

**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 REPLY MEMORANDUM IN SUPPORT OF
MOTION TO LIFT STAY**

Nationwide Energy Partners, LLC (NEP) argues that Complainant’s motion to lift the stay of discovery should be denied 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.” (Mem. Contra at 1.) Both arguments are meritless. The jurisdictional uncertainties NEP cited as grounds for a stay of discovery have been resolved. The Commission has determined that it has jurisdiction over submetering complaints. This is a complaint about submetering. Complainant has a statutory right to discovery. The previously-entered stay of discovery must therefore be lifted.

In granting the stay, the Commission found that NEP would be unduly burdened by responding to discovery “*while we conduct our investigation* into third-party entities such as billing agents or contractors and submetering in the state of Ohio.” Nov. 8, 2015 Entry at ¶16, emphasis added. NEP agrees that “[t]he stay was granted to avoid undue burden and expense to NEP until the investigation was completed.” (Mem. Contra at 4.) In its December 7, 2016 Finding and Order in the COI docket, the Commission declared that it “*has now conducted a*

complete and thorough review of submetering in the state of Ohio and issues this Finding and order to provide guidance to Ohio’s public utilities and interested stakeholders.” Case No. 15-1594-AU-COI, Dec. 7, 2016 Finding and Order at ¶7 (emphasis added). Even though it has solicited additional comments on one aspect of the “guidance” explained in its December 7 Finding and Order, the Commission plainly considers its investigation complete *as to the central issue* in the COI docket, *i.e.*, “the scope of the Commission’s jurisdiction over submetering by condominium associations and similar entities in the state of Ohio.” Case No. 15-1594-AU-COI, Dec. 16, 2015 Entry, at ¶ 3. Because the Commission has completed its investigation of this issue, the grounds for staying discovery (*i.e.*, the pending investigation of the Commission’s jurisdiction) no longer exist. The stay of discovery should therefore be lifted.

Neither argument presented by NEP supports continuation of the stay. First, NEP makes no attempt to explain why the existence of an unresolved application for rehearing in the COI dictates a continued stay of discovery in this CSS docket. The application for rehearing objected to the Commission’s decision to stay discovery while it conducted its investigation. The Commission has completed its investigation. The pending motion seeks to lift the stay not in repetition of the grounds alleged in the application for rehearing, but because of a new development—a Finding and Order has been issued in the proceeding that triggered the stay. For all practical purposes, the completion of the investigation moots the application for rehearing. Whether moot or not, there is no reason a ruling on the pending motion cannot also address the application for rehearing.

Second, the erroneous characterization of the investigation as “ongoing” and the “potential for rehearing” are not grounds for a continued stay of discovery. The COI Finding and Order declares that the Commission will apply a modified *Shroyer* test to submetering

arrangements. Under the third prong of the test, if a customer's total bill is an unspecified "percentage threshold" above the prevailing standard service offer price for comparable service, then a rebuttable presumption will arise that the provision of service is not ancillary to the provider's primary business. *See* Case No. 15-1594-AU-COI, Dec. 7, 2016, at ¶ 16. The Commission invited further comment on where this "percentage threshold" should be set. *Id.* at ¶22.

NEP tries to spin this additional comment period as evidence that the investigation is "ongoing," but its argument misses the point. The central issue of the investigation was "to determine the scope of the Commission's jurisdiction over submetering by condominium associations and similar entities in the state of Ohio." Case No. 15-1594-AU-COI, Dec. 16, 2015 Entry at ¶ 3. The *Commission* believes it has conducted a "complete and thorough review" of this issue, and has issued an order providing "guidance to Ohio's public utilities and interested stakeholders." As is clear from the order, the Commission has determined not only that it *will* exercise jurisdiction, but *how* it will exercise it; *i.e.*, by applying the three-prong *Shroyer* test. Regardless of whatever "percentage threshold" the Commission eventually decides, the central jurisdictional issue the Commission set out to investigate has been investigated.

To the extent the additional comment period is deemed to render the motion to lift the stay "premature," the solution is to order the stay lifted on or after February 3, 2017, which is when reply comments are due in the COI docket. Whatever work the *Commission* must do after that date does not affect *NEP's* ability to respond to discovery.

NEP's real objective is not only to prolong a stay of discovery, but to maintain a stay indefinitely. "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.” (Mem. Contra at 5.) Why? Because NEP says so, apparently. NEP points to its right to seek rehearing under R.C. 4903.10, but the rehearing and discovery processes are not necessarily mutually exclusive, and NEP fails to explain how granting Complainant his statutory right to discovery in the CSS docket (*see* R.C. 4903.082) in any way prejudices NEP’s right to seek rehearing in the COI docket. Moreover, Commission orders are “effective immediately upon entry thereof” (R.C. 4903.15), so neither rehearing nor appeal would stay execution of any final orders issued in the COI docket in any event. R.C. 4903.16.

Regardless of any perceived relationship between this proceeding and the COI docket, the fact remains that these are separate proceedings. This proceeding is governed by R.C. 4905.26; a statute which says the Commission “shall fix a time for hearing” and “parties to the complaint shall be entitled to be heard” More specifically, “All parties and intervenors shall be granted ample rights of discovery.” R.C. 4903.082. The Commission cannot enforce these rights while continuing to maintain the stay of discovery. Complainant’s motion should be granted and the stay lifted.

Dated: January 3, 2017

Respectfully submitted,

s/ Mark A. Whitt

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(Complainant is willing to accept
service by email)

CERTIFICATE OF SERVICE

I hereby certify that a courtesy copy of Complainant's Reply Memorandum in Support of Motion to Lift Stay was served by electronic mail this 3rd day of January, 2017 to the following:

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Summary: Reply Memorandum in Support of Motion to Lift Stay electronically filed by Ms. Rebekah J. Glover on behalf of Mark A. Whitt