

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF
OHIO POWER COMPANY,

COMPLAINANT,

CASE NO. 21-990-EL-CSS

v.

NATIONWIDE ENERGY PARTNERS, LLC,

RESPONDENT.

ENTRY

Entered in the Journal on December 1, 2023

I. SUMMARY

{¶ 1} The attorney examiner denies the motion to stay filing of amended submetering tariff filed by Ohio Power Company and extends the deadline for filing such tariff until February 5, 2024.

II. RELEVANT PROCEDURAL HISTORY

{¶ 2} On September 24, 2021, the Ohio Power Company (AEP Ohio) filed a complaint against Nationwide Energy Partners, LLC (NEP). As background, AEP Ohio is a “public utility” under R.C. 4905.02, an “electric light company” under R.C. 4905.03 and 4928.01, and an “electric utility” and “electric distribution utility” as those terms are defined in R.C. 4928.01. AEP Ohio explained that it has been granted a service territory under the Certified Territories Act, within which AEP Ohio has the exclusive right to provide electric distribution service and other noncompetitive electric services. *See* R.C. 4933.83(A). In the complaint, AEP Ohio stated that NEP is an entity engaged in the practice of submetering, whereby NEP, acting as the agent of a landlord or building owner engages in the resale or redistribution of public utility services where the owner of an apartment building or multi-residential complex divides up a master bill to individual tenants so that each tenant pays

for their share of utilities used. AEP Ohio explained that the complaint arose from a request from NEP, acting as the agent of five apartment complex owners (Apartment Complexes), that AEP Ohio establish master-metered service at the Apartment Complexes, which AEP Ohio asserted would amount to NEP taking over electric distribution service to the tenants in the Apartment Complexes. AEP Ohio alleged that NEP intends to purchase electric service from AEP Ohio at wholesale-like master-metered rates and then resell electric service to the individual Apartment Complex tenants at a considerable markup. In the complaint, AEP Ohio alleged that allowing NEP to begin submetering at the Apartment Complexes would violate numerous statutes and Commission regulations, including the Certified Territories Act, as NEP would be operating as a public utility. AEP Ohio asserted that while NEP has operated in this capacity for many years, the question of whether third-party submetering companies such as NEP are public utilities is now unsettled following the Supreme Court of Ohio's decision in *In re Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St.3d 208, 2020-Ohio-5583, 169 N.E.3d 617 (*Wingo*).

{¶ 3} On October 18, 2021, NEP filed its answer to the complaint. NEP admitted that AEP Ohio is a public utility subject to the Commission's jurisdiction and that AEP Ohio has been granted an exclusive territory to provide electric distribution service under the Certified Territories Act. NEP further admitted that it provides certain management services to property owners, managers, and developers pursuant to private contractual agreements. NEP conceded that pursuant to its contractual obligations and as the authorized representative of each property owner, manager, and developer, NEP receives and pays invoices from AEP Ohio's master-metered utility charge on behalf of the respective property owner, manager, and developer. NEP denied, however, that it would be "taking over" service from AEP Ohio if the requested master-metered service were set up at the Apartment Complexes. NEP further denied that it is a public utility under R.C. 4905.02 and, therefore, NEP asserted that it is not subject to the Commission's statutes and rules governing public utilities. NEP's answer also asserted a number of affirmative defenses.

{¶ 4} On January 11, 2022, NEP filed a motion for leave to file an amended answer and counterclaim, *instanter*. On January 26, 2022, AEP Ohio filed a memorandum contra NEP's motion. On February 2, 2022, NEP filed a reply in support of its motion.

{¶ 5} AEP Ohio filed its answer to NEP's counterclaim on April 22, 2022. On May 2, 2022, AEP Ohio filed an amended answer to the counterclaim. NEP filed correspondence in the case docket on May 5, 2022, indicating that NEP did not object to the filing of AEP Ohio's amended answer.

{¶ 6} The evidentiary hearing commenced on October 24, 2022, at the offices of the Commission, with the first phase of the hearing continuing through November 1, 2022. On November 4, 2022, the hearing reconvened via Webex to take a witness' testimony. Then on November 8, 2022, the hearing reconvened via Webex to close the record and set a briefing schedule.

{¶ 7} In its September 6, 2023 Opinion and Order, the Commission found that AEP Ohio failed to carry its burden of proving that NEP is (i) engaged in the business of supplying electricity, is an "electric light company" under R.C. 4905.03(C), or a "public utility" under R.C. 4905.02(A); (ii) operating as an "electric supplier" within Ohio Power Company's certified territory in violation of R.C. 4933.83(A); and (iii) violating R.C. 4928.08(B) by supplying or arranging for the supply of a competitive retail electric service without the required certification. With respect to counterclaims filed by NEP, the Commission found that NEP failed to carry its burden of proving that AEP Ohio's actions (i) violated R.C. 4905.26, except to the second alleged violation of Count I of its counterclaims where the Commission found in favor of NEP on a limited basis, and (ii) violated R.C. 4905.35(A).

{¶ 8} Additionally, as part of the directives in the Opinion and Order, the Commission directed AEP Ohio to file an application to modify its electric service resale tariff to include certain provisions related to landlords engaging in the resale of electricity to tenants within 90 days of the date of the Opinion and Order. Specifically, the Commission

directed AEP Ohio to file the tariff such that the resale of electric service from a landlord to a tenant is conditioned on the landlord's compliance with the following conditions: (1) the landlord's lease agreement contains a notice, in capital letters and in a particular font size, that the tenant agrees to have the landlord secure and resell electricity and that the customer will no longer be under the Commission's jurisdiction; (2) the landlord's charges for resale of electricity must be no higher than what a similarly situated standard service (SSO) customer would be for electric service from the applicable public utility; and (3) the landlord must follow the disconnection standards for landlords contained in Ohio Adm.Code 4901:1-18. The Commission directed that this tariff should be filed within 90 days from the date of the Opinion and Order. (Opinion and Order at ¶ 224.)

{¶ 9} Pursuant to R.C. 4903.10, any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days after the Commission's order is journalized.

{¶ 10} On October 6, 2023, AEP Ohio filed an application for rehearing (Application for Rehearing), asserting that the Opinion and Order was unlawful and unreasonable based upon four grounds for rehearing outlined therein, including the requirement that it file the electric reseller tariff. NEP filed a memorandum contra AEP Ohio's Application for Rehearing on October 16, 2023.

{¶ 11} On October 18, 2023, AEP Ohio filed a motion to stay filing of the amended submetering tariff, as directed in the Opinion and Order. In the motion, AEP Ohio requests that the Commission grant a stay of its order to file a new electric resale tariff within 90 days of the date of the Opinion and Order pending a Commission ruling on AEP Ohio's Application for Rehearing and, if necessary, appellate review by the Supreme Court of Ohio.

{¶ 12} By Entry issued November 1, 2023, the Commission granted AEP Ohio's Application for Rehearing for the limited purpose of affording the Commission more time to consider the issues raised therein.

{¶ 13} On November 2, 2023, NEP filed a memorandum contra AEP Ohio's motion to stay filing of amended submetering tariff.

{¶ 14} On November 9, 2023, AEP Ohio filed a reply in support of its motion to stay filing of amended submetering tariff.

III. DISCUSSION

{¶ 15} The Commission has adopted a four-factor test to determine whether a stay should be granted in a Commission proceeding. Specifically, the Commission considers:

- (1) Whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits;
- (2) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- (3) Whether the stay would cause substantial harm to other parties; and
- (4) Where lies the public interest.

In re Complaint of Northeast Ohio Public Energy v. Ohio Edison Company, et al., Case No. 09-423-EL-CSS, Entry (July 8, 2009) at ¶6 citing *In re Investigation into Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing (Feb. 20, 2003) at 5; *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-917-EL-SSO, Entry (Mar. 30, 2009) at 3

{¶ 16} AEP Ohio alleges that its motion for stay satisfies each of these four criteria. For the reasons outlined in its Application for Rehearing, AEP Ohio believes that it is likely to prevail on the merits on rehearing. Specifically, AEP Ohio argues that the tariff the Commission ordered AEP Ohio to file violates the logic of the central holding of *Wingo*, as it regulates the price that landlords charge for reselling utility service based on how the landlord's price compares to the utility's SSO price. According to AEP Ohio, the

Commission cannot order it to do indirectly through its tariffs what the Court barred the Commission from doing directly. Further, AEP Ohio asserts that the manner in which the Commission adopted the required tariff language runs afoul of the standard Commission rulemaking process in R.C. Chapters 106, 111, and 119. Second, AEP Ohio claims that it would suffer irreparable harm absent the granting of the stay. AEP Ohio states that the filing and implementation of the reseller tariff would impose considerable costs and compliance burdens on AEP Ohio having to monitor, police, and regulate third parties over which it has no control. AEP Ohio believes that it will have great difficulty enforcing the ordered tariff provisions. Further, AEP Ohio notes that the Opinion and Order provides for no cost recovery of the resources AEP Ohio must expend to enforce the tariff. (Motion for Stay at 4-6.)

{¶ 17} For the third factor, AEP Ohio argues that granting the stay would not cause substantial harm to other parties. In support of this contention, AEP Ohio calls the protections which the reseller tariff contain to be “largely illusory,” as it will be insurmountably difficult for AEP Ohio to truly enforce the tariff. AEP Ohio submits that a reversal by the Supreme Court could add additional expenses for both it and landlords, who work to get in compliance with the new tariff, only to then have to reverse course after the appeal is decided. AEP Ohio believes that pausing the tariff portion of the Opinion and Order pending resolution of the Application for Rehearing and, if necessary, appeal to the Supreme Court, would avoid some of the harm that immediate compliance could harm. Finally, for the fourth factor, AEP Ohio argues that the public interest supports staying the tariff portion of the Opinion and Order. AEP Ohio states that requiring it to adopt the tariff before the Commission has the opportunity to at least clarify certain portions of the tariff language could cause confusion not only for AEP Ohio but also landlords and submetering companies throughout AEP Ohio’s service territory. (Motion for Stay at 6-7.)

{¶ 18} In its memorandum contra the motion for stay, NEP argues that the motion should be denied. First, NEP submits that AEP Ohio will not prevail on the merits for the reasons NEP outlines in its memorandum contra AEP Ohio’s Application for Rehearing; in

particular, NEP asserts that AEP Ohio raised no new arguments or evidence in the Application for Rehearing. According to NEP, AEP Ohio's arguments in the Application for Rehearing are simply a repeat of the initial arguments raised at hearing and briefing before the Commission. Second, NEP does not see the irreparable harm alleged by AEP Ohio, as the enforcement concerns raised by AEP Ohio can easily be resolved through customer certifications and an informal dispute process. Further, NEP believes that the proper avenue for AEP Ohio to seek a stay pending appeal to the Supreme Court is to follow the procedure outlined in R.C. 4903.16, not the filing of a motion with the Commission. (Memo Contra at 1-3.)

{¶ 19} In its reply in support, AEP Ohio denies NEP's accusations that it is stalling. AEP Ohio reiterates that the filing of the reseller tariff while an application for rehearing is pending is impractical, as Staff is unlikely to consider the tariff application until the Commission issues a second entry on rehearing. Further, AEP Ohio submits that if the Commission modifies or reverses this part of the Opinion and Order, then AEP Ohio will potentially need to amend or withdraw the tariff application. Rather than wasting time and resources preparing a complex tariff application, AEP Ohio feels it would be more efficient to stay the filing and allow the rehearing and appeal process to play out. (Reply in Support at 1-2.)

{¶ 20} The attorney examiner first recognizes that any determination in this Entry as to any of the four factors is not dispositive of the issues raised in the Application for Rehearing and further notes that the Commission will speak on the merits of the assignments of error raised therein at a later date. Having reviewed the filings related to the motion for stay, and considering the arguments with respect to the four-factor test used by the Commission to determine whether a stay should be granted, the attorney examiner finds that the motion should be denied. While the attorney examiner acknowledges that granting a stay would be unlikely to cause substantial harm to other parties (the third factor in the test), AEP Ohio fails to satisfy the other three factors. The attorney examiner disagrees that AEP Ohio has demonstrated it is likely to prevail on the merits. In support of this

contention, AEP Ohio points to its Application for Rehearing, which largely restates arguments made at hearing and in its post-hearing briefs. The Commission carefully considered these arguments in issuing its thorough Opinion and Order and the attorney examiner is unconvinced that repeating the bulk of those arguments in the Application for Rehearing results in a “strong showing” that there will be a reversal of the Opinion and Order. The Commission acted under its authority to “set reasonable terms and conditions on jurisdictional utilities providing master meter service so as to ensure that users of that service, such as landlords, are providing it to the ultimate end user in a manner which is safe and consistent with the public interest” when issuing the directive for AEP Ohio to file the new reseller tariff. (Opinion and Order at ¶224.) AEP Ohio has presented no new evidence or argument representing a “strong showing” that the Commission will alter, let alone remove, this directive. The attorney examiner also finds that AEP Ohio would suffer no irreparable harm in having to file the new reseller tariff. While AEP Ohio may have uncertainty as to how to best enforce the amended tariff, granting an indefinite stay to the filing is not appropriate, as these concerns can be raised and addressed through the routine Commission tariff application process. Further, in response to AEP Ohio’s concerns about resources being expended on the amended tariff only to potentially later have all or portions of the Opinion and Order reversed on appeal, it is not unusual for public utilities to undertake actions or to make filings as directed by the Commission while also pursuing rehearing or an appeal to the Supreme Court. For similar reasons as those outlined regarding the first and second factors, the attorney examiner does not believe that the public interest supports the granting of a stay. As stated by the Commission, the directive to incorporate the new reseller tariff language was prompted by the Commission’s understanding that tenants would potentially be losing a multitude of protections ensuring that consumers receive adequate, safe, and reasonable electric service. Based on this understanding, the Commission felt it appropriate exercise its authority over public utilities’ tariffs to direct that the language be incorporated into AEP Ohio’s tariff. (Opinion and Order at ¶224.) As this reseller tariff language was created to protect the public and

consumers, the attorney examiner is unpersuaded that a stay of indeterminate length in filing the tariff would be in the public interest.

{¶ 21} While finding that there has been no showing that an indefinite stay in the filing of the reseller tariff is reasonable, the attorney examiner acknowledges that a full review of a tariff application is unlikely while the Application for Rehearing remains pending. Further, to the extent that AEP Ohio has raised administrative or enforcement questions in its Application for Rehearing that have yet to be addressed by the Commission and could potentially impact the language ultimately proposed in the tariff application, an extension of time for the filing of the tariff is reasonable. The attorney examiner, therefore, does find that the date for AEP Ohio to file the reseller tariff directed in the Opinion and Order should be extended to February 5, 2024. Further, the attorney examiner clarifies that AEP Ohio should file the proposed tariff application in a separate docket in which all interested parties will have a full and fair opportunity to raise any issues regarding the proposed tariff application.

IV. ORDER

{¶ 22} It is, therefore,

{¶ 23} ORDERED, That AEP Ohio's motion to stay filing of amended submetering tariff be denied, as stated in Paragraph 20. It is, further,

{¶ 24} ORDERED, That the deadline for AEP Ohio to file the new electric reseller tariff directed by the Commission in the Opinion and Order be extended to February 5, 2024, as stated in Paragraph 21.

{¶ 25} ORDERED, That a copy of this Entry be served upon all interested persons and parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/David M. Hicks

By: David M. Hicks
Attorney Examiner

JSA/dmh

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Case No(s). 21-0990-EL-CSS

Summary: Attorney Examiner Entry that AEP Ohio's motion to stay filing of amended submetering tariff be denied and the deadline for AEP Ohio to file the new electric reseller tariff directed by the Commission in the Opinion and Order be extended to February 5, 2024 electronically filed by Ms. Donielle M. Hunter on behalf of David M. Hicks, Attorney Examiner, Public Utilities Commission of Ohio.