

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates.	) ) )	Case No. 20-585-EL-AIR
In the Matter of the Application of Ohio Power Company for Tariff Approval.	) ) )	Case No. 20-586-EL-ATA
In the Matter of the Application of Ohio Power Company for Approval to Change Accounting Methods.	) ) )	Case No. 20-587-EL-AAM

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**OHIO POWER COMPANY’S MEMORANDUM CONTRA  
NATIONWIDE ENERGY PARTNERS, LLC’S  
MOTION TO REOPEN THE HEARING RECORD**

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**INTRODUCTION**

Ohio Power Company (“AEP Ohio”) and Nationwide Energy Partners, LLC (“NEP”) have recently come to a disagreement about an issue that has nothing to do with AEP Ohio’s distribution rate case: whether NEP can force AEP Ohio to terminate the service AEP Ohio currently provides to customers living in five apartment buildings in Central Ohio, so that NEP can submeter those buildings and serve the customers itself – even though NEP is not the property owner. NEP rushed to the Commission to file a “motion to reopen the hearing record” in AEP Ohio’s distribution rate case, seeking to insert this collateral dispute into a proceeding whose record has been closed for four months. This motion is nothing more than a thinly veiled and meritless attempt by NEP to delay AEP Ohio’s distribution rate case and thereby gain negotiation leverage in an entirely collateral matter.

The legal dispute that NEP is seeking to insert into this distribution rate case has nothing to do with applying the three-part test to the Stipulation filed in this case. Instead of extending

and delaying the resolution of this proceeding to address this new, tangential issue, the Commission should deny NEP's motion to reopen and allow NEP and AEP Ohio to resolve that issue in the case in which that issue is directly presented: AEP Ohio's recently filed complaint case against NEP to proactively air this dispute before the Commission, Case No. 21-0990-EL-CSS.

### **ARGUMENT**

Rule 4901-1-34 authorizes an attorney examiner to "reopen a proceeding at any time prior to the issuance of a final order." Ohio Adm.Code 4901-1-34(A). However, the party moving to reopen the proceeding must show "good cause" for doing so. *Id.* In particular, if the movant seeks to reopen the proceeding to present "additional evidence" that "could not, with reasonable diligence, have been presented earlier in the proceeding," the movant must "specifically describe the nature and purpose of [the] evidence" sought to be introduced. Ohio Adm.Code 4901-1-34(B).

The Commission has repeatedly denied motions to reopen where the evidence or arguments the movant seeks to raise are irrelevant to the issues before the Commission in the proceeding. *See In the Matter of the Commission's Consideration of Matters Related to the Stipulation Approved in Recent Cases Involving The Cleveland Electric Illuminating Co. and The Toledo Edison Co.*, Case No. 89-498-EL-COI, Opinion and Order, 1991 Ohio PUC LEXIS 106, \*19-20 (Jan. 24, 1991) (denying a motion to reopen where the movant's "arguments are not relevant to this proceeding"); *In the Matter of the Joint Application of SBC Communications Inc. and AT&T Corporation for Consent and Approval of a Change of Control*, Case No. 05-269-TP-ACO, Entry ¶ 3 (Oct. 12, 2005) (denying a motion to reopen to present new survey evidence, where the movant "failed to establish a nexus between the survey and the Commission's

consideration in this proceeding”). The Commission has also denied motions to reopen where the movant’s concerns are being addressed in other proceedings. *In the Matter of the Application of Ohio Power Co. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.43, in the Form of an Electric Security Plan*, Case Nos. 16-1852-EL-SSO, *et al.*, Opinion and Order ¶¶ 34-35 (Apr. 25, 2018) (declining to reopen an ESP proceeding to address federal tax changes that were the subject of another proceeding).

**I. The “new information” NEP seeks to introduce is irrelevant to applying the three-part test to this proceeding**

NEP’s purported reason for participating in AEP Ohio’s distribution rate case was to argue that AEP Ohio did not respond to NEP’s requests to purchase AEP Ohio equipment fast enough. Even though NEP did not support the Stipulation, AEP Ohio included language in the settlement in which it agreed to make best efforts to respond within 21 days to such customer requests. (Jt. Ex. 1, Section III.E.12.)

Through its testimony presented during the evidentiary hearing, NEP asked for a more prescriptive process for customer requests to purchase AEP Ohio equipment. (NEP Ex. 33 at 5.) NEP witness Ringenbach stated that NEP believed the language in the stipulation could have included a more detailed and complicated “standardized” process (NEP Ex. 33 at 3) and “it would be unreasonable for the Commission to approve any stipulation without such” (*id.* at 4). Although NEP believed it appropriate to create new requirements and numerous additions to the Stipulation language concerning customer requests to purchase AEP Ohio facilities, it failed to identify any specific important regulatory principle or practice that may have been violated by the inclusion of existing § III.E.12 in the Stipulation. Of course, merely repeating one’s litigation position is not an appropriate basis for contesting a settlement. *Cf. Ohio Partners for Affordable Energy v. Pub. Util. Comm.’n (In re E. Ohio Gas Co.)*, 144 Ohio St.3d 265, 2015-

Ohio-3627, ¶ 32 (holding that “[t]he fact that [a] stipulation did not resolve all of [an intervenor]’s opposition arguments does not mean that the commission’s approval of the stipulation was unlawful.”). In short, as demonstrated in the Company’s merit brief, NEP failed to show that AEP Ohio’s 21-day commitment violated the three-part test.

The information presented in NEP’s motion to reopen is no more relevant to the three-part test than its direct testimony was. The motion to reopen purports to provide additional evidence concerning the updated status of pending service requests that (in NEP’s view) merely cumulatively supports NEP’s litigation position (though inconsistently, as explained below). But this does nothing to address the dispositive three-part test that governs the Commission’s evaluation of the Stipulation. And any change in the number of requests or the outcome of pending requests is not a basis to reopen the record – any more than other developments that occur after the hearing record closes affecting the cost of service, such as an increase to the cost of service after the hearing closes, a change in cost of capital after the hearing, or the existence of a new capital investment after the hearing closes. Regardless, this base rate case is not a forum to air all grievances NEP may have about AEP Ohio’s handling of a service request.

NEP wants to codify its proposed solution to a problem it alone perceives and advocates for in this case into AEP Ohio’s tariff. But that does not mean that the issue is properly considered – or must be addressed – in this rate case. NEP’s arguments throughout this proceeding regarding customer equipment purchase requests were about the number of requests and the process used by AEP Ohio to timely consider the requests. The arguments were never aimed at resolving the requests or address them specifically. (*See* NEP Merit Brief at 9-11.) Now, however, NEP’s “supplemental evidence” disingenuously shifts away from NEP’s original

purpose and attempts to bring the resolution of the specific service requests into the case – as part of an untimely and spurious scheme to delay the rate case from being decided.

Nothing about the Stipulation’s 21-day response commitment requires a particular answer or pricing method with respect to customer equipment purchase requests. And nothing about the commitment binds the Company to take a specific position or view toward submetering practices or other related conduct by NEP or others. Of course, there are also customer requests to purchase Company equipment that do not relate to submetering in any way that are also encompassed by the 21-day response commitment in the Stipulation. More to the point, none of the allegations made in the improperly filed supplemental testimony are relevant to the Commission’s evaluation of the Stipulation under the three-part test.

## **II. NEP fails to offer good cause to reopen the record**

NEP’s only statement of good cause to reopen is that a conversation about NEP’s service requests occurred after the close of the evidentiary record. (NEP Motion at 4.) That development has no bearing on the issues discussed in the record and argued on brief, which relate to the generic timing and process language that could end up in one of the Company’s tariffs. More importantly, NEP’s current position conflicts with its position on this issue presented during the case. NEP’s position on the merits of this issue was that AEP Ohio should be timely in issuing its responses and provide meaningful response to customers. (NEP Reply Brief at 9-11.) Now, however, NEP argues that AEP Ohio’s clear responses to certain customers’ service requests provides a basis to reopen the hearing, meaning AEP Ohio would have been better off ignoring NEP’s request until after a merit ruling in this case. NEP cannot have it both ways.

Moreover, any tariff decision from the Commission on this point in the rate case would be applied prospectively and not retroactively like NEP seeks here. The fact that NEP is unhappy with AEP Ohio's response to service requests that were pending during the rate case is not relevant to the rate case. And it is obvious that the nature of NEP's arguments and "supplemental evidence" is really a complaint against AEP Ohio, not a basis for reopening a completed hearing that is already ripe for a merit decision. NEP also ignores the fact that the status of submetering companies under Ohio law has changed while the base rate case has remained pending, as further explained below. Regardless, the issues raised by NEP are not part of the rate case and, in fact, are the subject of another pending case where these issues can be aired before the Commission.

**III. The new issues NEP seeks to insert into this proceeding are more appropriately considered in the context of Ohio Power's complaint case against NEP**

The issues NEP is attempting to raise should be addressed not in this proceeding but rather in Case No. 21-990-EL-CSS, a separate proceeding that that AEP Ohio has recently filed under R.C. 4905.26. Understanding why these issues belong in Case No. 21-990-EL-CSS requires some background about why NEP has filed this motion at this time.

As noted above, NEP's true reason for attempting to reopen the record here is a discrete dispute between NEP and AEP Ohio concerning five apartment complexes: Norton Park, the Normandy, Gateway Lofts, Arlington Pointe, and the Edge at Arlington (collectively the "Apartment Complexes"). AEP Ohio currently provides electric distribution service to the individual tenants of the Apartment Complexes. NEP has demanded that AEP Ohio terminate its service to the individual customers of the Apartment Complexes and establish so-called "master meter service" to the Apartment Complexes so that NEP itself can "submeter" and serve the individual tenants itself. AEP Ohio has informed NEP that it is denying NEP's request because,

in AEP Ohio’s view, if NEP were to take over service to Apartment Complex customers, NEP would be operating as a “public utility” in violation of the Certified Territory Act, R.C. 4933.83, and numerous other statutes and regulations.

As the Commission is aware, following the Ohio Supreme Court’s December 2020 decision in *In re Complaint of Wingo v. Nationwide Energy Partners, LLC*, 2020-Ohio-5583, ¶ 3, there is an open question in Ohio law about whether new “big business” submetering companies such as NEP are “electric light companies” and therefore “public utilities” under R.C. 4905.03 and 4905.04. *See Wingo*, 2020-Ohio-5583, ¶ 3 (“Originally, submetering developed with an apartment owner, or other similar owner of a multi-residential complex, dividing up a common master bill so that each individual resident would pay for their share of the utilities used. Today, submetering is big business, with third-party resellers such as NEP providing submetering services for multiple properties and landlords.”). In *Wingo*, the Supreme Court struck down the Commission’s “modified *Shroyer* test,” under which the Commission had held that NEP is not a “public utility.” *Id.* ¶ 17 (holding that the modified *Shroyer* test had “nothing to do with the statutory language”). The Court “remand[ed] the case for the PUCO to determine whether it has jurisdiction” over NEP “based upon the jurisdictional statute, not the modified *Shroyer* test.” *Id.* ¶ 26. AEP Ohio was a party in the *Wingo* case and expected to participate in the remand proceeding and argue that NEP is a public utility under the jurisdictional statute. However, before the Commission could undertake this jurisdictional inquiry, *Wingo* moved to dismiss her complaint, and the Commission granted dismissal in July 2021. *See Entry, In re Complaint of Wingo*, Case No. 17-2002-EL-CSS (July 14, 2021).

Following the dismissal of the *Wingo* case, AEP Ohio began developing the complaint it has now filed in Case No. 21-990-EL-CSS. The purpose of the complaint is to provide the

Commission an opportunity to carry out the jurisdictional inquiry mandated by the Court in *Wingo*. Whereas the Commission determined that there was no live controversy on remand in *Wingo*, there is a live controversy concerning NEP's demand that AEP Ohio abandon its service to the individual customers in the Apartment Complexes so that NEP can serve them.

As AEP Ohio was developing its complaint, NEP inquired about the status of the Apartment Complexes. Acting in good faith, AEP Ohio informed NEP that AEP Ohio's position on the question left open by *Wingo* was that NEP was operating as a public utility under the jurisdictional statutes, and therefore AEP Ohio was denying NEP's request for AEP Ohio to establish "master meter" service to the Apartment Complexes. This conversation took place on September 15, 2021. Six days later, before AEP Ohio had a chance to file its complaint, NEP rushed to file this motion to reopen the record in AEP Ohio's distribution rate case.

As should be clear by now, this dispute has nothing to do with AEP Ohio's distribution rates or tariffs. Instead, it is a dispute about whether NEP is operating as a "public utility" in violation of Ohio law, and whether AEP Ohio should be forced to abandon its customers in the Apartment Complexes so that NEP can serve them instead. Both questions can – and should – be addressed in Case No. 21-990-EL-CSS, where they are discretely presented for decision. Whether NEP is a "public utility" is entirely collateral to AEP Ohio's distribution rate case; it is fundamentally a question about *NEP*, not AEP Ohio. And the question presents no reason to delay the distribution rate case, which is fully briefed and ready for decision.

#### **IV. NEP's proffered testimony should be stricken**

Finally, NEP's submitted "supplemental testimony" should be struck. Rather than describing the nature and purpose of the testimony that NEP would provide if the Commission were to grant its motion, as directed by the Commission's rules, NEP chose to submit that



testimony (pre-marked as NEP Ex. 36) *instanter*, with two attachments, neither of which is currently in the evidentiary record. Simply attaching unsworn testimony and other extra-record information to a post-hearing filing, without a Commission entry or order authorizing such new evidence, is improper and unduly prejudicial, and the Company moves the Commission to both disregard and strike that testimony. *Compare Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, Opinion and Order (Apr. 10, 2019) (granting a motion to strike previously disallowed rebuttal testimony that was attached to a post-hearing reply brief and described as a “proffer [of] disputed evidence,” and “emphasizing that [the] rebuttal testimony has not been considered in our determination of this proceeding”).

### CONCLUSION

For the foregoing reasons, the Commission should strike the supplemental testimony attached to Nationwide Energy Partners, LLC’s Motion to Reopen the Hearing Record and deny the Motion to Reopen for failure to show good cause.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing was sent by, or on behalf of, the undersigned counsel to the following parties of record this 24<sup>th</sup> day of September, 2021, via email.

*/s/ Steven T. Nourse* \_\_\_\_\_

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Summary: Memorandum Memo Contra electronically filed by Mr. Steven T. Nourse on behalf of Ohio Power Company