

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Mark A. Whitt,

Complainant,

v.

Nationwide Energy Partners, LLC,

Respondent.

Case No. 15-697-EL-CSS

**NATIONWIDE ENERGY PARTNERS, LLC'S REPLY
TO THE OHIO CONSUMERS' COUNSEL'S MEMORANDUM CONTRA
REGARDING NATIONWIDE ENERGY PARTNERS, LLC'S
MOTION FOR A PROTECTIVE AGREEMENT**

I. Introduction

Nationwide Energy Partners, LLC ("NEP") hereby responds to the July 8, 2015 Memorandum Contra filed by the Ohio Consumers' Counsel ("OCC") wherein OCC opposed NEP's motion for a protective agreement, which was filed on June 23, 2015. OCC's opposition is premised on a claim that NEP's proposed non-disclosure agreement must be rejected because it is not OCC's preferred non-disclosure agreement. In other words, only OCC's agreement is best for this proceeding because OCC's non-disclosure agreement has been used in other proceedings at the Public Utilities Commission of Ohio ("Commission").

OCC's arguments should be rejected. NEP's motion never stated that NEP's non-disclosure agreement is what must apply in toto to OCC. NEP and OCC had not even begun discussing a non-disclosure agreement at the time NEP's motion was filed. In addition, while OCC outlined some of the discussions that have taken place in the first two weeks of July between it and NEP, OCC completely ignores that NEP and OCC are still in the process of

discussing non-disclosure terms. No impasse exists at this time with OCC. Thus, it is improper for OCC to interject its preferred agreement and request, in a memorandum contra, a Commission ruling requiring its use. Moreover, OCC's preferred agreement is not a non-disclosure agreement for use in all Commission proceedings, or even reasonable when NEP is not a Commission-regulated entity. Lastly, OCC's has basically conceded one major issue it takes with NEP's proposed non-disclosure agreement because OCC agrees that confidential information disclosed will be for use by OCC in conjunction with this proceeding.

II. NEP's motion for a protective agreement is for the establishment of an agreement with the Complainant.

NEP asked the Commission to establish a protective agreement after discussions with the Complainant reached an impasse over one provision.¹ Those discussions did not involve OCC – in fact, discussions about a non-disclosure agreement with OCC did not even commence until weeks later.² NEP and the Complainant have agreed on nearly every aspect of the non-disclosure agreement as between them, including that they agree “to use the Confidential Information only for the purpose of PUCO Case No. 15-697-EL-CSS.”³ As to the one provision in their dispute, the Complainant claims that it is improper for the non-disclosure agreement to further reflect that any filing of such Confidential Information be only filed in Case No. 15-697-EL-CSS. OCC is attempting to interject a host of other issues when they are not involved, ripe, or necessary.

¹ The impasse involves the last sentence of paragraph 2 of the proposed non-disclosure agreement, a copy of which was included as part of Attachment A of NEP's Motion for a Protective Agreement. The dispute revolves around the addition of a clause (as underlined below) in the last sentence of paragraph 2: “Documents or portions thereof marked ‘Confidential’ will not be publicly filed at the Public Utilities Commission, but may be filed in redacted form, in only Case No. 15-697-EL-CSS.”

² A comparison of Attachment A of NEP's Motion for a Protective Agreement and Attachment 1 of OCC's Memorandum Contra shows that NEP's discussions with the Complainant took place and the impasse was reached well before the non-disclosure agreement conversation began between NEP and OCC.

³ This is the first sentence of paragraph 2 of NEP's non-disclosure agreement, with which the Complainant has agreed. See, Complainant's Memorandum Contra at 3 (“Complainant does not object to the general notice [that] the use of confidential information produced by NEP be limited to this case.”)

III. NEP and OCC began discussing a non-disclosure agreement as between them after NEP's motion for a protective agreement was filed.

OCC presented its preferred non-disclosure agreement to NEP on July 1,⁴ after NEP had filed its motion for a protective agreement on June 23. NEP and OCC are still in discussions as to a non-disclosure agreement between them. In fact, NEP presented OCC with a revised agreement on July 10, 2015, and awaits a response from OCC.⁵ An impasse has not occurred.

Thus, OCC's attempt to interject its preferred non-disclosure agreement should be rejected as premature and unnecessary. Nor should the Commission provide an advisory ruling on a non-disclosure agreement between NEP and OCC.

IV. OCC has presented only one option to NEP, but NEP is attempting to work through the concerns.

OCC alleges that NEP's non-disclosure agreement does not adequately protect OCC's interests.⁶ OCC cites the following as shortcomings:⁷

- No right to dispute the designation of information as confidential.
- No right to oppose recovery of damages or equitable relief upon breach.
- No provisions for handling public records requests and indemnification related thereto.

Instead of proposing specific language to address those alleged "shortcomings," OCC has repeatedly presented only one position – take its preferred non-disclosure agreement in its entirety. Through emails on July 1 and July 2, it offered only its own preferred non-disclosure agreement.⁸ Then again on July 8, through its memorandum contra, OCC requested adoption of its entire preferred non-disclosure agreement.⁹ As noted earlier, NEP is willing to continue

⁴ See, OCC's Memorandum Contra Attachment 1 at 2.

⁵ NEP responded to OCC's July 2, 2015 email within a few business days after it was sent, and is willing to continue discussions with OCC regarding terms for a non-disclosure agreement. See, Attachment A to this Reply.

⁶ OCC Memorandum Contra at 3.

⁷ *Id.* at 4.

⁸ *Id.* at Attachment 1.

⁹ *Id.* at 3.

discussions with OCC. Moreover, it has offered to incorporate OCC's language for handling public records requests and indemnification related thereto. NEP awaits OCC's response. Regarding its provision addressing recovery of damages or equitable relief upon breach, NEP points out that it is equally applicable to both parties to the non-disclosure agreement – thus applying fairly should a breach occur.

Moreover, NEP notes that its proposed agreement is not dramatically different from OCC's preferred agreement. While OCC's memorandum contra creates the impression that there are significant differences and only its own agreement is reasonable, the chart below shows that there are many key terms in common:

NEP Proposed Agreement	OCC Preferred Agreement
Initial Paragraph: NEP and OCC are the parties.	Initial Paragraph: NEP and OCC are the parties.
Initial Paragraph: The agreement is for purposes of conducting discovery, as well as litigating and settlement discussions.	Initial Paragraph: The agreement is to facilitate the exchange of all information in the discovery process.
¶1: "Confidential Information" means any information marked 'Confidential' and disclosed by a Party and does not include information that is or becomes public knowledge.	¶3: "Protected Materials" mean documents so designated by the Company and do not include information or document that enters the public domain.
¶2: "Each Party agrees to use the Confidential Information only for the purpose of PUCO Case No. 15-697-EL-CSS."	¶4: "Protected Materials provided in the context of this Proceeding will be provided to OCC for use by OCC in conjunction with this Proceeding."
¶1: Allows employees, agents, or representatives to have access to Confidential Information.	¶5: Allows authorized representatives to have access to Protective Materials, which include employees and persons retained by OCC.
¶3: Confidential Information must later be destroyed or returned to the producing party.	¶9: OCC must later return or dispose of Protected Materials.
New ¶4: If OCC receives a public records request for Confidential Information, it will provide notice to NEP, who will have 5 business days to file a pleading to prevent disclosure.	¶13: If OCC receives a public records request for Protected Materials, it will provide notice to NEP, who will have 5 business days to file a pleading to prevent disclosure.
New ¶4: NEP will pay attorney's fees, statutory damages or court costs if awarded in connection with OCC's non-disclosure or	¶14: NEP will pay attorney's fees, statutory damages or court costs if awarded in connection with OCC's non-disclosure or

delayed disclosure of Confidential Information.	delayed disclosure of Confidential Information.
New ¶4: Certain notices will be served via email, hand-delivery, or overnight delivery.	¶15: Certain notices will be served via email, hand-delivery, or overnight delivery.

In sum, the Commission should recognize that NEP is attempting to work with OCC still and there are many common points that exist in NEP's proposed non-disclosure agreement. These facts do not justify an order by the Commission to follow OCC's preferred non-disclosure agreement at this time or provide any reason to reject NEP's motion.

V. OCC's preferred non-disclosure agreement is not a "Commission standard" applicable for all cases and parties, nor is it appropriate for a non-regulated entity such as NEP.

NEP has proposed an agreement by which confidential information can be disclosed in the instant complaint proceeding, while fairly protecting its rights. NEP has already expressed its great concerns over the scope of this proceeding, as well as actions beyond this complaint case.¹⁰ In filing its motion for a protective agreement, NEP has asked the Commission to make sure that NEP's rights are protected during this proceeding.

OCC contends that its preferred agreement is somehow better because the Commission ordered its use as between OCC and Duke Energy Ohio, Inc. ("Duke") in that utility's electric security plan proceeding in 2014 (Case Nos. 14-84-EL-SSO et al.).¹¹ The Commission's determination in that matter is based on several key facts that are completely inapplicable in this situation:

- (a) Duke is a regulated utility, which is subject to the continuous and ongoing regulatory authority of the Commission. That regulatory supervision involves numerous Commission proceedings each year, many of which involve revolving issues and reviews.
- (b) OCC, as a representative of residential consumers of public utilities, is involved in the numerous Commission proceedings each year as to Duke (as well as other public utilities), including the many revolving issues and reviews.

¹⁰ See, NEP's Motion to Bifurcate.

¹¹ OCC Memorandum Contra at 7-8.

- (c) Duke's 2014 electric security plan was its third such plan in an unknown number of such cases. It involved numerous issues, many of which repeat and are interrelated.
- (d) NEP's proposed non-disclosure agreement was not presented or considered in the Duke case and cannot automatically be declared inappropriate because OCC's preferred agreement was adopted in that case.
- (e) NEP is not a Commission-regulated utility or entity. It is not subject to the continuous and ongoing regulatory authority of the Commission. It is not involved in numerous proceedings at the Commission each year or involved in revolving issues and reviews at the Commission.
- (f) NEP is a private entity. It should not be forced to enter into a nondisclosure agreement that puts its confidential information at risk now or in the future simply because a complaint was filed with the Commission.
- (g) This complaint case is distinctly different from utility electric security plan proceedings, as those involve an extensive number of issues and can related back to many past proceedings. This complaint case is narrower and, for the reasons argued by NEP in its Motion to Bifurcate, is not within the Commission's jurisdiction.

OCC touts its preferred non-disclosure agreement on the ground that it will afford "the utility the ability to contest the use of the confidential information in the future proceeding," whereas NEP's "limited use of discovery information" is not in line with long-standing principles of the Commission.¹² Those long-standing principles apply to Commission-regulated entities that appear before the Commission continually, which NEP is not and does not. NEP has been brought before this Commission because others contend that NEP has somehow begun performing public utility functions and the Commission must now begin to regulate it. The parties have presented not-so-veiled threats of future Commission proceedings in which NEP will be forced to participate if this proceeding is not enough. The fact of the matter is that NEP is not today a Commission-regulated entity and there is no law on the books in Ohio that will

¹² OCC Memorandum Contra at 9. Similarly, OCC pointed out that the Attorney Examiner had found OCC's non-disclosure agreement preferable because "there's always information that is needed for the client in subsequent cases referring to previous cases." *Id.* at 8.

subject NEP to the Commission's regulatory authority in the future. As a result, the Commission should be reticent of imposing a non-disclosure agreement that blatantly exposes NEP's confidential information to greater risks and use in unknown and untold numbers of other Commission proceedings, even if NEP could challenge the use in a future proceeding. Such a ruling will be not only unfair, it will be unjust and unreasonable.

VI. OCC has proposed to limit the use of the confidential information disclosed in this proceeding too.

OCC had expressly stated that it is willing to agree that confidential information provided "will be provided to OCC for use by OCC in conjunction with this Proceeding."¹³ NEP holds this same position – documents disclosed in discovery in this proceeding are being "discovered" for use in this proceeding only. This is akin to the language in NEP's proposed non-disclosure agreement. Given this position of OCC, it is illogical to conclude that NEP's proposed non-disclosure agreement should be rejected.

Within the very same paragraph of the same document, NEP cannot agree on the one hand to limit the use of confidential information to just this case and also on the other hand be forced to have language that others interpret as allowing use of disclosed confidential information in another proceeding or forum. OCC's opposition to NEP's agreement unreasonably exposes NEP to further litigation and future arguments about the use of NEP's confidential information.

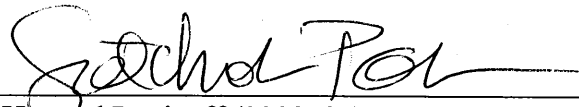
VII. Conclusion

Discovery here is limited to matters that are likely to lead to discovery of admissible evidence as to Mr. Whitt's complaint in Case No. 15-697-EL-CSS. NEP has prepared and presented a non-disclosure agreement, which it believes applies fairly to the parties of the

¹³ OCC Memorandum Contra Attachment 2 at ¶4.

agreement and protects rights. NEP has come to near agreement with the Complainant (save for one provision) and it is awaiting further discussions with the OCC. The opposition requests that the discovery, in effect, be usable in an unknown future proceeding(s). That request is unjust and unreasonable given (a) what has already agreed upon with the Complainant, (b) the continued discussions between NEP and OCC, (c) that NEP is not a regulated entity subject to the Commission's ongoing and continuous regulation, and (d) what OCC has already stated it would agree upon. Moreover, OCC's preferred agreement is not reasonably applicable in this proceeding. NEP's proposed non-disclosure agreement appropriately balances the concerns and protects the rights of the parties. OCC's arguments should be rejected and NEP's motion for a protective agreement should be granted.

Respectfully submitted,



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in

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

Summary: Reply to OCC's Memorandum Contra electronically filed by Mrs. Gretchen L. Petrucci on behalf of Nationwide Energy Partners, LLC