energy price plus transmission congestion price plus the cost of marginal losses.

INSTRUCTIONS FOR ANSWERING

1. All information is to be divulged which is in your possession or control, or within the possession or control of your attorney, agents, or other representatives of yours or your attorney.
2. Where an interrogatory calls for an answer in more than one part, each part should be separate in the answer so that the answer is clearly understandable.
3. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections are to be signed by the attorney making them.
4. If any answer requires more space than provided, continue the answer on the reverse side of the page or on an added page.
5. Your organization(s) is requested to produce responsive materials and information within its physical control or custody, as well as that physically controlled or possessed by any other person acting or purporting to act on your behalf, whether as an officer, director, employee, agent, independent contractor, attorney, consultant, witness, or otherwise.
6. Where these requests seek quantitative or computational information (e.g., models, analyses, databases, and formulas) stored by your organization(s) or its consultants in computer-readable form, in addition to providing hard copy (if an electronic response is not otherwise provided as requested), you are requested to produce such computer-readable information, in order of preference:
 - A. Microsoft Excel worksheet files on compact disk;

- B. other Microsoft Windows or Excel compatible worksheet or database diskette files;
 - C. ASCII text diskette files; and
 - D. such other magnetic media files as your organization(s) may use.
7. Conversion from the units of measurement used by your organization(s) in the ordinary course of business need not be made in your response; e.g., data requested in kWh may be provided in mWh or gWh as long as the unit measure is made clear.
8. Unless otherwise indicated, the following requests shall require you to furnish information and tangible materials pertaining to, in existence, or in effect for the whole or any part of the period from January 1, 2000 through and including the date of your response.
9. Responses must be complete when made, and must be supplemented with subsequently acquired information at the time such information is available.
10. In the event that a claim of privilege is invoked as the reason for not responding to discovery, the nature of the information with respect to which privilege is claimed shall be set forth in responses together with the type of privilege claimed and a statement of all circumstances upon which the respondent to discovery will rely to support such a claim of privilege (i.e. provide a privilege log). Respondent to the discovery must a) identify (see definition) the individual, entity, act, communication, and/or document that is the subject of the withheld information based upon the privilege claim, b) identify all persons to whom the information has already been revealed, and c) provide the basis upon which the information is being withheld and the reason that the information is not provided in discovery.

INTERROGATORIES

1. Referring to the Opinion and Order in Case No. 12-1230-EL-SSO at page 43, with respect to Rider DCR, has FirstEnergy consulted “with Staff to select projects, among others, which will mitigate effects of the transmission constraint in the ATSI zone of PJM”?

RESPONSE:

2. If the response to OCC Interrogatory No. 1 is affirmative:
 - a. Identify the date on which each consultation took place;
 - b. Identify each person(s) representing FirstEnergy who participated on each date, and
 - c. Identify the Public Utilities Commission of Ohio Staff member(s) who participated on each date.

RESPONSE:

3. If the response to OCC Interrogatory No. 1 is affirmative, identify each project discussed and describe how each will “mitigate effects of the transmission constraint in the ATSI zone of PJM”.

RESPONSE:

4. Referring to the response to OCC Interrogatory No. 3:
- a. Identify each specific project selected.
 - b. Why was each project identified in (a) selected?
 - c. Identify each specific project not selected.
 - d. Why was each project identified in I not selected?
 - e. How did FirstEnergy determine, for each project identified in (a) and (c), whether and to what extent the project “will mitigate effects of the transmission constraint in the ATSI zone of PJM”?

RESPONSE:

5. Are any of the projects identified in response to OCC Interrogatory No. 4(a) included in the revenue requirement of the quarterly Rider DCR rates for 2012 or projected for the first quarter 2013?

RESPONSE:

6. If the response to OCC Interrogatory No. 5 is affirmative, what is the portion of the revenue requirement in each quarterly Rider DCR that is attributable to each project included?

RESPONSE:

7. For each project identified in response to OCC Interrogatory No. 4(a), provide the timeline for construction/installation of the project.

RESPONSE:

8. If the response to OCC Interrogatory No. 1 is affirmative:
- a. How did FirstEnergy determine which projects to discuss with Staff?
 - b. Are there any projects “which will mitigate effects of the transmission constraint in the ATSI zone of PJM” that FirstEnergy did not discuss with Staff?
 - c. Referring to the response to (b), identify any projects not discussed and indicate why they were not discussed.

RESPONSE:

9. If the response to OCC Interrogatory No. 1 is negative:
- a. Why has FirstEnergy not consulted “with Staff to select projects, among others, which will mitigate effects of the transmission constraint in the ATSI zone of PJM”?
 - b. When does FirstEnergy plan to consult “with Staff to select projects, among others, which will mitigate effects of the transmission constraint in the ATSI zone of PJM”?

RESPONSE:

REQUEST FOR PRODUCTION OF DOCUMENTS

1. Referring to the response to OCC Interrogatory No. 2, for each consultation between FirstEnergy and Staff, provide all notes, documents referenced, and all correspondence, including electronic, related to selecting projects “which will mitigate effects of the transmission constraint in the ATSI zone of PJM”.
2. Provide all documents, analyses, studies and data, including electronic, upon which FirstEnergy relied to determine whether and to what extent projects “will mitigate effects of the transmission constraint in the ATSI zone of PJM”.
3. Provide the June 1, 2012 letter from Bradley D. Eberts, Manager, Load Forecasting for FirstEnergy to Mr. Daniel R. Johnson, Chief, Planning and Market Analysis for the Public Utilities Commission of Ohio. (This letter is marked as Staff Exhibit 1 in Case No. 12-1230-EL-SSO, however the record includes only the first and last pages of the letter.)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this *First Set of Interrogatories and Request for Production of Documents* was served on the persons stated below via electronic transmission, this 22 day of April 2013.

/s/ Larry S. Sauer

Larry S. Sauer
Assistant Consumers' Counsel

SERVICE LIST

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James Burk
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burkj@firstenergycorp.com

In the Matter of the Delivery Capital)
Recovery Rider Contained in the Tariffs) Case No. 12-2855-EL-RDR
of Ohio Edison Company, The Cleveland)
Electric Illuminating Company, and The)
Toledo Edison Company.)

May 21, 2013

Larry S. Sauer
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sauer@occ.state.oh.us
schuler@occ.state.oh.us

Additionally, the FirstEnergy EDUs must follow the instructions provided herein in responding to the inquiries. Definitions are provided below that are used in the Office of the Ohio Consumers' Counsel's discovery.

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articles, advertisements, circulars, press releases, graphic records or representations or publications of any kind (including microfilm, videotape and records, however produced or reproduced), electronic (including e-mail), mechanical and electrical records of any kind and computer produced interpretations thereof (including, without limitation, tapes, tape cassettes, disks and records), other data compilations (including, source codes, object codes, program documentation, computer programs, computer printouts, cards, tapes, disks and recordings used in automated data processing together with the programming instructions and other material necessary to translate, understand or use the same), all drafts, prints, issues, alterations, modifications, changes, amendments, and mechanical or electric sound recordings and transcripts to the foregoing. A request for discovery concerning documents addressing, relating or referring to, or discussing a specified matter encompasses documents having a factual, contextual, or logical nexus to the matter, as well as documents making explicit or implicit reference thereto in the body of the documents. Originals and duplicates of the same document need not be separately identified or produced; however, drafts of a document or documents differing from one another by initials, interlineations, notations, erasures, file stamps, and the like shall be deemed to be distinct documents requiring separate identification or production. Copies of documents shall be legible.

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discussing a specified matter encompasses documents having factual, contextual, or logical nexus to the matter, as well as communications in which explicit or implicit reference is made to the matter in the course of the communication.

3. The “substance” of a communication or act includes the essence, purport or meaning of the same, as well as the exact words or actions involved.
4. “And” or “Or” shall be construed conjunctively or disjunctively as necessary to make any request inclusive rather than exclusive.
5. “You,” and “Your,” or “Yourself” refer to the party requested to produce documents and any present or former director, officer, agent, contractor, consultant, advisor, employee, partner, or joint venture of such party.
6. Each singular shall be construed to include its plural, and vice versa, so as to make the request inclusive rather than exclusive.
7. Words expressing the masculine gender shall be deemed to express the feminine and neuter genders; those expressing the past tense shall be deemed to express the present tense; and vice versa.
8. “Person” includes any firm, corporation, joint venture, association, entity, or group of natural individuals, unless the context clearly indicates that only a natural individual is referred to in the discovery request.
9. “Identify,” or “the Identity of,” or “Identified” means as follows:
 - A. When used in reference to an individual, to state his full name and present or last known position and business affiliation, and his position and business affiliation at the time in question;

- B. When used in reference to a commercial or governmental entity, to state its full name, type of entity (e.g., corporation, partnership, single proprietorship), and its present or last known address;
 - C. When used in reference to a document, to state the date, author, title, type of document (e.g., letter, memorandum, photograph, tape recording, etc.), general subject matter of the document, and its present or last known location and custodian;
 - D. When used in reference to a communication, to state the type of communication (i.e., letter, personal conversation, etc.), the date thereof, and the parties thereto and the parties thereto and, in the case of a conversation, to state the substance, place, and approximate time thereof, and identity of other persons in the presence of each party thereto;
 - E. When used in reference to an act, to state the substance of the act, the date, time, and place of performance, and the identity of the actor and all other persons present.
 - F. When used in reference to a place, to state the name of the location and provide the name of a contact person at the location (including that person's telephone number), state the address, and state a defining physical location (for example: a room number, file cabinet, and/or file designation).
10. The terms "PUCO" and "Commission" refer to the Public Utilities Commission of Ohio, including its Commissioners, personnel (including Persons working for the PUCO Staff as well as in the Public Utilities Section of the Ohio Attorney General's Office), and offices.

11. The term “e.g.” connotes illustration by example, not limitation.
12. “OCC” means the Office of the Ohio Consumers’ Counsel.
13. “OE” means Ohio Edison Company, “CEI” means The Cleveland Electric Illuminating Company and “TE” means The Toledo Edison Company.
14. “FirstEnergy EDUs” and “the Company” means OE, CEI, and TE collectively.
15. “FirstEnergy Solutions” means the affiliate of OE, CEI, and TE that owns generating plants, some or all of which were formerly owned by the FirstEnergy EDUs.
16. “ATSI” means the American Transmission Service, Incorporated, the affiliate of OE, CEI, and TE that owns transmission facilities located in and around Ohio.
17. “FirstEnergy-Affiliated Companies” means the FirstEnergy EDUs and their affiliated companies (including, but not limited to, FirstEnergy Solutions and ATSI).
18. “Application” means the document, labeled as such, filed in the above-captioned case on April 13, 2012, but not including the attached Stipulation and Recommendation.
19. “Stipulation” means the document, labeled as such, attached as part of the application filed in the above-captioned case on April 13, 2012.
20. “CBP” means the competitive bidding process.
21. “SSO” means standard service offer.
22. “RTO” means regional transmission organization, and includes what have also been called independent system operators (e.g. including by the PJM Interconnection, “PJM,” and the Midwest Independent System Operator, “MISO”).

23. “ESP Proceeding” and means the above-captioned case; “MRO Proceeding” means Case No. 09-906-EL-SSO; and “SSO Proceedings” means these two cases, collectively.
24. “LMP” means the locational marginal price that is defined as the sum of the system energy price plus transmission congestion price plus the cost of marginal losses.
25. “Blue Ridge 2012 Audit” means Compliance Audit of the 2012 Delivery Capital Recovery (DCR) Riders of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. Submitted on March 22, 2013.

INSTRUCTIONS FOR ANSWERING

1. All information is to be divulged which is in your possession or control, or within the possession or control of your attorney, agents, or other representatives of yours or your attorney.
2. Where an interrogatory calls for an answer in more than one part, each part should be separate in the answer so that the answer is clearly understandable.
3. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections are to be signed by the attorney making them.
4. If any answer requires more space than provided, continue the answer on the reverse side of the page or on an added page.
5. Your organization(s) is requested to produce responsive materials and information within its physical control or custody, as well as that physically controlled or possessed by any other person acting or purporting to act on your behalf, whether as an officer, director, employee, agent, independent contractor, attorney, consultant, witness, or otherwise.
6. Where these requests seek quantitative or computational information (e.g., models, analyses, databases, and formulas) stored by your organization(s) or its consultants in computer-readable form, in addition to providing hard copy (if an electronic response is not otherwise provided as requested), you are requested to produce such computer-readable information, in order of preference:
 - A. Microsoft Excel worksheet files on compact disk;

- B. other Microsoft Windows or Excel compatible worksheet or database diskette files;
 - C. ASCII text diskette files; and
 - D. such other magnetic media files as your organization(s) may use.
7. Conversion from the units of measurement used by your organization(s) in the ordinary course of business need not be made in your response; e.g., data requested in kWh may be provided in mWh or gWh as long as the unit measure is made clear.
8. Unless otherwise indicated, the following requests shall require you to furnish information and tangible materials pertaining to, in existence, or in effect for the whole or any part of the period from January 1, 2000 through and including the date of your response.
9. Responses must be complete when made, and must be supplemented with subsequently acquired information at the time such information is available.
10. In the event that a claim of privilege is invoked as the reason for not responding to discovery, the nature of the information with respect to which privilege is claimed shall be set forth in responses together with the type of privilege claimed and a statement of all circumstances upon which the respondent to discovery will rely to support such a claim of privilege (i.e. provide a privilege log). Respondent to the discovery must a) identify (see definition) the individual, entity, act, communication, and/or document that is the subject of the withheld information based upon the privilege claim, b) identify all persons to whom the information has already been revealed, and c) provide the basis upon which the information is being withheld and the reason that the information is not provided in discovery.

INTERROGATORIES

INT-10. Referring to Item 6 on page 48 of the Blue Ridge 2012 Audit, have the Companies quantified increases in efficiency and savings associated with FECO work order # ITS-SC-M00001-1 – Project Lightyear (SAP) and work order # ITS-SC-M00009-1 – Merger, Consolidate Network Operations?

RESPONSE:

INT-11. If the response to OCC Interrogatory No. 10 is affirmative, by year for 2012 and beyond, what is the quantification of increases in efficiency and savings associated with each work order (please include projections)?

RESPONSE:

INT-12. Referring to page 54, Figure 1, of the Blue Ridge 2012 Audit:

- a. Why has the Percent Overhead for OECO fluctuated over the period 2007 through 2012?
- b. Why is the Percent Overhead for 2012 for TECO so much higher than OECO?
- c. How are the Percent Overheads for each company calculated?

RESPONSE:

INT-13. Referring to page 72 of the Blue Ridge 2012 Audit, on what basis does FirstEnergy consider the 12 employee transfers within Ohio a merger-related change?

RESPONSE:

REQUEST FOR PRODUCTION OF DOCUMENTS

- RPD-4. Referring to page 57 of the filing made in Case Nos. 12-2679-EL-RDR and 89-6001-EL-TRF on February 1, 2013, please provide calculations, workpapers, and source documents to support Annual Revenue Through 12/31/2012 for CEI, OE, and TE as shown in Section X, Annual Rider DCR Revenue Through December 31, 2012.
- RPD-5. Referring to the response to OCC Interrogatory No. 11, please provide any assumptions, data, documents, and interactive spreadsheets supporting the quantification of increases in efficiency and savings associated with each work order.
- RPD-6. Referring to the response to OCC Interrogatory No. 13, please provide all documents and data supporting FirstEnergy's basis for considering the 12 employee transfers within Ohio as a merger-related change.

CERTIFICATE OF SERVICE

I hereby certify that a copy of these *Interrogatories and Request for Production of Documents, Second Set*, was served on the persons stated below via electronic transmission, this 21st day of May 2013.

/s/ Larry S. Sauer
Larry S. Sauer
Assistant Consumers' Counsel

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Case No(s). 15-1739-EL-RDR

Summary: Memorandum Memorandum in Opposition to the Office of the Ohio Consumers' Counsel's Motion to Compel electronically filed by Mrs. Emily C. Wilcheck on behalf of The Cleveland Electric Illuminating Company and The Toledo Edison Company and Ohio Edison Company