BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Cynthia Wingo Complainant, v. Nationwide Energy Partners, LLC, et al. Respondents.	)	Case No. 17-2002-EL-CSS

COMPLAINANT'S MEMORANDUM CONTRA
MOTION TO DISMISS OF NATIONWIDE ENERGY PARTNERS

Nationwide Energy Partners, LLC (NEP) has filed another motion to dismiss for lack of subject matter jurisdiction. NEP's legal arguments here are the same arguments it made in Case No. 16-2401-EL-CSS (the "Gateway Lakes Complaint"). Rather than repeat what has already been said, Ms. Wingo incorporates by reference the response she filed on October 10, 2017 to NEP's prior motion to dismiss. In that case as well as this one, there are reasonable grounds for complaint under R.C. 4905.26, which precludes summary dismissal.

Both of NEP's motions to dismiss are attempts to short-circuit this Commission's process, gaining an early ruling on the *Shroyer* test without engaging in the factual discovery and evidentiary hearing required for the Commission to apply this test. NEP's arguments rely on the existence of contracts among NEP and various other parties, and the lack of a written contract between NEP and Ms. Wingo. These claims involve factual matters—and disputed ones at that. But even setting aside the factual disputes about these contracts and the circumstances under which they were entered (including NEP's pay-offs to property owners and developers to enter them), none of the purported contractual relationships highlighted by NEP would justify dismissal, ***even if NEP's characterizations of these contracts were accepted as true***.

We can start with the lack of a written service agreement between Ms. Wingo and NEP. The absence of a signed agreement does not prove that Ms. Wingo is not NEP's customer. If anything, the absence of a signed service agreement shows that NEP tries to operate just like a regulated or governmental utility. As the Commission and any residential ratepayer well knows, consumers typically do not sign a written service agreement with AEP Ohio or the City of Columbus to receive electricity or water/sewer service. Consumers call the utility, provide the service address, disclose a few pieces of personal information, and start receiving service.[1] Ms. Wingo is no differently situated with NEP than she would be with AEP Ohio or the City of Columbus. The lack of a written service agreement does not preclude Ms. Wingo from being a "customer" of NEP. Nor does the absence of a signed writing preclude a finding that NEP renders public utility service to Ms. Wingo under an implied contract. "A contract implied-in-fact is a contract inferred from the surrounding circumstances, including the conduct and statements of the parties, which lead to a reasonable assumption that a contract exists between the parties by tacit understanding." *Aero Fulfillment Servs. Corp. v. Oracle Corp*., 186 F. Supp. 3d 764, 773 (S.D. Ohio 2016) (quoting *Keybank Nat'l Ass'n v. Mazer Corp*., 188 Ohio App.3d 278, 2010-Ohio-1508, ¶ 34 (2d Dist.)).

Nor are NEP's alleged contracts with third parties dispositive of the true provider/customer relationship. The Commission cannot blindly accept NEP's purported agreements at face value. Where "the totality of the evidence could indicate that the real

[1] This is the very reason for requiring public utilities to file and adhere to tariffs. Tariffs define the rights and obligations of the provider and customer, rendering the need for written service agreements superfluous in most circumstances. By not filing a tariff or otherwise disclosing the terms of service until it renders the first bill (*see* NEP Mem. Supp. at Ex. 2, Ex. C thereto pp. 2-11, "Terms and Conditions"), NEP has set up a system where it gets to unilaterally decide what terms are enforceable ***by*** NEP, while simultaneously claiming that no terms are enforceable ***against*** NEP.

intention of the deal" was to circumvent Ohio law, the Commission may "look beyond the surface" of written agreements to consider whether there was an "underlying deal" to circumvent regulation. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n*, 76 Ohio St. 3d 521, 524, 1996-Ohio-298 (reversing Commission dismissal of complaint alleging sham transactions used to violate Certified Territory Act). Here, as in *Cleveland Electric*, "[w]hat we and the commission should be concerned with is whether" NEP and its counterparties "have 'artfully' or otherwise created a series of transactions which, taken together, contravene the laws of this state." *Id*. at 528 (Douglas, J., concurring).

NEP claims it "does not resell, redistribute or otherwise provide electric, water, sewer or any other utility service to Ms. Wingo (or any other tenants of Creekside)." (NEP Mem. Supp. at 1). But the documents attached to the affidavit accompanying its motion show just the opposite. AEP Ohio issues bills to NEP for electric distribution service. (*Id*. at Ex. 2, Ex. A thereto). The City of Reynoldsburg issues bills to NEP for water/sewer service. (*Id*. at Ex. B). NEP then issues bills to Ms. Wingo for electric, water and sewer service registered by NEP-owned meters. (*Id*. at Ex. C, pp. 2-11).[2] The Commission unquestionably has jurisdiction to determine whether brokering this arrangement constitutes the provision of public utility service—regardless of whether NEP entered contracts to "artfully or otherwise" mask an underlying deal to "contravene the laws of this state." *Id*.

NEP will not and cannot dispute that tenants of both Gateway Lakes and Creekside were once directly served by AEP Ohio. NEP orchestrated a deal for AEP Ohio to sell the distribution

[2] "Metering service" and "billing and collection service" are components of "retail electric service." R.C. 4928.01(A)(27). Neither has been declared a competitive service under R.C. 4928.04. NEP's admission that it provides these services (*see* NEP Mem. Supp. at 5) is an admission to a violation of Ohio law—regardless of whether the services are provided to a "property owner, manager, or developer" or an end-user such as Ms. Wingo.

infrastructure serving these properties to the property owners—with none other than NEP (not the property owners) signing the agreement to transfer these facilities. One day tenants were customers of AEP Ohio. The next day they were not. As AEP Ohio customers, tenants had some assurance that the regulatory process would protect them. Now they receive only such protections as NEP is willing to afford—which is to say, not many. Tenants are routinely disconnected and threatened with eviction in the winter. They are routinely assessed late fees and penalties. They are denied the ability to shop for a competitive supplier. They are forced to pay common area charges for usage they have no ability to control. Tenants in NEP communities are treated like second-class citizens. It is outrageous.

One of the goals of public utility regulation is to protect the public from the utility. If the Commission dismisses this case or the Gateway Lakes Complaint, any criticism that the Commission believes it is more important to protect the utility (or a faux-utility) from the public would not be undeserved.

Dated: November 16, 2017

Respectfully submitted,

s/ Mark A. Whitt

Mark A. Whitt
(Counsel of Record)
Andrew J. Campbell
Rebekah Glover
WHITT STURTEVANT LLP
88 E. Broad St., Suite 1590
Columbus, Ohio 43215
614.224.3911
614.224.3960 (f)
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com

Shawn J. Organ
Joshua M. Feasel
Carrie M. Lymanstall
ORGAN COLE LLP
1330 Dublin Road
Columbus, Ohio 43215
614.481.0900
614.481.0904 (f)
sjorgan@organcole.com
jmfeasel@organcole.com
cmlymanstall@organcole.com

Attorneys for Complainant

CERTIFICATE OF SERVICE

This document was filed via the Commission's e-filing system on November 16, 2017. Parties who have subscribed to electronic service will receive notice of this filing from the Commission. Service is also being made this day to the following persons by email:

Michael J. Settineri	mjsettineri@vorys.com
Ilya Batikov	ibatikov@vorys.com
Gretchen L. Petrucci	glpetrucci@vorys.com
Barth E. Royer	barthroyer@aol.com
Christopher J. Allwein	callwein@keglerbrown.com
Steven T. Nourse	stnourse@aep.com
Christen M. Blend	cmblend@aep.com

s/ Mark A. Whitt

Summary: Memorandum Contra Motion to Dismiss electronically filed by MARK A WHITT on behalf of Wingo, Cynthia