

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

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**I. INTRODUCTION**

This is a case where the Complainant alleges 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.<sup>1</sup> On August 14, 2015, Nationwide Energy Partners, LLC (“NEP” or “the Company”) filed a second motion seeking a protective order for documents provided to the Complainant through the discovery process. NEP is attempting to “unring” the proverbial bell by requesting that the Public Utilities Commission of Ohio (“PUCO” or “the Commission”) determine that documents already provided by non-parties to the Complainant, Mr. Whitt, and made available to Office of the Ohio Consumers’ Counsel (“OCC”), be “recalled” and “properly redacted” to preclude dissemination of account numbers, usage, and other

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<sup>1</sup> Complaint at ¶ 21.

North Bank residents' names and addresses.<sup>2</sup> NEP also requests that the Commission require redactions of "any other confidential/privileged information contained in the disseminated documents."<sup>3</sup> Presumably, NEP's request to "recall" documents would require OCC and others to return documents that they have already received and reviewed. And those documents would not be returned to OCC until the PUCO has determined whether the information is confidential information deserving of protection.

The Commission should reject NEP's overly broad request to recall entire documents and review documents in search of "any other confidential/privileged information" — information that NEP has not specifically identified as confidential. To ensure the protection of sensitive customer information, however, OCC will voluntarily agree to redact any customer account numbers, names, and addresses that have not been redacted by the subpoenaed parties.

## **II. STATEMENT OF FACTS**

On April 10, 2015, the Complainant, Mark Whitt, filed a Complaint alleging that NEP was unlawfully providing public utility services at The Condominiums at North Bank Park ("North Bank"). Because NEP claims that it is not providing public utility services, Complainant subpoenaed certain information from four non-parties: [1] NWD 300 Spring, LLC; [2] North Bank Condominium Owners Association ("NBCOA"); [3] Ohio Equities LLC; and [4] the City of Columbus.<sup>4</sup> Before the non-parties responded to the subpoenas, on June 26, 2015, NEP filed its First Motion for a Protective Order,

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<sup>2</sup> Nationwide Energy Partners, LLC's Motion for Protective Treatment of Documents Released to Others at 2 (Second Motion for Protection").

<sup>3</sup> Second Motion for Protection at 9.

<sup>4</sup> Motion for Subpoenas at p. 2 (June 10, 2015).

requesting the PUCO to “[r]equire Mr. Whitt to keep confidential all of the documents produced in response to the third-party subpoenas, until otherwise ordered by the Commission.”<sup>5</sup> NEP also requested the ability to inspect the documents produced in response to the subpoenas and to raise claims of confidentiality.<sup>6</sup> NEP’s First Motion for Protective Order is still pending before the PUCO.

In the meantime, NBCOA and NWD 300 Spring, LLC provided Mr. Whitt with approximately 1,100 pages of documents in response to their subpoenas. On July 24, 2015, Mr. Whitt properly made the subpoenaed documents available to the other parties to this action, which were promptly picked up and reviewed by OCC on that same day. Although NBCOA and NWD 300 Spring, LLC redacted some portions of the subpoenaed documents prior to producing the documents, NEP claims that “the effort was not thorough or complete.”<sup>7</sup> And having not received a ruling from the PUCO with respect to the subpoenaed information, NEP filed this Motion for Protective Treatment of Documents Released to Others (“Second Motion for Protective Order”) on August 14, 2015.

### **III. LAW AND ARGUMENT**

NEP appears to be seeking confidential treatment of [1] North Bank residents’ NEP account numbers;<sup>8</sup> [2] the names and addresses of the residents at North Bank; and

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<sup>5</sup> Nationwide Energy Partners, LLC’s Motion for a Protective Order, at 1-2 (June 26, 2015) (“First Motion for Protective Order”).

<sup>6</sup> Id.

<sup>7</sup> Second Motion for Protective Order at p. 5.

<sup>8</sup> The PUCO should take notice of the inconsistencies asserted by NEP – the Company claims that the North Bank residents are not consumers for purposes of standing, (Nationwide Energy Partners, LLC’s Motion to Bifurcate the Proceedings and Motion for a Limiting Instruction and Stay, at 6 (June 26, 2015)) but then claims confidentiality over their individual account numbers.

[3] utility usage of the North Bank residents.<sup>9</sup> For these reasons explained below, the PUCO should order parties to redact only the account numbers, names, and addresses of NEP's customers. But the subpoenaed documents should not be "recalled" from the intervening parties.

**A. NEP's request to "recall" the documents should be denied because it is overly broad and unreasonable.**

The PUCO should decline to adopt NEP's overly broad and unnecessarily complicated approach where documents are recalled from parties. Instead, if the PUCO finds that any of the information is confidential, it should merely order parties to redact the information from the documents. Not only would this serve administrative efficiency, but is consistent with the PUCO's rules and practice.

It is a general rule that "discovery requests and responses shall be served upon all parties."<sup>10</sup> The Complainant obtained the documents from non-parties through a properly executed subpoena, consistent with Ohio Adm. Code 4901-1-25(D): "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. Such a subpoena is subject to the provisions of rule 4901-1-24 of the Administrative Code as well as paragraph (C) of this rule."

Yet, NEP seeks to "recall" the subpoenaed documents from the intervening parties by claiming that "OCC, OPAE, AEP Ohio, and IEU as of this writing are not

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<sup>9</sup> Second Motion for Protective Order at p. 1.

<sup>10</sup> Ohio Adm. Code 4901-1-18.

‘parties’ to this proceeding yet.”<sup>11</sup> This argument is a red herring because the information acquired from NBCOA and NWD 300 Spring, LLC was not produced pursuant to a protective agreement. The PUCO rules allow discovery to be conducted of non-parties through subpoenas. Obtaining discovery documents through such means necessitated Mr. Whitt to serve the discovery documents on all parties to the proceeding. For purposes of discovery, under “rules 4901-1-16 to 4901-1-24 of the Administrative Code, the term ‘party’ includes any person who has filed a motion to intervene which is pending at the time of a discovery request or motion is to be served or filed.”<sup>12</sup>

The PUCO rules and precedent also require that “where confidential material can be reasonably redacted from a document without rendering the remaining document incomprehensible or of little meaning, redaction should be ordered rather than wholesale removal of the document.”<sup>13</sup> The information that NEP claims to be confidential could easily be redacted, especially since the Company has already provided a list of what information it claims should be redacted,<sup>14</sup> making it unnecessary to return the documents. NEP’s request to “recall” the documents is simply another attempt to slow down the discovery process and prevent the intervening parties from retaining information that is adverse to the Company.

Finally, requiring OCC to return documents is likely to create a violation of the Public Records Law of Ohio. NEP does not even allege that all of the information

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<sup>11</sup> Second Motion for Protective Order at p. 8 (citing Ohio Adm. Code 4901-1-10).

<sup>12</sup> Ohio Adm. Code 4901-1-16(H); *see also*, Motion for Protective Order at p. 8, fn. 1.

<sup>13</sup> *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, Opinion at 11 (October 24, 2007) (citing Ohio Adm. Code 4901-1-24(D)(1)).

<sup>14</sup> Second Motion for Protective Order at Attachment A.

contained in the subpoenaed documents is confidential in nature; yet, NEP requests that all of the documents be recalled. Once OCC received the documents, they became public records pursuant to R.C. 149.43. Ordering a recall of the subpoenaed documents would put OCC in the position of having to violate Ohio Public Records law. To avoid this dilemma and further delay in this proceeding, the PUCO should only order redaction if it finds that any of the information contained in the subpoenaed documents is in fact confidential.

**B. The PUCO should order that the intervening parties redact only the account numbers, names, and address of customers that were not already redacted by NBCOA and/or NWD 300 Spring, LLC.**

It is true that the PUCO has traditionally kept personal information and account numbers confidential. The reasoning for redacting such information is to protect utility customers. Therefore, before publicly using or filing any of the subpoenaed documents, OCC is willing to agree to redact any customer account numbers, names, and addresses that have not previously been redacted by the subpoenaed parties. And OCC reserves the right to argue, at a later date, that certain information willingly agreed to be redacted herein, should no longer be protected. However, the customer usage data contained in the subpoenaed documents should not be redacted.

NEP claims that the PUCO should treat the North Bank residents' NEP account numbers as confidential because customers could be "slammed."<sup>15</sup> But this argument is a misguided. NEP is the exclusive provider for the residents of North Bank. It is not possible to slam a captive customer because a captive customer cannot shop and switch providers. The inability for residential customers to shop for their electric service

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<sup>15</sup> Second Motion for Protective Order at 1-2.

provider is contrary to Ohio law and is one of the issues raised in the Complaint. It also is a legitimate reason for the PUCO to scrutinize NEP's request for protection of this customer-related information.

“[T]he ultimate burden for demonstrating that information in a document warrants protective treatment is on the party who owns the allegedly confidential material.”<sup>16</sup> NEP fails to carry this burden with respect to customer usage data because there is no concern about revealing personally identifying information once the personally identifying information – names, addresses, and account numbers – is redacted. In other words, there will be no way of identifying or associating which customers or accounts are associated with the individual usages. Moreover, customer usage is information that will be useful in determining the possible damages suffered by NEP's customers.

To the extent NEP is attempting to claim that any other information is confidential, the Motion should be denied. As previously mentioned, NEP has the burden of establishing the need for confidentiality<sup>17</sup> and Ohio Adm. Code 4901-1-24(D)(3) requires a movant to file a motion for protective treatment with the Commission “setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure \* \* \* .” Other than the information forth in Attachment A of NEP's Motion for Protective Agreement, NEP has failed even to identify what

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<sup>16</sup> *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 26, 2014) (emphasis added); *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).

<sup>17</sup> See, *supra*; see also, Ohio Adm. Code 4901-1-27(B)(7)(e).

information should be protected let alone carry the high burden associated with such protection. Thus, the PUCO, should order redaction of only the customers' account numbers, names, and addresses and deny the remainder of NEP's Second Motion to redact "any other confidential/privileged information contained in the disseminated documents."<sup>18</sup>

#### **IV. CONCLUSION**

The PUCO should deny NEP's duplicative Second Motion for a Protective Order. Instead it should allow the parties to retain the documents and require that the intervening parties redact limited information. The information that should be redacted before publicly using or filing any of the subpoenaed documents should be limited to the North Bank customers' account numbers, names, and addresses.

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<sup>18</sup> Second Motion for Protective Order at 9.



Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing *Memo Contra Motion for Protective Treatment* was served upon the following parties via electronic transmission on August 21, 2015.

/s/ Michael J. Schuler  
Michael J. Schuler  
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