**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| Mark A. Whitt,  Complainant,  v.  Nationwide Energy Partners, LLC,  Respondent. | ) )  )  )  )  )  )  )  ) | Case No. 15-697-EL-CSS |

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**MEMORANDUM CONTRA NATIONWIDE ENERGY PARTNERS, LLC’S MOTION FOR A STAY AND MOTION FOR AN EXPEDITED RULING**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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1. **INTRODUCTION**

This is a case where the Complainant alleges that Nationwide Energy Partners, LLC (“NEP” or “the Company”) is unlawfully providing utility services at rates in excess of what would otherwise be charged by utilities or other service providers.[[1]](#footnote-1) This case is important to the residential utility customers of Ohio because the Complainant is asking the Public Utilities Commission of Ohio (“PUCO” or “The Commission”) to determine whether NEP, a company that resells public utility services to residential customers, is acting unlawfully under Title 49. Specifically, the PUCO will review allegations that NEP is a public utility as it is defined under R.C. 4905.02(A).[[2]](#footnote-2) And the PUCO will review, among other things, whether the rates being charged by NEP are unjust and unreasonable violating R.C. 4909.18 and R.C. 4905.22,[[3]](#footnote-3) which requires that, “no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service.” The PUCO also has a duty to, among other things, “[e]nsure the availability to consumers of …reasonably priced retail electric service.”[[4]](#footnote-4)

In its latest attempt to block the discovery of information, NEP requests that the PUCO stay all discovery until the Commission rules on NEP’s earlier filed motions. NEP’s previously filed motions seeking to bifurcate the hearings and limit or stay discovery. Those motions were filed on June 26, 2015, and have not been ruled upon.[[5]](#footnote-5)

The PUCO should deny NEP’s motion. It is procedurally improper, and is duplicative of NEP’s motion of June 26, 2015. Like NEP’s June 26, 2015 motion, this motion should not be granted because staying or limiting discovery will unduly delay this proceeding and is likely to lead to a plethora of discovery disputes that the PUCO will have to resolve. Additionally, NEP has failed to satisfy its burden of meeting the four-factor test that the Commission uses for determining whether to issue a stay.

1. **STATEMENT OF FACTS**

On June 26, 2015, NEP filed its First Motion to Stay. In that Motion, NEP sought, in part, to stay discovery not associated with Complainant’s standing to bring this action.[[6]](#footnote-6) NEP did not seek an expedited ruling in its First Motion to Stay. The Company’s First Motion to Stay Discovery is still pending before the PUCO.

Perhaps realizing its error in not requesting expedited treatment of its motion; NEP filed a second Motion for a Stay (“Second Motion to Stay”) on August 14, 2015. In the Second Motion to Stay, NEP reiterated and expanded its initial request for a stay. It sought a ruling by this Commission to “stay *all discovery* in this proceeding until the Commission has ruled upon NEP’s [First Motion to Stay].”[[7]](#footnote-7) In the meantime, the parties to this case have served discovery on NEP to which NEP has provided very few, if any, substantive responses to interrogatories and zero documents in response to requests for production of documents.

1. **LAW AND ARGUMENT**

The PUCO has used a four-factor test for generally determining whether to stay non-discovery related portions of a proceeding. Under the four-factor test for granting a stay, “the Commission will consider: [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.”[[8]](#footnote-8)

**A. NEP has made no strong showing that it is likely to prevail on the merits.**

Relying on its First Motion to Stay and accompanying affidavit for support, NEP argues that it is likely to succeed on the merits because the Complainant does not have standing to bring this action. NEP, however, has failed to produce a strong showing to support its contention. To the contrary, the Complainant and OCC have demonstrated why the Complainant has standing and the Complaint is properly before the PUCO. Perhaps even more peculiar, despite NEP continuing to assert that Mr. Whitt has no standing, the Company has yet to file a dispositive motion on these grounds. Instead, NEP cites to an affidavit that is signed and sworn to by NEP’s in-house corporate counsel, attesting to the business practices of the North Bank Condominium Owners Association (“NBCO”). Reliance on an affidavit submitted by an in-house attorney attesting to the business practices for another company is insufficient and cannot qualify as a substantial showing that NEP is likely to succeed on the merits. Thus, NEP has failed to meet the first factor and its request for a stay should be denied.

**B. NEP has not shown irreparable harm.**

NEP claims that absent a stay it will suffer irreparable harm through the investment of time and expenses associated with the discovery process.[[9]](#footnote-9) To this point, NEP attempts to portray itself as a victim diligently responding to nearly 100 discovery requests rather than sitting “on its laurels” or being “disruptive or [] uncooperative.”[[10]](#footnote-10) NEP neglects to mention, however, that the Company has yet to produce a single document in discovery and has refused to substantively answer nearly half of the interrogatories that were propounded by OCC and the Complainant.

Rather than try to informally work through discovery issues as is required by the PUCO rules,[[11]](#footnote-11) NEP has chosen to file multiple, duplicative motions with the Commission, causing all the parties to spend time and resources responding to such motions. The added costs associated with filing duplicative motions are a result of NEP’s own actions.[[12]](#footnote-12) Rather than placing incessant roadblocks and preventing access to relevant and discoverable information, NEP should want to provide ample evidence supporting its position.

**C. Other parties would suffer substantial harm.**

A ruling that stays discovery until the PUCO has ruled on NEP’s First Motion to Stay would substantially harm the parties by preventing them from adequately preparing their case. NEP claims that the other parties to this action will not suffer substantial harm because the requested stay will “only toll the time for discovery temporarily.”[[13]](#footnote-13) However, discovery delays will translate into procedural delays. Without a procedural schedule in this case, the parties have no assurances of when this case will be scheduled for a hearing. The parties must proceed with preparing their case in anticipation of an imminent proceeding. Consumers, like Mr. Whitt, are entitled to be heard, and should be afforded that opportunity in a timely manner, free from undue delay. As each day goes by, customers continue to pay rates that may be unjust and unreasonable. The PUCO should reject NEP’s efforts to stymie the progress of Mr. Whitt’s complaint.

**D. The public interest lies with allowing parties full and complete discovery.**

The PUCO’s rules encourage a prompt and expeditious use of a pre-hearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings. These rules are also intended to minimize Commission intervention in the discovery process.[[14]](#footnote-14) NEP clams that a temporary stay will serve the public interest inferring that the parties are abusing the discovery process.[[15]](#footnote-15) But granting a stay will undermine the intent of the PUCO’s discovery rules because it prevents ample discovery.

Moreover, the facts surrounding this case are far from clear due to NEP’s efforts to avoid responding to discovery requests. The procedural confusion that NEP has created in this case does not serve the public interest. The intervening parties should be precluded from moving forward with discovery. Delays in resolving this case should not be tolerated, given the importance of this case where consumers may be paying unjust and unreasonable rates by NEP.[[16]](#footnote-16) A stay of discovery will inevitably serve to delay the resolution of this case by preventing parties from simultaneously conducting discovery while discovery motions are pending before the Commission. Such undue delay is contrary to the public interest.

1. **CONCLUSION**

NEP fails to carry its burden of establishing why there should be a stay on all discovery until the Company’s First Motion to Stay is ruled upon by the PUCO. NEP has had a Motion to Stay Discovery pending since June 26, 2015, that the PUCO has chosen not to rule on. NEP should not be allowed to impede the intervening parties' right to ample discovery – a right guaranteed by law[[17]](#footnote-17) -- simply because NEP has raised a legal argument regarding standing. NEP failed to carry its burden of establishing that a stay should be issued. Therefore, the PUCO should deny NEP’s Second Motion to Stay.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing *Memo Contra Motion for Stay* *and Motion for Expedited Ruling* was served upon the following parties via electronic mail on August 21, 2015.

*/s/ Michael J. Schuler*\_\_\_\_\_\_\_

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**SERVICE LIST**

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1. Complaint at ¶ 21. [↑](#footnote-ref-1)
2. Complaint at ¶ 25. [↑](#footnote-ref-2)
3. Complaint at ¶¶ 29, 44, 49, Prayer for Relief. [↑](#footnote-ref-3)
4. R.C. 4928.02 (A). [↑](#footnote-ref-4)
5. OCC filed a memorandum Contra NEP’s Motion (July 13, 2015). [↑](#footnote-ref-5)
6. Nationwide Energy Partners, LLC’s Motion to Bifurcate the Proceedings and Motion for a Limiting Instruction and Stay, at p. 6 (June 26, 2015) (hereinafter “First Motion to Stay”). [↑](#footnote-ref-6)
7. Nationwide Energy Partners, LLC’s Motion to Stay and Motion for an Expedited Ruling, at p. 2 (August 14, 2015) (hereinafter “Second Motion to Stay”). [↑](#footnote-ref-7)
8. *In the Matter of the Complaint of the Northeast Ohio Public Energy, Council v. Ohio Edison Company and The Cleveland Electric Illuminating Company*, Case No. 09-423-EL-CSS, Opinion at 2 (July 8, 2009) (citing In re Investigation into Modification of Intrastate Access Charges, Case No. 00-127-TP-001, Entry on Rehearing, (February 20, 2003) at 5. In re Columbus Southern Power Company and Ohio Power Company, Case No. 08-917-EL-SSO, Entry at 3 (March 30, 2009). [↑](#footnote-ref-8)
9. Second Motion to Stay at 6. [↑](#footnote-ref-9)
10. Id. at 1, 4-5. [↑](#footnote-ref-10)
11. *See*, Ohio Adm. Code 4901-1-23(C). [↑](#footnote-ref-11)
12. *See*, Ohio Adm. Code 4901-1-16 through 4901-1-24. [↑](#footnote-ref-12)
13. Second Motion to Stay at 7. [↑](#footnote-ref-13)
14. Ohio Adm. Code 4901-1-16. [↑](#footnote-ref-14)
15. Second Motion to Stay at 7. [↑](#footnote-ref-15)
16. *See e.g.*, Dan Gearino, “Shocking cost investigation: Utility middle men charge renters inflated prices,” available at <http://www.dispatch.com/content/stories/business/2013/10/20/shocking-cost.html> (October 20, 2013); Dan Gearino, “Shocking cost investigation: Pay electricity bills or face eviction,” available at http://www.dispatch.com/content/stories/business/2013/10/21/pay-electricity-bills-or-face-eviction.html (October 21, 2013); Dan Gearino, “Shocking cost investigation: Lawmakers call for action on electricity markups,” available at <http://www.dispatch.com/content/stories/business/2013/10/22/lawmakers-call-for-action-on-markups.html> (October 22, 2013). [↑](#footnote-ref-16)
17. R.C. 4903.082. [↑](#footnote-ref-17)