

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA FIRSTENERGY’S MOTION
FOR PROTECTIVE ORDER
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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I. INTRODUCTION

PUCO proceedings should be conducted in the public light. The Office of the Ohio Consumers’ Counsel (“OCC”) represents approximately 1.9 million residential electric consumers of the Ohio Edison Company, the Cleveland Electric Illuminating Company and The Toledo Edison Company (“FirstEnergy” or “Utility”). OCC files this Memorandum contra the Utility’s motion where FirstEnergy seeks a protective order from the PUCO to block the release of public records to OCC in this case involving many millions of dollars of consumers’ money. FirstEnergy’s efforts should be unsuccessful so that the PUCO’s process is more transparent and the public will know what happens in government.

The information that OCC sought is now in the possession of the Public Utilities Commission of Ohio (“PUCO”), and is a public record under Ohio law. The records at issue are those that the Utility provided to the PUCO and Blue Ridge Consulting (“Auditor”). Any person may request public records for any purpose. State agencies have a fundamental duty to ensure transparency and promote the public interest, and the public

has a right to know that these decisions are made ethically and without undue influence from interested parties. Litigants are permitted to use the Ohio Records Act regardless of any discovery process.¹ OCC files this Memorandum Contra because FirstEnergy attempts to confuse Ohio public records law with the law and rules of the PUCO's processes.

The Utility's motion should be denied and the PUCO should immediately release the information to the OCC.²

II. PROCEDURAL BACKGROUND

Though FirstEnergy will ask its customers to pay the delivery capital recovery ("DCR") revenue of \$239 million, it is unwilling to let customers know what it is that they are being asked to pay. Throughout this proceeding, FirstEnergy has fought OCC's participation in this proceeding. In this regard, the Utility opposed OCC's Motion to intervene. FirstEnergy has also refused to respond to discovery requests, prompting OCC to file a motion to compel.

Now FirstEnergy's tactics have turned to keeping OCC from obtaining copies of information that is the subject of an OCC public record request to the PUCO. Specifically, on July 22, 2016, OCC hand-delivered a public records request to Ms. Angela Hawkins, Legal Director of the PUCO.³ In its public records request, OCC sought records related to the auditor's draft audit report that were submitted to the PUCO Staff, all communications by FirstEnergy to the PUCO, all copies of formal and informal

¹ *In the Matter of Ohio Power Company to Establish a Competitive Bidding Process for Procurement of Energy to Support its Standard Service Offer*, Case No. 12-3254-EL-UNC.

² And the PUCO should rule in favor of OCC's Motion to Compel and Order FirstEnergy to provide the information as part of discovery in this case.

³ See Attachment A.

requests made to FirstEnergy and the responses, and copies of workpapers provided to the PUCO. Notably the Auditor's investigation into these matters is complete. The audit report was filed over six months ago.

Yet on October 28, 2016, FirstEnergy filed a Motion for a Protective Order, asking the PUCO not to provide any information to OCC. FirstEnergy asked that alternatively, if the PUCO determined that OCC's requested records were public and must be disclosed, that FirstEnergy be given an opportunity to redact critical infrastructure information and commercially sensitive information related to energy supply.⁴ OCC is willing to enter into a protective arrangement with FirstEnergy; but has been unable to come to agreement on the terms.

FirstEnergy's arguments in its Motion for Protection have no merit and the PUCO must divulge the requested public records.

III. ARGUMENT

A. FirstEnergy argues for absolute secrecy, but the PUCO's process should be transparent. Ohio's public record law requires disclosure of the record, as the law contains only a limited exception to the requirement for disclosure by a public agency such as the PUCO.

Ohioans are asked to pay millions of dollars to fund the FirstEnergy DCR in this case. As such, Ohioans have a right to know what is happening in government. Ohio law provides for that type of transparency. Ohio's state and local government offices must follow Ohio's Public Record Act, found at R.C. 149.43. And that law requires

⁴ FirstEnergy Motion at 13 – 14. OCC sent a Protective Agreement to FirstEnergy that the Utility had signed on June 2, 2016 in *In the Matter of the Application of Ohio Edison Company, The Cleveland electric Illuminating Company, and The Toledo Edison Company For Approval of Their Energy Efficiency and Peak Demand Reduction Program Portfolio Plans for 2017 through 2019*, Case No. 16-0743-EL-POR.

transparency in the operation of government. Scrutiny of state and local government records is permitted according to Ohio law.

A public office, such as the PUCO must organize and maintain its public records in manner that meets its duty to respond to public records requests. And it must keep a copy of its records retention schedule at a location readily available to the public. When it receives a proper public records request, and unless the record is exempt from release, a public office must provide inspection of the requested record promptly and at no cost, or provide copies at cost within a reasonable period of time.

The PUCO is subject to an additional requirement for public records, according to R.C. 4901.12 “all proceeding of the public utilities commission and all documents and record in its possession are public records.” And R.C. 4905.07 provides that, “all facts and information in the possession of the public utilities commission shall be public, and all reports, records, filed, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interest parties or their attorneys.” Also, R.C. 4911.16 mandates that, “the consumers’ counsel shall have access to all books, contracts, records, documents, and papers in the possession of the public utilities commission at any time.” These public record statutes are specifically applicable to the PUCO and “provide a strong presumption in favor of disclosure.”⁵

And yet FirstEnergy asks the PUCO to cloak with secrecy and keep from the public the following public records:

1. All drafts of audit reports that the PUCO (and any organizations working on the PUCO’ s behalf, including the Auditor and the

⁵ See for example, *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 5-6 (October 18, 1990).

Ohio Attorney General's office) provided to FirstEnergy in this case;

2. All communications by FirstEnergy to the PUCO (and to any organizations working on the PUCO's behalf, including the auditor and the Ohio Attorney General's office) in memorialized form regarding drafts of audit reports by the Auditor in this case;
3. All copies of all formal and informal requests (e.g. interrogatories, data requests) made to the Utility, the PUCO, the PUCO staff, and the PUCO's Attorneys General in this proceeding, and the Utility's responses;
4. Copies of all document and workpapers provided to the PUCO, the PUCO staff and/or the PUCO's Attorneys General in the case; and
5. Copies of all communications (e.g. email, memos, draft reports) related to this case between FirstEnergy and the PUCO, the PUCO staff and/or the PUCO's Attorneys General.

The Utility makes the argument that "R.C. 149.43(v)"⁶ exempts the PUCO from providing the public records requested by OCC because the information may not be released under state or federal law. This provision of the law – R.C. 149.43(A)(1)(v) is a "catch-all" exemption from disclosure. The Utility argues that the state law that prohibits disclosure of the information is R.C. 4901.16. The Utility asserts that R.C. 4901.16 requires secrecy from public in certain of the Utility's matters with staff and the Auditor

⁶ FirstEnergy Motion at 7; however, FirstEnergy must have meant R.C. 149(A)(1)(v) because there is no R.C. 149.43(v).

and prohibits the release of the information requested by OCC.⁷ But the utility is mistaken.

R.C. 4901.16 precludes any employee from divulging information acquired related to the transaction, property, or business of any public utility, while acting as an employee or agent of the PUCO. The PUCO has recognized that as a potential exception to Ohio public records law, R.C. 4901.16 should be construed narrowly.⁸ Under case law, the PUCO has strictly limited the application of that statute in two ways. First, the statute is understood to place limitations on the PUCO Staff, but not on the Commission itself.⁹ Second, the statute is applied to prevent disclosure of information when PUCO investigations are ongoing; the statute is not applied to information that relates to completed investigations.¹⁰

Here, the public records sought pertain to draft reports produced by a PUCO-appointed Auditor, who functioned as an independent contractor, not an employee.¹¹ And the information relates to an investigation that has concluded. The final Audit report was docketed with the PUCO over six months ago. R.C. 4901.16 does not prohibit the release of the information regarding Blue Ridge consulting, the PUCO-appointed independent contractor, who completed its audit of the Utility.

⁷ FirstEnergy Motion at 7.

⁸ See, e.g., *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case No. 11-5906-EL-FAC, et al., Entry at ¶13 (Jan. 8, 2016).

⁹ See *In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, Entry (Dec. 17, 2003).

¹⁰ See *In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS Entry on Rehearing at 11 (July 28, 2004).

¹¹ Entry issuing request for proposal at 2 (Nov. 4, 2016).

Interestingly, FirstEnergy cites *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case Nos. 11-5906-EL-FAC et al.,¹² as authority for preventing disclosure under of R.C. 4901.16. Yet, that proceeding provides no support for the Company's position. Instead it bolsters OCC's case.

In that fuel case, OCC requested, as a public records request, copies of the draft audit report *after* the report had been filed, just as OCC now makes a public records request *after* the audit report has been filed in this case. AEP claimed (like FirstEnergy here) that the draft audit report and communications were part of an ongoing confidential audit process under R.C. 4901.16. Although the Attorney Examiner initially ruled that the records should not be disclosed, that ruling was overturned through an interlocutory appeal taken to the entire Commission.¹³

The PUCO held, “where the draft audit report has been presented to the Commission and filed in the dockets the release of the draft audit report and related communications is not inconsistent with the purposes of Title 49 of the Revised Code, including R.C. 4901.16.”¹⁴ The PUCO overturned the Attorney Examiner's earlier conclusion¹⁵ that the PUCO's investigation was ongoing until a final appealable order is issued.

The PUCO should once again rule that, given the PUCO investigation was completed, R.C. 4901.16 does not preclude the release of public information. Such a

¹² FirstEnergy Motion at 6.

¹³ *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power company and Related Matters*, Case No. 11-5901-EL-FAC, et. al., Entry (Feb. 3, 2016).

¹⁴ *Id.* at 6 ¶ 18.

¹⁵ *Id.* at 7.

ruling is consistent with PUCO precedent,¹⁶ and properly construes R.C. 4901.16 as a narrow exception to Ohio public records law.

B. Ohioans have an expectation that state government operates in the open for public protection. In furtherance of that public protection, Ohio public records law allows public records requests to be made. And those requests are not limited by the rules of discovery.

FirstEnergy argues that, “staff is not a party under the rules for purposes of discovery in Commission proceedings,” citing Ohio Adm. Code 4901-10(C).¹⁷ FirstEnergy claims that OCC seeks information that is not otherwise discoverable, according to Ohio Adm. Code 4901-10(C) and disguises the request as a public records request. The Utility goes on to say that OCC is using a public records request in an attempt to “conduct its own *de facto* audit of the companies.”¹⁸ OCC is not circumventing Ohio Adm. Code 4901-10(C).

What OCC seeks are actual public records that are held by a public government body. Like any other person, OCC has the right to seek public records from a state agency. That right is not constrained by PUCO rules or litigation practice. FirstEnergy is wrong.

¹⁶ See also *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company et al.*, Case No. 11-5201-EL-RDR, Entry at ¶18 (Feb. 14, 2013)(FirstEnergy was ordered to disclose a redacted version of the draft audit report , along with the comments it had made).

¹⁷ FirstEnergy Motion at 12.

¹⁸ *Id.* at 13.

C. The public has the right to know what happens in government. The PUCO should not permit secrecy from the public through its process, and should reject FirstEnergy’s claim that the Ohio public record law can be silenced with PUCO Administrative Rule 4901-1-24.

FirstEnergy requests secrecy “[p]ursuant to Ohio Administrative Code Rule 4901-1-24.”¹⁹ FirstEnergy incorrectly mixes the PUCO’s regulatory authority with the PUCO’s responsibility as a state office under Ohio’s public records law. Ohio Adm. Code 4901-1-24(A), (B), and (C) relate to a motion for protection from discovery. Subsection (A) clearly states: “Upon motion of any party or person from whom discovery is sought the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Subsections (B) and (C) refer back to subsection (A), and explain the requirements of a motion for protection and the PUCO’s ability to deny the motion in whole or in part. OCC’s request is not a discovery request to the PUCO staff. Ohio Adm. Code 4901-1-24(A) – (C) have not application in the context of a public records request.

Additionally, subsection (D) of Ohio Adm. Code 4901-1-24 does not apply because this subsection relates to seeking protection against the filing of a document with PUCO docketing. The subsection provides: “Upon motion of any party or person with regard to the filing of a document with the commission’s docketing division relative to a case before the commission, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect the confidentiality of information contained in the document.” The documents that OCC

¹⁹ *Id.* at 1.

request do not relate to the filing of a document with the PUCO. The draft audit report, the data requests and responses are not documents filed with the PUCO. Even if the documents were filed, this PUCO rule does not invalidate the Ohio public records law that requires that the PUCO provide the requested information.

D. FirstEnergy’s argument that only staff and other signatory parties to the earlier SSO case have the right to participate in the process should be rejected.

OCC made a public records request of a public agency – the PUCO. The PUCO is bound by R.C. 149.43 and must release all public records unless the records are specifically exempted from being released. R.C. 4901.16 does not preclude the PUCO from disclosing the information requested.

But FirstEnergy argues that since OCC does not have a right to participate in the audit process, then it should not be able to obtain the public records it requests. FirstEnergy is confused. The rules of litigation are separate from the public records law. The litigation rules cannot be used to block a public records request.

Additionally, FirstEnergy's underlying premise--that OCC has no right to participate in the audit process--is flawed. FirstEnergy conveniently ignores the PUCO’s words in its Order that provide that non-signatory parties, “will have the opportunity to fully participate in any Commission proceeding resulting from the audit process, including ample rights for discovery.”²⁰ The PUCO’s language could not be clearer – OCC shall have ample rights of discovery in the DCR proceedings.

²⁰ *In the Matter of the application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and The Toledo Edison Company 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, Opinion and Order at 11 (August 25, 2010).

IV. CONCLUSION

The PUCO should comply with Ohio's public record law and release the public records now. The PUCO must reject FirstEnergy's attempts to hide the information held by the PUCO staff in this case where many millions of dollars of customer charges are under review. The public has the right to know what happens in government. The PUCO should release the information that was requested by OCC on behalf of consumers over seven months ago.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Memorandum Contra was served upon the persons listed below via electronic transmission this 14th day of November 2016.

/s/ Jodi Bair
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Office of the Ohio Consumers' Counsel

July 22, 2016

VIA HAND DELIVERY

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

Re: Public Records Request

Dear Ms. Hawkins:

I am following up on our email correspondence regarding the Office of the Ohio Consumers' Counsel's ("OCC") request for copies of records held at the Public Utilities Commission ("PUCO") relating to Case No. 15-1739-EL-RDR. This letter shall serve to formalize the request that OCC is making. Thank you for your assistance with the following. The OCC requests copies of public records that the PUCO possesses. The authority for this request is R.C. 149.43 et seq.

As background, the PUCO has retained Blue Ridge Consulting, Inc. ("Blue Ridge") to investigate and audit the FirstEnergy Companies' distribution capital recovery rider ("DCR") in Case No. 15-1739-EL-RDR. On April 22, 2016, the final audit report of Blue Ridge was filed at the PUCO.

Please provide the following public records¹ to OCC: (1) all drafts of Blue Ridge audit reports that the PUCO (and any organizations working on the PUCO's behalf, including Blue Ridge and the Ohio Attorney General's office) provided to FirstEnergy regarding PUCO Case No. 15-1739-EL-RDR; (2) all communications by FirstEnergy to the PUCO (and to any organizations working on the PUCO's behalf, including Blue Ridge and the Ohio Attorney General's office) in memorialized form regarding drafts of audit reports by Blue Ridge in connection with PUCO Case No. 15-1739-EL-RDR; (3) all copies of all formal and informal requests (e.g. interrogatories, data requests) made to the FirstEnergy Companies by the PUCO, the PUCO Staff and the PUCO's Attorneys General in this proceeding, and the Company's responses to those requests; (4) copies of all documents and workpapers provided to the PUCO, the PUCO Staff and/or the PUCO's Attorneys General in connection with Case No. 15-1739-EL-RDR; and (5) copies of all communications (e.g. email,

¹ Public records are as defined by R.C. 149.43.

Ms. Angela Hawkins, Director
September 15, 2015
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memos, draft reports) related to Case No. 15-1739-EL-RDR between the FirstEnergy Companies and the PUCO, the PUCO Staff and/or the PUCO's Attorneys General..

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

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

If you have any questions, please contact me at (614) 466-9559 or by email at: Jodi.bair@occ.ohio.gov. Thank you.

Sincerely,



Jodi Bair
Assistant Consumers' Counsel

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Summary: Memorandum Memorandum Contra FirstEnergy's Motion for Protective Order by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Bair, Jodi Ms.