

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Mark A. Whitt,)	
)	
Complainant,)	
)	
v.)	Case No. 15-697-EL-CSS
)	
Nationwide Energy Partners, LLC,)	
)	
Respondent.)	

**MEMORANDUM CONTRA TO NATIONWIDE ENERGY PARTNERS, LLC’S
MOTION FOR A PROTECTIVE AGREEMENT
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION AND STATEMENT OF FACTS

The Office of the Ohio Consumers’ Counsel (“OCC”) intervened in this complaint case, on behalf of Ohio residential utility consumers. The complaint asserts, inter alia, that Nationwide Energy Partners, LLC (“NEP” or “the Company”) is unlawfully providing utility services at rates in excess of what would otherwise be charged by utilities or other service providers.

Mr. Whitt, the Complainant, served a first set of discovery on NEP to which the Company responded on June 5, 2015. In its responses, NEP repeatedly asserted that “information sought is proprietary and would require a suitable confidentiality agreement before it could be provided.”¹ According to NEP, “the parties reached an impasse” while trying to negotiate a confidentiality agreement.² NEP then filed a Motion for a Protective Agreement (“Motion”) on June 23, 2015 requesting “that the Attorney Examiner exercise

¹ NEP Response to Whitt INT-1.

² Motion for a Protective Agreement at 4 (June 23, 2015).

his authority in this proceeding to establish a reasonable and appropriate scope for the use of the confidential information that will be disclosed during this proceeding.”³ NEP further requested that the Attorney Examiner approve the confidentiality agreement attached to its Motion as Attachment A.⁴

In the meantime, OCC propounded its first set of discovery upon NEP on June 11, 2015. Anticipating that NEP would allege its responses to OCC discovery would also contain confidential information, OCC emailed NEP’s counsel to propose its own confidentiality agreement⁵ based upon the confidentiality agreement that was recently approved by the Public Utilities Commission of Ohio (“PUCO” or “the Commission”).⁶ NEP’s counsel responded that it “has already proposed a non-disclosure agreement for use in this proceeding,”⁷ and attached a document that is nearly identical to the confidentiality agreement at issue in this Motion.⁸ OCC responded by explaining that it could not agree to NEP’s proposed confidentiality agreement due to numerous issues, not the least of which pertained to public records concerns.⁹ NEP never responded to OCC’s July 2, 2015 email. In the meantime, NEP responded to OCC’s first set of discovery on July 2, 2015, refusing to answer certain interrogatories and requests to produce documents by asserting that they seek confidential information.

³ *Id.*

⁴ *Id.* at 4-5.

⁵ *See*, Attachment 1.

⁶ *See*, Attachment 2.

⁷ *See*, Attachment 1.

⁸ *See*, Attachment 3.

⁹ *See*, Attachment 1.

II. LAW AND ARGUMENT

NEP proposes to establish a one size fits all protective agreement in this proceeding that will govern alleged confidential information that has been sought in discovery by the Complainant and OCC.¹⁰ But, NEP's proposed confidentiality agreement does not adequately protect the unique interests of OCC. NEP also seeks to inappropriately impose limits on the parties' ability to use information obtained in this proceeding in other related cases. The PUCO should reject NEP's Motion. Instead, OCC requests that the PUCO establish a separate Protective Agreement for OCC to obtain alleged confidential information from NEP that recognizes OCC's unique obligations to the Ohio public regarding records and transparency.

A. The PUCO should not approve NEP's proposed confidentiality agreement, which fails to take into account numerous provisions that are required in order to adequately protect OCC's unique interests.

NEP's proposed confidentiality agreement is surprisingly thin and fails to address a number of concerns that are unique to OCC. Accordingly, OCC has attached as Attachment 2, a satisfactory protective agreement for the PUCO to adopt that pertains to OCC's unique needs as a public agency. Attachment 2 also reflects the prior agreements OCC has reached with numerous utilities after negotiating terms to the smallest detail. And Attachment 2 is a protective agreement that the PUCO has found to be just and

¹⁰ As indicated by the language of NEP's Motion seeking "a protective agreement that can be used for purposes of disclosing confidential information requested during discovery in this proceeding."

reasonable and has ordered parties to adopt on numerous occasions¹¹-- most recently in the Duke electric security plan proceeding.¹²

NEP's proposed confidentiality agreement fails to preserve OCC's right to dispute the designation of "confidential," despite that language existing in the confidentiality agreement that the Company proposed to Mr. Whitt. It has long been recognized by this Commission that the "the ultimate burden for demonstrating that information in a document warrants protective treatment is on the party who owns the allegedly confidential material."¹³ NEP's proposed confidentiality agreement arguably eviscerates this burden contrary to PUCO precedent. To the extent OCC could raise any objection to NEP's designation of confidentiality, it would be arguably diminished substantially.

Any opposition to NEP recovering damages and equitable relief will also be thwarted under NEP's proposed confidentiality agreement as well as where the parties "agree[] to indemnify and hold harmless the other Party . . . against any expenses, losses, damages or liabilities incurred by it or any of them as a result of the breach of this Agreement" and "that the Confidential Information is such that the other Party could not be compensated fully by money damages for breach of such Party's obligations

¹¹ See, *In re CG&E Post-MDP Service*, Case No. 03-93-EL-UNC et al., Entry at 4, ¶(9) (May 13, 2004); *In re: Columbus Southern Power Company*, Case No. 05-376-EL-UNC, Entry at ¶7 (July 21, 2005); *In re: Embarq*, Case No. 07-760-TP-BLS, Entry at ¶7 (Aug. 10, 2007).

¹² *In the matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, Entry at 5 (August 27, 2014).

¹³ *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order at 11 (March 24, 2014); *In the Matter of the Commission's Review of Chapters 4901-1, Rules of Practice and Procedure; 4901-3, Commission Meetings; 4901-9, Complaint Proceedings; and 4901:1- 1, Utility Tariffs and Underground Protection, of the Ohio Administrative Code, In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of Alternate Form of Regulation and for a Threshold Increase in Rates*, Case No. 11-776-AU-ORD, Finding and Order at 6 (January 22, 2014); Case No. 93-432-TP-ALT, 1993 Ohio PUC LEXIS 1157 at *3 (December 22, 1993).

hereunder.”¹⁴ This language appears to impose some sort of strict liability upon OCC in the event there is disclosure. Such language is contrary to the burden of proof that is borne by NEP to establish that any confidential information should be protected.

NEP’s proposed confidentiality agreement also fails to recognize many other intricacies that have been ironed out over the years such as proper handling of public records requests and related indemnification. OCC is a state agency that is differently situated than other parties, including the Complainant. OCC’s unique status as a state agency requires a protective agreement that acknowledges its duties and responsibilities regarding records and transparency under Ohio law. Attachment 2 is an OCC-tailored protective agreement that OCC presented to NEP on July 1, 2015. OCC’s proposed protective agreement is designed to address the legal requirements placed on the OCC as a public agency and designed to address a rational, fair basis for document protection. The OCC is the only party to this case that is public in nature; therefore, any protective agreement approved by this Commission must address public records issues accordingly.

While NEP’s proposed protective agreement is silent to public records, OCC’s proposed protective agreement recognizes that it could receive public records requests seeking information provided by NEP in this case.¹⁵ OCC’s proposed protective agreement also addresses the OCC’s legal obligation to comply with records retention requirements that have been approved by the Ohio Department of Administrative Services.¹⁶ Finally, OCC’s proposed protective agreement recognizes OCC’s need, as a

¹⁴ Attachment 3 at p. 2.

¹⁵ Attachment 2 at ¶¶13, 14.

¹⁶ Attachment 2 at ¶16.

public agency, to have transparency in the proceedings of government that affect Ohioans.

The protective agreement offered by the OCC had its beginnings in 2003 after extensive research and consultation with the Attorney General's Office. Versions of agreements that recognize the public nature of the OCC have been used in various cases before the Commission. Parties executing similar agreements with the OCC include AEP Ohio, Columbia Gas, CG&E, Dayton Power & Light, FirstEnergy, and SBC Ohio.¹⁷

The OCC is willing to execute its attached and time-honored protective agreement that recognizes the legal responsibilities of the OCC as a public office. The OCC will treat NEP's documents with the appropriate care under the protective agreement. There is nothing in the present case that is more compelling or distinctive that warrants treatment different than that which has satisfied numerous Ohio utilities.

B. The PUCO should not approve NEP's proposed confidentiality agreement, which limits the use of confidential information in future related proceedings.

NEP filed its Motion after refusing to enter into a confidentiality agreement that allowed parties to use the discovery received in this case in other proceedings.¹⁸ In its Motion, NEP argues that a confidentiality agreement allowing "discovery, in effect, to be used in some unknown future proceeding(s)" is "unjust and unreasonable," on its face.¹⁹ Subsequently, OCC proposed its own confidentiality agreement that NEP has refused to sign. Presumably, NEP is unwilling to accept the language of OCC's confidentiality

¹⁷ See, e.g., *In re: Columbus Southern Power Company*, Case No. 05-376-EL-UNC, Entry at ¶7 (July 21, 2005); see also *In re: Embargo*, Case No. 07-760-TP-BLS, Entry at ¶7 (Aug. 10, 2007); *In re CG&E Post-MDP Service*, Case No. 03-93-EL-UNC et al., Entry at 4, ¶ (May 13, 2004); *In re SBC/AT&T Merger*, Case No. 05-269-TP-ACO; also *In re Verizon/MCI Merger*, Case No. 05-497-TP-ACO.

¹⁸ Motion for a Protective Agreement at 3, Attachment A (June 23, 2015)

¹⁹ *Id.* at 4.

agreement, which permits discovery to be used in “the above-captioned case(s), including any appeals, remands and other cases related thereto.”²⁰ Contrary to NEP’s assertions in its Motion, however, the PUCO has approved confidentiality agreements that do not limit the use of confidential information for other cases over specific similar objections.

In Duke Energy Ohio, Inc.’s fourth electric security plan (“Duke ESP IV”), the PUCO adopted *the same confidentiality agreement* that OCC has proposed to use in this case. In that case, Duke Energy Ohio, Inc. (“Duke”) filed a Motion for Protective Order recommending that the PUCO adopt a confidentiality agreement that it attached to its Motion. That confidentiality agreement specifically provided that “if the recipient [of confidential information] attempts to use the confidential information in any proceeding before the Commission or any other court, the recipient will not oppose Duke’s motion to strike the use of the information and the recipient shall reimburse Duke for any costs it incurs in defending such confidentiality.”²¹ In its Memorandum Contra, OCC proposed its own confidentiality agreement, with the language asserted above – allowing protected materials to be used in conjunction with this proceeding and any cases related thereto.²²

The PUCO found that OCC’s proposed confidentiality agreement attached to its memorandum contra “is more reasonable, consistent with our past cases and precedent,

²⁰ See, Attachment 2 at p. 2.

²¹ *In the matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, Entry at 2 (August 27, 2014).

²² *In the matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, Memorandum Contra Duke Energy Ohio Inc.’s Motion for Protective Order by the Office of the Ohio Consumers’ Counsel, at Exhibit 1 p. 2 (July 14, 2014).

and contains the language needed to sufficiently protect Duke’s interests.”²³ Specifically, the PUCO made note that OCC’s proposed confidentiality agreement contains provisions that:

- ensure recipients do not disclose confidential information and are bound by the confidential agreement, even if they are no longer engaged in the proceeding;
- require recipients to provide notice to Duke if they desire to use the protected material other than in a manner provided for in the confidential agreement;
- and, if OCC receives a public records request for protected materials, OCC is required to provide Duke notice to enable Duke to file a pleading before a court of competent jurisdiction.²⁴

The PUCO also considered the fact that “in the event of a breach of the agreement [proposed by OCC], Duke may pursue all remedies available by law.”²⁵ In so ruling, the PUCO required the parties to execute OCC’s proposed protective agreement.²⁶ And in the underlying holding that the PUCO upheld in part, the Attorney Examiner found that “there’s always information that is needed for the client in subsequent cases referring to previous cases,” such that the parties should not be required to give up their rights to

²³ *In the matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, Entry at 5 (August 27, 2014).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

possibly use confidential information in future cases.²⁷ To that point, the Attorney Examiner also acknowledged that the confidentiality agreement would still afford the utility the ability to contest the use of the confidential information in the future proceeding.²⁸

OCC has proposed that NEP execute the exact same agreement in this matter, but NEP has refused this notion and instead proposed its own confidentiality agreement. NEP's proposed confidentiality agreement limits the use of confidential information such that "[e]ach Party agrees to use the Confidential Information *only for the purpose of PUCO Case No. 15-697-EL-CSS*."²⁹ NEP's confidentiality agreement, however, directly contradicts the holding in the Duke ESP IV case. And much like the confidentiality agreement in the Duke ESP IV case, OCC's proposed confidentiality agreement does not foreclose NEP from raising its objections to OCC using the confidential information in subsequent matters. The limited use of discovery information set forth in NEP's proposed confidentiality agreement is not in line with the long standing principles of the PUCO, and should be rejected accordingly.

²⁷ *In the matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, Transcript at 49 (August 14, 2014).

²⁸ *Id.* at 51.

²⁹ *See*, Attachment 3 at p. 1 (emphasis added). NEP's proposed confidentiality agreement also provides that "[e]ach Party further understands that it may not discuss, characterize, rely upon, and/or introduce into evidence the Confidential Information in any proceeding before the PUCO or any other state or federal administrative agency or court."

III. CONCLUSION

Consistent with past practices of this Commission, OCC requests that the PUCO deny NEP's Motion for a Protective Agreement and exercise its authority to adopt the confidentiality agreement set forth in Attachment 2.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Michael J. Schuler

Michael J. Schuler (0082390)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone Schuler: (614) 466-9547
michael.schuler@occ.ohio.gov
(Will accept service via email)

/s/ Kimberly W. Bojko

Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Bojko@carpenterlipps.com
(Will accept service via email)

*Outside Counsel for the Office of the Ohio
Consumers' Counsel*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on July 8, 2015.

/s/ Michael J. Schuler

Michael J. Schuler
Assistant Consumers' Counsel

SERVICE LIST

William.wright@puc.state.oh.us
mhpetricoff@vorys.com
cmooney@ohiopartners.org
fdarr@mwncmh.com
mpritchard@mwncmh.com
sam@mwncmh.com

whitt@whitt-sturtevant.com
stnourse@aep.com
mjsatterwhite@aep.com
msmckenzie@aep.com

Attorney Examiner:

Bryce.mckenney@puc.state.oh.us

Schuler, Michael

From: Schuler, Michael
Sent: Thursday, July 02, 2015 5:16 PM
To: 'Petrucchi, Gretchen L.'; Kimberly W. Bojko
Cc: Petricoff, M. Howard; Howard, Stephen M.
Subject: RE: Whitt v. NEP 15-697-EL-CSS - Confidentiality Agreement

Gretchen,

As a public agency, we are not able to agree to the confidentiality agreement that you have circulated. As you saw in the confidentiality agreement that I sent yesterday, there are a number of public records provisions (among other substantive provisions) that we have worked out over the years. Rather than try to add and delete all of the specific provisions based upon your proposed agreement, we believe it is best to use the confidentiality agreement we have circulated, which was approved and adopted in the Duke ESP Case No. 14-841-EL-SSO. Please advise if you will sign and execute the agreement that I sent yesterday.

Sincerely,

Mike

Michael J. Schuler

Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
(614)466-9547 (direct)
(614)466-9475 (fax)
michael.schuler@occ.ohio.gov

From: Petrucci, Gretchen L. [<mailto:glpetrucci@vorys.com>]
Sent: Wednesday, July 01, 2015 6:08 PM
To: Schuler, Michael; Kimberly W. Bojko
Cc: Petricoff, M. Howard; Howard, Stephen M.
Subject: RE: Whitt v. NEP 15-697-EL-CSS - Confidentiality Agreement

Mike, we have already proposed a non-disclosure agreement for use in this proceeding. A copy of it is attached. Please review and, if acceptable, sign and return to us. We will then sign it and send you a fully executed copy.

Gretchen



Gretchen L. Petrucci
Senior Attorney

Vorys, Sater, Seymour and Pease LLP
52 East Gay Street | Columbus, Ohio 43215

Direct: 614.464.5407

Fax: 614.719.4793

Email: glpetrucci@vorys.com

www.vorys.com

From: Michael.Schuler@occ.ohio.gov [<mailto:Michael.Schuler@occ.ohio.gov>]

Sent: Wednesday, July 01, 2015 10:44 AM

To: Petricoff, M. Howard; Petrucci, Gretchen L.; Howard, Stephen M.

Cc: Kimberly W. Bojko

Subject: Whitt v. NEP 15-697-EL-CSS - Confidentiality Agreement

Howard,

Based upon the NEP's responses to Mr. Whitt's first set of discovery, I'm assuming that we will also need to enter into a confidentiality agreement for the discovery responses that are due today. Attached to this email you'll find our proposed confidentiality agreement, which is taken directly from the confidentiality agreement that was approved by the PUCO in Case No. 14-841-EL-SSO. After you have signed and returned the document, I will finalize execution and email you a copy of the fully executed confidentiality agreement.

Sincerely,

Mike

Michael J. Schuler

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215

(614)466-9547 (direct)

(614)466-9475 (fax)

michael.schuler@occ.ohio.gov

From the law offices of Vorys, Sater, Seymour and Pease LLP.

CONFIDENTIALITY NOTICE: This e-mail message may contain confidential and/or privileged material. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. If you are the intended recipient but do not wish to receive communications through this medium, please so advise the sender immediately.

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Mark A. Whitt,)	
)	
Complainant,)	
)	
v.)	
)	Case No. 15-697-EL-CSS
Nationwide Energy Partners, LLC,)	
)	
Respondent.)	

PROTECTIVE AGREEMENT

This Protective Agreement ("Agreement") is entered into by and between **Nationwide Energy Partners, LLC** ("Company") and the Office of the Ohio Consumers' Counsel ("OCC") (collectively, "the Parties"). This Agreement is designed to facilitate and expedite the exchange with OCC of all information in the discovery process in this proceeding, as this "Proceeding" is defined herein. It reflects agreement between the Company and OCC as to the manner in which "Protected Materials," as defined herein, are to be treated. This Agreement is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials.

1. The purpose of this Agreement is to permit prompt access to and review of such Protected Materials in a controlled manner that will allow their use for the purposes of this Proceeding while protecting such data from disclosure to non-participants, without a prior ruling by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection.

2. "Proceeding" as used throughout this document means the above-captioned case(s), including any appeals, remands and other cases related thereto.

3. "Protected Materials" means documents and information furnished subject to the terms of this Agreement and so designated by the Company by conspicuously marking each document or written response as confidential. Protected Materials do not include any information or documents contained in the public files of any state or federal administrative agency or court and do not include documents or information which at, or prior to, commencement of this Proceeding, is or was otherwise in the public domain, or which enters into the public domain.

4. Protected Materials provided in the context of this Proceeding will be provided to OCC for use by OCC in conjunction with this Proceeding. Nothing in this Agreement precludes the use of any portion of the Protected Materials that becomes part of the public record or enters into the public domain. Nothing in this Agreement precludes OCC from filing Protected Materials under seal or otherwise using Protected Material in ways, such as *in camera* proceedings, that do not disclose Protected Materials.

5. As used in this Agreement, the term "Authorized Representative" includes OCC's counsel of record in this Proceeding and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by OCC and engaged in this Proceeding.

6. Access to Protected Materials is permitted to OCC's Authorized Representatives who are either a signatory to this Agreement or who have executed a Non-Disclosure Certificate in the form attached hereto as Exhibit A prior to any access. OCC must treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom as proprietary and confidential, and will safeguard such Protected Materials, copies thereof, information contained therein, and writings made therefrom so as to prevent voluntary disclosure to any persons other than OCC's Authorized

Representatives.

7. If any OCC Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person will be terminated immediately and such person must promptly return Protected Materials in his or her possession to another Authorized Representative of OCC and if there is no such Authorized Representative, such person must treat such Protected Materials in the manner set forth in Paragraph 16 hereof as if this Proceeding herein had been concluded. Any person who has signed the foregoing Non-Disclosure Certificate will continue to be bound by the provisions of this Agreement even if no longer so engaged.

8. In this proceeding, OCC may disclose Protected Materials or writings regarding their contents to any individual or entity that is in possession of said Protected Materials or to any individual or entity that is bound by a Protective Agreement or Order with respect to the Protected Materials. OCC may also disclose Protected Materials to employees or persons working for or representing the Public Utilities Commission of Ohio in connection with this Proceeding.

9. OCC may file Protected Materials under seal in this Proceeding whether or not OCC seeks a ruling that the Protected Materials should be in the public domain. If OCC desires to include, utilize, refer, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, then OCC must first give notice (as provided in Paragraph 15) to the Company, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Company will have five (5) business days after service of OCC's notice to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion must set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that

would result from the disclosure of such information. If the Company does not file such a motion within five (5) business days of OCC's service of the notice, then the Protected Materials will be deemed non-confidential and not subject to this Agreement.

10. The Parties agree to seek *in camera* proceedings by the administrative agency of competent jurisdiction or court of competent jurisdiction for arguments or for the examination of a witness that would disclose Protected Materials. Such *in camera* proceedings will be open only to the Parties, their counsel, other OCC Authorized Representatives, and others authorized by the administrative agency or court to be present; however, characterizations of the Protected Materials that do not disclose the Protected Materials may be used in public.

11. Any portion of the Protected Materials that the administrative agency of competent jurisdiction or court of competent jurisdiction has deemed to be protected and that is filed in this Proceeding will be filed in sealed confidential envelopes or other appropriate containers sealed from the public record.

12. It is expressly understood that upon a filing made in accordance with Paragraph 9 or Paragraph 13 of this Agreement, the burden will be upon the Company to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

13. OCC will give the Company notice (as provided in Paragraph 15) if OCC receives a public records request for Protected Materials. The Company will have five (5) business days after service of OCC's notice to file a pleading before a court of competent jurisdiction to prevent disclosure of the Protected Materials in question. If the Company files such a pleading, OCC will continue to protect the Protected Materials as required by this Agreement pending an order of the court. If the Company does not file at a court of competent jurisdiction within five (5) business days of service of OCC's notice, then such Protected Materials can be deemed by OCC to be non-confidential, not a trade

secret and not subject to this Agreement. Alternatively, the Company may provide notice to OCC that the Protected Materials may be disclosed in response to a public records request.

14. If, under Ohio's public records law, a court awards a relator or person or party attorney's fees or statutory damages or court costs in connection with OCC's non-disclosure or delayed disclosure of Protected Materials, then the Company will pay such awarded fees, statutory damages, and/or court costs to the relator or person or party so that the State of Ohio, OCC and OCC's employees and officials are held harmless.

15. All notices referenced in Paragraphs 9 and 13 must be served by the Parties on each other by one of the following methods: (1) sending the notice to such counsel of record herein via e-mail; (2) hand-delivering the notice to such counsel in person at any location; or (3) sending the notice by an overnight delivery service to such counsel.

16. Once OCC has complied with its records retention schedule(s) pertaining to the retention of the Protected Materials and OCC determines that it has no further legal obligation to retain the Protected Materials and this Proceeding (including all appeals and remands) is concluded, OCC must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal. OCC may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross-examination, transcripts, briefs and work product pertaining to such information and will maintain that copy as provided in this Agreement.

17. By entering into this Protective Agreement, OCC does not waive any right that it may have to dispute the Company's determination regarding any material identified as confidential by the Company and to pursue those remedies that may be available to OCC before an administrative agency or court of competent jurisdiction. Nothing in this Agreement precludes OCC from filing a motion to compel.

18. By entering into this Protective Agreement, the Company does not waive any right it may have to object to the discovery of confidential material on grounds other than confidentiality and to pursue those remedies that may be available to the Company before the administrative agency of competent jurisdiction or court of competent jurisdiction.

19. This Agreement represents the entire understanding of the Parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement is valid, unless in writing signed by both Parties. Nothing in this Agreement should be construed as a waiver of sovereign immunity by OCC.

20. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

Nationwide Energy Partners, LLC
By:

Office of the Ohio Consumers' Counsel
By:

Counsel

Counsel

Date

Date

Exhibit A

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Mark A. Whitt,)	
)	
Complainant,)	
)	
v.)	
)	Case No. 15-697-EL-CSS
Nationwide Energy Partners, LLC,)	
)	
Respondent.)	

NON-DISCLOSURE CERTIFICATE

I certify my understanding that Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed ____ 200_, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from protected materials will not be voluntarily disclosed to anyone other than in accordance with the Protective Agreement and will be used only for the purposes of this Proceeding as defined in paragraph two of the Protective Agreement.

Name: _____

Company: _____

Address: _____

Telephone: _____

MUTUAL NON-DISCLOSURE AGREEMENT

This Mutual Non-Disclosure Agreement ("Agreement") is made by and between the Office of the Ohio Consumers' Counsel ("OCC") and Nationwide Energy Partners, LLC ("NEP") to facilitate and expedite the reciprocal disclosure of Confidential Information between the OCC and NEP ("Parties") for purposes of litigating and conducting discovery in PUCO Case No. 15-697-EL-CSS and for purposes of engaging in confidential discussions exploring settlement of some or all of the issues to be presented in the PUCO Case No. 15-697-EL-CSS. This Agreement shall be effective as of the date on which it is signed by both Parties.

WHEREAS the documents and information to be shared pursuant to this process is regarded by the producing Parties as valuable;

THEREFORE, the Parties agree as follows:

1. Definition of Confidential Information. As used herein, "Confidential Information" shall mean any information marked "Confidential" and disclosed during discovery and/or settlement discussions by one Party, its employees, agents, or representatives to the other Party, its employees, agents, or representatives after the date hereof, whether such disclosure be directly or indirectly, in writing, orally, by visual inspection, or otherwise. "Confidential Information" shall not include any: (A) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Agreement or another such agreement; (B) information or document contained in the files of any state or federal administrative agency or court, unless the information or document has been determined to be protected by such agency or court; or (C) other information or documents subsequently obtained through discovery as part of the PUCO proceeding concerning Mark A. Whitt's Complaint in Case No. 15-697-EL-CSS (though confidential information or documents provided through discovery may be subject to the terms of a separate protective agreement).

2. Non-Disclosure and Use Restrictions. Each Party agrees to use the Confidential Information only for the purpose of PUCO Case No. 15-697-EL-CSS. Except when required by a court or regulatory agency, neither Party will distribute, share or disseminate any Confidential Information to any person or entity that is not retained as their respective consultant or their respective witness in PUCO Case No. 15-697-EL-CSS. Neither Party may use the other Party's Confidential Information to give any person any commercial advantage. Each Party understands that it must hold in confidence and protect the Confidential Information from disclosure to and/or use by any third party. All Confidential Information shall be maintained in a secure place. Each Party understands that it may not write down, record, or reproduce the Confidential Information. Each Party further understands that it may not discuss, characterize, rely upon, and/or introduce into evidence the Confidential Information in any proceeding before the PUCO or any other state or federal administrative agency or court. Prior to a Party distributing, sharing or disseminating any Confidential Information to a retained consultant or witness in PUCO Case No. 15-697-EL-CSS, that Party shall require its consultants or witnesses to review and sign the attached Acknowledgement to this Agreement and provide a copy to the other Party.

3. Return or Destruction of Confidential Information. Following the final disposition of the Complaint in Case No. 15-697-EL-CSS, upon request by the producing Party, any Confidential Information furnished pursuant to this Agreement must be destroyed or returned to the producing party within fifteen days of such request.

4. Rights and Remedies Upon Breach. Each Party agrees to promptly advise the other in writing of any breach of this Agreement which may come to their attention. Each Party acknowledges that the Confidential Information is such that the other Party could not be compensated fully by money damages for breach of such Party's obligations hereunder. In the event of such breach, in addition to any other rights or remedies available at law or equity, the other Party shall be entitled to seek such equitable relief as is appropriate, including, without limitation, an injunction to be issued by any court of competent jurisdiction enjoining and restraining such Party or any person to whom such Party has disclosed such Confidential Information, from committing any breach of its obligations hereunder. Each Party further agrees to indemnify and hold harmless the other Party and its employees, agents, representatives and affiliates against any expenses, losses, damages or liabilities incurred by it or any of them as a result of the breach of this Agreement by such Party, its officers, directors, employees, agents, representatives or consultants. Each Party also agrees to reimburse the other Party and its employees, agents or representatives for any legal and other expenses incurred by any of them in connection with any such breach.

5. Miscellaneous.

a. This Agreement shall be governed by the laws of the State of Ohio, without regards to the principles of conflicts of laws thereof.

b. No failure or delay by either party in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial waiver thereof preclude any other exercise of any other right, power or privilege hereunder.

c. In the event that any provision of this Agreement, or any portion thereof, is determined by competent judicial, legislative, or administrative authority to be prohibited by law, then such provision or portion thereof shall be ineffective only to the extent of such prohibition, without invalidating the remaining provisions of this Agreement.

d. This Agreement contains the full and complete understanding of the Parties with respect to the subject matter hereof, and supersedes all prior representations and understandings, whether oral or written.

e. This Agreement shall be binding on the Parties hereto and their respective officers, directors, agents, employees, successors and assigns.

f. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the dates set forth below:

On behalf of the Office of the Consumers' Counsel

Date: _____

Nationwide Energy Partners, LLC

Date: _____

ACKNOWLEDGEMENT

The undersigned, retained as a witness or consultant by the Complainant or the Respondent in Case No. 15-697-EL-CSS, acknowledges that he/she has read the foregoing Mutual Non-Disclosure Agreement and agrees to abide by its terms and conditions.

Signature

Date

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

7/8/2015 4:07:07 PM

in

Case No(s). 15-0697-EL-CSS

Summary: Memorandum Memorandum Contra to Nationwide Energy Partners, LLC's Motion for a Protective Agreement by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Schuler, Michael J.