

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

REPLY OF NATIONWIDE ENERGY PARTNERS, LLC

I. INTRODUCTION

Nationwide Energy Partners, LLC filed its motion asking for a protective order or a stay on discovery because the Complainant (Cynthia Wingo) seeks to engage in discovery even though a dispositive motion is pending. In her memorandum contra, Ms. Wingo argues that the Commission should deny the motion for protective order so that she can commence discovery to rebut NEP's motion to dismiss. But briefing is closed on NEP's motion to dismiss and Ms. Wingo failed to conduct any discovery in this matter for months after filing her complaint and did not take any steps during the briefing on NEP's motion to dismiss to pursue or ask for additional time for discovery. With NEP's motion to dismiss fully briefed, NEP should not be required to incur the undue burden and cost of discovery until after the Commission rules on the motion to dismiss. That can be accomplished through a protective order or a stay, neither of which will prejudice Ms. Wingo as she will have ample time for discovery and to prepare for hearing if the Commission denies NEP's motion to dismiss. Ms. Wingo's arguments in her memorandum contra should be rejected, and NEP's motion granted.

II. ARGUMENT

A. Ms. Wingo wants to “rebut” NEP’s motion to dismiss but that pleading cycle has been completed.

Ms. Wingo states in her memorandum contra that discovery should be allowed (and NEP’s motion for protective order be denied) because she “needs to rebut the [NEP] motion and supporting affidavit.”¹ Ms. Wingo, however, had a fair and ample opportunity to respond to NEP’s motion to dismiss, which she did by filing a memorandum contra on November 16, 2017, six days early. She does not explain her delay in serving discovery in this case until January 2018 or her failing to ask the Commission for more time to respond to NEP’s motion to dismiss during the briefing period. Instead, she attempts to excuse her decision to forgo discovery by claiming that other Commission cases somehow influenced her decision to not serve discovery in this matter.² But that excuse is irrelevant because she has had the opportunity to conduct discovery since September 19, 2017, the day she filed her complaint.³

As the below order of events shows, the delay on discovery was of her own making.

Date	Event
September 19, 2017	Ms. Wingo filed the complaint.
October 10, 2017	NEP and the other respondents filed answers.
November 7, 2017	NEP filed its motion to dismiss.
November 16 & 17, 2017	Ms. Wingo and AEP Ohio filed memorandum contra.
November 24, 2017	NEP filed a reply in support of its motion to dismiss.
January 9, 2018	Ms. Wingo filed a notice of deposition for January 29.

¹ See Wingo Memorandum Contra at 9.

² See Wingo Memorandum Contra at 2-5.

³ See Rule 4901-1-17(A), Ohio Administrative Code (subject to exceptions not applicable here, “discovery may begin immediately after a proceeding is commenced * * *.”)

With briefing on the motion to dismiss long closed, it would be procedurally improper to deny NEP's motion for a protective order so that Ms. Wingo can conduct discovery and file a "rebuttal" that is not permitted under the Commission's rules. The Commission may issue a protective order or stay on discovery because NEP's motion to dismiss is fully briefed and decisional.

B. NEP's request for a protective order or stay in discovery is reasonable.

The Commission should also reject Ms. Wingo's claims that NEP has not established undue burden or expense. NEP filed its motion for a protective order or stay because it should not have to incur the expense and time of responding to Ms. Wingo's discovery given that NEP's motion to dismiss is decisional. Supporting NEP's motion is that the facts in this proceeding are very similar to the dispositive facts that resulted in the Commission's recent dismissal of Ms. Wingo's Gateway Lakes complaint. *See Cynthia Wingo v. Nationwide Energy Partners, LLC*, Case No. 16-2401-EL-CSS, Finding and Order (Nov. 21, 2017).

NEP's request is not unusual. For example, in 2015, the Commission granted NEP's motion for a stay of further discovery finding that it would be unduly burdensome or expensive for NEP to respond to further discovery requests during the pendency of the Commission's investigation on submetering. *Mark A. Whitt v. Nationwide Energy Partners*, Case No. 15-697-EL-CSS, Entry (Nov. 18, 2015) at ¶16. The Commission has also stated that "Rule 4901-1-24(A), O.A.C., provides a remedy where a response to discovery requests would be unduly burdensome or costly." *See In the Matter of the Petition of OHIOTELNET.COM, Inc.*, 2001 Ohio PUC LEXIS 1012, *16, Case No. 00-1601-TP-ARB, Arbitration Award, January 11, 2001.

Ms. Wingo ignores that authority and instead tries to rely on decisions from two state court decisions and a Michigan federal court for the proposition that NEP has not met its burden of showing undue burden and expense.⁴ NEP, however, stated in its motion that it would have to incur the time and cost to collect and review documents and to prepare objections to the document requests. As well, NEP noted that it 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. Most importantly, NEP noted that all of this time and expense would be undue given that a dispositive motion is pending that, if granted, would result in the dismissal of Ms. Wingo's complaint.

Ms. Wingo is also wrong that somehow only she will have spent time and money on the deposition and document requests if the motion to dismiss is granted.⁵ If and when all objections are resolved as to the deposition and document requests, NEP will have to produce documents, prepare responses, prepare for deposition and defend a deposition – all at significant cost and time to NEP. A protective order or a simple stay on discovery until after the dispositive motion to dismiss is decided will protect NEP from incurring more costs and time in a case that likely will be dismissed.⁶

Ms. Wingo claims that such a remedy would be a “drastic remedy” to allow NEP to quash the deposition or block further discovery. NEP, however, is not arguing that discovery

⁴ Wingo Memorandum Contra at 5 citing to *Insulation Unlimited Inc. v. Two J's Properties, Ltd.*, 95 Ohio Misc. 2d 18, 28 (Miami Cty. Com. Pl. 1997) (evaluating issue of in which state a deposition should take place); *Future Comm., Inc., v. Hightower*, 2002-Ohio-2245 (10th Dist.), ¶17 (addressing motion to quash subpoena); *Isaac v. Shell Oil Co.*, 83 F.R.D. 428, 431 (E.D. Mich. 1979) (granting motion for protective order given overly broad discovery requests). None of the cases cited by Ms. Wingo apply to the circumstances in this proceeding.

⁵ See Wingo Memorandum Contra at 7.

⁶ Ms. Wingo neglected to address NEP's alternative request for a stay in her memorandum contra, which may issue as an alternative to a protective order given the likelihood of NEP prevailing on the merits (given the *Gateway Lakes* decision), the irreparable harm that NEP would incur of needless time and expense on discovery, the lack of any prejudice to Ms. Wingo, and the public interest in delaying discovery when a dispositive motion is fully briefed and decisional.

should be prohibited in this proceeding. NEP requests, rather, that discovery (depositions, document requests, etc.) not be had until after the Commission issues a decision on NEP's motion to dismiss. That is a reasonable request, whether granted through a protective order or a stay on discovery.⁷

C. A protective order or stay on discovery will not prejudice Ms. Wingo.

Ms. Wingo claims she would be unduly prejudiced by a protective order or stay on discovery, arguing that she needs discovery to “rebut the motion and supporting affidavit.”⁸ But as noted above, briefing on NEP's motion to dismiss is complete and Ms. Wingo had a fair and ample opportunity to respond to NEP's motion to dismiss. She does not explain why she did not ask for a stay of the briefing schedule to conduct discovery, why she did not serve discovery as soon as NEP filed its motion to dismiss or why she did not oppose NEP's motion to dismiss with her own affidavit. Significantly, she also does not explain how the facts in this case are different from the *Gateway Lakes* case, an explanation she cannot provide because she alleged in her complaint in this case that she believes she is paying standard service offer rates for electric generation service.⁹ NEP is not asking to quash the deposition or block further discovery, it is simply asking that discovery not be had until after the Commission rules on NEP's motion to dismiss. Granting the motion will not prejudice Ms. Wingo, who has already responded to NEP's motion to dismiss, and will save NEP the undue burden and expense of discovery.

III. CONCLUSION

NEP's motion for a protective order or in the alternative, a motion for stay should be granted. It would be unduly burdensome and/or expensive for NEP to respond to further

⁷ Additionally, denial of a protective order or stay of discovery could be viewed by Ms. Wingo as an invitation to serve more discovery under the guise of seeking an opportunity to “rebut” NEP's motion to dismiss.

⁸ *Id.* at 8-9.

⁹ Complaint at ¶ 32.

discovery requests while the Commission conducts its review and decides on NEP's pending motion to dismiss. Accordingly, the deposition should not be held and in the alternative a stay of discovery be imposed until after the Commission issues its decision on the motion to dismiss.

Respectfully submitted,

/s/ Michael J. Settineri

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CERTIFICATE OF SERVICE

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Summary: Reply electronically filed by Mr. Michael J. Settineri on behalf of Nationwide Energy Partners, LLC