BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

NATIONWIDE ENERGY PARTNERS, LLC'S MEMORANDUM ON NEP'S RELATIONSHIP WITH THE NORTH BANK CONDOMINIUM OWNERS ASSOCIATION AND WHETHER THE ASSOCIATION IS A NECESSARY OR INDISPENSABLE PARTY

In accordance with the November 18, 2015 directive of the Public Utilities Commission of Ohio ("Commission"), Nationwide Energy Partners, LLC ("NEP") presents its views on the following two topics:[1]

- The nature of the agency relationship between the parties and the North Bank Condominium Home Owners Association ("NBCOA"); and
- Whether NBCOA is a necessary or indispensable party to this case

I. Background

Mark A. Whitt filed this complaint with the Commission on April 10, 2015, alleging that, since November 2014, NEP has supplied, arranged for, or provided him with electricity, water, and sewer services, and retail electric service at his condominium, and improperly charged him for such services and for services to the common areas of the condominium building. In addition, Mr. Whitt alleges that NEP's actions and services qualify it to be an electric light

[1] By making this filing, NEP does not waive its defense that the Commission lacks jurisdiction over NEP and Mark A. Whitt's complaint.

company, electric distribution utility, electric utility, public utility, electric supplier, water-works company, and sewage disposal company. Mr. Whitt also alleges that NEP does not possess the necessary Commission certification in order to provide him with electricity, water and sewer services, has not otherwise complied with Title 49 of the Revised Code, or does not have an exemption from regulation. Mr. Whitt did not name NBCOA in his complaint.

The Public Utilities Commission of Ohio has jurisdiction over utilities and utility services. To bring a complaint about utility services, Mr. Whitt has to establish that he is the utility customer. In his complaint, Mr. Whitt claims he resides at 300 West Spring Street. On file at the Franklin County Recorder's office is a declaration from NBCOA stating that NBCOA owns and procures utility service for that address.[2] Previously filed in this proceeding by affidavit are invoices from Ohio Power Company, and the City of Columbus invoicing NBCOA for electric distribution service and water and sewer service.[3] The affidavit also includes documentation showing that competitive retail electric service is provided to that address from a competitive retail electric service supplier that is not affiliated with NEP.[4]

NEP has denied the substantive arguments presented in Mr. Whitt's complaint, and argues that Mr. Whitt lacks the standing to bring his complaint, which in turn means the Commission has no jurisdiction to hear the complaint.[5]

On November 18, 2015, the Commission granted the intervention request of Ohio Power Company (the electric distribution utility in the territory where Mr. Whitt resides), and denied the intervention requests of the Ohio Consumers' Counsel, Ohio Partners for Affordable Energy

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[2] *See*, Exhibit 2 of NEP's motion to bifurcate, page 16 of the Amended Declaration and Amended Bylaws.
[3] *See*, attachments to Exhibit 1 of NEP's motion to bifurcate.
[4] *Id.*
[5] The Ohio Supreme Court reaffirmed last month that Section 4905.26, Revised Code, confirms exclusive jurisdiction on the Commission to adjudicate complaints filed against public utilities challenging any rate or charge as "unjust, unreasonable, * * * or in violation of law." *In re Complaint of Pilkington N. Am., Inc.*, Slip Opinion No. 2015-Ohio-4797 at 8.

and Industrial Energy Users-Ohio. In addition, the Commission denied NEP's motion to bifurcate the proceeding. Instead, the Commission ruled that this complaint case should be held in abeyance while the Commission conducts an investigation "to determine whether third-party agents or contractors such as NEP are operating as public utilities, as well as whether the scope of the Commission's jurisdiction extends to submetering arrangements."[6] At that same time, the Commission ruled that:

> [T]he parties should file a memorandum in this case by December 18, 2015 elaborating on the nature of the agency relationship between the parties and NBCOA, and indicating whether NBCOA is a necessary or indispensable party to this case. We note that NEP admits that it issues bills to the Complainant on a monthly basis pursuant to its contract with NBCOA. Additionally, NEP asserts that it holds agency status and/or power of attorney on behalf of NBCOA and does not act independently of its principal. Therefore, unless NBCOA files a motion to intervene in this proceeding by December 18, 2015, the Commission finds that the parties should submit a Memorandum regarding whether NBCOA is a necessary or indispensable party to this case.[7]

As of the filing of this Memorandum, NBCOA has not filed a motion to intervene in this proceeding.

II. Agency Relationship between NBCOA and NEP

NEP has a contract with NBCOA to review and then pay the utilities and competitive retail electric supplier who serve the 300 Spring Street building for services on behalf of the NBCOA[8]. NEP's contract with NBCOA also directs it to meter the internal use of power within the Spring Street building, and on behalf of the NBCOA, bill and collects the money owned the NBCOA by its members[9]. The electric utility which serves the NBCOA building on Spring Street is the Ohio Power Company. NEP does not own nor is it affiliated with the Ohio Power

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[6] November 18, 2015 Entry at 6, 9.
[7] *Id.* at 7.
[8] Answer of NEP paragraph 54
[9] Answer of NEP paragraph 9

Company. Water and sewer service is supplied to NBCOA by the City of Columbus. NEP has no affiliation or special arrangement with the City of Columbus. The competitive retail electric service provided to NBCOA for the Spring Street building is supplied by AEP Energy, Inc. NEP has no affiliation with AEP Energy, Inc. NEP has already provided key pieces of information regarding its relationship with NBCOA:

- Affidavit of NEP's Corporate Counsel, in which he affirms that NEP is under contract with NBCOA to provide services including billing and collection of utility services at North Bank (where Mr. Whitt resides) and NBCOA procures and receives electric distribution, competitive retail electric, water, and sewage services for use at North Bank. The affidavit included copies of bills from Ohio Power Company and the City of Columbus reflecting that they and a competitive retail electric service provider serve NBCOA. (Exhibit 1 to NEP Motion for Bifurcation)

- Declaration and bylaws of NBCOA, which reflect that only NBCOA can contract for utility services to North Bank: "Each Unit Owner by acceptance of a deed to a Unit agrees to pay the local utility company or a private third-party provider, as applicable, for utility services separately metered or separately submetered to that Unit, and to reimburse the Association for that Owner's Unit's share of any utility cost that the Board, or its designee, reasonably determines is attributable to use by that Owner's Unit All other utility costs shall be common expenses and paid by the Association. The Board on behalf of the Association may enter into one or more service agreements with a private utility provider for the provision of and/or monitoring of electric, water, sewer and any other utility service." (Page 16 of Exhibit 2 to NEP Motion for Bifurcation)

These documents demonstrate the existing relationship between NEP and NBCOA and that NEP does not constitute a public utility.

III. NBCOA is not a Necessary and Indispensable Party to this Case

A. NBCOA is not a Necessary and Indispensable Party under the tests in the Ohio Civil Rules

Under Ohio Civ. R. 19, courts have discretion to dismiss an action when a person needed for a just adjudication is not subject to service of process and, therefore, cannot be joined. While the rule does not explicitly label persons as "necessary," "indispensable," or the like, the effect of

the rule is that the Court should order joinder of a person needed for "just adjudication" if he or she can be served with process or, depending on certain factors, proceed with or dismiss the action if the person necessary for "just adjudication" cannot be served with process. Specifically, paragraph (A) of the rule describes those "necessary parties" who shall be joined in the action, assuming that service of process may be affected. Where joinder of that necessary party is not feasible, paragraph (B) provides a mechanism for the court to determine whether it should proceed with the parties before it or dismiss the action. Where the factors direct the Court to dismiss the action because joinder of the necessary party is not feasible, the necessary party is termed an "indispensable party."

As stated above, paragraph (A) describes those people that should be joined as a party where service of process may be effected. These "necessary parties" include a person:

> (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, or (3) he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee.[10]

Paragraph (B) of Civ. R. 19 provides that, if a person who should be joined cannot be joined, as where such person is not subject to the jurisdiction of the court, the Court must determine whether it should proceed with the parties before it or dismiss the action. Ordinarily, the Court will proceed with the parties before it unless the absent party is considered "indispensable." An "indispensable party," for example, may be one who might expose the defendant to the threat of multiple liabilities, as distinguished from the threat of multiple

[10] *See*, Ohio Civ. R. 19(A).

litigation. Paragraph (B) of Civ. R. 19 contains the following four factors used determine whether a party is "indispensable":

> - To what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties.
> - The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided.
> - Whether a judgment rendered in the person's absence will be adequate.
> - Whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.[11]

Thus, Ohio Civ. R. 19 is meant to encourage moving the action forward with the parties present, provided that the Court can fashion appropriate relief after weighing the interest of the absent party and the parties before the court. While not binding on the Commission, the civil rules are instructive to the Commission's consideration of this question.[12]

Looking now at the factors for determining a party to be necessary, the answer is clear that NBCOA is not necessary.[13] First, complete relief in this matter can be accorded without NBCOA's participation. More directly, NEP points out the NBCOA is not needed for the Commission to evaluate whether Mr. Whitt has standing to bring this complaint (which he does not) or whether the Commission has jurisdiction to consider this complaint (which it does not).

Second, the NBCOA has expressed no interest in this matter and again, the NBCOA is not so situated that disposition of the action in its absence may impair or impede the NBCOA's ability to protect that interest or leave any of the parties subject to substantial risk due to its absence. Third, nothing in the record reflects that the NBCOA has an interest as an assignor,

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[11] *See*, Ohio Civ. R. 19(B).

[12] *See, e.g., S.G. Foods, et al. v. FirstEnergy Corp. et al.*, Case Nos. 04-28-EL-CSS, et al., Entry on Rehearing at 6-7 (April 26, 2006), wherein the Commission found the civil rules instructive as to an evidentiary issue and elected to follow them.

[13] This is not to say that the NBCOA is completely unrelated to the allegations or that it has no relevant knowledge of matters related to Mr. Whitt's claims.

assignee, subrogor or subrogee. Taken altogether, the only conclusion to reach is that the NBCOA is not a necessary party to this proceeding.

Turning now to the four factors used to find a party indispensable, the answer is again clear – the NBCOA is not indispensable. A judgment by the Commission as to Mr. Whitt's claims against NEP will not prejudice the NBCOA or the existing parties. There is no reason to believe that any judgment cannot be shaped to lessen or avoid prejudice to the NBCOA. Any judgment without having NBCOA's participation will be adequate. Finally, the last factor is not really applicable in this situation because, based on the prior Commission precedent, there is no reason to believe that the matter will be dismissed because of nonjoinder of the NBCOA. Moreover, Mr. Whitt certainly does not believe that NBCOA must be joined because he (an experienced utility attorney) has not ever sought to join the NBCOA. Taken altogether, the only conclusion to reach is that the NBCOA is not an indispensable party to this proceeding.

B. NBCOA is not a necessary or indispensable party because it is not a public utility.

The Commission has evaluated whether certain parties are necessary or indispensable in two similar complaint cases involving whether individuals and entities who were submetered were improperly charged for electric service, and in both cases the Commission dismissed the property owners from the complaints because they were not public utilities subject to the Commission's jurisdiction.[14]

In addition, the Ohio Supreme Court reaffirmed in 2002 that property owners of office buildings, apartment houses, and shopping centers are "consumers" of electricity, even though

[14] *Toledo Premium Yogurt, Inc., dba Freshens Yogurt v. Toledo Edison Company et al.*, Case No. 91-1528-EL-CSS, Entry (September 17, 1992); and *Brooks et al. v. Toledo Edison Company*, Case No. 94-1987-EL-CSS, Entry (March 16, 1995).

they may resell, redistribute, or submeter part of the electric energy to their tenants.[15] Importantly, the Court went on to state that "S.B. 3 did not change the law governing the resale or redistribution of electric service by a landlord to its tenants, and nothing in S.B. 3 overrules *Jonas*, *Shopping Centers Assn.*, or the commission's decision in *Brooks* (which relied on *Shopping Centers Assn.*)."[16]

More recently, the Commission found in 2004, that a landlord's provision of water and sewer services to a residential apartment complex did not make the landlord a jurisdictional public utility.[17] It also determined that it had no jurisdiction over the landlord or over the complaint, noting that there is a separate, comprehensive set of statutes in Ohio governing the landlord-tenant relationship. The Ohio Supreme Court affirmed the Commission's ruling.[18]

in addition, the Commission's own rules reflect that, for master-metered properties, the landlord/property owner is the utility customer.[19]

In sum, the Commission's own cases and its existing rule establish that NBCOA is not a necessary party to this complaint case as it is not a public utility under Ohio law.

IV. Conclusion

For the foregoing reasons, the Commission should determine based on Ohio law and the Commission's own precedent that the NBCOA is neither a necessary nor an indispensable party in this proceeding. Then, the Commission should find that NBCOA is the consumer of the enumerated services and Mr. Whitt is not a utility consumer. Finally, the Commissions should

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[15] *FirstEnergy Corp. v. Pub. Util. Comm.*, 96 Ohio St.3d 371, 2002-Ohio4847 (2002), citing *Jonas v. Swetland Co* (1928), 119 Ohio St. 12, 162 N.E. 45, and *Shopping Centers Assn. v. Pub. Util. Comm.* (1965), 3 Ohio St.2d 1, 32 O.O.2d 1, 208 N.E.2d 923, and *Brooks*, *supra*.
[16] *FirstEnergy Corp. v. Pub. Util. Comm.*, *supra*.
[17] *Pledger v. Capital Properties Management Ltd.*, Case No. 04-1059-WW-CSS, Entry (October 6, 2007).
[18] *Pledger v. PUC*, 109 Ohio St.3d 463; 2006-Ohio-2989; 849 N.E.2d 14; 2006 LEXIS 1980 (2006).
[19] Rule 4901:1-18-08(H), Ohio Administrative Code.

conclude that Mr. Whitt has no standing to raise the allegations in his complaint against NEP at the Commission and dismiss the complaint with prejudice.

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Summary: Memorandum Memorandum on NEP's Relationship with the North Bank Condominium Owners Association and whether the Association is a Necessary or Indispensable Party electronically filed by M HOWARD PETRICOFF on behalf of Nationwide Energy Partners, LLC