

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the :
Distribution Modernization Rider of : Case No. 17-2474-EL-RDR
Ohio Edison Company, The Cleveland :
Electric Illuminating Company, and :
The Toledo Edison Company. :

In the Matter of the Review of The :
Ohio Edison Company, The Cleveland : Case No. 17-974-EL-UNC
Electric Illuminating Company, and :
The Toledo Edison Company's :
Compliance with R.C. 4928.17 and the :
Ohio Adm. Code Chapter 4901:1-37. :

**MEMORANDUM CONTRA TO THE MOTION FOR
SUBPOENA DUCES TECUM TO DEPOSE AUDITOR
AND FOR WAIVER OF O.A.C. 4901-1-25(D)**

On December 10, 2021, the Office of the Ohio Consumers' Counsel ("OCC") filed a "Motion for A Subpoena Duces Tecum to PUCO Auditor Oxford Advisors to Attend and Give Testimony at a Deposition and Produce Related Documents Regarding FirstEnergy's Distribution Modernization Rider and Motion for a Waiver of O.A.C. 4901-1-25(D) (If Necessary)." The Staff of the Public Utilities Commission of Ohio ("Staff") opposes OCC's Motion for the reasons addressed herein.

Respectfully submitted,

Dave Yost
Ohio Attorney General

John Jones
Section Chief

/s/ Thomas G. Lindgren

Thomas G. Lindgren

Kyle L. Kern

Werner L. Margard

Assistant Attorneys General

Public Utilities Section

30 East Broad Street, 26th Floor

Columbus, Ohio 43215-3414

614.644. 8588 (telephone)

866.849.3176 (fax)

Thomas.Lindgren@OhioAGO.gov

Kyle.Kern@OhioAGO.gov

Werner.Margard@OhioAGO.gov

**On Behalf of the Staff of the
Public Utilities Commission of Ohio**

MEMORANDUM IN SUPPORT

On October 20, 2021, OCC filed a Motion for a Subpoena of the PUCO's Never-Filed "Final" Audit Report and Related Documents Regarding FirstEnergy's Infamous Distribution Modernization Rider and Motion for a Waiver of O.A.C. 4901-1-25(D) (If Necessary) in Case No. 17-2474-EL-RDR ("*DMR Case*"). That motion sought to subpoena a former auditor, Oxford Advisors, Inc. ("Oxford"), to produce a report that was neither completed nor filed. Staff opposed that motion, which is still pending.

On December 10, 2021, OCC filed the instant motion, seeking to conduct a discovery deposition of Oxford, and a waiver, if necessary, of the Commission rule barring discovery of Staff. In addition, OCC has also filed this Motion in Case No. 17-974-EL-UNC ("*Corporate Separation Case*"). As it argued in response to the earlier motion, Staff respectfully submits that the Commission's rules do not permit a subpoena either to compel appearance at a deposition, or the production of documents at such a deposition, by a Commission-selected auditor. Staff hereby incorporates its November 4, 2021 Memorandum Contra OCC's October 10th motion in the *DMR Case* by reference here in the *Corporate Separation Case* as if fully rewritten herein.

The underlying rationale remains the same. The Commission's rules do not permit discovery upon Staff. Ohio Adm.Code 4901-1-25(D) provides that "A subpoena may require a person, *other than a member of the commission staff*, to attend and give testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery set forth in rule 4901-1-16 of the

Administrative Code.” Ohio Adm.Code 4901-1-25(D) (emphasis added). The Commission Staff is explicitly exempted from this rule, and the auditor was operating as an extension of Staff.

In an Entry issued on December 13, 2017 in the *DMR Case*, the Commission directed Staff to issue a request for proposals for a third-party monitor *to assist Staff* in the review of Rider DMR. On January 24, 2018, the Commission issued an Entry selecting Oxford *to assist Staff* in its review. That Entry provided that “Oxford will execute its duties pursuant to the Commission's statutory authority to investigate and acquire records, contracts, reports, and other documentation under R.C, 4903.02, 4903.03, 4905.06, 4905.15, and 4905.16.” *DMR Case* (Entry at ¶10) (January 24, 2018). Oxford was thus operating as an extension of the Commission Staff and is entitled to the same exemption from discovery that applies to Staff. That exemption specifically applies to any requirement that Staff attend and give testimony at a deposition.

While OCC does not concede this exemption, the language of the Commission rule is clear. Consequently, OCC also seeks a waiver of that rule pursuant to Ohio Admin.Code 4901-1-38(B). A waiver, however, is neither proper nor appropriate in these circumstances.

Ohio Admin.Code 4901-1-38(B) provides that the Commission “may, upon its own motion or upon a motion filed by a party, waive any requirement of this chapter for good cause shown, other than a requirement mandated by statute from which no waiver is permitted.” Staff respectfully submits that the Staff exemption from discovery is not a “requirement” as contemplated by this rule, and is therefore not subject to this waiver

provision. There are certain things that the Commission, either by rule or pursuant to its statutory scheme, *requires* be done in order to carry out its responsibilities. While the subpoena rule, Ohio Admin.Code 4901-1-25(D), “require[s] a person . . . to attend and give testimony at a deposition,” that *requirement* does not apply to Staff. By its very terms, then, the Ohio Admin.Code 4901-1-38(B) waiver provision does not apply to the Ohio Admin.Code 4901-1-25(D) subpoena *exemption*.

Moreover, even should that provision apply, OCC has failed to demonstrate that “good cause” exists to *require* Staff to attend a discovery deposition in this, or any, matter before the Commission. Neither of its advanced rationale warrant granting a waiver of this fundamental protection.

OCC argues that, under R.C. 4903.082, parties must be given ample rights to discovery. By extension, it argues, Staff must also be subject to discovery.

The Commission’s rules provide ample rights of discovery. At the same time, the Commission must balance those rights against the integrity of its investigatory process. This process is equally protected by the statutory scheme, including R.C. 4901.16, which provides that “[e]xcept 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” (emphasis added).¹ The Commission’s rules recognize this important protection. In

¹ The Ohio Power Siting Board (“OPSB”) has properly denied discovery requests for drafts of Staff reports, whether made pursuant to R.C. 4903.082 or Civ.R. 26(B)(1). *In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case

addition to the specific exemption granted in the subpoena rule, Ohio Admin.Code 4901-1-16(I) specifies that the discovery rules “do not apply to the commission staff.” The Commission’s exemption of Staff from discovery does not violate R.C. 4903.082, but is consistent with the Commission’s statutory scheme and mandate.

OCC further argues that the Commission should uphold its previous order that “any conclusions, results, or recommendations formulated by Oxford Advisors may be examined by any participant to this proceeding.” This does not, however, mean that participants must be permitted to do so during *discovery*. That order, which did not waive the Commission’s rules, must be read in the context of those rules. And those rules preclude such examination during discovery. OCC seeks to compel the auditor to testify advance of any hearing, and that is improper under the Commission’s rules. OCC may well be entitled to its examination, but not in discovery.²

OCC offers no other basis to warrant a waiver, even if such a waiver would be proper under the Commission’s rules. Its sole rationale is “to have ample discovery for case preparation for the hearing.” That is merely a definition of the purpose of discovery, not “good cause” for waiving a fundamental exemption intended to afford Staff with an unfettered opportunity to conduct a thorough investigation.

No. 12-160-EL-BGN, Opinion, Order, and Certificate (May 28, 2013) at 11-12. By statute, OPSB procedures must follow those of the Commission. R.C. 4906.12.

² Staff has no intention of calling a representative of Oxford Advisors as its witness in this proceeding. Daymark Energy Advisors was selected by the Commission to perform the audit when it reopened this matter and it is unclear how Oxford Advisor’s midterm audit, which was more limited in scope, would have any relevance to the matter currently before the Commission.

For the reasons explained above, OCC's Motion should be denied. The Commission's rules do not permit a subpoena for a Commission-designated auditor to attend a deposition, nor do they permit a waiver of that exemption. Even were such a waiver permissible, and Staff reiterates that it is not, OCC has provided no rationale other than desiring to conduct discovery. It has certainly offered no good cause for ignoring an exemption so fundamental to its function and mission.

Respectfully submitted,

Dave Yost
Ohio Attorney General

John H. Jones
Section Chief

/s/ Thomas G. Lindgren

Thomas G. Lindgren

Kyle L. Kern

Werner L. Margard

Assistant Attorneys General

Public Utilities Section

30 East Broad Street, 26th Floor

Columbus, Ohio 43215-3414

614.644. 8588 (telephone)

866.849.3176 (fax)

Thomas.Lindgren@OhioAGO.gov

Kyle.Kern@OhioAGO.gov

Werner.Margard@OhioAGO.gov

**On Behalf of the Staff of the
Public Utilities Commission of Ohio**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Memorandum Contra to The Motion for Subpoena Duces Tecum to Depose Auditor and For Waiver of O.A.C. 4901-1-25(D)**, on behalf of the Staff of the Public Utilities Commission of Ohio, has been served upon the below-named counsel via electronic mail, this 27th day of December, 2021.

/s/ Thomas G. Lindgren

Thomas G. Lindgren
Assistant Attorney General

PARTIES OF RECORD:

17-974-EL-UNC

bethany.allen@igs.com
bknipe@firstenergycorp.com
bojko@carpenterlipps.com
ctavenor@theOEC.org
donadio@carpenterlipps.com
dstinson@bricker.com
evan.betterton@igs.com
fykes@whitt-sturtevant.com
gkrassen@bricker.com
iavalon@taftlaw.com
john.finnigan@occ.ohio.gov
joliker@igsenergy.com
kverhalen@taftlaw.com
maureen.willis@occ.ohio.gov
mdengler@jonesday.com
mfleisher@dickinsonwright.com
mleppla@theOEC.org

Mnugent@igsenergy.com
mpritchard@mcneeslaw.com
mrgladman@jonesday.com
mwise@mcdonaldhopkins.com
radoringo@jonesday.com
rdove@keglerbrown.com
tdougherty@theOEC.org
tlong@mcneeslaw.com
whitt@whitt-sturtevant.com
william.michael@occ.ohio.gov

Attorney Examiner:

Gregory.price@puco.ohio.gov
Megan.addison@puco.ohio.gov
Jacqueline.st.john.puco.ohio.gov

17-2474-EL-RDR

mkurtz@BKLawfirm.com
kboehm@BKLawfirm.com
jkylercohn@BKLawfirm.com
rdove@keglerbrown.com
Bojko@carpenterlipps.com
Donadio@carpenterlipps.com
bknipe@firstenergycorp.com
mrgladman@jonesday.com
mdengler@jonesday.com
radoringo@jonesday.com
sgoyal@jonesday.com
jlang@calfee.com
khehmeyer@calfee.com

mpritchard@mcneeslaw.com
rglover@mcneeslaw.com
mleppla@theoec.org
dparram@bricker.com
rmains@bricker.com
mfleisher@dickinsonwright.com
mwise@mcdonaldhopkins.com

Attorney Examiner:

Gregory.price@puco.ohio.gov
Megan.addison@puco.ohio.gov

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

12/27/2021 12:16:10 PM

in

Case No(s). 17-2474-EL-RDR, 17-0974-EL-UNC

Summary: Memorandum Contra to The Motion for Subpoena Duces Tecum to Depose Auditor and For Waiver of O.A.C. 4901-1-25(D) electronically filed by Mrs. Kimberly M. Naeder on behalf of PUCO