BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Cynthia Wingo Complainant, v. Nationwide Energy Partners, LLC Respondent.	)	Case No. 16-2401-EL-CSS

REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

In objecting to the proposed Amended Complaint, Nationwide Energy Partners (NEP) is basically complaining about getting what it asked for. NEP sought a stay of the proceedings in Case No. 15-697-EL-CSS, which the Commission effectively granted by holding that proceeding in abeyance while conducting the investigation in Case No. 15-1594-AU-COI. *See* Case No. 15-697-EL-CSS, Entry ¶ 11 (Nov. 18, 2015). The investigation has concluded and a new "regulatory framework" has been announced. Case No. 15-1594-AU-COI, Second Entry on Rehearing ¶ 1 (June 21, 2017). Complainant has sought leave to amend her complaint to incorporate this new framework, as well as additional facts that have occurred during the past nine months. Good cause exists for the amendment, as set forth in the motion for leave.

NEP argues that the motion for leave to amend should be denied for two reasons; first, because there is not "good cause" for the amendment; second, because R.C. 4905.26 and the

Commission's complaint procedures do not allow complaints against multiple public utilities. Complainant will address the second argument first.

A. NEP's "statutory" argument is expressly foreclosed by statute.

NEP claims that because R.C. 4905.26 uses the singular term "public utility," the statute "contemplates a single public utility defendant." Mem. Contra at 10. Unfortunately for NEP, the rules of statutory construction foreclose this restrictive interpretation. In interpreting a statute, "[t]he singular includes the plural, and the plural includes the singular." R.C. 1.43(A). Thus, under R.C. 4905.26, the right to complain against any "public utility" also includes the right to complain against multiple "public utilities." There is nothing insensible or unworkable about such a reading. Moreover, as a statute authorizing a cause of action, R.C. 4905.26 is a remedial law and must therefore be liberally construed. *Kilbreath v. Rudy*, 16 Ohio St. 2d 70, 72 (1968) (a remedial law "prescribes the methods of enforcement of rights or obtaining redress."); R.C. 1.11 ("Remedial laws and all proceedings under them shall be liberally construed . . . ."). R.C. 4905.26 simply does not limit complaints to one respondent, and NEP grasps at straws to claim otherwise.[1]

This formalism animates much of NEP's motion. NEP claims that Complainant should have filed multiple complaints against individual entities instead of a single complaint against multiple entities. NEP Mem. Contra at 6, 10–12. NEP cites no case where this was required of a Complainant, and the only basis for NEP's argument is R.C. 4905.26's use of the singular

[1] Indeed, the same counsel now arguing otherwise was counsel to a group of no less than seven Ohio universities that named the three FirstEnergy utilities, as well as Ohio Power Company and FirstEnergy Solutions, as respondents in one of several "Polar Vortex" complaints. *See* Complaint, Case No. 15-0455-EL-CSS (March 2, 2015). Unlike that complaint, the proposed Amended Complaint is brought by a single complainant.

"public utility"—which Complainant has already rebutted. Moreover, the Amended Complaint makes clear that the Complainant's separate tenancies (Gateway Lakes and Creekside) implicate overlapping claims and defenses. NEP is the common denominator. It rendered the same bills for the same services at both apartment complexes. The claims are related, and there is a common Complainant and Respondent.

True, additional parties have been added. But NEP has invited this and should not now be heard to claim this is improper. NEP has consistently argued that it is not Complainant's service provider; her landlords are. If that is true, then it is the landlords, not NEP, who are subject to the COI order; so what else could Complainant do but name her landlords as respondents as well? The "John Doe" respondents are named as a precaution, because NEP likes to play shell games—evidenced, in part, by recently forming a CRES under a fictitious name. *See* Case No. 17-614-EL-CRS, March 6, 2017 Correspondence. Naming John Doe respondents serves no other purpose but to preserve and protect Complainant's rights, and to avoid the need to file further amendments to the Complaint if NEP produces another entity to point the finger at.

That Complainant *could* have elected to file two complaints instead of one does not defeat her showing of good cause. And it is hard to understand why NEP objects to defending a single complaint anyway. Instead of defending one complaint, NEP wants the Commission to make Complainant file two complaints (or perhaps more, as needed to bring in noncompliant, service-providing landlords)—and then, file a motion to consolidate those separate complaints into a single proceeding. *See* Mem. Contra at 11. What point would this serve? If consolidation were denied, NEP would be forced to defend two complaints instead of one. If consolidation were granted, NEP would find itself in the same position it is in currently.

Is it possible that the parties might conclude down the road that bifurcating the claims or issues makes sense? It is possible, but that is a totally separate issue from whether good cause exists to amend the pleading that puts these claims and issues in front of the Commission. And it is far from clear that multiple complaints against multiple entities—each one (presumably) with its own docket numbers, pleadings, settlement conferences, discovery deadlines, hearing dates, and so forth, with the possibility of later consolidation—would result in a *less* "tortured" litigation process than a single Complaint. Even if NEP's suggestion were workable, which is far from clear, NEP has not shown that it is the only permissible approach.

The bulk of NEP's memorandum contra consists of blatant formalism. This only confirms that the motion for leave should be granted.

B. NEP does not otherwise rebut the motion's showing of good cause.

As for whether "good cause" exists for the amendment, NEP argues that there has not been a change in law. The first order in the COI docket was issued a week before Complainant's original filing, so NEP reasons that the Complaint could have incorporated the law reflected in that order. *See* Mem. Contra at 5. Had Complainant done what NEP says she should have done, Complainant would have had to amend *again* after the second entry on rehearing, because the second entry introduced a "safe harbor" to the modified *Shroyer* test. Case No. 15-1594-AU-COI, Second Entry on Rehearing ¶ 1 (June 21, 2017). All of which would have left this Complaint precisely where it is today. Complainant's decision to not engage in a vain, potentially repetetive act did not prejudice NEP.[2] In any event, the standard for leave to amend is

[2] Had the Complaint referenced or incorporated the December 7, 2016 Finding and Order, there is little doubt that NEP would have tried to get the Complaint dismissed or stricken on grounds that the order was only recently issued and still subject to rehearing. NEP itself sought rehearing of that order, so it is foolish to argue that Complainant should have incorporated legal standards to which NEP itself objected.

"good cause." O.A.C. 4901-1-06. A change in law is not *required* to establish "good cause," but the change in both law *and* fact establishes good cause here.

NEP also claims that Complainant's move to a different apartment does not provide good cause to amend. Mem. Contra at 6. If the fact that Complainant no longer lives at the apartment identified in the Complaint is not "good cause" to amend her pleading, it is hard to imagine what would be. Civil Rule 18(A) expressly allows a plaintiff to assert "as many claims, legal or equitable, as he has against an opposing party." That is what Complainant has elected to do. Again, NEP *acknowledges* that these claims could be "properly" presented through separate complaints. This belies any suggestion that good cause has not been shown to amend the Complaint or that the Commission should not otherwise consider the new allegations.

There is good cause for the amended complaint, and granting leave to amend is neither contrary to R.C. 4905.26 nor unfairly prejudicial to NEP. The motion for leave to amend should be granted.

Dated: August 9, 2017

Respectfully submitted,

s/ Mark A. Whitt

Mark A. Whitt
(Counsel of Record)
Andrew J. Campbell
Rebekah Glover
WHITT STURTEVANT LLP
88 E. Broad St., Suite 1590
Columbus, Ohio 43215
614.224.3911
614.224.3960 (f)
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com

Shawn J. Organ
Joshua M. Feasel
Carrie M. Lymanstall
Organ Cole LLP
1330 Dublin Road
Columbus, Ohio 43215
614.481.0900
614.481.0904 (f)
sjorgan@organcole.com
jmfeasel@organcole.com
cmlymanstall@organcole.com

CERTIFICATE OF SERVICE

This document was filed via the Commission's e-filing system on August 9, 2017. Parties who have subscribed to electronic service will receive notice of this filing from the Commission. Service is also being made this day to the following persons by email:

Michael J. Settineri	mjsettineri@vorys.com
William A. Sieck	wasieck@vorys.com
Gretchen L. Petrucci	glpetrucci@vorys.com

s/ Mark A. Whitt

Summary: Reply in support of motion for leave to file first amended complaint electronically filed by MARK A WHITT on behalf of Wingo, Cynthia