BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

COMPLAINANT'S MEMORANDUM CONTRA
MOTION FOR PROTECTIVE TREATMENT AND
MOTION TO STAY

This memorandum contra responds to the two motions filed by Nationwide Energy Partners (NEP) on August 14, 2015. Expedited treatment is requested on both. One of the motions requests "protective treatment" of customer account information contained in documents obtained by Complainant from third parties. The other motion requests a stay of discovery. Both motions should be denied.

NEP does not have standing to request "protective treatment" of information that is neither NEP's confidential information nor appears in documents produced by NEP. NEP does *not* allege that the documents contain information confidential to NEP. Rather, NEP claims that protective treatment is necessary to prevent an "invasion of privacy" of North Bank residents whose name or NEP account number appear in the documents. (The irony here is rich: NEP has consistently claimed it has no relationship with residents and that they are not its customers, yet it seeks protective status of the account numbers NEP uses to identify them as its customers.) The Commission's rules adequately provide for the protection of personal identifying information contained in documents *filed* with the Commission. None of the documents at issue

have been filed. To go through these documents now and redact them *as if* they were going to be filed would be unfounded and pointless.

NEP's other motion requests a stay of all discovery until the Commission rules on the previous round of NEP motions filed on June 26, 2015. The only reason NEP filed this motion is to buy more time. NEP has produced no documents and refuses to answer the most basic interrogatories – such as who owns NEP, how Complainant's bill is calculated, or exactly what services NEP provides to North Bank or its residents. When asked to authenticate documents included with requests for admission, NEP claimed amnesia – it cannot admit or deny whether documents put in front of it are NEP documents. Given this history, Complainant is well aware that any further requests to supplement discovery responses will be resisted on grounds that NEP has filed a motion to stay discovery – as if the request for a stay means a stay has been granted. Thus, as far as Complainant is concerned, the motion for stay is moot. NEP is not going to cooperate in discovery anyway until all of the outstanding motions are resolved.

Complainant does agree with NEP on one thing: these motions should be ruled on quickly. The previous round of motions should be ruled on as well. The Attorney Examiner should deny all of NEP's outstanding motions, schedule a pretrial conference, and establish a procedural framework that gets this case to hearing within a reasonable amount of time.

ARGUMENT

Complainant will first address the motion for protective treatment, then the motion to stay. Both motions are governed by Rule 4901-1-24, O.A.C., and NEP bears the burden of proof.

A. The motion for protective treatment should be denied.

The documents at issue are *not* NEP's documents. As authorized by Rule 4901-1-25, Complainant subpoenaed documents from North Bank Condominium Owners' Association

(NBCO) and the developer of North Bank, NWD 300 Spring LLC (NWD). Neither NEP nor the entities receiving the subpoenas moved to quash them. NBCO and NWD produced a combined total of approximately 1100 pages of documents. As received by Complainant, some of the documents were redacted, presumably because of confidentiality or privilege.[1] Complainant paid to have the documents copied and Bates-stamped, and offered a set to each party in this proceeding.

NEP believes the redactions are inadequate. "NEP has reviewed the documents and found that they indeed contain account numbers, and names of non-party residents at the same condominium complex where Mr. Whitt resides." (Mem. Supp. at 5.) This, according to NEP, requires Complainant to recall and sequester all production sets of the documents and hand them over to the Attorney Examiner. The Attorney Examiner would then go through the six pages of Attachment A to NEP's motion to match up NEP's proposed redactions within the 1100 pages produced. If the Attorney Examiner agrees that a page contains confidential information, the information would be redacted. At the end of the process envisioned by NEP, the parties would have two sets of documents: one set with the original redactions, the other set with the additional redactions requested by NEP. The point of all of this is never explained. The parties would have two sets of documents, but NEP does not say what the parties should do (or not do) with them.

1. NEP does not have standing to seek protective treatment on behalf of third parties.

A spot check of NEP's proposed redactions reveals that much of what it claims is confidential actually isn't.[2] But there is no need to have that debate because NEP does not have

[1] NEP's lack of knowledge of who redacted the documents reinforces the point raised at the end of this motion about its failure to address matters with opposing counsel before filing motions.

[2] Indeed, the names of North Bank residents are a matter of public record. Anyone with the time or inclination can look at the Franklin County Recorder's website and determine not only who owns each unit, but when they bought it, how much they paid, and who they bought it from. Utility account numbers

standing to seek protective status of information belonging to or produced by third parties, nor does NEP have standing to seek protective treatment from discovery requests served on *other* parties. The Commission's rules and case law make clear that standing to quash, modify or seek protective treatment of information requested by subpoena is limited to the recipient of the subpoena. The recipients of the subpoenas at issue here redacted what they felt was confidential. NEP has no right to second-guess their decisions.

Rule 4901-1-24(A), O.A.C., authorizes issuance of a protective order "Upon motion of any party or person from whom discovery is sought . . . ." That NEP is a "party" does not give it standing to object to, or seek a protective order regarding, third parties "from whom discovery is sought." The Commission's subpoena rules are substantially similar to Rule 45 of the Federal Civil Rules, and under the federal rules, "a party to litigation has no standing to move to quash a third-party subpoena *duces tecum* unless the movant claims some personal right or privilege to the documents sought." *Laethem Equipment Co. v. Deere and Co.*, 2007 U.S. Dist. LEXIS 70740, *47-48 (E.D. Mich. 2007) (citations omitted). This rule applies not only to attempts to quash a subpoena, but also to claims that documents produced by third parties be treated as confidential. *Id.* at *51-53. In *Laethem*, for example, the plaintiff subpoenaed documents from third parties. The defendant sought a protective order to restrict the use of the documents to counsel only, thereby prohibiting the plaintiffs from seeing the documents. The court denied the motion, finding that the defendant failed to demonstrate "a personal right or privilege to the requested documents." *Id.* at 52.

NEP does not claim any "personal right or privilege" in the documents subpoenaed from third parties. To the contrary, it seeks protective treatment to prevent the disclosure of

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are not a matter of public record, but as explained below, the litigants in this case are well aware of the Commission's expectations for the proper handling of this information.

information it believes "could invade the privacy of *others*." (Mem. Supp. at 9)(emphasis added). Whether this assertion is genuine is immaterial. NEP does not have standing to ask the Commission to place conditions on the use of documents produced by third parties and containing no information confidential to NEP.

2. Production of the documents to other parties in this proceeding does not constitute public disclosure of (alleged) confidential information.

Most of NEP's memorandum in support ignores the merits of whether information should be subject to protective treatment, focusing instead on production of the information to other parties in this case. Production to other parties has no bearing whatsoever on whether the information should be treated as confidential. Reading between the lines, it appears that NEP is attempting to create the impression that Complainant is an irresponsible steward of confidential information. Contrary to showing that Complainant did anything under-handed or wrong by producing the documents to other parties, NEP's narrative only serves to confirm that Complainant gave NEP exactly what it asked for in its June 26, 2015 motion for protective order.

NEP's previous motion for protective order asked for three things: (1) that all documents obtained by subpoena be kept confidential, (2) that NEP be permitted to inspect the documents, and (3) that subsequent to inspection, NEP be allowed to raise arguments regarding confidentiality and privilege. (*See* Mem. at 7.)

Complainant gave NEP what it asked for. First, Complainant kept the documents confidential. Copies were made available only to parties in this proceeding – which NEP concedes includes everyone who has filed a motion to intervene. (Mem. Supp. at 8 fn 7.) NEP tries to insinuate an improper, ulterior motive to Complainant's decision to make the documents available without a written discovery demand, seemingly forgetting that NEP received the documents too, and it did not serve a written discovery request either. In any event, cooperation

through informal discovery should be encouraged, not criticized. *See* Rule 4901-1-16 (F) ("Nothing in rules 4901-1-16 to 4901-1-24 of the Administrative Code precludes parties from conducting informal discovery by mutually agreeable methods or by stipulation.").

Second, NEP was given the opportunity to inspect the documents. NEP apparently believes it was the *only* party entitled to inspect the documents. This position is too absurd to even take seriously. Remember – NEP is not seeking to protect its own confidential information. This is not a case of Complainant disclosing confidential information about NEP to other parties in the case. If NEP may argue that someone else's documents contain confidential information about third parties, then surely other parties in this proceeding must be given the opportunity to challenge NEP's proposed confidential designations. That can only happen if all parties have access to the documents. Again, these documents did not come from NEP. NEP has no greater right of access to them than anyone else.

Third, NEP has raised arguments regarding confidentiality. (It makes no claim of privilege.) While its arguments are seriously flawed and misguided, NEP is only able to make them because Complainant turned over the documents. The parties and Attorney Examiner are now in a position to constructively resolve any differences concerning the treatment of these documents by looking at the actual documents, as opposed to NEP's uninformed speculation about what the documents "might" or "could" contain.

Any suggestion that Complainant violated anyone's confidentiality is misguided and wrong.

3. The confidentiality concerns raised by NEP are adequately addressed by existing rules.

Ultimately, NEP's motion proposes a solution in search of a problem. NBCO and NWD obviously reviewed the documents before producing them, and redacted what they believed

should be redacted. These entities obviously knew, as well, that the documents were being used in a legal proceeding. And since they knew they were producing documents for use in a legal proceeding, it is fair to conclude that they knew the documents would be seen by the parties in that proceeding. Thus, while NEP characterizes the redacting effort as slipshod and ineffective, the more plausible explanation is that these entities redacted exactly what they intended, no more and no less. As just explained, absent some personal, proprietary interest in the information (which is lacking here), neither NEP nor anyone else has standing to challenge the sufficiency of the producing parties' efforts to protect confidential information.

None of this is to say that the Commission should turn a blind eye to the potential disclosure of confidential information. As noted by NEP, the Commission has enacted rules requiring utilities and CRES providers to keep account numbers and other personal information confidential. (Motion at 2 fn.1, citing Rules 4901:1-10-24(E)(1), 4901:1-21-10(B), 4901:1-13-12(D).) It is beyond Complainant how to square NEP's citation of this rule with its denial that it is a utility or CRES provider, as well as its denial that the people (whose privacy interests it purportedly represents) are its customers.[3] It is thus far from clear how NEP could suggest that these rules somehow obligate it to seek the protective order. But whether the rule applies or not, Complainant certainly would not object to an order requiring that account numbers be redacted from any documents ultimately *filed* with the Commission.

Moreover, regardless of what the rules specifically require, litigants in Commission cases routinely redact personal identifying information in documents filed with the Commission. This is usually done informally and unilaterally by the filing party, with a shared understanding that people should not be put at risk of fraud or identify theft because personal information is put into

[3] Complainant's memorandum contra NEP's June 26, 2015 motions addresses the "evidence" and arguments cited by NEP to attempt to support its claim that Complainant and North Bank residents are not NEP's customers. *See* pp. 7-9 therein.

the public domain. When formal process for redacting personal information is pursued under Rule 4901-1-24(D)(1), "only such information redacted as is essential to prevent disclosure of the allegedly confidential information." The point is, exchanging documents in discovery does not make the documents public records. *Filing* documents with the Commission, a public agency, makes them public records. None of the documents at issue have been filed. To go through 1100 pages of third-party documents and redact them *as if* they were going to be filed would be a monumental waste of time and resources – not only for the parties, but for the Commission as well.

NEP's real concern isn't whether the parties will redact account numbers in documents filed with the Commission. Although it does not say so in so many words, NEP's real concern is that Complainant, OCC or other parties will use the third-party documents to build more cases against NEP. The end-game for NEP is to convince the Commission to suppress as much information as possible under the guise of "confidentiality," and limit disclosure of "confidential" information to the smallest possible audience. That way, if NEP gets sued again, NEP can hurl accusations that Commission orders limiting the disclosure of "confidential" information have been violated. It is one thing to pursue such an aggressive position to protect legitimate trade secret information – the formula for Coke, The Colonel's chicken recipe, a list of executives NEP wants to recruit – but that is not what is at issue. At issue is information contained in documents legally obtained from third parties, none of which has been filed at this time, and none of which is confidential to NEP.

There are no grounds for issuance of a protective order limiting or restricting the use of third party documents. NEP's motion must be denied.

B. The motion to stay is moot (but should be denied anyway).

NEP's first motion to stay sought to limit discovery to "Phase 1" issues. NEP now seeks to stay discovery altogether, pending rulings on its June 26 motions. NEP claims that without a stay, Complainant will be able to conduct "unlimited discovery," including depositions of "11 NEP employees before the end of September." (Motion at 2.) A stay would also relieve NEP from responding to motions to compel discovery that have been "threatened" but not actually filed. (*Id.*)

NEP's "motion" is actually a request for the Commission's blessing to continue to do what NEP already decided to do before asking for permission to do it: refuse to provide substantive discovery responses, refuse to explain the basis for objections, and refuse to cooperate in the scheduling of depositions. So it is important that the Commission rule on the motion sooner rather than later. Otherwise, NEP will continue to disregard its discovery obligations on grounds that the mere act of requesting a stay allows it to act as if a stay has been granted. For all practical purposes, a stay is already in effect. Ironically, a ruling on NEP's present motions is required to *lift* the *de facto* stay unilaterally imposed by NEP. This is the opposite of how the discovery process and motion practice before the Commission is supposed to work, but that is where the parties find themselves.

As things stand, arguing over the merits of a stay would serve no purpose. With that said, NEP's misleading narrative about depositions cannot be left unaddressed. In particular, the claim that Complainant "plans to depose 11 NEP employees in the very near future" is flatly wrong. (Mem. at 4.) Complainant merely asked for dates when 11 employees would be available between mid-August and mid-September. Some of the employees may no longer work for NEP. Those that do may not be available until later in the fall. The point is that Complainant reached

out to NEP's counsel as a first step in potentially scheduling depositions. Complainant did not and has not issued deposition notices – again, under the theory that it is preferable to work out dates and times with opposing counsel *before* sending notices, as opposed to unilaterally scheduling depositions, sending notices, and then fighting about it later. Instead of responding to Complainant, NEP went straight to the Commission with a motion – wholly contrary to the requirements of Rule 4901-1-24.

In considering NEP's claim that it "has not sat on its laurels, been disruptive or been uncooperative" (Mem. at 5), the Commission should know that within an hour of NEP filing its motions, Complainant offered to resolve the issues by agreeing to a stay of *all* written discovery, a stay of *all* discovery motions, and an agreement to keep *all* documents obtained by subpoena confidential – basically, everything that NEP asked for. The only thing asked of NEP in return is that it produce one witness – *one* -- for deposition. (*See* Exhibit A.) NEP never responded to this offer. For NEP to claim it has acted above-board and in good faith is remarkable.

CONCLUSION

NEP has unilaterally stayed discovery since the beginning of this case. For all the complaining it does about how burdensome and unfair it is to respond to discovery, the reality is that it has spent far more time and resources preparing redundant, unfounded motions than actually responding to discovery.

The Commission should put a stop to this. All of NEP's outstanding motions should be denied. NEP has not and cannot identify meritorious grounds not to face the allegations in the Complaint. A prehearing conference should be scheduled. Parties and their counsel should bring their calendars. It is time to get this case moving.

Dated: August 21, 2015

Respectfully submitted,

s/ Mark A. Whitt

Mark A. Whitt (0067996)
WHITT STURTEVANT LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, Ohio 43215
(614) 224-3911
(614) 224-3960 (fax)
whitt@whitt-sturtevant.com

(Complainant is willing to accept service by email)

CERTIFICATE OF SERVICE

I hereby certify that a courtesy copy of Complainant's Memorandum Contra Motion for Protective Treatment and Motion to Stay was served by electronic mail this 21st day of August 2015 to the following:

Howard Petricoff
(mhpetricoff@vorys.com)

Stephen M. Howard
(smhoward@vorys.com)

Michael Schuler
(Michael.schuler@occ.ohio.gov)

Kimberly Bojko
(bojko@carpenterlipps.com)

Colleen Mooney
(cmooney@ohiopartners.org)

Steven Nourse
(stnourse@aep.com)

Matthew Satterwhite
(mjsatterwhite@aep.com)

Matthew McKenzie
(msmckenzie@aep.com)

Frank Darr
(fdarr@mwncmh.com)

/s/ Mark A. Whitt
Mark A. Whitt

Subject: Re: 2015-8-14 Case No. 15-697-EL-CSS / E-Filing Confirmation
Date: Friday, August 14, 2015 at 5:35:07 PM Eastern Daylight Time
From: Mark Whitt
To: Petrucci, Gretchen L., Schuler, Michael, bojko@carpenterlipps.com, cmooney@ohiopartners.org, stnourse@aep.com, mjsatterwhite@aep.com, msmckenzie@aep.com, fdarr@mwncmh.com, mpritchard@mwncmh.com, sam@mwncmh.com
CC: Petricoff, M. Howard, Howard, Stephen M.

I am willing to resolve these motions by agreeing as follows:

1. NEP to make James Dunn available for deposition within 3 weeks.
2. Between now and the conclusion of the Dunn deposition:
    1. No party/intervenor will serve additional written discovery.
    2. No party/intervenor will file a motion to compel concerning discovery previously served.
    3. No party will disclose the documents obtained by subpoena.

These terms essentially give NEP everything it has asked for in its motion: a complete stay of discovery, in exchange for making 1 person available for deposition. Please let me know by the end of the day Monday whether this is acceptable.

Mark A. Whitt
whittsturtevant LLP
The KeyBank Building
88 E. Broad Street, Suite 1590
Columbus, Ohio 43215
614.224.3911 (direct)
614.804.6034 (mobile)

whitt@whitt-sturtevant.com

From: "Welch, Jeanne A." on behalf of "Petrucci, Gretchen L."
Date: Friday, August 14, 2015 at 4:28 PM
To: Mark Whitt, "Schuler, Michael", "bojko@carpenterlipps.com", "cmooney@ohiopartners.org", Steve Nourse, Matt Satterwhite, "msmckenzie@aep.com", Frank Darr, Matt Prichard, Sam Randazzo
Cc: "M. Howard Petricoff", "Petrucci, Gretchen L.", Stephen Howard
Subject: 2015-8-14 Case No. 15-697-EL-CSS / E-Filing Confirmation

Attached please find Nationwide Energy Partners, LLC's Motion for Protective Treatment of Documents Released to Others and Motion for an Expedited Ruling, as well as Nationwide Energy Partners, LLC's Motion for a Stay and Motion for an Expedited Ruling filed today in Case No. 15-697-EL-CSS.

Gretchen L. Petrucci
Senior Attorney
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street | Columbus, Ohio 43215

Direct: 614.464.5407
Email: glpetrucci@vorys.com
www.vorys.com

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Date & Time: 8/14/2015 at 16:20:39.2142174 EST
Case Number(s): 15-0697-EL-CSS
Summary : Motion Motion for a Stay and Motion for an Expedited Ruling electronically filed by Mrs. Gretchen L. Petrucci on behalf of Nationwide Energy Partners, LLC
Confirmation Number: d14938ab-5865-4011-8bc1-6c7672c04caf

Official PDF File: d14938ab-5865-4011-8bc1-6c7672c04caf_Official_Gretchen Petrucci814201542018PM_Final NEP Motion for a Stay 15-697-EL-CSS.pdfSecure.pdf

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-----Original Message-----
From: DISSUBSCRIPTION@puc.state.oh.us [mailto:DISSUBSCRIPTION@puc.state.oh.us]
Sent: Friday, August 14, 2015 4:22 PM
To: Petrucci, Gretchen L.; Welch, Jeanne A.

Subject: E-Filing Confirmation

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Case Number(s): 15-0697-EL-CSS
Summary : Motion Motion for Protective Treatment of Documents Released to Others and Motion for an Expedited Ruling electronically filed by Mrs. Gretchen L. Petrucci on behalf of Nationwide Energy Partners, LLC
Confirmation Number: 303a94ea-369d-48a1-82e6-55e10cab147d

Official PDF File: 303a94ea-369d-48a1-82e6-55e10cab147d_Official_Gretchen Petrucci814201542147PM_NEP Motion for Protective Treatment for Docs- Final 15-697-EL-CSS.pdfSecure.pdf

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

Summary: Memorandum Contra Motion for Protective Treatment and Motion to Stay electronically filed by Ms. Rebekah J. Glover on behalf of Mark A. Whitt