

**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 CONTRA TO COMPLAINANT’S MOTION TO LIFT STAY**

I. Introduction

Pursuant to Rule 4901-1-12(B) of the Ohio Administrative Code, Nationwide Energy Partners, LLC (“NEP”) submits this Memorandum Contra to the December 12, 2016 Motion to Lift Stay filed by the Complainant, Mark A. Whitt.¹ The Public Utilities Commission of Ohio (“Commission”) should deny the Complainant’s Motion to Lift Stay because: (1) Complainant’s application for rehearing on the same issue remains pending before the Commission and (2) it is premature given the ongoing Commission investigation and potential for rehearing in the investigation docket. Having already answered over 100 discovery requests, NEP should not be exposed to the burden and expense of additional discovery in this proceeding until *after* the Commission completes its investigation on submetering and finalizes its application of the *Shroyer* test. The Commission should deny the Motion to Lift Stay and let the investigation proceed to completion.

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

II. Background

Complainant, Mark A. Whitt, filed a complaint with the Commission on April 10, 2015, alleging that, since November 2014, NEP has supplied, arranged for, or provided him with electricity, water, sewer, and retail electric services at his condominium, and improperly charged him for such services and for those services to the common areas of the condominium building. In addition, Complainant alleged that NEP's actions and services qualify it to be an electric light company, electric distribution utility, electric utility, public utility, electric supplier, water-works company, and sewage disposal company. Complainant also alleged that NEP does not possess the necessary Commission certification in order to provide him with electricity, water, sewer and retail electric services, has not otherwise complied with Title 49 of the Revised Code, or does not have an exemption from regulation.

On November 18, 2015, the Commission ruled that discovery and this complaint case should be stayed while the Commission separately conducted 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."² The Complainant filed an application for rehearing challenging the Commission's decision to stay discovery and hold this complaint in abeyance. That application for rehearing is still pending before the Commission.

The Commission opened its investigation and requested comments, including whether condominium associations and similarly situated entities are public utilities.³ On December 7, 2016, the Commission issued a Finding and Order in Case No. 15-1594-AU-COI directing

² November 18, 2015 Entry at 6, 9.

³ *In the Matter of the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI, Entry (December 16, 2015).

interested stakeholders to file an additional round of comments by January 13, 2017, and reply comments by February 3, 2017. The Finding and Order in Case No. 15-1594-AU-COI was silent on any impact on the status of this complaint case.

III. Argument

A. Whether there should be a stay in this complaint case is already a question pending before the Commission.

As an initial point, the Complainant's Motion to Lift the Stay should be denied because the Complainant has an application for rehearing pending before the Commission on this same subject. Specifically, the Complainant filed an application for rehearing on December 18, 2015 "directed to the portion of the Entry staying discovery and holding this proceeding in abeyance."⁴ That rehearing application remains under the Commission's consideration, given the Commission's January 13, 2016 Entry on Rehearing, in which it stated that "... the application for rehearing should be granted for further consideration of the matters specific in the application for rehearing."⁵ The Commission should deny Complainant's Motion to Lift Stay.

B. The Commission's investigation should be completed prior to a lifting of the stay.

The Commission opened its investigation in Case No. 15-1594-AU-COI "... to determine the scope of the Commission's jurisdiction over submetering by condominium associations and similar entities in the state of Ohio."⁶ In its December 7, 2016 Finding and Order in Case No. 15-1594-AU-COI (at ¶22), the Commission stated it would be expanding

⁴ Complainant's Application for Rehearing at 2.

⁵ January 13, 2016 Entry at ¶ 5.

⁶ *In the Matter of the Commission's Investigation of Submetering in the State of Ohio*, Case No. 15-1594-AU-COI, Entry at ¶ 3 (December 16, 2015).

the application of the *Shroyer* test to condominium associations, submetering companies and other entities, and modified the test. Important to the matter at bar, the Commission decided *to continue* with its investigation to further develop its application of the *Shroyer* test. Additional comments on the third prong of the test are due January 13, 2017, and reply comments by February 3, 2017.⁷

Although the investigation remains ongoing, Complainant claims that the December 7 2016 Finding and Order “resolves the issues giving rise to the investigation” and therefore the grounds for the stay in this proceeding no longer exist.⁸ Complainant also claims that none of the discovery previously served addressed the modification to the *Shroyer* test and that NEP cannot “be heard to complain that it needs further direction from the Commission before responding to this discovery.” Complainant, however, misses the point. The stay was granted to avoid undue burden and expense to NEP until the investigation was completed.

The Commission expressly stated at ¶15 in its November 18, 2015 Entry granting the stay, “...that it would be *unduly burdensome or expensive* for NEP to respond to further discovery requests *while we conduct our investigation* into third-party entities such as billing agents or contractors and submetering in the state of Ohio.” Indeed, NEP responded to nearly 100 discovery requests in this proceeding prior to the stay being granted. NEP should not be subjected to further discovery until the Commission completes its investigation and finalizes its modifications of the *Shroyer* test. NEP should not be forced to litigate the complaint filed

⁷ The Commission seeks comments regarding the reasonable threshold percentage to establish the rebuttable presumption for which the provision of utility service is not ancillary to the landlord’s or other entity’s primary business.

⁸ Complainant’s Motion to Lift Stay at 1.

by the Complainant under the *Shroyer* test while the Commission continues to seek comments on the test itself.

Importantly, Complainant will not be harmed by a continuation of the stay. Complainant has been an active participant in the investigation, filing both initial and reply comments, and NEP expects Complainant to continue to file comments in the investigation. The Commission has also indicated that it will act quickly in the investigation, stating in its Finding and Order that “[o]nce comments and reply comments are filed, the Commission expects to act expeditiously in this matter.” The Commission appropriately used its discretion to impose the stay, and that stay should remain in place to avoid unnecessary discovery (and discovery disputes) in this proceeding until after the investigation is completed.

Additionally, even if the Complainant were correct that the December 7 Finding and Order resolves the issues giving rise to the investigation (which it does not), the Commission has yet to hear applications for rehearing on its December 7, 2016 Finding and Order. NEP and other interested stakeholders have a statutory right to apply for rehearing with respect to matters determined by the Commission.⁹ NEP should not be burdened with discovery in a proceeding so long as the Commission can modify its application of the *Shroyer* test on rehearing. Not only should the Commission not lift the stay until after the investigation is complete, it should keep the stay in place until it rules on any rehearing applications filed in the investigation docket.

III. Conclusion

Of the two parties, it is not Complainant but rather NEP that would be harmed if the Commission lifts the stay prior to completing its investigation. To avoid the harm of undue

⁹ R.C. 4903.10.

burden and expense, the Commission should keep the stay in place so long as the Commission continues to consider modifications to the *Shroyer* test. Neither the Complainant nor NEP should be forced to litigate this proceeding until the investigation in Case No. 15-1594-AU-COI is complete.

Respectfully submitted,

/s/ Gretchen L. Petrucci

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/s/ Gretchen L. Petrucci

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Summary: Memorandum Contra to Complainant's Motion to Lift Stay electronically filed by Mrs. Gretchen L. Petrucci on behalf of Nationwide Energy Partners, LLC