

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

PREHEARING CONFERENCE

before Mr. Gregory Price and Ms. Megan Addison,  
Attorney Examiners, at the Public Utilities  
Commission of Ohio, 180 East Broad Street, Room 11-A,  
Columbus, Ohio, called at 10:00 a.m. on Wednesday,  
November 30, 2016.

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APPEARANCES:

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On behalf of Ohio Edison, The Cleveland  
Electric Illuminating Company, and The  
Toledo Edison Company.

Bruce E. Weston, Ohio Consumers' Counsel  
By Mr. Ajay Kumar,  
Ms. Jodi Bair,  
and Mr. Larry Sauer,  
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On behalf of the Residential Consumers of  
Ohio Edison, The Cleveland Electric  
Illuminating Company, and The Toledo  
Edison Company.

Mike DeWine, Ohio Attorney General  
By Mr. William Wright, Section Chief  
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On behalf of the Staff of the PUCO.

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1 Wednesday Morning Session,  
2 November 30, 2016.

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4 EXAMINER PRICE: Let's go on the record.  
5 Good morning. The Public Utilities  
6 Commission has set for hearing at this time and place  
7 Case No. 15-1739-EL-RDR, being in the Matter of the  
8 2015 Review of the Delivery Capital Recovery Rider  
9 Contained in the Tariffs of Ohio Edison Company, The  
10 Cleveland Electric Illuminating Company, and The  
11 Toledo Edison Company.

12 My name is Gregory Price. With me is  
13 Megan Addison. And we are the Attorney Examiners  
14 assigned to preside over today's prehearing  
15 conference, not a hearing.

16 Let's begin by taking appearances,  
17 starting with the company.

18 MS. HASBROOK: Yes, hello. Denise  
19 Hasbrook, I'm an attorney with Roetzel & Andress.  
20 And also on behalf of the companies is Erika  
21 Ostrowski. And would you like me to introduce guests  
22 as well?

23 EXAMINER PRICE: Sure.

24 MS. HASBROOK: All right. Peter Blasano  
25 and Bob Endris are also present.

1 EXAMINER PRICE: Thank you.

2 Mr. Kumar.

3 MR. KUMAR: Your Honor, on behalf of the  
4 residential consumers of the Cleveland Electric  
5 Illuminating Company, The Toledo Edison Company, and  
6 the Ohio Edison Company, we have the Office of the  
7 Ohio Consumers' Counsel by Bruce Weston and Ajay  
8 Kumar and Jodi Bair. And also with us today we have  
9 Larry Sauer.

10 EXAMINER PRICE: Mr. Beeler.

11 MR. BEELER: Thank you, your Honor. On  
12 behalf of the staff of the Public Utilities  
13 Commission of Ohio, Ohio Attorney General Mike  
14 DeWine, I am Steve Beeler, Assistant Attorney  
15 General, 30 East Broad Street, Columbus, Ohio 43215.  
16 And with me today is Doris McCarter with the staff.

17 EXAMINER PRICE: Thank you. We have two  
18 pending motions before us today. We have a  
19 FirstEnergy motion for protective order that was  
20 filed on October 20, 2016, and we have a motion to  
21 compel discovery filed by Consumers' Counsel on  
22 July 20, 2016.

23 Mr. Kumar, Ms. Bair, since your motion  
24 was filed first, we'll take your motion up first.  
25 Mr. Kumar, if you would like to briefly summarize

1 your arguments, or Ms. Bair, whoever is arguing this.

2 MR. KUMAR: Well, your Honor, so would  
3 you like to hear the arguments on the motion to  
4 compel first?

5 EXAMINER PRICE: Yes. We'll take the  
6 motion to compel, and then we'll deal with the motion  
7 for protective order.

8 MR. KUMAR: Well, your Honor, in the  
9 motion to compel OCC is seeking discovery in  
10 accordance with our rights in the order that was the  
11 10-388 SSO case where the Commission, I guess,  
12 created -- first created the DCR rider.

13 In that order the Commission determined  
14 that nonsignatory parties will have an opportunity to  
15 fully participate in any Commission proceeding  
16 resulting from the audit process including ample  
17 rights of discovery.

18 FirstEnergy's argument that OCC does not  
19 have full rights of intervention as a nonsignatory  
20 party to the stipulation I think is flawed. You  
21 know, this is a Commission proceeding that has  
22 resulted from the audit process, and we are simply  
23 seeking to exercise those rights as was articulated  
24 in the Commission order in 10-388.

25 EXAMINER PRICE: Mr. Kumar, it seems like

1 the best point the company makes is that there's --  
 2 it's well established there's no right to discovery  
 3 where the Commission does not hold a hearing. We  
 4 have not been holding hearings in these audit cases  
 5 stemming out of a capital recovery rider. So would  
 6 you care to address why in this case you should be  
 7 entitled to discovery even though we may or may  
 8 not -- we have not set a hearing? And our past  
 9 practice in these cases has not been to set a  
 10 hearing.

11 MR. KUMAR: Well, your Honor, I think I  
 12 look back specifically while the rules do create  
 13 certain rules for discovery in the 10-388 order, they  
 14 do say that -- they don't say -- the Commission  
 15 doesn't say hearing. They say in any Commission  
 16 proceeding that results from the audit process, and  
 17 they say that in that process that nonsignatory  
 18 parties will have ample rights of discovery. So even  
 19 outside of what the rules allow in the Ohio  
 20 Administrative Code, I feel that our rights of  
 21 discovery are guaranteed by the Commission order in  
 22 10-388.

23 EXAMINER PRICE: So you care not to  
 24 address my question about whether or not a hearing --  
 25 you should be entitled to discovery with or without a

1 hearing?

2 MR. KUMAR: I think -- I think that OCC  
3 has maintained that we still have discovery rights,  
4 and we still have the opportunity to determine I  
5 guess sort of the validity of the assessments that  
6 were incurred in the audit and that even though there  
7 may not be a hearing in this case, I think discovery  
8 is still necessary for OCC to determine the validity  
9 of the audit report.

10 In fact, if you look at the appendix to  
11 the audit report, the documents that OCC is seeking  
12 are directly referenced in the audit report. In  
13 fact, there is an entire appendix that lists the  
14 questions that were asked by the auditor to  
15 FirstEnergy and references to the full requests being  
16 available in the electronic workpapers and it's  
17 simply these sorts of documents OCC is seeking in  
18 order to, you know, assess the validity of the audit  
19 report.

20 I think that despite the fact there isn't  
21 going to be a hearing, I think that OCC still would  
22 like to go through and those sort of discovery rights  
23 would be necessary if we were even just filing  
24 comments.

25 EXAMINER PRICE: Thank you.

1 Company.

2 MR. KUMAR: Your Honor --

3 EXAMINER PRICE: I think that's plenty.

4 Thank you. We've read your pleadings. I just wanted  
5 to ask a few questions.

6 Company.

7 MS. HASBROOK: Yes, yes. And our  
8 position, of course, is set forth in our briefs, and  
9 so I won't restate it here but two main points.  
10 First of all, it goes to your question which was that  
11 there is no proceeding resulting from the audit  
12 process as -- as stated in the August 24 -- 25, 2010,  
13 order as being the nonsignatories. That's the  
14 trigger for them to be able to have ample rights for  
15 discovery.

16 And then, secondly, that the scope is  
17 overly broad even if that first position, which we  
18 believe is extremely strong, would happen to fail.  
19 And going right to the issue that you addressed about  
20 the proceeding, we cited on pages 9 and 10 the In Re:  
21 Chapter 4901-1 and 4901-3 and other statutes case  
22 where the OCC advanced the very same position that it  
23 is advancing here. They want a proceeding to be  
24 broad and the definition to be broadened for the same  
25 reasons and that is because they felt they had the



1 right to just get more information.

2 And the Commission rejected that argument  
3 and said that, no, that there has to be a hearing and  
4 if you took OCC's view, then the outcome of many  
5 cases would be slow. So we can find no exception of  
6 that -- that ruling or any other place.

7 EXAMINER PRICE: Let's talk about the  
8 cases that you cite to in support of your proposition  
9 that where there is no hearing there should be no  
10 opportunity for discovery. The first one is that  
11 PIPP case. Now, that PIPP case did not involve an  
12 audit, did it?

13 MS. HASBROOK: No, no, it did not, no.

14 EXAMINER PRICE: It involved just an  
15 automatic adjustment on a 45-day timeline to the  
16 companies' rates.

17 MS. HASBROOK: That's right.

18 EXAMINER PRICE: And it's not practical  
19 we would have discovery in a 45-day timeline; is that  
20 right?

21 MS. HASBROOK: That's right, nor would  
22 there be a hearing schedule.

23 EXAMINER PRICE: But there is no 45-day  
24 timeline in this case.

25 MS. HASBROOK: That's right but --

1 EXAMINER PRICE: Let's talk about the  
2 other two. You cite to two accounting authority  
3 cases. Isn't it true that when the Commission  
4 authorizes a deferral under the accounting statute,  
5 the ultimate ratemaking treatment of that deferral is  
6 determined in another proceeding?

7 MS. HASBROOK: Yes, uh-huh.

8 EXAMINER PRICE: And so in this  
9 proceeding though we are making rates because we're  
10 setting the rates for the actual DCR case; is that  
11 correct?

12 MS. HASBROOK: Yes.

13 EXAMINER PRICE: So those cases could be  
14 distinguished because those cases don't involve  
15 actual ratemaking.

16 MS. HASBROOK: Uh-huh, uh-huh.

17 EXAMINER PRICE: You make a point in your  
18 briefs, and you say it repeatedly, that this is a  
19 voluntary audit process. I think you say that three  
20 or four times. It's only voluntary because we've  
21 agreed to this DCR mechanism; is that correct?

22 MS. HASBROOK: Yes, and that it has been  
23 extended, yes, yes, by agreement.

24 EXAMINER PRICE: If we didn't have the  
25 DCR mechanism with the voluntary audit process, you

1 would recover these capital investments through a  
2 distribution rate case; is that correct?

3 MS. HASBROOK: Yes, most likely.

4 EXAMINER PRICE: And in a distribution  
5 rate case, Consumers' Counsel would have full  
6 opportunity to conduct discovery on the capital  
7 investments; is that correct?

8 MS. HASBROOK: Yes, uh-huh.

9 EXAMINER PRICE: So is it your  
10 position -- and the distribution rate case we're  
11 going -- we would have evidentiary hearings; is that  
12 correct?

13 MS. HASBROOK: I'm sorry?

14 EXAMINER PRICE: We would have an  
15 evidentiary hearing, correct?

16 MS. HASBROOK: Yes.

17 EXAMINER PRICE: So is it your position  
18 that the DCR proceedings, No. 1, they're entitled to  
19 less due process? There's no requirement for a  
20 hearing; is that correct?

21 MS. HASBROOK: I -- I disagree with the  
22 less due process for a hearing.

23 EXAMINER PRICE: You think they are  
24 entitled to a hearing?

25 MS. HASBROOK: Well, no, but if it's set,

1 then everything -- then everything would fall into  
2 place in a due process manner.

3 EXAMINER PRICE: Do you think that in the  
4 DCR cases there is less scrutiny of the investments  
5 than there would be in a rate case?

6 MS. HASBROOK: No, no. I believe that  
7 they are equal.

8 EXAMINER PRICE: Do you believe there is  
9 less -- but you do think there is less opportunity  
10 for participation by other parties than in the  
11 distribution rate case.

12 MS. HASBROOK: Yes. And I believe that  
13 that's what the August 25, 2010, order was stressing.

14 EXAMINER PRICE: Well, the August 25,  
15 2010, order said ample rights of discovery.

16 MS. HASBROOK: When there is a  
17 proceeding.

18 EXAMINER PRICE: Well, we are in a  
19 proceeding. We've finished the audit phase. I think  
20 the -- but, now, we're into -- the audit has been  
21 filed. So I agree with you that they don't have a  
22 right to participate in the audit phase. But the  
23 audit has been filed, and, now, we are on to  
24 adjudicating whether the audit is proper so why would  
25 they have less rights than in any other case they

1 would have?

2 MS. HASBROOK: In the five years that  
3 this has been pending, a hearing schedule has never  
4 been set. It has never been turned into a proceeding  
5 as defined in the case that we cite. The 4901 case  
6 does help with that definition. So since that has  
7 never -- the Commission does not have a hearing  
8 schedule, has never opened a process here, a  
9 procedure, then -- then it's premature. It just has  
10 not come to that point. All we have right now is a  
11 filed audit which, by the way, was filed after this  
12 motion to compel -- or after the discovery was served  
13 upon us. So, yes, we do have an audit but there is  
14 no proceeding on that audit.

15 EXAMINER PRICE: How can they -- how can  
16 they meaningfully file comments on the audit report  
17 if you don't respond to their discovery requests? I  
18 mean, the purpose of having comments would be to  
19 decide whether or not to hold a hearing, right?

20 MS. HASBROOK: Well, it --

21 EXAMINER PRICE: And so how can they --  
22 how can they comment upon an audit report when they  
23 can't do any discovery regarding what's in the audit  
24 report?

25 MS. HASBROOK: Well, and that goes to the

1 alternative position. So our first position is that  
2 this is not a proceeding. But if it was found to be  
3 a proceeding, then the scope of the -- of the  
4 discovery was set forth in the -- in the  
5 determination as to how the participants could --  
6 could discover in the November -- November 14 entry  
7 and then the entry appointing Blue Ridge.

8 So in that case -- in that situation,  
9 they were limited to conclusions and findings of the  
10 audit report. So this would be a different case, and  
11 this was our offer to settle, that would be if the --  
12 if the questions had been worded of please provide  
13 all the backup information for this finding on page  
14 2, paragraph 6, but instead what we have is just this  
15 overbroad where it is not as expressly stated on the  
16 conclusions and findings.

17 EXAMINER PRICE: Well, one of the -- one  
18 of the discovery requests you claim is overly broad  
19 is simply a request to be served with all the  
20 discovery the staff served on you. Isn't it routine  
21 in Commission proceedings for the companies, and  
22 every other party, to serve upon all the parties to  
23 the proceeding all responses to all discovery  
24 requests? In the 30 -- 20, 30 years we've been doing  
25 this, hasn't that always been the practice?

1 MS. HASBROOK: That -- yes, that is  
2 for --

3 EXAMINER PRICE: How can that be overly  
4 broad if that's just normal Commission practice?

5 MS. HASBROOK: Well, our position as to  
6 what we would produce was based upon their -- their  
7 roles as nonsignatories. So that could be a  
8 negotiation point but at that point all -- all  
9 discussions at least fell through. And so it was  
10 also linked to many other much broader requests, as  
11 you well know. That was only one of them. We did  
12 produce the e-mails which is also something that we  
13 felt was the communications and would be -- could be  
14 discoverable if they were in the position of  
15 participants which that is our first statement, that  
16 they are not.

17 So I'm not disagreeing with you that that  
18 would be discoverable for -- or could be for a  
19 participant but, again, that circles back to our  
20 first argument that they are not a participant and  
21 they are not a signatory.

22 EXAMINER PRICE: This is our fourth or  
23 fifth audit proceeding or -- since we instituted the  
24 DCR and this is the first time the dispute has come  
25 up. Has the company responded to OCC discovery

1 requests in the past audit proceedings?

2 MS. HASBROOK: I would have to consult in  
3 order to honestly answer that question.

4 MR. KUMAR: Yes. Your Honor, we have --  
5 they have responded to our discovery requests in the  
6 past.

7 MS. HASBROOK: So -- and, I'm sorry, I  
8 missed what you said.

9 EXAMINER PRICE: He said "yes."

10 MS. HASBROOK: The answer is yes, but  
11 those were more tailored -- those were tailored in  
12 the manner that we're -- that the order is -- we're  
13 advocating.

14 EXAMINER PRICE: Your initial position is  
15 absolute that they have no right to discovery, but  
16 you responded in the past.

17 MS. HASBROOK: Well, and that's because  
18 of the August 25, 2010, order giving them ample  
19 rights to discovery when there is a proceeding and  
20 our belief that there is no proceeding.

21 EXAMINER PRICE: Mr. Kumar, you can have  
22 the last word.

23 MR. KUMAR: Well, first of all, your  
24 Honor, with regards to the fact that these are overly  
25 broad, these are the four standard discovery requests



1 that OCC makes in many audit cases with many  
2 companies. In fact, I made these same requests  
3 earlier this year in a case with Duke. And so --

4 EXAMINER PRICE: You can't hold Duke  
5 against them.

6 MR. KUMAR: I would argue that these are  
7 not overly broad. In fact, these are standard OCC  
8 discovery requests that we made -- we often make in  
9 these DCR and AEP's -- I believe we have made in the  
10 past AEP DIR. They may have differed from the  
11 specific requests we made in this past DCR case, but  
12 they are sort of standard, run-of-the-mill discovery  
13 that OCC does in many of the cases that we  
14 participate in before this proceeding.

15 Additionally, I think this is -- this is  
16 actually -- this circumstance is similar to a -- the  
17 company cites 4901.16 with regards to this motion to  
18 compel as well, and I think it's similar to a --  
19 very, very similar to a case that came up earlier  
20 this year with AEP, their fuel adjustment clause  
21 case.

22 EXAMINER PRICE: That is a public records  
23 request. We'll get to that shortly. Don't they make  
24 a good point though you have very limited rights in  
25 this proceeding up to the filing of the audit report?

1           MR. KUMAR: Your Honor, I think if you go  
2 back and look at the original second supplemental  
3 stipulation in the 10-388 case, the Commission set  
4 aside a very specific process for signatory parties  
5 to participate. It was like a 120-day timeline and  
6 specifically --

7           EXAMINER PRICE: That's what I said, up  
8 to the filing of the audit report.

9           MR. KUMAR: I think there may be some  
10 questions as to now that that process was set aside,  
11 I believe the 2012, 2013, and 2014 audits, I think,  
12 I'm not sure whether that process is still in place  
13 for I guess the 2015 audit because the Commission  
14 order never went that far. So I think it's possible  
15 that 2015 audit we may have more -- greater rights of  
16 discovery, but I would also concede that, you know,  
17 the audit report was filed months ago, and our  
18 discovery requests are still valid.

19           I would disagree that this is not a  
20 proceeding. I think that any case in front of the  
21 Commission that has a filed docket, is an open  
22 docket, is a proceeding regardless of whether there  
23 is a hearing or not.

24           EXAMINER PRICE: So I guess my question  
25 is are you looking for an expansive ruling saying you

1 have discovery rights prior to the filing of the  
2 audit report, or are you content with a discovery  
3 ruling that would give you discovery rights upon the  
4 filing of the audit report?

5 MR. KUMAR: I'm not sure that we're  
6 looking for an expansive ruling. However, the OCC  
7 may not concede that our discovery rights are  
8 limited -- are limited before the audit report is  
9 filed when we're simply asking for the same discovery  
10 requests, the same discovery that's being served by  
11 staff and the auditor just contemporaneously as is  
12 standard in any base rate proceeding, any proceeding  
13 where we're examining the capital costs that a  
14 company has incurred.

15 EXAMINER PRICE: And actually, Mr. Kumar,  
16 OCC's position is we shouldn't have these DCR  
17 mechanisms at all; isn't that correct?

18 MR. KUMAR: I believe the office has  
19 taken a --

20 EXAMINER PRICE: And your position is the  
21 audits are insufficient. We should just do this  
22 through distribution rate cases because of the  
23 difficulties in participating in these audits; is  
24 that correct?

25 MR. KUMAR: Yes, your Honor, that is

1 exactly the position that my office has articulated I  
2 believe in innumerable cases.

3 EXAMINER PRICE: Certainly FirstEnergy's  
4 ESP which was recently argued --

5 MR. KUMAR: Yes, your Honor.

6 EXAMINER PRICE: -- and lengthily argued  
7 by all of us.

8 MR. KUMAR: Ad nauseam.

9 EXAMINER PRICE: Ad nauseam, okay.

10 At this time OCC's motion to compel will  
11 be granted. The company is directed to respond to  
12 the discovery requests immediately. To the extent  
13 that the discovery requests implicate confidential  
14 information, the parties are directed to enter into  
15 confidentiality agreements. I would caution the  
16 parties this is not a time to be breaking new ground  
17 and new terms in these confidentiality agreements.  
18 As we just mentioned, we just had a lengthy ESP  
19 proceeding with very high levels of confidentiality.

20 There is no need to relitigate this. The  
21 parties will respond back to the Examiners within one  
22 week as to whether the confidentiality agreements  
23 have been entered into, and the companies are  
24 directed to respond to all nonconfidential discovery  
25 requests within that one-week period. You can

1 respond to anything that you have confidentiality  
2 information once you get the confidentiality  
3 agreements in place.

4 Any questions regarding that ruling?

5 MR. KUMAR: We have already sent  
6 FirstEnergy a protective agreement that we've signed  
7 with them in the past so.

8 EXAMINER PRICE: Okay. I would just like  
9 to point out that we do believe that it's clear the  
10 Commission intended in 10-388 that OCC and other  
11 nonsignatory parties have limited rights to -- or the  
12 extraordinary participation in the audit process up  
13 until the filing of the audit, but clearly the  
14 Commission when it said ample discovery was intending  
15 that there be discovery after the filing of the audit  
16 report.

17 MS. HASBROOK: Could I just have a  
18 clarification for future?

19 EXAMINER PRICE: Sure.

20 MS. HASBROOK: Is the -- is the ruling  
21 then affecting before audit reports are filed for --

22 EXAMINER PRICE: The ruling is that since  
23 the audit report is filed you need to respond to  
24 discovery.

25 MS. HASBROOK: That's because that's

1 where we are right now.

2 EXAMINER PRICE: Because that's where we  
3 are right now.

4 MS. HASBROOK: I understand.

5 EXAMINER PRICE: Okay. Then let's take  
6 up your motion for protective order.

7 MS. HASBROOK: Thank you. Well, our  
8 motion for protective order, of course, is based upon  
9 some of the same arguments, but it's also based upon  
10 and more heavily relying upon 4901.16. When we look  
11 at public records, of course, that is there were  
12 amendments 4905.05 and 4901.12 in 1996 that directly  
13 referred to 149.43 and Title 49 and that's when  
14 4901.16 was added and became very relevant whether it  
15 is a public record.

16 So our -- our position is that the  
17 information is not a public record, and if it was,  
18 there is a privilege established by 4901.16 that no  
19 employee or agent can divulge any information  
20 acquired by them in respect to any transaction for  
21 --for the utility. This is consistent with  
22 4901-1-24(G) that information submitted to staff but  
23 not filed with the docketing division does not  
24 constitute a public record.

25 It also coincides with -- with the ruling

1     that we just -- just had regarding a difference in  
2     treatment after the audit report is docketed and in  
3     regard to how it was before -- treated before. The  
4     Commission looked at 4901.16 in the context of  
5     4901-21-24(G) in that 49 -- in that -- In Re: Chapter  
6     4901-1/4901-3 case we cite in our motion where it  
7     sided with Ohio Edison and said that it was correct  
8     in stating that 4901.16 means a utility that submits  
9     confidential information may do so without first  
10    filing any protective order.

11                 EXAMINER PRICE: Isn't that a procedural  
12    issue just describing how routinely before the  
13    Commission when something is docketed, you have to  
14    file for protective order, but if you give something  
15    to the staff and it's stamped confidential, staff  
16    will not disclose it without giving you prior notice  
17    and an opportunity at that point to file a protective  
18    order, which I believe is what happened in this  
19    proceeding; isn't that correct, Mr. Beeler?

20                 MR. BEELER: Yes.

21                 EXAMINER PRICE: Thank you. I mean,  
22    that's more of a process question than a -- whether  
23    substantively something is protected from disclosure  
24    in the public records.

25                 Let's talk about that Ohio Power case

1 that Mr. Kumar touched on briefly. I'll let you have  
2 the firsts bite at that apple. Why -- ironically in  
3 that Ohio Power case the Attorney Examiners initially  
4 ruled that the material should not be disclosed and  
5 were overruled by the Commission on an interlocutory  
6 appeal. Why are my hands not tied by that Ohio Power  
7 case? Isn't this case virtually on all four corners  
8 with the Ohio Power case? The audit report has been  
9 filed.

10 MS. HASBROOK: It is not because, first  
11 of all, what is being requested is very different  
12 than the Ohio Power case. And what is being  
13 requested here is -- is not draft reports that were  
14 foundations for that report or -- or any information  
15 regarding -- that would otherwise be discoverable.  
16 It is -- it is a direct end run around really the  
17 statute where if you don't get it from the one  
18 source, then you'll get it from the staff. So what  
19 is -- it's the nature of what is being requested here  
20 that makes this so different and plus this is not  
21 a -- this is -- we do not believe this is a rate  
22 case. This is -- this is a rider. And so it is a  
23 different type of -- different type of proceeding as  
24 well.

25 EXAMINER PRICE: How is the information



1 different than in the -- I understand that it's --  
 2 that the AEP case primarily involved the draft audit  
 3 report and communications back and forth between the  
 4 staff and the company. How is the information  
 5 requested in this case any different?

6 MS. HASBROOK: Well, it's far broader. I  
 7 mean, it is asking for all of the -- all of the  
 8 material that was submitted underlying the entire  
 9 audit and -- and just everything between staff of  
 10 what flowed. So in that -- in this position it's not  
 11 to test any type of draft report, how did things  
 12 change, and why did they change. It's really just to  
 13 become the auditor themselves.

14 And 4901.16 doesn't make differentiations  
 15 on that. I would consider this to be, you know, a  
 16 privileged statute where you really are not required  
 17 to redact and parse through and see what information  
 18 is -- is, you know, may be -- may be troublesome.  
 19 It's everything that is going to the staff. So we  
 20 are -- we are under the belief that in exchanging it  
 21 in the first place we would be more open, more  
 22 candid. We are not going to put protective orders on  
 23 the --

24 EXAMINER PRICE: We expect you to be open  
 25 and candid all the time.

1 MS. HASBROOK: Well, of course, but there  
2 could be that procedure.

3 EXAMINER PRICE: With your regulator.

4 MS. HASBROOK: And we are not saying  
5 otherwise, but the procedure or protective order that  
6 you talked about before is -- is not something we  
7 utilized here. We don't want to slow the process  
8 down. And the draft report from the Ohio Power  
9 Company was the staff to the company also. It was  
10 not -- it was not the other way around. It wasn't  
11 the underlying data and information that the company  
12 was freely sharing with staff without any redactions  
13 and discussions, just handing it over in total  
14 reliance on 4901.16. I mean, the key is it's the  
15 company to staff and not the staff to the company.

16 EXAMINER PRICE: Well, actually in the  
17 AEP case it was company to staff communications, but  
18 it wasn't workpapers. It was just --

19 MS. HASBROOK: In the AEP case?

20 EXAMINER PRICE: In the AEP case.

21 MS. HASBROOK: The AEP case also has that  
22 phraseology it is very narrow and it is a very unique  
23 situation, and we certainly would highlight that when  
24 we move to the AEP case.

25 EXAMINER PRICE: Mr. Kumar.

MR. KUMAR: Well, of course, I would disagree with FirstEnergy's characterization. I think the -- actually the discovery requests and the public -- nature of the public records request we submitted in the AEP FAC case is actually very, very similar. In fact, we asked for all communications between the auditor and staff and the companies, and we asked for those draft audit reports. That's the -- pretty much the same thing we were asking for here.

Additionally --

EXAMINER PRICE: She says it's much broader, that you are asking for all the workpapers that the company -- and other documents the company gave to you. Does breadth matter, Mr. Kumar?

MR. KUMAR: I'm sorry, your Honor?

EXAMINER PRICE: Does -- if it's a public record, it's a public record or does the breadth of the request matter?

MR. KUMAR: Well, I would also disagree. I don't think the breadth of the request matters because I think public records requests are fundamentally under a different proceeding outside of the scope of discovery. In fact, I think there is a case from the Ohio Supreme Court Deilbert V Summit

1 County where an attorney sought public records or a  
2 federal audit report from a Summit County government  
3 that was relevant to federal litigation that that  
4 attorney was involved in. And the Supreme Court  
5 determined that -- of course, this is civil  
6 litigation, that a person may inspect a public  
7 record -- inspect a copy of public record as defined  
8 in Revised Code 49 -- 149.413 irrespective of his or  
9 her purpose for doing so.

10 And separately as a matter of public  
11 policy, if the intent is to use public records in  
12 litigation were relevant to their availability, the  
13 burden on government entities to ensure the  
14 records -- the requested records were not in any way  
15 connected to ongoing potential litigation would be  
16 exceedingly onerous.

17 So we don't believe this is an end run  
18 around discovery. We believe the public records  
19 request is entirely separate of the discovery  
20 process, but the Ohio Supreme Court has ruled that  
21 even if such a thing were to exist, that the public  
22 records request is an entirely separate cause of  
23 action.

24 With regards to FirstEnergy's claim that  
25 these records are protected under state law, I think

1 this case is just way too similar to what happened in  
 2 the Ohio Power FAC case. Under these specific -- and  
 3 I'm quoting the Commission's order here. Under these  
 4 specific circumstances where the draft audit report  
 5 has been provided to AEP Ohio for review, that's what  
 6 happened in this case, where the final audit report  
 7 has been presented to the Commission and filed in the  
 8 dockets, and our public records request was made  
 9 after the report was filed in the dockets, the  
 10 Commission finds that the release of the draft audit  
 11 report and related communications, and that's what we  
 12 are simply asking for here, those workpapers are  
 13 simply related communications that between -- that  
 14 are referenced in the audit report in that appendix  
 15 that I mentioned earlier. It's not inconsistent with  
 16 the purposes of Revised Code 4901.16. And so, you  
 17 know, I think that it's appropriate that the public  
 18 records request is -- should be granted.

19 EXAMINER PRICE: Final word.

20 MS. HASBROOK: Yes, yes. This -- this is  
 21 very different from what was -- what was requested in  
 22 Columbus -- in the AEP case and the Ohio Power.  
 23 First of all, you know, when we look at it, we're --  
 24 we're not just looking for communications. It's  
 25 every -- every document -- when you read 1 through 4,

every document that was given in the course of this audit is what is being requested. And so it is -- it is way broader than that. But we go back to the fact that what was requested in the AEP and Ohio Power case was the draft audit reports that -- and then the eventual report was filed, the final was filed with the docketing division, so that part was public.

Now, the Commission had to mean something when it made it clear that the decision to release a specific draft report here should not be construed as precedent for any other case. So that -- that is strong language. And 4901.16 has to mean something, and it is extremely clear that the staff shall not divulge information. A very specific, by the Commission's own statement, exception was made for a draft report that then became a filed and docketed report this year.

And we believe that this is not a precedential case that assists this in any way or advances it in any way.

EXAMINER PRICE: Thank you. As my colleague has pointed out, our interpretation of 4901.16 has been to preclude premature disclosure of information except through the established Commission processes and protect companies from people leaving

1 draft audit reports around -- laying around at  
2 cocktail parties or disclosing them for improper  
3 purposes.

4 I don't think that it is appropriate to  
5 distinguish between the breadth of the request or to  
6 make an argument that these workpapers which were  
7 communicated to the staff are any different than the  
8 related communications that Mr. Kumar points out.

9 Accordingly, the motion for protective  
10 order will be denied. FirstEnergy should respond  
11 to -- or staff, I'm sorry, my mistake. Staff should  
12 respond to the public records request within 10 days  
13 unless otherwise ordered by the Commission.

14 There is a question of confidential  
15 information. Do you have with you the redactions  
16 that you would make in the event that you believe  
17 certain of this information is confidential and for  
18 that reason not subject to the public records log?

19 MS. HASBROOK: We do not have the  
20 redactions.

21 EXAMINER PRICE: If you can provide those  
22 redactions to staff within 48 hours, by let's say  
23 noon on Friday, the staff can --

24 MS. HASBROOK: There's one file has  
25 hundreds of thousands of documents in it -- line

1 items, I'm sorry, line items, so it will be a  
2 monumental task to do these redactions in 48 hours.

3 EXAMINER PRICE: I think you should have  
4 had this done when you came to the conference. I  
5 think you are lucky you are getting 48 hours.  
6 However, we will make it Monday at noon. If your  
7 backup plan was this was confidential, you should  
8 have brought those -- should have been prepared to  
9 identify what's confidential while we were here so we  
10 could deal with it.

11 Provide that to the staff by Monday at  
12 noon. If the staff has any disputes, the attorney,  
13 as to what's been claimed confidential, the Examiners  
14 will review it in camera and issue a subsequent  
15 ruling after that.

16 Any questions?

17 MS. HASBROOK: No. Thank you.

18 EXAMINER PRICE: Seeing none, we're  
19 adjourned for the day. Thank you all.

20 (Thereupon, at 10:36 a.m., the hearing  
21 was adjourned.)

22 - - -



CERTIFICATE

I do hereby certify that the foregoing is  
a true and correct transcript of the proceedings  
taken by me in this matter on Wednesday, November 30,  
2016, and carefully compared with my original  
stenographic notes.

\_\_\_\_\_  
Karen Sue Gibson, Registered  
Merit Reporter.

(KSG-6278)

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

Summary: Transcript 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, hearing held on November 30, 2016. electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.