

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Ohio Power Company)	
)	Case No. 21-990-EL-CSS
Complainant,)	
)	
v.)	
)	
Nationwide Energy Partners, LLC)	
)	
Respondent.)	

**MEMORANDUM CONTRA NATIONWIDE ENERGY PARTNERS’ MOTION FOR
PROTECTIVE ORDER OR, IN THE ALTERNATIVE, FOR A STAY OF DISCOVERY
BY
OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

Ohio Power Company (“AEP”) filed a complaint against Nationwide Energy Partners, LLC (“NEP”) regarding NEP’s demand to provide electric utility service to AEP’s residential consumers through submetering. Submetering involves an entity (here NEP) that resells or redistributes public utility service to consumers. Traditionally, apartment landlords have provided submetering service to residents by dividing up the total bill for utility service according to each resident’s use. But today, non-landlord submetering companies like NEP seek to provide this service and profit from sales of utility service to consumers, without providing consumers the protections that they would otherwise receive under PUCO regulation. OCC has sought discovery from NEP in an effort to protect AEP’s residential utility customers, who reside in the apartment complexes NEP seeks to serve.

Through its filing of a motion for a protective order or, in the alternative, for a stay of discovery, NEP attempts to thwart OCC's rights to conduct discovery to investigate important

consumer protection matters.¹ NEP asks the PUCO to indefinitely delay OCC's discovery by allowing NEP to respond 20 days after the PUCO rules on OCC's motion to intervene and NEP's motion to dismiss. NEP's request is contrary to the Ohio Administrative Code.

The backdrop for this discovery dispute includes consumer protection issues raised by AEP's Complaint against NEP, involving NEP's reselling (submetering) electric utility service to consumers. If NEP prevails in the Complaint case and is allowed to submeter to the apartment complexes at issue, consumers will pay higher rates and lose many of the consumer protections they receive when AEP provides service as a regulated utility under Ohio law. The PUCO should reject NEP's efforts to infringe upon OCC's discovery rights that exist under law and rule.

NEP wants to resell electric utility service to apartment complex residents for profit. NEP has objected to OCC's intervention to protect consumers and moved to dismiss AEP's Complaint.² NEP claims that it should not have to incur the time and expense to respond to OCC's discovery.

The PUCO should take note that it's not a great start for NEP's assumption of the important role of a public utility that it opposes the intervention of the state consumer advocate. And it's not a good sign that NEP does not want to spend time or money answering the consumer advocate's questions that go with acting as a public utility. This from an entity, NEP, that does not offer consumers the protections available from AEP's service.

Notably, the Franklin County Court of Common Pleas recently dismissed NEP's suit against AEP regarding the same issues, stating that this matter is within the PUCO's

¹ Nationwide Energy Partners, LLC's Motion for Protective Order or, in the Alternative, for a Stay of Discovery (November 24, 2021) ("Motion").

² *See id.* at 2-5.

jurisdiction.³ Moreover, the Ohio Supreme Court has held that the PUCO should consider whether NEP acts as a public utility in providing submetering service.⁴ Thus the issues raised by AEP's Complaint affecting consumers are squarely before the PUCO, and OCC should be permitted to conduct discovery on NEP now.

NEP claims that OCC will not be harmed by a protective order or discovery stay because there is no procedural schedule in this case.⁵ NEP is wrong. NEP's Motion ignores Ohio law, Ohio Supreme Court precedent, and the Ohio Administrative Code. The PUCO should deny NEP's Motion, and direct NEP to respond to OCC's discovery requests.

II. ARGUMENT

A. Ohio law and the Ohio Administrative Code allow OCC's discovery while motions are pending. The PUCO should deny NEP's motion to thwart OCC's discovery for consumer protection.

R.C. 4903.082 provides that “*all parties* and intervenors shall be granted ample rights of discovery.” (emphasis added). The PUCO has established that “discovery may begin immediately after a proceeding is commenced.”⁶ This proceeding was commenced when AEP filed its Complaint on September 24, 2021. To protect consumers, OCC moved to intervene in this case on October 28, 2021, and served its first set of discovery requests on NEP on November 5, 2021.

³ See Ohio Power Company's Notice of Additional Authority (Dec. 8, 2021) (Attaching Decision Granting AEP's Motion to Dismiss, *Nationwide Energy Partners, LLC v. Ohio Power Company*, Case No. 21CVH07-7186, Franklin County Court of Common Pleas (December 3, 2021)).

⁴ *In re Complaint of Wingo*, 2020-Ohio-5583, ¶26.

⁵ See *id.*

⁶ O.A.C. 4901-1-17 (A). *Accord*, Ohio Civ. R. 33 (A) (interrogatories may be served by any party without leave on the plaintiff “after commencement of the action.”).

NEP claims that discovery should not start until 20 days after the PUCO rules on OCC's motion to intervene and NEP's motion to dismiss. But discovery may and should begin now. Under O.A.C. 4901-1-16(H), OCC is expressly permitted to conduct discovery on NEP while OCC's Motion to Intervene is pending.⁷ The PUCO has ruled that discovery should begin at the outset of the case and not await a ruling on a motion to intervene or a motion to dismiss.⁸ In a previous case where a company opposed discovery pending a decision on OCC's motion to intervene, the Attorney Examiner found:

As a final matter, the attorney examiner notes that, under Ohio Adm.Code 4901-1-16(H), the term "party" includes any person who has filed a motion to intervene, which is pending at the time a discovery request or motion is to be served or filed. Therefore, *unless and until the attorney examiner rules on any pending motion to intervene, all parties, including the Company, are subject to discovery for the purposes of these proceedings, and should timely respond to all discovery requests.*⁹

The Ohio Supreme Court has routinely upheld OCC's rights to discovery as well.¹⁰

According to the PUCO "the policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly without taking undue advantage of the other side's industry or efforts."¹¹ The rules on discovery in the Ohio Administrative Code "*do not create an*

⁷ See *In the Matter of the Joint Application of Cinergy Corp., on Behalf of the Cincinnati Gas & Electric Company, and Duke Energy Holding Corp. for Consent and Approval of a Change of Control of the Cincinnati Gas & Electric Company*, Case No. 05-732-EL-MER (December 7, 2005), at ¶ 14 (PUCO found that "Rule 4901-1-16(H), O.A.C., would allow OCC to commence discovery even though its motion for intervention has not been granted.")

⁸ See, e.g., *Consumers' Counsel v. West Ohio Gas Company*, 89-275-GA-CSS, Entry (April 18, 1989); *Consumers' Counsel v. Ohio Bell Telephone Company*, 93-576-TP-CSS, Entry (July 27, 1993); *Consumers' Counsel v. DP&L*, 88-1744-EL-CSS, Entry (June 6, 1989).

⁹ *In the Matter of the Application of Verde Energy USA Ohio, LLC for Certifications as a Competitive Retail Electric Service Supplier*, Case No. 11-5886-EL-CRS *et al.*, Entry, ¶ 13 (March 3, 2020) (emphasis added).

¹⁰ *In Re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, Slip Opinion No. 2021-Ohio-3630, ¶ 42 (intervening parties have broad rights of discovery); see also *Ohio Consumers Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶¶ 82-83 (PUCO erred in denying discovery to OCC).

¹¹ *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (March 17, 1987).

additional field of combat to delay trials or to appropriate the Commission's time and resources; they are designed to confine discovery procedures to counsel and to expedite the administration of the Commission proceedings.”¹²

The Ohio Administrative Code allows parties to obtain “discovery on any matter, not privileged, which is relevant to the subject matter of the proceeding.”¹³ The PUCO rule setting the scope of discovery is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases. Civ.R.26(B)(1) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.¹⁴

The Ohio Administrative Code is intended to facilitate full and reasonable discovery, consistent with the statutory discovery rights parties are afforded under Ohio law. As noted above, R.C. 4903.082 provides that “[a]ll parties and intervenors shall be granted ample rights of discovery.”¹⁵ The discovery statute was effective in 1983 as part of a more comprehensive regulatory reform. R.C. 4903.082 was intended to protect discovery rights for parties in PUCO cases. Yet all these years later – despite clear precedent and rules affirming OCC’s rights to discovery – NEP is trying to thwart OCC’s consumer protection discovery efforts. The PUCO should not allow NEP to deny OCC the ample discovery rights allowed under Ohio law and rules.

¹² *Id.*, citing *Penn Central Transportation Co. v. Armco Steel Corp.* (C.P. 1971), 27 Ohio Misc. 76 (emphasis added).

¹³ Ohio Adm. Code 4901-1-16(B).

¹⁴ *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661, 1994 Ohio 324.

¹⁵ See *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789.

B. OCC will be prejudiced if the PUCO grants NEP's request to delay discovery.

Contrary to NEP's claims, OCC will be harmed if discovery is delayed. In light of OCC's broad and ample discovery rights, NEP's own assertions of hardship in responding to OCC's consumer protection discovery ring hollow. OCC has served 20 consumer protection discovery requests.¹⁶ NEP is a large, sophisticated business looking to provide an *essential* service (electric utility service) to a substantial number of residential consumers.¹⁷ Representing it are *three* attorneys from one of Columbus's largest law firms who are actively engaged in utility regulatory matters before the PUCO. There is no reason NEP is incapable of responding to OCC's consumer protection discovery requests, particularly given the extension of time offered by OCC.

By contrast, hardship would be felt by consumers if NEP's Motion is granted. There can be no certainty when the PUCO will rule on NEP's motion to dismiss or OCC's motion to intervene. Further, the PUCO may establish a procedural schedule with limited time for OCC to conduct its consumer protection discovery. Thus, NEP's request that it not have to respond until 20 days after a ruling is plainly unreasonable and harmful to consumers.

Finally, prohibiting OCC from obtaining consumer protection information indefinitely, as NEP has asked the PUCO to do, would unduly and unnecessarily prolong this entire case. It is contrary to the PUCO's stated policy of discovery: "the policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly without taking undue advantage of the other side's industry or efforts."¹⁸ NEP's Motion should be denied.

¹⁶ See Motion at 2.

¹⁷ Well over 1,000, according to AEP's Complaint. See AEP Complaint, at ¶¶ 31-35.

¹⁸ *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (March 17, 1987).

III. CONCLUSION

As stated, the PUCO should take note that it's not a great start for NEP's assumption of the important role of a public utility that it opposes the intervention of the state consumer advocate. And it's not a good sign that NEP does not want to spend time or money answering the consumer advocate's questions that go with acting as a public utility. This from an entity, NEP, that does not offer consumers the protections available from AEP's service.

Ohio law, Ohio Supreme Court precedent, the Ohio Administrative Code, and PUCO orders support OCC's rights to conduct discovery. NEP's Motion asks the PUCO to ignore the well-settled discovery process and to deny consumers the rights they have been granted under law. For the reasons explained above, the PUCO should deny NEP's Motion and direct NEP to respond to OCC's discovery without further delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra Motion for Protective Order was provided electronically to the persons listed below this 9th day of December 2021.

/s/ Angela D. O'Brien _____
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Summary: Memorandum Memorandum Contra Nationwide Energy Partners' Motion for Protective Order or, in the Alternative, for a Stay of Discovery by Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of O'Brien, Angela D