

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2017 Review of the Delivery)
Capital Recovery Rider of Ohio Edison Company,) Case No. 17-2009-EL-RDR
The Cleveland Electric Illuminating Company, and)
The Toledo Edison Company.)

**MEMORANDUM CONTRA OF OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND
THE TOLEDO EDISON COMPANY TO APPLICATION FOR REHEARING
FILED BY THE OFFICE OF THE OHIO CONSUMERS' C, OUNSEL**

INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") seeks to improperly, prematurely, and preemptively disrupt the normal Commission procedural rules by demanding the Commission revise its Entry issued December 6, 2017 ("Entry") selecting Blue Ridge Consulting Services, Inc. ("Blue Ridge") as its consultant in this proceeding, specifically to order the draft audit report to be provided to all intervening parties at the same time and that comments on the draft audit report(s) may be released to any intervening party that properly and timely requests the comments through discovery. Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively "Companies") urge the Commission to deny OCC's Application for Rehearing ("OCC App.") for at least four reasons.

First, OCC's request that the draft audit report be "provided to all intervening parties at the same time" is improper because it would obligate the Staff to disseminate its draft work product before its work is complete. The selection of Blue Ridge in response to the Request For Proposal ("RFP") requires the auditor to deliver a draft of its final audit report to Staff on a date

certain. There is no provision in the RFP or the Entry requiring the draft report to be provided to any third party. Changing the Entry to compel its production to every intervenor further would effectively serve as an improper automatic discovery request to Staff for its draft work product.

Second, OCC's request is premature because no draft audit report yet exists to be produced. The Entry makes clear that the Draft Report is due to Staff April 12, 2018. OCC's request is also premature because none of the circumstances OCC cites from other proceedings has occurred, such as a refusal to produce documents in response to discovery.¹ Even if such a scenario were to have occurred, the facts and circumstances from unrelated proceedings would need to be compared to determine their relevance to the instant proceeding.

Third, OCC's request is preemptive because it seeks to predetermine an outcome of the discovery process governed by long-standing well-known Commission rules. These rules spell out the procedural steps to follow in the event of a dispute over production of documents or other responses to discovery, again, none of which have not even occurred yet here. OCC effectively requests an advanced ruling on a Motion to Compel a response to discovery without following any of the other procedural steps required before a motion to compel may be granted, such as attempting to work out the issues.

Fourth, despite OCC's assertions, there has not yet been a determination that the draft audit report in this proceeding will be relevant to the issues to be decided by the Commission herein. Indeed, the Supreme Court of Ohio has ruled that draft audit reports are not probative in the sense of making the conclusions, results, and recommendations based on the underlying facts "more or less probable."² Such a determination by the Commission would be a necessary

¹ OCC App. p. 4.

² May 28, 2013 Opinion, Order, and Certificate, In the Matter of the Application of Champaign Wind, LLC., Case No. 12-160-EL-BGN, 2013 Ohio PUC LEXIS 110, at *26-28, affd, In the Matter of the Application of Champaign Wind, LLC., 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.2d 1142.

condition before a Motion to Compel would be granted, and should not become a de facto advisory opinion at this stage of this proceeding.

ARGUMENT

1. Ordering the draft audit report be provided to all intervenors at the same time results in improper discovery to Staff.

OCC's request that the Entry be modified to require the draft audit report be "provided to all intervening parties at the same time" is improper for several reasons. First, the Entry and the RFP previously approved make clear that the auditor selected to conduct the annual review of the Companies' Rider DCR must produce its draft audit report to Staff on or before April 12, 2018. A standing Order to require the auditor to provide its draft report to all intervenors at the same time it provides the draft report to Staff would force Staff to reveal its on-going work product even before reaching and filing any conclusions, results or ultimate recommendations. The Entry does not require this action because it would obligate the Staff to disseminate its draft work product before its work is complete. Widespread dissemination of its incomplete work product could hinder Staff in its effort to complete its investigation and provide its report in the public docket.

Second, a requirement for Staff to produce its draft audit report to all intervenors at the same time is no different than requiring Staff to respond to a standing discovery request to Staff to produce its draft report in a clear contradiction to the plain meaning of O.A.C. 4901-1-16(I). Currently, there is no requirement for Staff to provide its draft audit report to any other party, although in the past Staff has provided the draft audit report to the Companies to review for clerical and mathematical errors, as well as for inadvertently unredacted confidential

information. Further, if the audit report does include inadvertently unredacted confidential information, under what authority would OCC or other intervenors enter into a non-disclosure agreement with Staff to govern its treatment?³ OCC's request offers no guidance on how Staff should accomplish production of confidential information to intervenors, and the Commission should deny OCC's invitation to create discovery rights upon Staff.

2. OCC's request is premature because the draft audit report does not yet exist, and no correlated issues regarding its production have arisen in this proceeding.

OCC requests the Commission modify its Entry to require the draft audit report to be produced to "all intervening parties at the same time." Specifically, the OCC states "[t]he Entry failed to explicitly state that the draft audit report(s) shall be provided to all intervening parties and that comments on the draft audit report(s) are discoverable evidence." (OCC App. at p.1) However, there is no draft audit report in this proceeding at this time. At this stage of the proceeding, the draft audit report is simply one of the deliverables sought by the Commission, serving both to aid Staff in its direction to the auditor and in its preparation for the filing of the final audit report. No intervening parties⁴ are at this time required to be provided a copy of said draft report.⁵ The Commission need not modify its Entry to order all intervenors to be provided a copy at the same time in order to proceed with the audit.

³ Conversely, the Entry clearly establishes a process for dissemination of information pursuant to a public records request.

⁴ Arguably, the Companies are neither "intervenors" nor "intervening parties" in this proceeding—they are automatic parties as Applicants/Subjects. Clearly, no Motion to Intervene is required nor has ever been required in order for the Companies to participate in the annual review audit proceeding. As such, Staff voluntarily providing the draft audit report to the Companies would not trigger OCC's request that it be provided to "all intervening parties at the same time."

⁵ In response to OCC discovery Set 1,-RPD-5, the Companies noted that no such draft audit report exists at this time, but have not refused to produce.

Furthermore, OCC cites a pending case⁶ with another electric distribution utility as justification, in part, for its request in this proceeding. However, not only has the Commission not ruled on OCC's motion to compel in that case, the facts and circumstances therein cannot be analogized to this case because, in fact, no documents have been requested in discovery and, even if they had been, no documents exist to be produced. Even more outrageous, the other case explicitly cited by OCC as "legal precedent," for access to draft audit reports and related communications very explicitly is not to be considered legal precedent:

Further, AEP Ohio offers no grounds for protection of the documents other than RC. 4901.16. Accordingly, because AEP Ohio has failed to demonstrate that the designated information should be granted protective treatment under R.C. 4901.16, the Commission finds that the attorney examiner's January 8, 2016 Entry, which granted the Company's motion for protective order, should be reversed. However, the Commission notes that our decision in these proceedings is limited to the specific facts of these proceedings *and should not be construed as precedent in any other case.*⁷

Compounding this improper citing of the *Columbus Southern* case as legal precedent for its request herein, OCC fails to acknowledge that the request for the draft audit report cited above was made pursuant to a public records request, not through discovery. Thus, the ruling cited above dealt only with disclosure pursuant to the Public Records Act. The case is distinguishable, not analogous, and should not be cited for legal precedent in any event.

Simply put, OCC's request is premature until there is: 1) a draft report; 2) that has been requested in discovery; and 3) that has not been produced in discovery. The

⁶ *In the Matter of the Application of the Dayton Power and Light Company for an Increase in Electric Distribution Rates*, Case No. 15-1830-EL-AIR, OCC Motion to Compel Discovery Responses (October 31, 2017).

⁷ *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., Entry at Par. 18 (February 3, 2016) (emphasis added).

Commission should reject OCC's request unless or until circumstances are ripe for such a determination.

3. OCC's request seeks to preempt the Commission's discovery rules by pre-determining the outcome of a discovery request it intends to make.

While OCC cites to the Commission's discovery rules in support of its request, it fails to acknowledge a simple but fundamental fact: it and other parties still must properly submit discovery to another party before it must be produced. Embedded within this simple truism is the opportunity to raise numerous procedural, fact-based, and privileged objections to production of discovery available to a respondent. Requests that are vague and ambiguous in their terms, or overly broad and unduly burdensome in nature can require an interrogatory to be more accurately or narrowly constructed before a substantive response is compelled. Further, information that is not in the possession of the respondent cannot be produced, while requests that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence may also properly be denied. Finally, information that is protected by legal privilege, such as attorney work product in furtherance of litigation or attorney-client communications, enjoys a long-standing privilege against disclosure through discovery. A legal representative's due diligence demands the assertion of appropriate objections to discovery in litigation.

In addition to these basic legal principles of discovery, the Commission has rules that govern disputes over production of information in response to discovery, most specifically, Ohio Adm. Code 4901-1-23, "Motions to Compel Discovery." This rule covers when and how a discovery dispute is to be brought before the Commission for resolution through a motion to compel, and specifically requires the requesting party to affirm its efforts to resolve the

differences with the other party.⁸ In other words, even with all of the rights of discovery as cited by OCC, OCC is required to demonstrate resolution efforts before seeking to compel response.

OCC requests to be relieved in advance of its obligation to submit an appropriate discovery request to the appropriate party, seeks to deny the recipient's assertion of appropriate and lawful objections to its discovery, and seeks to cancel its obligation to undertake efforts to resolve any differences before filing a motion seeking to compel responses to discovery. Moreover, OCC cites not a single case in support where this Commission has ordered a complete bypass of these important procedural rights and obligations resulting in a predetermined compulsion of discovery. The Commission should reject OCC's request to preempt the normal discovery rules.

4. OCC has not demonstrated that the draft audit report is relevant to the issues that will be determined by the Commission in this proceeding.

Although OCC asserts various reasons why it believes the draft audit report is relevant in this proceeding, the Commission has made no such determination. OCC's argument, a scant few paragraphs and a citation to a non-precedential order regarding a public records request which did not even address relevance, can hardly be considered a fully-developed record upon which the Commission could base such a determination.

From a precedential perspective, the Commission has, in fact, previously ruled that draft Staff reports are not relevant to the Commission's determination of the issues based on the record before it. Confronted with an argument similar to OCC's in this case, that potential contradictions between draft and final versions of the Staff report may have probative value, the

⁸ O.A.C. 4901-1-23(C) (3) states: "An affidavit of counsel, or of the party seeking to compel discovery if such party is not represented by counsel, setting forth the efforts which have been made to resolve any differences with the party or person from whom discovery is sought."

Commission refused to admit the draft report into evidence.⁹ On appeal, the Supreme Court of Ohio agreed and rejected the Appellants' argument.¹⁰

OCC opines that comparing the draft and final versions of the audit report may reveal changes, which could be explored by intervenors to determine the reasons for those changes.¹¹ OCC goes on to assert that granting this premature, preemptive access to intervenors "will produce more informed comments from the intervenors, which will only help to develop a more complete and informed record for the PUCO."¹² While OCC's arguments may have bearing on disclosure pursuant to a public records request, they are unlikely to lead to admissible evidence in this proceeding. The Commission should deny OCC's request to predetermine the relevance of any draft audit report produced in this proceeding.

CONCLUSION

For all of the above-stated reasons the Commission should deny OCC's request to modify its Entry to require the draft audit report be provided to all intervening parties at the same time and to predetermine that all comments on the draft audit report are discoverable.

Respectfully submitted,

⁹ May 28, 2013 Opinion, Order, and Certificate, In the Matter of the Application of Champaign Wind, LLC., Case No. 12-160-EL-BGN, 2013 Ohio PUC LEXIS 110, at *26-28.

¹⁰ In the Matter of the Application of Champaign Wind, LLC., 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.2d 1142. ("Instead, the neighbors requested draft versions of documents based on the possibility that earlier drafts *may* have contradicted the final versions. The neighbors have failed to establish why potential contradictions between a draft and final version would be relevant to the board's consideration, which is based on the developer's final application. Accordingly, we reject this proposition of law.") (emphasis in original).

¹¹ OCC App. at 4.

¹² *Id.*

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CERTIFICATE OF SERVICE

I certify that the foregoing Memorandum Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Application for Rehearing Filed by the Office of Ohio Consumers' Counsel has been filed with the Commission's Docket Information System on January 17, 2018, and is available for all interested parties.

/s/ Robert M. Endris
*One of the Attorneys for Ohio Edison
Company, The Cleveland Electric Illuminating
Company and The Toledo Edison Company*

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Summary: Memorandum Memorandum Contra OCC's Application for Rehearing of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company electronically filed by Mr. Robert M. Endris on behalf of Endris, Robert Mr.