

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

The Office of the Ohio Consumers' Counsel,)	
)	
Complainant,)	
)	
v.)	
)	Case No. 16-0782-EL-CSS
Ohio Power Company,)	
)	
Respondent.)	

**REPLY TO MEMORANDUM CONTRA OF
NATIONWIDE ENERGY PARTNERS, LLC
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

On April 12, 2016, the Office of the Ohio Consumers' Counsel ("OCC") filed a complaint against Ohio Power Company ("AEP Ohio") to protect submetered residential consumers in its service territory. The complaint would protect Ohioans who have been billed unreasonably high rates and denied the significant consumer protections and market-based pricing that other Ohioans receive.¹ Simultaneously with its complaint, OCC filed a motion for a moratorium on all new AEP Ohio sales to submeterers who resell service to submetered residential consumers.²

¹ See *In the Matter of the Complaint and Request for Relief for Consumers by the Office of the Ohio Consumers' Counsel*, Case No. 16-0782-EL-CSS (Apr. 12, 2016) (OCC Complaint).

² See *Motion for a Moratorium to Stop AEP Ohio From Providing New Service to Those who Resell Service to Submetered Residential Consumers by the Office of the Ohio Consumers' Counsel*, Case No 16-0782-EL-CSS (Apr. 12, 2016).

On April 27, 2016, AEP Ohio filed an answer to the OCC complaint, a memorandum contra the OCC's motion for a moratorium, and its own motion to amend its tariffs.³ In its motion to amend, AEP Ohio agreed with OCC that "the practice of 'submetering' has proliferated in recent years and has caused substantial harm to customers in AEP Ohio's territory."⁴ As a means to prevent further harm to consumers from submeterers, AEP Ohio proposed to revise its tariff "to limit the harm caused by submetering."⁵ Specifically, AEP Ohio requested approval of tariff modifications so that AEP Ohio will "not provide electric service to any submetered premises where a landlord, condominium association, 'submetering company,' or any other entity is assessing a markup or separate charge to individual tenants or occupants."⁶ AEP Ohio explained that its tariff modification would prohibit electrical service from being provided to any premise served by AEP Ohio where any markup or additional charge is assessed to all end-use customers for electric service.⁷ AEP Ohio's request appears to be a blanket prohibition of reselling electric service,⁸ applying to anyone who assesses a charge or markup to AEP Ohio's charges to all submetered customers, including non-residential customers.

³ See *Answer of Ohio Power Company*, Case No. 16-0782-EL CSS (Apr. 27, 2016) (AEP Ohio Answer); *Ohio Power Company's Memorandum Contra OCC's Motion for a Moratorium*, Case No. 16-0782-EL-CSS (Apr. 27, 2016) (AEP Ohio Memo Contra Moratorium); *Ohio Power Company's Motion for Tariff Amendment and Memorandum in Support*, Case No. 16-0782-EL-CSS (Apr. 27, 2016) (AEP Ohio Motion to Amend).

⁴ AEP Ohio Motion to Amend at 1, 3.

⁵ *Id.*

⁶ *Id.* at 1.

⁷ *Id.* at 7-8.

⁸ As that term is defined and used in Section 17 of AEP Ohio's tariffs. See Section 17 of AEP Ohio's Open Access Distribution Service Tariff, P.U.C.O. No. 20, 2nd Revised Sheet No. 103-13D and Section 17 of AEP Ohio's Standard Service Tariff, P.U.C.O. No. 20, 1st Revised Sheet No. 103-13.

OCC filed a memorandum contra AEP Ohio's motion to amend on May 12, 2016.⁹ The Industrial Energy Users-Ohio (IEU) and Nationwide Energy Partners, LLC (NEP) also filed memoranda contra AEP Ohio's motion to amend.¹⁰ IEU, NEP, and the Ohio Apartment Association and the International Council of Shopping Centers (OAA/ICSC) moved to intervene in this proceeding.¹¹

In OCC's memorandum contra AEP Ohio's motion to amend, OCC stated that it appreciated AEP Ohio's proposal to not provide electric service to apartment communities, condominium complexes, and other types of housing that submeter to residential customers.¹² However, OCC explained that AEP Ohio's desire to alter its tariff to address non-residential issues goes beyond the scope of OCC's complaint, which is to ban submetering to *residential* customers.¹³ OCC also argued that AEP Ohio's proposed expansion raises additional issues not raised in OCC's complaint to protect residential consumers that will unduly prolong and delay needed relief to protect residential customers.¹⁴ IEU agreed that the complaint should be limited to address "legitimate concerns of residential customers," asserting that AEP Ohio failed "to

⁹ *Memorandum Contra Ohio Power Company's Motion for Tariff Amendment by the Office of Ohio Consumers' Counsel*, Case No. 16-0782-EL-CSS (April 27, 2016) (OCC Memo Contra AEP Ohio Motion to Amend).

¹⁰ *Memorandum Opposing Ohio Power Company's Motion for Tariff Amendment by Industrial Energy Users-Ohio*, Case No. 16-0782-EL-CSS (May 10, 2016) (IEU Memo Contra AEP Ohio Motion to Amend); *Memorandum Contra of Nationwide Energy Partners, LLC*, Case No. 16-0782-EL-CSS (May 12, 2016).

¹¹ *Motion to Intervene of Industrial Energy Users-Ohio*, Case No. 16-0782-EL-CSS (May 10, 2016); *Motion for Limited Intervention of Nationwide Energy Partners, LLC*, 16-0782-EL-CSS (May 12, 2016); *Motion to Intervene of Ohio Apartment Assn and the International Council of Shopping Centers*, Case No. 16-0782-EL-CSS (May 12, 2016). OCC will address the interventions of IEU, NEP, and OAA/ICSC in separate filings as set forth in the PUCO's rules.

¹² OCC Memo Contra AEP Ohio Motion to Amend at 3.

¹³ AEP Ohio Motion to Amend at 1, 3.

¹⁴ OCC Memo Contra AEP Ohio Motion to Amend at 3.

demonstrate any factual basis for expanding the remedy sought by OCC for the alleged injuries suffered by residential customers.”¹⁵

OCC hereby files its reply to NEP’s memorandum contra AEP Ohio’s motion to amend.

II. ARGUMENT

A. The PUCO has jurisdiction to amend AEP Ohio’s tariff to limit submetering.

Contrary to the arguments of NEP, the PUCO does have jurisdiction to amend AEP Ohio’s tariffs to limit AEP Ohio’s authority to resell its service, including to submetering entities such as NEP.¹⁶ As noted by AEP Ohio, the PUCO has jurisdiction over the service it provides, as a public utility, to a submetered premise.¹⁷ Therefore, the PUCO has all the jurisdiction it needs to revise AEP Ohio’s tariffs to prevent abusive practices.

Additionally, NEP’s attempt to rely on cases such as *Brooks* in its memorandum contra to assert that AEP Ohio cannot amend its tariff is misplaced.¹⁸ The PUCO has adopted other public utilities’ tariffs that ban reselling.¹⁹ AEP Ohio’s current tariffs, however, are not as restrictive and are being construed as allowing reselling that permits broader submetering arrangements than that contemplated by other public utilities’

¹⁵ IEU Memo Contra AEP Ohio Motion to Amend at 6, 8.

¹⁶ OCC Complaint at 2-4, 8, 14-15; also see AEP Ohio Motion to Amend at 5- 6.

¹⁷ See AEP Ohio Motion to Amend at 6 (citing *Shopping Centers Assoc. v. PUCO*, 3 Ohio St.2d 1 (1965)).

¹⁸ *Brooks v. Toledo Edison Co.*, Case No. 94-1987-EL-CSS, 1996 WL 331201 (May 8, 1996).

¹⁹ See, e.g., The Toledo Edison Company, P.U.C.O. No. 8, Original Sheet 4, Page 10 of 24, Effective January 23, 2009. See OCC/OPLC Attachment 5.

tariffs.²⁰ However, AEP Ohio's tariffs may be revised to restrict reselling,²¹ and the PUCO may approve such revised tariffs.

Brooks allowed resale or redistribution of electric service from a landlord to a tenant where the landlord was not operating as a public utility, and the landlord owned the property upon which resale or redistribution took place.²² The facts showed that commercial landlords owned the property at issue and were not functioning as public utilities. NEP derives no support from *Brooks*.

Brooks should not be understood to interfere with the ability of AEP Ohio to take responsible steps to curb the pernicious abuses caused by certain submetering arrangements in the residential context that were not landlord-tenant situations. First, *Brooks* arose in the commercial context; thus, the interests of residential customers were not presented for the Commission's consideration. Second, *Brooks* pre-dated the increased growth of submetering and the harms engendered by it. Its analysis therefore was not informed by this new and harmful phenomenon. A case must be understood based on the context in which it arose, not reflexively applied to a different set of circumstances. "Context matters" when it comes to the act of interpretation.²³ The context faced by the Commission in *Brooks* was radically different than it is today as submetering was not as pervasive and residential customers were not being victimized by pernicious submetering arrangements like today. Third, NEP is not a landlord as envisioned by *Brooks*. Whatever may have motivated the decision in *Brooks*, no one can

²⁰ OCC Complaint at 10-11.

²¹ See AEP Ohio Motion to Amend.

²² *Brooks*, 1996 WL 331201, *12.

²³ *In re Application of Ohio Power Co.*, 140 Ohio St.3d 509, 2014-Ohio-4271, ¶ 26.

reasonably dispute that the harms associated with submetering and the alarm caused by the submetering industry are more acute now. While the Commission can certainly account for the rationales articulated in *Brooks*, NEP's argument ignores the contextual differences between that case and the circumstances surrounding the activities of NEP. Contrary to NEP, *Brooks* does not control here.

B. This complaint and the accompanying consumer protections it requests should move forward without delay.

NEP's request to unnecessarily stall this case to the detriment of residential customers is meritless. R.C. 4905.26 authorizes a complaint alleging, inter alia, "that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law * * * ." OCC availed itself of the statutory right to protect residential customers. And incidentally, OCC was precluded from protecting residential customers through another submetering complaint case.²⁴ OCC initiated this complaint to protect residential customers in AEP Ohio's service territory from the harm that is occurring and to prevent future submetering situations from being implemented. As detailed in the complaint, these customers are not afforded the same set of protections afforded to AEP Ohio's distribution customers.²⁵

All residential customers, including those who are submetered or subject to reselling of utility service, are deserving of all protections afforded to customers that have

²⁴ *Whitt v. Nationwide Energy Partners LLC*, Case No. 15-697-EL-CSS, Entry at 5 (November 18, 2015) (denying OCC's motion to intervene).

²⁵ OCC Complaint at 1-2, 12-13.

direct relationships with public utilities. The practice of reselling, especially in the context of submetering, denies residential customers the ability to shop for competitive generation supply, denies customers critical consumer protections of rate regulation, subjects customers to higher and unknown rates, denies customers other consumer protections embedded in the PUCO's rules and Ohio law, and could raise reliability concerns.²⁶ For all these reasons, this complaint case should move forward without delay. If at all, delaying this case as requested by NEP will only perpetuate the harms inflicted on residents subject to reselling of utility service, particularly submetering arrangements.

III. CONCLUSION

The PUCO should reject NEP's claims and protect Ohioans by (1) immediately imposing a moratorium on new submetering arrangements with residential customers that involve the abusive practices described herein and (2) using its regulatory authority over public utility tariffs to ban existing and future reselling of residential customers' utility services.

²⁶ AEP Ohio Motion to Amend at 4.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was served by electronic mail to the persons listed below, on this 18th day of May 2016.

/s/ Kimberly W. Bojko
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Summary: Reply Reply to Memorandum Contra of Nationwide Energy Partners, LLC by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Bojko, Kimberly W.