

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

Cynthia Wingo,)	
)	
Complainant,)	
)	
v.)	Case No. 16-2401-EL-CSS
)	
Nationwide Energy Partners, LLC,)	
)	
Respondent.)	

**NATIONWIDE ENERGY PARTNERS, LLC’S MEMORANDUM CONTRA TO
APPLICATION OF REHEARING OF OHIO POWER COMPANY**

I. INTRODUCTION

Ohio Power Company’s (“AEP Ohio”) application for rehearing to the Commission’s November 21, 2017 Finding and Order (“Order”) is both procedurally and substantively flawed. As a threshold matter, AEP Ohio is not a party to this proceeding, and therefore, was required by R.C. 4903.10 to seek leave from the Commission to file its application for rehearing as an “affected person.” It did not do so, depriving the Commission of jurisdiction to consider it. At a minimum, the Commission should only consider AEP Ohio’s assignment of error as to the intervention – and not AEP Ohio’s other assignments of error. *See In re Application of 6011 Greenwich Windpark, LLC*, Case No. 13-990-EL-BGN, Entry on Rehearing at *5-6 (Aug. 27, 2015) (only accepting application for rehearing for limited purpose of hearing assignment of error on intervention).

Putting aside this threshold jurisdictional issue, AEP Ohio’s grounds for rehearing are without merit. While AEP Ohio did not establish its rights to intervene in this proceeding, it nonetheless had the opportunity to be heard, and yet it did not respond to or oppose NEP’s motion to dismiss, did not file or serve discovery and did not ask this Commission to stay a

ruling on the motion to dismiss pending a final order in the Submetering Investigation. And consistent with its longstanding precedent, the Commission was not required to stay this proceeding pending rehearing applications pending in another proceeding. Likewise, AEP Ohio's assertion that the Commission should have applied its proposed "no-mark" up test similarly fails as AEP Ohio's proposed test was already rejected by the Commission, and is directly contrary to Supreme Court of Ohio precedent.

For these reasons, and as further discussed below, the Commission should not consider AEP Ohio's application for rehearing and at a minimum, should only consider the assignment of error as to AEP Ohio's intervention claim.

II. ARGUMENT

A. AEP Ohio's application for rehearing is procedurally deficient

R.C. 4903.10 provides that two (and only two) classes of persons are entitled to seek rehearing of the Commission's decisions: (1) parties, and (2) other "affected person[s]" *but* only so long as they first seek leave from the Commission. R.C. 4903.10. AEP Ohio falls into neither category. A *party* includes "[a]ny person granted leave to intervene" by the Commission. Ohio Admin. Code. 4901-1-10 (emphasis added). Intervention movants, who have not yet been granted intervention, are not "parties,"¹ except for certain limited purposes of motion practice and discovery. *See* Ohio Admin. Code 4901-1-12(E); 4901-1-16(H).

AEP Ohio was not granted intervention in this case and is not a "party" for purposes of rehearing. Therefore, to perfect its application for rehearing, AEP Ohio was required to proceed

¹ See *In re Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order (Dec. 6, 2006), where the Commission rejected proposed change to Rule 4901-1-10, that would define "parties" to include not only those who have been granted leave to intervene but also those persons who have filed to intervene. The Commission found that "[t]his proposal would result in all persons who file a motion to intervene automatically becoming parties. Such a proposal has the unintended result of permitting persons to be parties even though they would fail to meet the requirements for intervening in a case." *Id.* at 15.

as an “*affected person*,” which, in turn, necessitated that it first seek the Commission’s leave to file its application for rehearing. AEP Ohio did not seek leave, and as a result, the Commission lacks jurisdiction to consider its application for rehearing.

The Commission has, however, on certain occasions, permitted movants for intervention to file application for rehearing without their intervention motions being granted and without seeking prior leave from the Commission. *See In re Cincinnati Gas & Electric Co.*, Case No. 05-732-EL-MER, Entry on Rehearing (Dec. 7, 2005) and *see In re FirstEnergy*, Case No. 11-5201-EL-RDR, Entry on Rehearing (Sept. 18, 2013). NEP submits that to the extent the Commission decides to follow these decisions (even though AEP Ohio is not a party to this proceeding) and accept AEP Ohio’s application for rehearing, it should do so only for the limited purpose of permitting AEP Ohio to contest the Order’s determination on its motion to intervene, as addressed in its first ground for rehearing. *See e.g. In re Application of 6011 Greenwich Windpark, LLC*, Case No. 13-990-EL-BGN, Entry on Rehearing at *5-6 (Aug. 27, 2015) (Ohio Power Siting Board accepting application for rehearing but only for limited purpose of hearing assignment of error on denied intervention).² Like the OPSB did in the *Greenwich* case, the Commission at most should only allow AEP Ohio’s assignment of error on intervention.

B. Even if the Commission could consider AEP Ohio’s application for rehearing, it should be denied.

Even if the Commission accepts AEP Ohio’s jurisdictionally-deficient application for rehearing, it should deny it for failure to state valid grounds for rehearing.

1. The Commission properly treated AEP Ohio’s motion to intervene as moot given the dismissal of the Complaint.

In this case, the Commission applied the *Shroyer Test* and held that based on the uncontroverted facts in the record before it, NEP is not a public utility over which the

² R.C. 4903.10 applies to Power Siting Board proceedings pursuant to R.C. 4906.12.

Commission has subject matter jurisdiction. Because the material facts were not in dispute and with the complaint dismissed, the Commission concluded that it was not necessary to address AEP Ohio's pending motion to intervene. (Order at ¶ 21). AEP Ohio claims this was error, and that the Commission deprived it of the opportunity to make "alternative arguments" distinct from those raised by the Complainant. (AEP Ohio's App. for Rehearing at 4). AEP Ohio is wrong.

As a threshold matter, AEP Ohio never established its entitlement to intervene in this proceeding, and its argument that this proceeding should have been stayed clearly shows that its intervention would have delayed this proceeding. Moreover, it is now apparent that AEP Ohio is using rehearing to attack the Commission's modifications to the *Shroyer Test* and advance an interest in this case that is solely precedential. As the Commission has recognized, "an interest in the precedential value of a case is not sufficient reason for intervention." *In re Complaint of Mark A. Whitt*, Case No. 15-697-EL-CSS, Entry, ¶ 9 (Nov. 18, 2015).

AEP Ohio also tries to rely on the Commission's decision to grant it intervention in the *Whitt* proceeding as a reason why its intervention should have been granted. AEP Ohio's reliance is misplaced because AEP Ohio's intervention was *unopposed* in the *Whitt* case and that case involved a separate set of facts. For example, unlike the facts in the *Whitt* case, AEP Ohio could not serve Ms. Wingo regardless of the outcome of her Second Amended Complaint because she moved out of her apartment. That fact alone shows that AEP Ohio has no specific interest in this proceeding and distinguishes the Commission's decision in *Whitt*.

The Commission should also take note that under its rules, AEP Ohio could have been heard during this proceeding on the same arguments it raises in its application for rehearing (which, as discussed below, are without merit). While AEP Ohio is not a party to this proceeding for most purposes (including rehearing), under the Commission's rules, it *was*

permitted to engage in motion practice and could have (but did not) ask for a stay of these proceedings. *See* Ohio Admin. Code 4901-1-12(E). AEP Ohio did not respond to or oppose NEP's motion to dismiss, did not file or serve discovery and did not ask this Commission to stay a ruling on the motion to dismiss pending a final order in the Submetering Investigation. Contrary to its claim in its first assignment of error, AEP Ohio has not been denied its right to be heard in this proceeding.

2. The Commission was not required to stay this proceeding.

AEP Ohio's second ground for rehearing is also without merit. AEP Ohio contends that the Commission acted unreasonably in failing to hold this case in abeyance until it ruled on the pending applications for rehearing concerning its Second Entry on Rehearing in the Submetering Investigation. AEP Ohio makes this argument even though neither Complainant nor NEP asked the Commission that this case be held in abeyance pending resolution of rehearing proceedings in the Submetering Investigation. AEP Ohio also could have asked the Commission to stay this proceeding because the Commission's rules permitted AEP Ohio to engage in motion practice during the pendency of its motion to intervene. **And yet AEP Ohio never asked for a stay and importantly did not oppose NEP's motion to dismiss.** The Commission cannot be accused of unreasonably failing to unilaterally stay this proceeding when AEP Ohio could have but did not make such a request.

Indeed, under AEP Ohio's line of reasoning, its tariff rates, including the PPA Rider as approved in Case No. 14-1693-EL-RDR, should not go into effect until after the Commission completes rehearing proceedings. And in fact, that very argument was rejected by the Commission in AEP Ohio's recent Rider case. *See In re Application of Ohio Power Company*, Case No. 14-1693-EL-RDR, Second Entry on Rehearing (Nov. 3, 2016) (concluding that the

Commission properly evaluated the stipulation based on the factors set forth in the *ESP 3 Case*,³ which remained subject to separate rehearing proceedings).

AEP Ohio's reliance on the *Whitt* case is equally misplaced. Although the Commission held the *Whitt* case in abeyance, it did so to conduct the Commission's Submetering Investigation. Numerous stakeholders filed comments in the Submetering Investigation, and after considering the various stakeholder responses, the Commission issued two substantive decisions addressing its modifications to the *Shroyer Test*. See Case No. 15-1594-AU-COI, Finding and Order (Dec. 7, 2016) and Second Entry on Rehearing (Jun 21, 2017). While AEP Ohio may be dissatisfied with the conclusions reached by the Commission and advocates that a different test should apply, it does not dispute that the Commission reached the right conclusion in this proceeding under the *Shroyer Test* as *currently adopted*.

The Commission was under no obligation to stay this proceeding until further rehearing proceedings in the Submetering Investigation are concluded. AEP Ohio's second assignment of error is without merit.

3. The Commission correctly determined that Complainant failed to state reasonable grounds for her complaint.

In its third ground for rehearing, AEP Ohio contends that the Commission erred in applying the *Shroyer Test* and concluding that no reasonable grounds for the complaint were stated. As noted earlier, AEP Ohio does not challenge the Commission's *application* of the *Shroyer Test*, as modified in the Second Entry on Rehearing in the Submetering Investigation to the *facts* of this case (which it does not dispute); rather it attacks the modified *Shroyer Test* itself. It urges that the Safe Harbors adopted by the Commission are unlawful, and that instead, that "the appropriate test to be applied to determine if a submetering entity or other reseller is a

³ *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order (Feb. 25, 2015).

public utility is whether the entity marks up master metering service and makes a profit from submetering.” (AEP Ohio’s App. for Rehearing at 9).

AEP Ohio’s “no-markup” test is the same one it proposed in its first application for rehearing in the Submetering Investigation, and which the Commission subsequently **rejected** in lieu of the *Shroyer Test* as modified by the Relative Price Test and Safe Harbor provisions. Second Entry on Rehearing at ¶¶ 45, 49. Moreover, AEP Ohio’s test is **directly contrary** to *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, which held that a landlord who submetered utility services to its tenants at a markup of ten percent was not a public utility under the *Shroyer Test*.

Nonetheless, AEP Ohio again advocates for its proposed “no mark-up” test in its pending June 21, 2017 application for rehearing to the Second Entry on Rehearing in the Submetering Investigation, which it incorporates in full into its application for rehearing in this case. (AEP Ohio’s App. for Rehearing at 8). Given the established Supreme Court authority stated in the *Pledger* case and the Commission’s previous rejection of AEP Ohio’s “no mark-up” approach in the Submetering Investigation, AEP Ohio’s third assignment of error is without merit. The Commission properly applied the *Shroyer Test*, as modified by the Commission’s Second Entry on Rehearing in the Submetering Investigation, to the facts of this case.

III. CONCLUSION

For the reasons set forth herein, the Commission should reject AEP Ohio's application for rehearing for failure to comply with R.C. 4903.10 and for failure to state meritorious grounds for rehearing.

Respectfully submitted,

/s/ Michael J. Settineri

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CERTIFICATE OF SERVICE

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Summary: Memorandum Contra to Application of Rehearing of Ohio Power Company
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