**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 TO NATIONWIDE ENERGY PARTNERS, LLC’S MOTION FOR A PROTECTIVE ORDER**

**BY**

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

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1. **INTRODUCTION AND STATEMENT OF FACTS**

On June 10, 2015, Complainant, Mark A. Whitt, served subpoenas on four different non-parties: (1) North Bank Condominium Owners Association; (2) NWD 300 Spring, LLC; (3) Ohio Equities, LLC and (4) The City of Columbus, Public Utilities Department. The subpoenas sought:

1. All contracts (regardless of whether you are a party to the contract) concerning the provision by NEP of any goods or services to the common areas or any unit in [the Condominiums at North Bank (“North Bank”)].
2. All letters, emails, notes, or other documents referring, reflecting, or relating to conversations, communications, or any exchange of information with NEP concerning the provision of any service to the common areas or any unit in North Bank.
3. All reports, documents, statements, receipts, invoices, advertisements, promotional material, or other documents of any nature received from NEP.
4. All contracts regarding the provision of any utility service (gas, electric, water, sewer, telephone) to the common areas or any unit in North Bank.
5. All documents referring, reflecting, or relating to communications with lawyers, consultants, experts, agents, or any other representative working on behalf of NEP.
6. All photographs, diagrams, videos, sketches, or other visual depictions of property and equipment that you own or control and which is installed or located anywhere at North Bank.
7. All contracts, bills of sale, invoices, receipts, or other evidence of transactions between you and any party concerning property and equipment installed or located anywhere at North Bank.
8. All documents referring, reflecting, or relating to money or other consideration paid to you in exchange for allowing NEP to provide any good or service to the common areas or any unit in North Bank.

On June 26, 2015, Nationwide Energy Partners, LLC (“NEP” or “the Company”) filed a Motion for a Protective Order (“Motion”), requesting that the Public Utilities Commission of Ohio (“PUCO” or “the Commission”) limit disclosure of the subpoenaed information – meaning that no other parties to this case (including OCC) would receive the information. As Mr. Whitt aptly points out in his Memorandum Contra that was filed July 7, 2015, NEP has not shown that it is entitled to a protective order.[[1]](#footnote-1) The Company has also not carried its burden of establishing that disclosure of the subpoenaed information should remain limited to the Complainant and NEP in this case. And most importantly, the PUCO rules limit the request for a protective order to the party or person from whom discovery is sought. NEP is not the party or person from whom discovery is sought. The request should be denied.

**II. LAW AND ARGUMENT**

It has long been recognized by this Commission that the “the ultimate burden for demonstrating that information in a document warrants protective treatment is on the party who owns the allegedly confidential material.”[[2]](#footnote-2) Ohio Adm. Code 4901-1-24(D)(3) requires movants to file a motion for protective treatment with the Commission “setting forth the specificbasis of the motion, including a detailed discussion of the need for protection from disclosure \* \* \* .”[[3]](#footnote-3) Ohio Adm. Code 4901-1-27(B)(7)(e) further requires that “[t]he party requesting such protection shall have the burden of establishing that such protection is required.” NEP failed to carry its burden.

Not only does NEP not own the information or documents that it is requesting confidential treatment of, NEP concedes that it “does not know exactly what documents will be produced by the third parties.”[[4]](#footnote-4) Instead, NEP turns the burden on its head by requesting that the PUCO issue a blanket protective order “requir[ing] Mr. Whitt to keep confidential all of the documents produced in response to the third-party subpoenas, **until otherwise ordered by the Commission**.”[[5]](#footnote-5) The request veers far from the General Assembly’s directive that all information and records at the PUCO shall be public[[6]](#footnote-6) and the PUCO’s practice of open and transparent proceedings and ensuring that only truly confidential information remains sealed from the public domain.[[7]](#footnote-7) In fact, it is the Commission’s practice to not seal entire documents, but rather, to redact information that a party can demonstrate is trade secret information or otherwise confidential.[[8]](#footnote-8)

Nonetheless, if the information is truly confidential, the four non-parties to which the subpoenas were issued have the burden to protect the confidential information that they own, not NEP. After all, NEP claims to have filed this Motion pursuant to Ohio Adm. Code 4901-1-24,[[9]](#footnote-9) which states that a motion for protective order should be “[u]pon motion of any party or person **from whom discovery is sought**.”[[10]](#footnote-10) But the discovery is not being sought from NEP—NEP thus, has no standing to file a motion for protection. And none of the subpoenaed parties have filed motions for protective orders to prevent disclosure of any documents. This appears to be NEP’s further attempts to thwart or stall discovery and block Complainant and other intervening parties from accessing information necessary to build their case and for the Commission to make an informed decision in this matter.

While it is true that the PUCO may order that “information not be disclosed or be disclosed only in a designated way,”[[11]](#footnote-11) NEP failed to mention that this only applies to trade secret or other confidential information. NEP, however, cannot establish that any specific information contained in the documents amounts to trade secret or confidential information when the Company cannot even identify the documents. NEP has not demonstrated that any of the requested documents or portions thereof meet the six prong trade secret test set forth in *State ex rel. Plain Dealer v. Department of Insurance*, 80 Ohio St.3d 513, 687 N.E.2d 661 (1997).[[12]](#footnote-12) Additionally, as previously stated, the subpoenaed parties remain silent about asserting any form of trade secret or confidentiality. Because NEP failed to carry its burden of establishing the need for a protective order, Mr. Whitt should not be required to keep the subpoenaed documents confidential or any portion thereof.

It is also true that the PUCO may issue a protective order designating specific persons to whom the confidential information may be disclosed in order to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense.”[[13]](#footnote-13) However, under the PUCO’s administrative rules of practice, it is the general rule that “discovery requests and responses shall be served upon all parties.”[[14]](#footnote-14) OCC has not found any precedent (or has NEP cited to any) indicating that the PUCO has exercised its discretion under Ohio Adm. Code 4901-1-24(A)(8) to subvert the general policy of requiring discovery responses to be served upon all parties. NEP has not raised any valid arguments to demonstrate that this occasion is deserving of inaugurally applying the Commission’s discretionary provision, especially when the subpoenas were not directed to NEP. Furthermore, discovery responses from other parties are required to be produced upon request through the normal course of discovery.[[15]](#footnote-15) Once again, NEP fails to explain why any party other than the Complainant should be denied access to this information, particularly when none of the information has been deemed to be trade secret or otherwise confidential.

**III. CONCLUSION**

Because NEP fails to carry its high burden of establishing the need for a protective agreement, the Company’s Motion should be denied and the third party subpoena responses should not be treated as confidential or the production limited to the Complainant.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on July 13, 2015.

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

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**SERVICE LIST**

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1. *See,* Complainant’s Memorandum Contra Motions for Protective Order at 7 (July 7, 2015). [↑](#footnote-ref-1)
2. *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order at 11 (March 24, 2014); *In the Matter of the Commission's Review of Chapters 4901-1, Rules of Practice and Procedure; 4901-3, Commission Meetings; 4901-9, Complaint Proceedings; and 4901:1- 1, Utility Tariffs and Underground Protection, of the Ohio Administrative Code*, *In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of Alternate Form of Regulation and for a Threshold Increase in Rates*, Case No. 11-776-AU-ORD, Finding and Order at 6 (January 22, 2014); Case No. 93-432-TP-ALT, 1993 Ohio PUC LEXIS 1157 at \*3 (December 22, 1993). [↑](#footnote-ref-2)
3. The Commission has recognized that this rule is intended to strike a reasonable balance between the legitimate interests of a company in keeping a trade secret confidential and the obligations of the Commission relative to the full disclosure requirements mandated by Ohio law and public policy*. See, In the Matter of the Amendment of Chapters 4901-1, et al. of the Ohio Administrative Code*, Case No. 95-985-AU-ORD, Entry at 11 (March 21, 1998). [↑](#footnote-ref-3)
4. Nationwide Energy Partners, LLC’s Motion for Protective Order (“Motion for Protective Order”) at 1 (June 26, 2015). [↑](#footnote-ref-4)
5. Id. at 4 (emphasis added). [↑](#footnote-ref-5)
6. R.C. 4905.07. [↑](#footnote-ref-6)
7. *In the Matter of the Complaints of S. G. Foods, Inc.; Miles Management Corp., et al.; Allianz US Global Risk Insurance Company, et al.; and Lexington Insurance Company, et al., v. The Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company, and American Transmission Systems, Inc., Respondents*, Case No. 04-28-EL-CSS, et al., 2007 Ohio PUC LEXIS 742, Entry at 4 (November 2, 2011) (stating “the Commission is obligated to keep as much information in the open record as possible”). [↑](#footnote-ref-7)
8. *See*, Ohio Adm. Code 4901-1-24(D); *See also*, *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, (1997) 80 Ohio St.3d 513, 524-525; *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Entry at 5 (January 20, 2012) (holding that where possible, “redaction should be ordered rather than removal of the document from public scrutiny”); *In the Matter of the Complaints of S. G. Foods, Inc.; Miles Management Corp., et al.; Allianz US Global Risk Insurance Company, et al.; and Lexington Insurance Company, et al., v. The Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company, and American Transmission Systems, Inc., Respondents*, Case No. 04-28-EL-CSS, et al., 2007 Ohio PUC LEXIS 742, Entry at 4 (November 2, 2011). [↑](#footnote-ref-8)
9. Motion for Protective Order at 3. [↑](#footnote-ref-9)
10. Ohio Adm. Code 4901-1-24(A) (emphasis added). [↑](#footnote-ref-10)
11. Motion for Protective Order at 3, (citing Ohio Adm. Code 4901-1-24(A)(7)). [↑](#footnote-ref-11)
12. In that case, the Supreme Court of Ohio adopted the following 6 prongs for purposes of determining whether information meets the trade secret definition under R.C. 1333.61(D): (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information, and (6) the amount of time and expense it would take for others to acquire and duplicate the information. [↑](#footnote-ref-12)
13. Motion for Protective Order at 3 (citing Ohio Adm. Code 4901-1-24-(A)(7) and (8)). [↑](#footnote-ref-13)
14. Ohio Adm. Code 4901-1-18. [↑](#footnote-ref-14)
15. *See generally,* Ohio Adm. Code 4901-1-16. [↑](#footnote-ref-15)