BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

COMPLAINANT'S MEMORANDUM CONTRA
MOTION FOR PROTECTIVE ORDER OR MOTION TO STAY DISCOVERY

NEP would not incur "undue burden and expense" if Mr. Calhoun is required to gather the documents cited in his affidavit, walk from his Arena District office to Capitol Square, and sit for a deposition. NEP makes this claim to mask what it really wants: an order that not only shields Mr. Calhoun's carefully-wordsmithed affidavit from cross examination, but also relieves NEP of any further defense costs. NEP is not entitled to such extraordinary treatment.

The Commission dismissed Ms. Wingo's original complaint against NEP, Case No.16-2401-EL-CSS (*Gateway Lakes*), based on an affidavit closely resembling the one filed here. The *Gateway Lakes* decision gives Ms. Wingo every reason to believe that if she does not rebut or impeach the "facts" offered by Mr. Calhoun, this case will meet a similar fate. The documents and information underlying the "facts" cited in Mr. Calhoun's affidavit are in the sole custody of NEP. Consequently, Mr. Calhoun's deposition ***must*** proceed—for the very reason NEP does not want it to. The motion for protective order or to stay discovery must be denied.

BACKGROUND

The not-so-subtle theme of NEP's motion is that Ms. Wingo somehow slept on her rights by not serving the deposition notice until January 9, 2018. The procedural history of this and related cases tells a different story. The timing of the deposition notice is a direct consequence of both NEP's actions and the Commission's inaction.

Ms. Wingo filed the *Gateway Lakes* Complaint on December 15, 2016. She did not immediately serve discovery because: (a) a stay of discovery was still in effect in Case No. 15-697-EL-CSS (*Whitt* complaint), and (b) in early January 2017, numerous parties sought rehearing of the initial order in Case No. 15-1594-AU-COI (the *COI*). It did not make sense to serve discovery while awaiting the Commission's guidance in the *COI*, and NEP undoubtedly would have objected to any discovery as premature—just as it did in the *Whitt* case.

The Commission issued its second entry on rehearing in the COI on June 21, 2017. Less than a month later, Ms. Wingo sought leave to file an amended complaint. The amended complaint addressed the "guidance" contained in the *COI* second entry on rehearing, and also added the Creekside entities as respondents. NEP promptly objected to the amended complaint, and days later filed a motion to dismiss. Ms. Wingo asked that the motion to dismiss be held in abeyance while the issues surrounding the motion for leave to amend were being sorted out. NEP objected to that request, too.

In September 2017, the attorney examiner sided with NEP and directed Ms. Wingo to file separate complaints against the Gateway Lakes and Creekside respondents. The *Gateway Lakes* complaint was amended again, and a new complaint prepared against NEP and the Creekside respondents. Both complaints were filed on September 19, 2017.

NEP filed a renewed motion to dismiss in *Gateway Lakes* on September 29, 2017. That motion, like the one pending here, relied on an affidavit from John Calhoun. The gist of the affidavit is that Mr. Calhoun reviewed various records in NEP's possession, ran some calculations, and determined that Ms. Wingo paid less for NEP's electric service that she would have paid to AEP Ohio. This obviously contradicts the allegations in the Second Amended Complaint, and Ms. Wingo's memorandum contra explained, "R.C. 4905.26 requires the Attorney Examiner to overrule NEP's poorly framed 'jurisdictional' motion and to allow the parties to proceed to discovery and an evidentiary hearing, where NEP's factual claims can be tested and weighed." As also pointed out to the Commission, "Ms. Wingo is not only entitled to a hearing; she is entitled to 'ample rights of discovery' in preparation for the hearing. R.C. 4903.082. And even where summary judgment is generally permissible as a matter of procedure, it is not permissible to grant it before the opposing party has had the opportunity to conduct discovery. *See* Ohio Civ. R. 56(F)." Briefing on the motion to dismiss concluded on October 24, 2017.

NEP filed its motion to dismiss in this case on November 7, 2017. Ms. Wingo's memorandum contra incorporated the arguments she had recently made in *Gateway Lakes*. She also pointed out that "[b]oth 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." She *specifically* called attention to the fact that Mr. Calhoun was offering conclusions that conflicted with the documents attached to his affidavit. She reminded the Commission of its reversible error in *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n,* 76 Ohio St. 3d 521, 524, 1996- Ohio-298, where the Court found that contractual relationships do not shield parties from claims that the

performance of such contracts violate Ohio law. The memorandum contra was filed on November 16, 2017, and was Ms. Wingo's last opportunity to address either of NEP's motions to dismiss.

A few days later, on November 21, the Commission granted the *Gateway Lakes* motion to dismiss. The dismissal order sidesteps what the Commission had said just a few months before: that in deciding cases like Ms. Wingo's, the Commission "must weigh the facts and circumstances of each case, and our consideration of whether any individual Reseller is a public utility must be made after the development of an evidentiary record in a complaint case."[1] Relying specifically on Mr. Calhoun's affidavit, the order claims that Ms. Wingo "does not dispute the fact that during her tenancy, NEP's invoiced charges were less than what Ms. Wingo would have paid for the same period and usage under the default service tariff on an annualized basis." [2]The order also erroneously concludes that Ms. Wingo failed to "identify any facts that, if proven at hearing, would change the outcome of our analysis[.]"[3]

The Commission thus set a precedent establishing that it will weigh and resolve disputed issues of fact to decide dispositive motions—regardless of the status of discovery. Litigants can no longer rely on the Commission to overrule a motion based on the non-moving party's lack of opportunity for discovery. Litigants must affirmatively rebut the moving party's factual claims. Ms. Wingo therefore elected to serve a deposition notice and request for documents cited or referenced in Mr. Calhoun's affidavit. She filed and served the notice on January 9, 2018.

As this procedural history reveals, Ms. Wingo has repeatedly and consistently objected to the summary resolution of fact issues before she has had an opportunity for discovery. The

[1] *COI*, Second Entry on Rehearing ¶ 31.
[2] *Gateway Lakes* Opinion and Order ¶ 26.
[3] *Id.*

Commission should not have ruled on the *Gateway Lakes* motion, and it should not rule on the dispositive motion pending here. Despite its acknowledgment that the Commission does not entertain summary judgments, the Commission addressed the Gateway Lakes dismissal request exactly like a summary judgment motion. The Commission will be reversed if it again grants the practical equivalent of summary judgment, without observing the summary judgment provisions requiring an opportunity for discovery. *See* Ohio Civ. R. 56(F).

I. ARGUMENT

"All parties and intervenors shall be granted ample rights of discovery." R.C. 4903.082. The scope of discovery encompasses "any matter, not privileged, which is relevant to the subject matter of the proceeding." O.A.C. 4901-1-16(B). Parties may request an attorney examiner to intervene in the discovery process to issue "any order that is necessary to protect a party or person from . . . undue burden or expense." O.A.C. 4901-1-24(A).

In the discovery context, the concept of "undue" has been defined as "'exceeding or violating propriety or fitness; excessive, immoderate, unwarranted . . . contrary to justice, right, or law: unlawful." *Insulation Unlimited, Inc. v. Two J's Properties, Ltd.,* 95 Ohio Misc. 2d 18, 28 (Com. Pl. 1997), *citing* Webster's Third New International Dictionary (1986) 2492. A conclusory statement that compliance with a discovery request would subject the responding party to "significant expense and effort . . . does not raise to the level of undue burden." *Future Comm., Inc. v. Hightower*, 2002-Ohio-2245 (10th Dist.), ¶ 17 (affirming denial of motion to quash subpoena). *See also, Isaac v. Shell Oil Co.*, 83 F.R.D. 428, 431 (E.D. Mich. 1979) ("Good cause for refusing discovery 'is not established solely by showing that discovery may involve inconvenience and expense.'"). Even where "undue" burden or expense has been found, "quashing a subpoena and the complete prohibition of a deposition are certainly extraordinary

measures which should be resorted to only in rare occasions." *Spears v. First Am. eAppraiseIT*, No. 13-MC-52, 2014 WL 1045998, at *2 (S.D. Ohio Mar. 14, 2014).

NEP has not established "undue burden and expense," let alone justified the drastic remedy of not only quashing the deposition notice, but prohibiting ***any*** further discovery.

A. NEP cannot meet its burden of proving undue burden or expense.

NEP does not claim that the deposition notice seeks testimony or documents outside the scope of discovery. It concedes that issuance of the notice violates no procedural order. And it cites no rule or case prohibiting the service of discovery to a party that has filed a dispositive motion. NEP's argument rests on just two conclusory sentences: "NEP would have to incur the time and costs to resolve any objections to Complainant's deposition notice in addition to preparing and defending the deponent. All of this time and expense would be undue given that the Commission could issue a decision soon dismissing the Complaint."[4]

NEP doesn't even address the relevant issue. The Commission could issue a ruling on the dispositive motion next week, next month, or next year. It could grant the motion, deny the motion, hold the motion in abeyance, or perhaps some combination. Many different scenarios could play out. What the Commission might do with the dispositive motion and how that decision would affect NEP is simply not the issue. The issue is whether Ms. Wingo's deposition notice requires any excessive or unreasonable effort from NEP. It plainly does not, and NEP does not even claim that it does.

Saying that the dispositive motion is "decisional" changes nothing. This is not a case where a dispositive motion was filed after a full and fair opportunity for discovery. NEP filed its motion almost immediately, less than a month after filing its Answer. NEP could not have had,

[4] Mem. Supp. at 5.

and was not entitled to, any expectation that it would not incur time and expense to respond to discovery about the affidavit. Nonetheless, NEP claims it should not have to produce the witness who filed supporting testimony because the Commission may grant its motion "soon." It overly-taxes the imagination to understand how NEP could be unduly burdened by getting what it asked for. NEP decided to file a dispositive motion early in the case. It supported the motion with an affidavit. Ms. Wingo wishes to depose the affiant. It is absurd to claim that the deposition would impose undue burden and expense because NEP expects to ultimately prevail on its motion. The fact remains that the Commission has not ruled on the motion, and there is no telling when it will—if ever.[5] To the extent NEP does not want to spend the time and money to prepare for and defend Mr. Calhoun's deposition if the case is going to be dismissed anyway, denying NEP's dispositive motion would just as easily solve this dilemma.

The purpose of a protective order is to prevent *undue* burden and expense. "Undue" burden or expense does not mean "all" or "any" burden or expense. Preparing for and defending the deposition of a key witness is an ordinary and necessary cost of litigation—for both parties. If Ms. Wingo is willing to expend the time and effort to take the deposition, NEP must spend the time and effort to defend it. If NEP's prediction turns out to be correct and the Commission dismisses the complaint, it is Ms. Wingo who will have spent time and money on an unproductive deposition, not NEP.

[5] The Commission never issued a ruling on the motion to lift the stay of discovery in the *Whitt* complaint case. It never issued a ruling on the request for emergency relief in the original *Gateway Lakes* complaint.

B. Ms. Wingo would be unduly prejudiced by a protective order or stay of discovery.

NEP claims that a protective order or stay of discovery "will not harm Complainant because no procedural schedule or hearing date has issued in this proceeding."[6] Therefore, "Complainant will have more than enough time to conduct a deposition and engage in other discovery in the event the Commission does not grant NEP's motion to dismiss."[7] As with its argument concerning undue burden and expense, NEP's attempt to show that granting a protective order will not prejudice anyone ignores the circumstances relevant to such a determination.

The lack of a procedural schedule or hearing date only confirms that the deposition notice was not served out of time, or in conflict with any case schedule. Delaying the deposition until a ruling issues on the dispositive motion would not conflict with any case schedule, but proceeding with the deposition before any ruling issues would not create any conflicts, either.

Likewise, the back-of-the-hand offer to produce Mr. Calhoun for deposition ***only if*** the Commission does not grant the dispositive motion only confirms what has already been said: preparing for and defending the deposition would not impose undue burden or expense. If NEP is willing to spend the time and effort necessary to prepare for and attend the deposition after a ruling on the motion, it cannot complain that putting in the same or similar effort prior to a ruling on the motion would be unduly burdensome. The same effort will be required of NEP regardless of when the deposition is held.

Delaying the deposition would severely harm Ms. Wingo while bestowing a windfall to NEP. NEP expects the Commission to grant the dispositive motion. Based on the *Gateway Lakes*

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[6] Mem. Supp. at 2.
[7] I*d.* at 5.

ruling, the odds of that happening only increase if Ms. Wingo is prevented from taking the discovery she needs to rebut the motion and supporting affidavit. But if the deposition proceeds, NEP will merely have to do what all litigants ordinarily do: prepare for and defend the deposition of a key witness. It is absurd for NEP to claim that its confidence that the dispositive motion will be granted entitles it to an order that spares it any further expense of defending its motion.

Granting NEP's motion would inflict prejudice, not prevent it. Prejudice is the very outcome NEP seeks. NEP is concerned that its carefully wordsmithed affidavit will not hold up under cross examination. As the affidavit goes, so goes NEP's dispositive motion. And if the dispositive motion is overruled, NEP will have to defend this case on the merits. NEP has proven that it will bear any burden, and spend whatever is necessary, to prevent this from happening

II. CONCLUSION

NEP requests relief for which it is not entitled. Its motion for protective order or to stay discovery must be denied.

Dated: February 12, 2018

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 February 12, 2018. 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 Nationwide Energy Partners' Motion for Protective Order or Motion to Stay Discovery electronically filed by Ms. Rebekah J. Glover on behalf of Ms. Cynthia Wingo