

**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

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY AND THE TOLEDO EDISON COMPANY’S MOTION FOR PROTECTIVE
ORDER**

Pursuant to Ohio Administrative Code Rule 4901-1-24, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (“the Companies”) respectfully move the Commission for a protective order protecting the disclosure of the Companies’ work papers and business information shared with independent auditor, Blue Ridge Consulting Services, LLC (“Blue Ridge”) and Staff as part of the audit process. As discussed in detail in the attached memorandum in support, The Office of the Ohio Consumer’s Counsel (“OCC”) has improperly sought access to such confidential business information from Staff through a public records request in an attempt to procure information outside the confines of the discovery process.

Release of the Companies’ business information, including work papers provided to Staff and Blue Ridge as part of the audit process would violate R.C. § 4901.16 because the disclosure sought by the OCC through its public record request is neither the type of report nor testimony specified in the statute to permit disclosure. The Companies provided the business information at

issue to Staff and Blue Ridge as part of the audit process in this case with the explicit understanding that the information would remain confidential. OCC must not be permitted to use a public records request to circumvent the protections afforded to such information the Companies shared with Staff and Blue Ridge as part of the audit process. Any holding to the contrary would undermine the balance of trust and candor fostered by R.C. 4901.16 and thwart the free-flow of information necessary for an effective audit. Indeed, the mere fact that the Staff and Blue Ridge reviewed the Companies' business information as part of the audit process in this case does not open such information to public disclosure. Accordingly, the Commission should deny OCC's public records request and issue a protective order protecting the Companies' business information from disclosure other than pursuant to the circumstances authorized under R.C. 4901.16.

Alternatively, if the Commission were to determine that the general public has the right to obtain such confidential business records, the Companies request an opportunity to redact and/or extract (1) critical energy infrastructure information, which poses a threat to public safety, if released; (2) commercially sensitive information related to the supply of energy; and (3) confidential customer information.

Respectfully submitted,

s/ Erika Ostrowski

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This matter involves the 2015 annual 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 broad categories of confidential, business information shared with independent auditor Blue Ridge Consulting Services, LLC (“Blue Ridge”). The Companies asserted valid objections to producing such broad categories of non-discoverable information. Rather than narrow or refine their 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 now improperly seeks to obtain such protected information through a public records request to Commission Staff. Specifically, OCC requested in email correspondence, dated July 14, 2016 that Staff provide copies of the Companies’ work papers and business information the Companies provided to Staff and/or Blue Ridge in the audit process.

However, such information is protected from disclosure under R.C. 4901.16. This protection is explicitly provided for in the RFP Entry issued in this matter on December 9, 2015. This information also has not been filed with the Docketing Division or otherwise made an open, public record in this matter. Accordingly, the Commission should issue a Protective Order holding that the documents sought by OCC are protected and not subject to disclosure in response to OCC’s public record request.

II. PROCEDURAL HISTORY

This proceeding arises from a voluntary 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 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 Signatory Parties to the Stipulation, as approved by the Commission, solely 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)). 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 DCR audit. The Commission ultimately selected Blue Ridge as an independent contractor to perform auditing services by Entry dated December 9, 2015. This Entry requires Blue Ridge to execute its duties pursuant to the Commission’s statutory authority to investigate and acquire records, contracts, reports, and other documentation under R.C. 4903.02, 4903.03, 4905.06, 4905.15, and 4905.16. (Case No. 15-1739-EL-RDR, Entry, at p. 2 (Dec. 9, 2015)).

These statutes, and the Commission's Entry, require the Companies to provide documentation or information requested by Blue Ridge and Staff. (*Id.* at p. 3). However, the Entry makes clear that Blue Ridge, like Staff, is subject to the Commission's statutory duty under R.C. 4901.16 to not divulge information except in its report to the Commission or when called on to testify in any court or proceeding of the public utilities commission. (*Id.*). The Companies provided responses to every request issued in the audit process and shared such information with Staff without asserting the many objections that could have been raised on grounds that certain information was irrelevant, inadmissible, privileged, confidential customer information, or critical energy infrastructure information ("CEII") in reliance upon the protections set forth in R.C. 4901.16.

III. LAW AND ARGUMENT

A. THE COMPANIES' WORK PAPERS AND UNDERLYING DATA PRODUCED AS PART OF THE AUDIT PROCESS ARE PROTECTED FROM DISCLOSURE BY R.C. 4901.16

1. The Information Sought By OCC Does Not Qualify As Public Records Subject to Disclosure.

The Commission has recognized that Ohio Admin. Code 4901-1-24 is the appropriate means for a utility to seek protection of utility-related information shared with Staff during the audit process. *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, 12-3133-EL-FAC, 13-572-EL-FAC, 13-1286-EL-FAC, 13-1892-EL-FAC, Entry, at pp. 5-6 (Jan. 8, 2016). Here, there is no question that Companies' work papers and business records sought by OCC through its public record request must be protected from disclosure under this Rule.

The work papers and business information at issue are not public records simply because the Companies shared such information, in confidence, with Blue Ridge and Staff as part of the

voluntary audit process agreed to by the Companies as signatories to the Stipulation. Under the plain language of R.C. 4905.07 and 4901.12, documents and information in the possession of the Commission are public “[e]xcept as provided in section 149.43 of the revised code and as consistent with the purpose of Title [4]9.” (Emphasis added). The excepting language within these statutes cannot be disregarded. This is especially true given that the Legislature amended these statutes in 1996 to specifically include such reference to R.C. 149.43 and Title 49 in order to harmonize the various statutes. (*See* 1996 Ohio Laws File 171 (H.B. 476)).

Under R.C. 149.43(v), the term “public records” excludes information which may not be released under state or federal law. Title 49, through R.C. 4901.16, protects from public disclosure information and documentation held by the Commission, its Staff and its Agents related to the business of public utilities under its purview. 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 in this case its Agent, Blue Ridge, may be disclosed. These circumstances consist of the following: 1) in 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 to protect from disclosure information discovered in the audit process except for 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 this audit and now at issue in OCC's request constitute information related to "the transaction, property or business" of the Companies as public utilities. As such, R.C. 4901.16 prohibits Staff and/or Blue Ridge from disclosing the Companies' business records and work papers acquired in the audit process except for the information that is contained within a *report* to the Commission or when called on to *testify* in proceedings.

Importantly, the business information at issue was not filed with the Docketing Division but rather was acquired by Staff in the audit process. This distinction between staff-acquired information and documentation filed with the Docketing Division is significant. 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. In adopting this Rule, the Commission explained 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). Accordingly, consistent with the purpose of Title 49, the Companies' business and work papers shared with Staff and Blue Ridge in the audit process are not public records under R.C. 149.43(v) and are not subject to release in response to OCC's public record request.

2. The Well-Established Public Policy Behind R.C. 4901.16 Must be Upheld in this Matter.

OCC's public record request seeking the Companies' work papers and business records shared with Staff and Blue Ridge as part of the audit process directly contravenes the principles and policy espoused under R.C. 4901.16. R.C. 4901.07 and R.C. 4901.12 plainly reference the exclusions set forth in R.C. 149.43 and Title 49 as exceptions to the general position that all documents and information in the possession of the Commission are public records open to inspection by interested parties or their attorneys. If the General Assembly intended for information provided confidentially to Staff to be a public record, then there would be no need for R.C. 4901.16 and no need for the clear exception language for public inspection specifically included within R.C. 4901.12 and 4905.07. There would also be no need for Ohio Admin. Code 4901-1-24(G) relative to Protective Orders and filings under seal, nor any need to distinguish between filing documents with the Docketing Division under seal verses submitting documents to Staff without need to file under seal.

The Legislature's intentional reference to R.C. 149.43 and the purpose of Title 49 within R.C. 4901.12 and 4905.07 as exceptions to the public nature of information and documentation in

the Commission's possession makes clear that R.C. 4901.16 affords protection from disclosure to information and documentation shared with Staff and the Commission's agents during the audit process. Indeed, 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. 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 the 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 in response to a public records request. *Id.* at p. 6. The same holds true here.

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, customer information or CEII (protected from disclosure under 18 C.F.R. §388.112, *et 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 were permitted to thwart the audit process by obtaining access to such confidential business information under the guise of a public records request. Such public disclosure would unquestionably have the chilling effect of discouraging utilities from freely and

openly sharing information with Staff for fear that their confidential business information would be considered a public record subject to disclosure upon request.

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 were permitted to use a public records request to seek the confidential business information of a public utility. R.C. 4901.16 exists to facilitate the free flow of information between the Commission and regulated utilities. It enables Staff to have 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 of R.C. 4901.16 through a public records request, the Companies and, indeed all public utilities under the Commission's jurisdiction, would be forced to assert objections and interpret document requests more narrowly due to concern that any information provided to Staff could forfeit their due process rights, endanger their proprietary information, and potentially violate other laws and regulations governing the release of customer information and CEIL.

Continued recognition of the distinction between information submitted to Staff from documents filed with the Docketing Division in this matter comports with recent Commission and Ohio Supreme Court decisions. In *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, 12-3133-EL-FAC, 13-572-EL-FAC, 13-1286-EL-FAC, 13-1892-EL-FAC, Entry (Feb. 3, 2016), the Commission held that a draft audit report was a public record subject to disclosure after noting that that such report had been provided by Staff to the utility (rather than information submitted by the utility to Staff) and the final audit report had been docketed. *Id.* at p. 6. The Ohio Supreme Court in *Vectren Energy Delivery of Ohio, Inc. v. Public Utilities Commission of Ohio*, 113 Ohio St.3d 180, 863 N.E.2d 599, 2006-Ohio-1386, explicitly

noted Staff's obligation to protect information related to the transaction, property, and business of public utilities under R.C. 4901.16 except for the limited circumstances specified in that statute which are not applicable here. *Id.* at ¶52. A determination that the confidential information submitted by the Companies to Staff as part of the audit process conducted by its appointed independent auditor amounts to a public record subject to disclosure would run counter to these pronouncements.

Rather than the Companies' voluminous work papers and business records, only Blue Ridge's final, docketed audit report meets the statutory exception of what may be divulged by Staff pursuant to R.C. 4901.16. The Companies recognize the policy favoring open access to the workings of government. However, that policy does not overwrite the interests of business in protecting its confidential records and proprietary information. The Companies do not lose the protections of R.C. 4901.16 simply because they are regulated by the Commission. To the contrary, through its enactment of R.C. 4901.16 and the exception language in R.C. 4901.12 and 4905.07, the General Assembly affirmed the value of candor and trust between Staff and regulated utilities and the importance of protecting such business information from public disclosure. The candor and trust established by such statutory protections facilitates the free flow of information between utilities and Staff regarding information that could otherwise be the subject of objections. Therefore, the Commission should continue to protect such information as provided for in R.C. 4901.16 and hold that the business records and work papers sought by OCC from Staff are not public records for disclosure.

B. OCC'S PUBLIC RECORD REQUEST IS AN ATTEMPT TO UNDERMINE OHIO ADMIN. CODE 4901-1-10(C) BARRING DISCOVERY DIRECTED TO STAFF.

Staff is not a party under the rules for purposes of discovery in Commission proceedings. Ohio Admin. Code 4901-1-10(C). Yet, OCC improperly seeks information not otherwise

discoverable via discovery directed to Staff disguised as a public record request. The Commission must not permit OCC to use the public record process as an attempt to stand in the shoes of the independent auditor, Blue Ridge, and conduct its own *de facto* audit of the Companies.

The Commission selected Blue Ridge as the independent auditor, not OCC. In fact, as a non-signatory party to the Stipulation giving rise to the DCR audit, OCC has no right to participate in the audit process. Rather, 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)). The Commission has upheld this principle, previously rejecting OCC's arguments that excluding it as a non-signatory party violated law or regulatory policy. (*Id.*). OCC's alternative attempt to circumvent 4901-1-10(C) through a public request is inappropriate and must not be allowed.

IV. CONCLUSION

The Companies provided work papers 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. Staff's disclosure of such confidential information in response to OCC's public record request would violate R.C. 4901.16 because the disclosure sought by the OCC is neither the type of report nor testimony authorized to be disclosed under the statute. Moreover, such disclosure would undermine the balance of trust and candor fostered by R.C. 4901.16 and thwart the free-flow of information necessary for the audit process. Accordingly, based upon the foregoing, the Commission should deny OCC's public records request and issue a protective order protecting the Companies' business information from disclosure other than pursuant to the circumstances authorized under R.C. 4901.16.

Alternatively, if the Commission were to determine that the general public has the right to obtain such confidential business records, the Companies request an opportunity to redact and/or extract (1) critical energy infrastructure information, which poses a threat to public safety, if

released; (2) commercially sensitive information related to the supply of energy; and (3) confidential customer information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On October 28, 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:

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Summary: Motion For Protective Order electronically filed by Ms. Erika Ostrowski on behalf of The Cleveland Electric Illuminating Company and The Toledo Edison Company and Ohio Edison Company