

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**NATIONWIDE ENERGY PARTNERS, LLC’S
MEMORANDUM CONTRA TO COMPLAINANT’S APPLICATION FOR
REHEARING**

Pursuant to Rule 4901-1-35(B) of the Ohio Administrative Code, Nationwide Energy Partners, LLC (“NEP”) submits this Memorandum Contra to the December 18, 2015 Application for Rehearing filed by the Complainant, Mark A. Whitt.¹ NEP urges the Public Utilities Commission of Ohio (“Commission”) to deny the Complainant’s Application for Rehearing and find that it has the authority to manage its dockets including the exercise of discretion to stay the complaint case hearing and discovery.

I. Background

Mark A. Whitt filed this complaint with the Commission on April 10, 2015, alleging that, since November 2014, NEP has supplied, arranged for, or provided him with electricity, water, and sewer services, and retail electric service at his condominium, and improperly

¹ By making this filing, NEP does not waive its defense that the Commission lacks jurisdiction over NEP and Mark A. Whitt’s complaint.

charged him for such services and for services to the common areas of the condominium building. In addition, Mr. Whitt alleges that NEP's actions and services qualify it to be an electric light company, electric distribution utility, electric utility, public utility, electric supplier, water-works company, and sewage disposal company. Mr. Whitt also alleges that NEP does not possess the necessary Commission certification in order to provide him with electricity, water and sewer services, has not otherwise complied with Title 49 of the Revised Code, or does not have an exemption from regulation.

The Commission has jurisdiction over utilities and utility services. To bring a complaint about utility services, Mr. Whitt has to establish that he is the utility customer. In his complaint, Mr. Whitt claims he resides at 300 West Spring Street. On file at the Franklin County Recorder's office is a declaration from North Bank Condominium Home Owners Association ("NBCOA") stating that NBCOA owns and procures utility service for that address.² Previously filed in this proceeding by affidavit are invoices from Ohio Power Company and the City of Columbus invoicing NBCOA for electric distribution service and water and sewer service.³ The affidavit also includes documentation showing that competitive retail electric service is provided to that address from a competitive retail electric service supplier that is not affiliated with NEP.⁴

NEP has denied the substantive arguments presented in Mr. Whitt's complaint, has argued that Mr. Whitt lacks standing to bring his complaint, and contends that the Commission has no jurisdiction to hear the complaint.⁵

² See, Exhibit 2 of NEP's motion to bifurcate, page 16 of the Amended Declaration and Amended Bylaws.

³ See, attachments to Exhibit 1 of NEP's motion to bifurcate.

⁴ *Id.*

⁵ The Ohio Supreme Court reaffirmed last month that Section 4905.26, Revised Code, confirms exclusive jurisdiction on the Commission to adjudicate complaints filed against public utilities challenging any rate or

On November 18, 2015, the Commission granted the intervention request of Ohio Power Company (the electric distribution utility in the territory where Mr. Whitt resides), and denied the intervention requests of the Ohio Consumers' Counsel, Ohio Partners for Affordable Energy and Industrial Energy Users-Ohio. In addition, the Commission denied NEP's motion to bifurcate the proceeding. Instead, the Commission ruled that this complaint case should be held in abeyance while the Commission conducts an investigation "to determine whether third-party agents or contractors such as NEP are operating as public utilities, as well as whether the scope of the Commission's jurisdiction extends to submetering arrangements."⁶ The Commission has opened that investigation and requested comments, including whether condominium associations and similarly situated entities are public utilities.⁷

In accordance with its previous determination that this case should be held in abeyance, the Commission also granted NEP's motion to stay further discovery while it conducts its investigation until further notice. The Complainant filed an application for rehearing on December 18, 2015, directed at that portion of the November 18, 2015 Entry staying discovery and holding this complaint proceeding in abeyance. This Memorandum Contra addresses the Complainant's arguments on rehearing. NEP respectfully requests that the Commission deny the Complainant's application for rehearing.

charge as "unjust, unreasonable, * * * or in violation of law." *In re Complaint of Pilkington N. Am., Inc.*, Slip Opinion No. 2015-Ohio-4797 at 8 (emphasis added).

⁶ November 18, 2015 Entry at 6, 9.

⁷ *In the Matter of the Commission's Investigation of Submetering in the state of Ohio*, Case No. 15-1594-AU-COI, Entry at 2 (December 16, 2015).

II. Argument

A. **The Complainant's Application for Rehearing must be denied in its entirety as the Commission, in its November 18, 2015 Entry, made no substantive decisions regarding the merits of the Complaint or discovery.**

The Complainant's rehearing request is directed to the portion of the November 18, 2015 Entry staying discovery and holding this proceeding in abeyance. The Commission made no decisions relating to the Complaint or the merits of the Complaint. It made no substantive ruling on whether reasonable grounds for the Complaint were stated. A majority of the Commission made no substantive ruling as to whether it had jurisdiction to hear this Complaint or whether the Complainant had standing.⁸ The fact of the matter is that with respect to the merits of the Complaint and discovery, the Commission made no substantive ruling in its November 18, 2015 Entry. Instead, the Commission established a process by which it will move forward to address the issues raised in the Complaint in a judicious manner. The Complainant is complaining about that process.

Recently, the Commission denied an application for rehearing in a situation where the Commission made no substantive ruling but instead established a procedural schedule.⁹ The Commission should likewise deny the Complainant's Application for Rehearing in its entirety.

B. **The Commission is invested with a wide latitude and discretion as to its order of business including its decision to hold this complaint case and discovery in abeyance.**

In its Application for Rehearing, the Complainant argues that holding this case in abeyance to contemplate the Complainant's standing or the Commission's jurisdiction makes

⁸ Commissioner Slaby issued a dissenting opinion on November 18, 2015, stating that the Commission does not have jurisdiction over the non-utility dispute.

⁹ See *In re Southeastern Natural Gas Company and Madison Energy Cooperative Association*, Case No. 15-1508-GA-ATR, Entry on Rehearing, November 4, 2015 at Finding 10.

no sense, because neither of these threshold issues has any relation to the merits of the claims the Complainant has brought and the Commission is being asked to hear.¹⁰ The Complainant argues that a hearing must be scheduled soon because (a) the process in Section 4905.26, Revised Code, is mandatory, (b) reasonable grounds for the Complaint have been stated, (c) the Commission has jurisdiction to hear a complaint that a company is engaged in the business of a public utility, (d) Section 4905.26, Revised Code, authorizes complaints concerning whether an entity is a public utility, (e) there is no basis for treating this Complaint differently than other complaints and (f) the Complainant has standing.¹¹

But the law of Ohio is that the Commission is invested with discretion as to its order of business, and there is such a wide latitude of that discretion that a court may not lawfully interfere with it, except in extreme cases. In the case of *State ex rel. Columbus Gas & Fuel Co. v. Public Utilities Comm.* (1930) 122 Ohio St. 473, 172 N.E. 284, 1930 Ohio LEXIS 222, a gas company brought an original action in the Ohio Supreme Court seeking a writ of mandamus to command the Commission to proceed to hear a proceeding filed by the gas company pending before the Commission. The gas company argued that on March 4, 1930, the Commission ordered:

that the assignment of this proceeding for hearing this day be, and hereby it is vacated, and that the reassignment of such hearing be deferred to some date subsequent to the determination of the issues now pending in the United States Circuit Court of Appeals.

The gas company argued that because the matter pending before the Commission was an appeal from a rate ordinance, the law provided that the Commission must proceed to hear such complaint and may adjourn the hearing thereof from day to day.

¹⁰ Complainant's Application for Rehearing at 1.

¹¹ *Id.* at 5-10.

The Commission answered, stating in relevant part:

that it will be impossible for this Commission, either properly, systematically, efficiently or with justice, to carry on its large amount of business and its many hearings if it is to be compelled forthwith and from day to day to hear all such rate complaints and appeals without any discretion in the premises and with adjournments only from day to day. These defendants further show that they have acted with due discretion in the premises and with due regard to all the rights and interests of all of the litigants.

The Ohio Supreme Court pointed out that the provision of the law cited by the gas company only applied where the utility accepted the rate and the complaint was made by a petition of three percent of the qualified electors of the city. The Court stated that the Commission's answer alleging that it was acting with due discretion and with due regard to the rights and interests of all the litigants before the Commission was a good defense. The Court stated that the Commission is invested with discretion as to its order of business, and there is such a wide latitude of that discretion that the Court may not lawfully interfere with it except in extreme cases.¹²

In *Sanders Transfer, Inc. v. Public Utilities Com.*,¹³ the Ohio Supreme Court decided whether the Commission's determination to postpone deciding an alleged jurisdictional issue was unreasonable and unlawful. In the *Sanders Transfer* case, a complaint was filed alleging that Sanders Transfer had engaged in unwarranted and unauthorized expansion of service under a Certificate of Public Convenience and Necessity. The complainant asked the Commission to rescind that certificate as a nullity due to a jurisdictional defect.

On April 5, 1978, the Commission issued an Opinion and Order in which it denied both the complainant's motion to rescind the certificate and the respondent's motion to

¹² *State ex rel. Columbus Gas & Fuel Co. v. Public Utilities Comm.*, 122 Ohio St. 473 at 475 (1930).

¹³ 58 Ohio St. 2d 21, 387 N.E. 2d 1370, 1979 Ohio LEXIS 382, 12 Ohio Op. 3d 12 (1979).

dismiss. However, it concluded that the respondent (Sanders Transfer) had engaged in an unauthorized expansion of services and ordered that Sanders Transfer cease and desist immediately any operations in excess of operating from and to the cities of Dover and New Philadelphia and the townships of Dover and Goshen, located in Tuscarawas County.

The complainant in the *Sanders Transfer* case appealed to the Ohio Supreme Court contending that the Commission's determination to postpone deciding the alleged jurisdictional issue pertaining to the 1925 Certificate was unreasonable and unlawful. The Court found that this contention was without merit as the Commission's refusal to presently address such a request was within the Commission's discretion, citing *State ex rel Columbus Gas & Fuel Co., Pub. Util. Comm., supra*.

Even more recently, in *Weiss v. PUC*, the Ohio Supreme Court again recognized that the Commission is vested with broad discretion to manage its dockets, including the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business.¹⁴ In *Weiss*, the Ohio Supreme Court concluded that the Commission had not erred in refusing to proceed with a complaint case in the manner in which that complainant wished (as a class action). The Court cited to the Commission's broad discretion for handling its dockets, reaffirming the Commission's broad discretion in this area.

Contrary to the arguments of the Complainant, it is clearly within the Commission's sound discretion as to its order of business to stay the hearing and discovery in Case No. 15-697-EL-CSS pending the outcome of the investigation.

¹⁴ *Weiss v. PUC*, 90 Ohio St. 3d 15 at 19, 734 N.E. 2d 775, 2000 Ohio LEXIS 2272, 2000-Ohio-5 (2000).

III. Conclusion

The Complainant's Application for Rehearing should be denied. Ohio law invests in the Commission's discretion as to its order of business and there is a wide latitude of that discretion that a court may not lawfully interfere with, except in extreme cases. The Complainant has not alleged, let alone established, that this is an extreme case demanding an immediate hearing. The Complainant's Application for Rehearing must be denied. If the Commission grants rehearing and lifts the stay, it should revisit and grant NEP's Motion to Bifurcate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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Summary: Memorandum Memorandum Contra to Complainant's Application for Rehearing electronically filed by M HOWARD PETRICOFF on behalf of Nationwide Energy Partners, LLC