

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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**I. Introduction**

On June 26, 2015, Nationwide Energy Partners, LLC (“NEP”) asked the Public Utilities Commission of Ohio (“Commission”) for a protective order as to documents to be received by the Complainant in response to his subpoenas *duces tecum* to four third parties so that any confidentiality/privilege concerns about the information in the documents could be raised properly and addressed by the Commission. At the time of filing, the third parties had not provided the documents to the Complainant. At this time, the documents have been provided to the Complainant.

On July 13, 2015, the Complainant, the Ohio Consumers’ Counsel (“OCC”) filed a memorandum contra NEP’s motion for a protective order. NEP hereby files this reply in response. The OCC has mischaracterized NEP’s motion and misapplied a statute addressing the public nature of information and records maintained at the Commission. Finally, contrary to OCC’s argument, Rule 4901:1-1-24, Ohio Administrative Code, does not prohibit NEP’s

request. As a result, OCC's arguments should be rejected and NEP's motion for a protective order (regarding the third-party documents) should be granted.

**II. OCC's claims that the requested protective order will preclude the other parties from ever viewing the third-party documents is incorrect.**

OCC's first argues that the requested protective order should be denied because it would allow no other party to view the third-party information because the information would be limited to only the Complainant and NEP.<sup>1</sup> Similarly, OCC stated that NEP's is attempting to "block the Complainant and other intervening parts from accessing the information," and somehow block the Commission from making an informed decision.<sup>2</sup> These statements mischaracterize NEP's motion significantly. To be very clear, NEP asked that the Commission to:

- (a) Require the Complainant to keep confidential all f the documents produced in response to the third-party subpoenas, *until otherwise ordered by the Commission*;
- (b) Require Mr. Whitt to inspect the documents produced in response to the third-party subpoenas; and
- (c) Allow NEP to raise arguments regarding confidentiality, privilege, and handling of any confidential/privilege information in the documents produced from the third parties.

NEP's proposal is intended to safeguard possible confidential/privileged information, if it is contained in the documents produced from the third parties, and to establish a protocol for handing any such confidential/privileged information going forward. Nothing in the motion stated that the other parties, including OCC, could never see the documents. That can be accomplished with discovery subject to the requested protective order. The OCC should be concerned that Mr. Whitt's subpoena requested records from the Condominium Association may

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<sup>1</sup> OCC Memorandum Contra at 2.

<sup>2</sup> *Id.* at 4-5.

include billing and payment records of the other condominium association members. Their privacy should be protected.

Additionally, the motion certainly does not block the Complainant's access to the information as he already has received it. NEP's motion did not address the admission of that third-party information into evidence for the Commission's decision-making process. The decision on admission of the subpoenaed documents will come at the hearing where such documents may or may not be challenged on relevance, authenticity, and a whole host of other possible issues, and the Attorney Examiner will rule at that time on admission.

In sum, OCC's first argument is simply a mischaracterization of NEP's motion, presents an issue that is not ripe at this time, and therefore should be reject outright, other than to note that, when and if the subpoenaed documents are presented for admission into the record, the Attorney Examiner will rule at that time based on the arguments raised in support or opposing admission.

### **III. The statute relied upon by OCC (Section 4905.07, Revised Code) is not applicable.**

OCC points to Section 4905.07, Revised Code, as a basis for denying NEP's motion for a protective order.<sup>3</sup> Section 4905.07, Revised Code, states in pertinent part "all facts and information **in the possession of the public utilities commission** shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature **in its possession** shall be open to inspection by interested parties or their attorneys." (Emphasis added.) That statutory basis for rejecting NEP's motion is misplaced, or at a minimum premature. The third-party documents have not been filed with the Commission, or even submitted to the Commission. As a result, the statute cannot apply to the third-party documents at this time. Moreover, if and

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<sup>3</sup> OCC Memorandum Contra at 3-4 and at Footnote 6.

when they are submitted to the Commission for an *in camera* review and possible protective treatment, they should not be publicly disclosed – they should be protected until an appropriate ruling is issued. The Commission should reject this argument as wholly inapplicable to the situation at hand.

**IV. NEP can seek a protective order regarding any confidential/privileged information in the third-party documents.**

Finally, OCC argues that NEP cannot seek a motion for a protective order on the theory that NEP is not the party from whom the third-party documents were sought. NEP is not the party from whom the involved documents were sought. It is true that Rule 4901:1-24, Ohio Administrative Code, allows a party or person from whom discovery is sought to file a motion for a protective order. However, the Commission's protective order rule (Rule 4901:1-24, Ohio Administrative Code) does not state that no one else is barred from requesting a protective order.<sup>4</sup> Those words simply do not exist in the Commission's rule and they should not be read into. Additionally, on multiple occasions, parties have sought and argued for protective orders related to discovery of third-party information.<sup>5</sup> Altogether, it is clear that OCC's contention that NEP is not permitted to request a protective order regarding the third-party documents is incorrect and, thus, it should also be rejected.

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<sup>4</sup> Rule 4901:1-24, Ohio Administrative Code, states: "Upon motion of any party or person from whom discovery is sought, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order that is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. \* \* \*"

<sup>5</sup> See, e.g., Interlocutory Appeal filed on June 8, 2015, by the FirstEnergy utilities regarding discovery of information held by third-party Duke Energy Ohio, Inc. in *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO; and Attorney Examiner ruling granting Champaign Wind LLC's motion for protective order regarding third-party documents in *In the Matter of the Application of Champaign Wind LLC for a Certificate to Install Electricity Generating Wind Turbines in Champaign County*, Case No. 12-160-EL-BGN, Entry at ¶20 (October 22, 2012).

## V. Conclusion

NEP's motion for a protective order is intended to safeguard possible confidential/privileged information in the third-party documents, if such is contained in those documents, and to establish a protocol for handling any such confidential/privileged information going forward. NEP explained that, by virtue of the information sought in the third-party subpoenas, it appeared likely that the documents could contain confidential/privileged information. For all of the reasons set forth in NEP's motion and herein, NEP has presented good cause for a protective order regarding the third-party documents. Nothing in the arguments raised by OCC in its memorandum contra warrants another outcome.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 20<sup>th</sup> day of July 2015 upon all persons/entities listed below:

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