

**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 REPLY IN SUPPORT OF THE
COMPANIES’ MOTION FOR PROTECTIVE ORDER**

I. INTRODUCTION

The Office of the Ohio Consumer’s Counsel (“OCC”) bases its Opposition to Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s (“the Companies”) Motion for Protective Order upon the false premise that the Companies seek to “block the release of public records.” (*Opposition*, p. 1). The Companies do not seek to block the release of “public records” as defined under Ohio law. Rather, the Companies contend that the documents and information subject to OCC’s public record request are not public records.

The information requested by OCC consists of business information and data confidentially shared with independent auditor, Blue Ridge Consulting Services, LLC (“Blue Ridge”) and Staff as part of the audit process. The Companies made such disclosures in direct reliance upon protections set forth in R.C. 4901.16, which were expressly incorporated into the Commission’s Entry appointing Blue Ridge as the independent auditor in this case. (Case No. 15-1739-EL-RDR, Entry, at p. 2 (Dec. 9, 2015)). Thus, the confidential business information,

work papers, and data requested by OCC are not public records under R.C. 149.43 and therefore should not be released in response to OCC's public record request.

OCC attempts to skew the legitimacy of the Companies' Motion for Protective Order by characterizing the Motion as a mere "tactic" to prevent OCC from obtaining discovery. That claim is baseless. On July 20, 2016, OCC filed a Motion to Compel the Companies to respond to onerous, overly broad, and irrelevant discovery requests to which the Companies asserted valid objections in this case. OCC's Motion to Compel remains pending. Rather than await the Commission's determination on the validity of the Companies' objections, OCC subsequently submitted a public records request to Staff for the same information at issue in the pending Motion to Compel. OCC's alternative attempt to obtain the information outside of the discovery process resulted in the instant Motion for Protective Order filed by the Companies.

Through this Motion for Protective Order, the Companies assert that the data and information requested by OCC are not public records subject to disclosure. Alternatively, disclosure of such information is prohibited by R.C. 4901.16 and the Commission should issue a Protective Order denying OCC's public records request.

II. LAW AND ARGUMENT

A. THE DOCUMENTS AND INFORMATION SOUGHT BY OCC ARE NOT PUBLIC RECORDS SUBJECT TO DISCLOSURE.

1. The documents and information sought by OCC fall under the exceptions to public records listed in R.C. 4901.12 and R.C. 4905.07.

OCC relies upon R.C. 4901.12 and R.C. 4905.07 to support its position that the information sought through its public record request is "public" by virtue of the fact that it is now in the possession of the Commission. However, OCC blatantly omits critical language from both statutory provisions explicitly supporting the Companies' position that this information is not "public." Specifically, R.C. 4901.12 and R.C. 4905.07 provide that 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 [49] of the Revised Code.”** (Emphasis added). This language clarifies that all information in the Commission’s possession is not “public” and not subject to disclosure as OCC suggests.

OCC’s relies upon *In the matter of Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets (“Ohio Bell”)*, Case No. 89-365-RC-ATR, Opinion and Order, at pp. 5-6 (October 18, 1990) to support their proposition that R.C. 4901.12 and R.C. 4905.07 create a strong presumption in favor of disclosure of this information. (*Opposition*, p. 4, f.n. 5). OCC’s reliance on *Ohio Bell* misplaced. Significantly, the *Ohio Bell* case predates the Legislature’s amendment of these statutes in 1996 to specifically include references to R.C. 149.43 and Title 49 as exceptions to the provisions of R.C. 4901.12 and R.C. 4905.07. (*See* 1996 Ohio Laws File 171 (H.B. 476)). The language creating these exceptions cannot be disregarded.

2. **R.C. 4901.16 Prohibits Release of The Companies’ Work Papers and Business Information.**

As stated above, R.C. 4901.12 and R.C. 4905.07 have expressly been amended to reference section R.C. 149.43 and Title 49 after 1996. Pursuant to R.C. 149.43(A)(1)(v), “public records” do not include “[r]ecords the release of which is prohibited by state or federal law.” R.C. 4901.16 expressly prohibits employees and agents of the Commission from disclosing information concerning the transaction, property, or business of any public utility acquired while acting or claiming to act as an employee or agent of the Commission. The statute provides:

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. Thus, there are only 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 are: 1) when such information is in Staff's 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, and the information must therefore be protected.

Unable to refute the plain language of R.C. 4901.16 protecting the information it seeks from disclosure, OCC claims that the protections afforded under the statute fail to apply to Blue Ridge because it was an independent contractor rather than employee of the Commission. (*Opposition*, p. 6). This argument lacks merit.

It is well established that the prohibition against disclosure in R.C. 4901.16 applies to both employees and agents of the Commission. *In the Matter of the Application of the Fuel Adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters* (“*Columbus Southern Power*”), Case Nos. 11-5906-EL-FAC, 12-3133-EL-FAC, 13-572-EL-FAC, 13-1286-EL-FAC, 13-1892-EL-FAC, Entry, at p. 6, ¶ 13 (Jan. 8, 2016); *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, ¶52. Here, Blue Ridge was an “agent” of the Commission while acting in its role as an independent auditor in this case. Indeed, the Commission's Entry appointing Blue Ridge as Auditor explicitly states that Blue Ridge is subject to the Commission's statutory duty under R.C. 4901.16 to protect information acquired in the audit process from disclosure. (Case No. 15-1739-EL-RDR, Entry, at p. 2 (Dec. 9, 2015).

OCC wrongfully asserts that R.C. 4901.16 only prohibits disclosure of information with respect to “ongoing” investigations. (*Opposition*, p. 6). No such authority exists. OCC’s reliance upon the Commission’s holding 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* (“*Cincinnati Gas & Electric*”), Case No. 00-681-GA-GPS, Entry (July 28, 2004) is entirely misplaced. In *Cincinnati Gas & Electric*, the Commission considered whether an investigative report informally shared with Staff as part of the utility’s efforts to resolve safety issues arising from an equipment failure was subject to public disclosure. After observing that the situation presented “a unique set of circumstances under which [the utility] agreed to provide regular reports to [Staff]” in order to collaborate with Staff on a comprehensive response to the equipment failure, the Commission first concluded that R.C. 4901.16 applied. The Commission then held that the subject report could not be disclosed pursuant to a public records request under these facts. *Id.* at p. 4-6, ¶11. In so holding, the Commission did not establish a bright-line test limiting the application of R.C. 4901.16 to “ongoing investigations” as OCC now claims. Rather, the Commission actually supported the Companies’ position here by emphasizing that the protections set forth in R.C. 4901.16 were appropriate and necessary to foster continued sharing of information between the utility and Staff. *Id.* at p. 6, ¶11.

In this case, the Companies provided responses to numerous audit inquiries to the Staff and Blue Ridge without objection to relevance, privilege, admissibility, or confidentiality of the requested documents. The Companies did so in full and complete reliance upon well-established statutory protections against public disclosure set forth in R.C. 4901.16 and case law interpreting that provision. 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, the Ohio Supreme Court 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 of its use within the report or when called upon to testify specified in that statute. *Id.* at ¶52.

The Commission has likewise acknowledged its employees and agents' duties to maintain high standards of confidentiality when discussing Proposed Rule 4901-1-24(G) and R.C. 4901.16. The Commission explained:

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 commentators [sic] are concerned about Paragraph (G) and their perceived implications relative to the submission of confidential information to the staff. The commentators [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, the Companies were justified in freely sharing business information and work papers with Staff and Blue Ridge in the audit process with the understanding that this material would not constitute public records. Such information should not be characterized, without basis, as public records to permit disclosure to OCC.

3. **The Well-Established Public Policy of R.C. 4901.16 Mandates That The Commission Affirm Its Protections.**

The public policy of R.C. 4901.16 facilitates candor and the free flow of information between the Commission and regulated utilities. If the Commission were permitted to divulge confidential business records and information disclosed by the Companies during an audit pursuant to a public records request, this public policy would be completely undermined forcing public utilities to proffer objections and argue for redaction of confidential or trade secret information during the audit process. R.C. 4901.16 alleviates such concerns and allows utilities to broadly respond to requests for information to facilitate candor and openness in this process. See *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); *Vectren Energy Delivery of Ohio, Inc.*, 2006-Ohio-1386 at ¶52.

The OCC points out that in *Columbus Southern Power* 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 R.C. 4901.16 does not bar the disclosure of a draft audit report that is **filed with** the Docketing Division. (*Opposition*, p. 7). However, such holding fails to advance OCC's position here where it seeks release of a broad class of documents that were not filed with the Docketing Division. Furthermore, the Commission made clear in its Entry in *Columbus Southern Power* that its decision to allow the release of the specific draft report and related communications at issue was "limited to the specific facts of [those] proceedings and **should not be construed as precedent for any other case.**" (Emphasis added). *Id.* at pp. 6-7, ¶ 18 (Feb. 3, 2016). Thus, OCC's attempt to utilize the Commission's February 3, 2016 Entry in *Columbus Southern Power* as precedent to support its broad request for documents in this case fails.

B. THE COMPANIES PROPERLY FILED THE MOTION FOR PROTECTIVE ORDER UNDER OHIO ADMIN. CODE 4901-1-24.

OCC claims that the Companies are not entitled to a protective order because the procedure outlined in Ohio Admin. Code 4901-1-24 does not apply to its public records request. (*Opposition*, p. 9). Significantly, the Commission has summarily rejected this precise argument. When construing Ohio Admin. Code 4901-1-24 in the context of public record requests, the Commission concluded that this provision is the appropriate means for a utility to seek protection of information shared with Staff and an appointed independent auditor from disclosure pursuant to a public records' request. See *Columbus Southern Power*, 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, ¶ 12 (Jan. 8, 2016).

Therefore, the Motion for Protective Order was properly filed by the Companies under Ohio Admin. Code 4901-1-24.

C. OCC'S ATTEMPT TO UTILIZE A PUBLIC RECORD REQUEST TO OBTAIN DOCUMENTS UNDERMINES OHIO ADMIN. CODE 4901-1-10(C) BARRING DISCOVERY DIRECTED TO STAFF.

Under Ohio Admin. Code 4901-1-10(C) discovery may not be directed to Staff. Here, OCC's attempts to circumvent this prohibition by issuing a public records request rather than discovery, but the result is the same. Regardless of the method employed, OCC is seeking to discover protected documents from Staff and its agent in contravention of Ohio Admin. Code 4901-1-10(C).

The Commission appointed Blue Ridge as the independent auditor in this case, not OCC. (Case No. 15-1739-EL-RDR, Entry, at p. 2 (Dec. 9, 2015)). The Stipulation bargained for and agreed to by the Companies makes clear that only Signatory Parties may participate in the audit process. (Case No. 10-388-EL-SSO, Opinion and Order, at p. 40 (Aug. 25, 2010). OCC asserted

the same argument that it attempts to make here; that excluding it from the audit process as a non-signatory violated law or regulatory policy. This position was rejected by the Commission. (*Id.*; see, also, Third Entry on Rehearing, at p. 7 (Feb. 9, 2011)). As a result, OCC's participation is limited to proceedings resulting from the audit process, through 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)).

OCC's own belief as to its "ample discovery rights" fails to recognize these decisions by the Commission as to its status in the proceeding. Accordingly, OCC's public records request should be denied and a Protective Order should be issued protecting the Companies' business information from disclosure.

III. CONCLUSION

Contrary to OCC's claim, the Companies do not seek to "hide" information while collecting "many millions of dollars" from customers by seeking a Protective Order. Instead, the Companies legitimately seek to protect their confidential work papers and business information through invoking the clear provisions of R.C. 4901.16.

Alternatively, if the Commission permits release of the requested information, 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 November 21, 2016, the foregoing document was 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: Reply Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company's Reply in Support of the Companies' Motion for Protective Order electronically filed by Mrs. Denise M. Hasbrook on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company