

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF
OHIO POWER COMPANY,

COMPLAINANT,

CASE NO. 21-990-EL-CSS

v.

NATIONWIDE ENERGY PARTNERS, LLC,

RESPONDENT.

ENTRY

Entered in the Journal on January 31, 2022

I. SUMMARY

{¶ 1} The attorney examiner finds that Nationwide Energy Partners, LLC's motion to dismiss should be denied and directs that the parties observe the procedural schedule set forth within. The attorney examiner further finds that the motion to intervene filed by the Office of the Ohio Consumers' Counsel and the motion for protective order or, in the alternative, a stay of discovery filed by Nationwide Energy Partners, LLC should both be denied.

II. PROCEDURAL HISTORY

{¶ 2} On September 24, 2021, the Ohio Power Company (AEP Ohio or the Company) filed a complaint against Nationwide Energy Partners, LLC (Nationwide). As background, AEP Ohio states that it is a "public utility" under R.C. 4905.02, an "electric light company" under R.C. 4905.03 and 4928.01, and an "electric utility" and "electric distribution utility" as those terms are defined in R.C. 4928.01. AEP Ohio further explains that it has been granted a service territory under the Certified Territory Act, within which AEP Ohio has the exclusive right to provide electric distribution service and other noncompetitive electric services. *See* R.C. 4933.83(A). In the complaint, AEP Ohio states that NEP is an entity engaged in the practice of submetering, whereby NEP, acting as the agent of a landlord or building owner engages in the resale or redistribution of public utility services where the

owner of an apartment building or multi-residential complex divides up a master bill to individual tenants so that each tenant pays for their share of utilities used. AEP Ohio explains that this complaint arises from a request from NEP, acting as the agent of five apartment complex owners (Apartment Complexes), that AEP Ohio establish master-metered service at the Apartment Complexes, which AEP Ohio asserts would amount to NEP taking over electric distribution service to the tenants in the Apartment Complexes. AEP Ohio alleges that NEP intends to purchase electric service from AEP Ohio at wholesale-like master-metered rates and then resell electric service to the individual Apartment Complex tenants at a considerable markup.

{¶ 3} In the complaint, AEP Ohio alleges that allowing NEP to begin submetering at the Apartment Complexes would violate numerous statutes and Commission regulations, including the Certified Territory Act, as NEP would be operating as a public utility. AEP Ohio asserts that while NEP has operated in this capacity for many years, the question of whether third-party submetering companies such as NEP are public utilities is now unsettled following the Supreme Court of Ohio's decision in *In re Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St.3d 208, 2020-Ohio-5583, 169 N.E.3d 617 (*Wingo*). In *Wingo*, the Supreme Court struck down the "modified *Shroyer* test," which is the Commission's most recent test for determining whether submetering companies are public utilities under Ohio law. As the complaint in the remanded *Wingo* case before the Commission was subsequently dismissed at the request of the complainant, the Commission has yet to address the proper test for determining whether submetering companies are acting as public utilities. Based upon the facts presented in the request for master-metered service at the Apartment Complexes, AEP Ohio asks the Commission to take up the jurisdictional inquiry envisioned by the Court in the *Wingo* remand dismissal entry and address whether NEP and other submetering companies are operating as public utilities. In its prayer for relief, AEP Ohio requests, among other things, a determination that if NEP's work requests were permitted at the Apartment Complexes that NEP would be operating as an electric light company, a public utility, and an electric supplier and an

uncertified retail electric service provider and therefore violating the Certified Territory Act. AEP Ohio further asks for a finding and order enjoining NEP from taking over electric distribution service to the customers residing at the Apartment Complexes.

{¶ 4} On October 18, 2021, NEP filed its answer to the complaint. NEP admits that AEP Ohio is a public utility subject to the Commission's jurisdiction and that AEP Ohio has been granted an exclusive territory to provide electric distribution service under the Certified Territory Act. NEP admits that it provides certain management services to property owners, managers, and developers pursuant to private contractual agreements. NEP further admits that pursuant to its contractual obligations and as the authorized representative of each property owner, manager, and developer, NEP receives and pays invoices from AEP Ohio's master-metered utility charge on behalf of the respective property owner, manager, and developer. NEP denies, however, that it would be "taking over" service from AEP Ohio if the requested master-metered service were set up at the Apartment Complexes. NEP further denies that it is a public utility under R.C. 4905.02 and, therefore, NEP asserts that it is not subject to the Commission's statutes and rules governing public utilities. NEP's answer also asserts a number of affirmative defenses.

{¶ 5} On October 20, 2021, NEP filed a motion to dismiss the complaint and a memorandum in support. In the motion to dismiss, NEP asserts three primary bases for dismissal: (1) that the complaint is not yet ripe; (2) that AEP Ohio has failed to state reasonable grounds for the complaint; and (3) that AEP Ohio has failed to name indispensable parties to the case. AEP Ohio filed a memorandum contra NEP's motion to dismiss on November 4, 2021. NEP filed a reply in support of its motion to dismiss on November 12, 2021.

{¶ 6} On October 28, 2021, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene and accompanying memorandum in support. As explained more fully below, OCC states that it seeks to intervene on behalf of the 1.3 million AEP Ohio residential utility customers, which includes the tenants at the Apartment Complexes. NEP

filed a memorandum contra OCC's motion to intervene on November 12, 2021. OCC filed a reply to NEP's memorandum contra on November 19, 2021.

{¶ 7} On November 24, 2021, NEP filed a motion for protective order or, in the alternative, a stay of discovery. In this motion and supporting memorandum, as described in more detail below, NEP seeks an order precluding NEP's response to the discovery requests issued by OCC until 20 days after the Commission rules on NEP's motion to dismiss and OCC's opposed motion to intervene. On December 8, 2021, AEP Ohio filed a memorandum contra NEP's motion. OCC filed a memorandum contra the motion on December 9, 2021. On December 15, 2021, NEP filed a reply in support of this motion.

{¶ 8} On December 8, 2021, AEP Ohio filed a notice of additional authority in which it wished to make the Commission aware of a decision which it believes bears directly on this case. In this filing, AEP Ohio attached a Decision Granting Defendant Ohio Power Company, dba AEP Ohio's Motion to Dismiss in which the Franklin County Court of Common Pleas dismissed a civil action that NEP recently brought against AEP Ohio concerning the same dispute at issue in this proceeding. *See Nationwide Energy Partners, LLC v. Ohio Power Co.*, Franklin C.P. No. 21CVH07-7186 (Dec. 3, 2021) (*Civil Case*). On December 22, 2021, NEP filed a motion to strike AEP Ohio's notice of additional authority or, in the alternative, requested leave to file a sur-reply. AEP Ohio filed a memorandum contra the motion to strike on December 28, 2022, and NEP filed a response to this memorandum contra on January 4, 2022.

{¶ 9} On December 10, 2021, NEP filed a motion for a stay and request for expedited ruling. Pursuant to that motion, NEP moved for a stay from AEP Ohio denying its construction requests for master-metered service at buildings where owners have engaged NEP's services. On December 17, 2021, both OCC and AEP Ohio filed memoranda contra NEP's motion for a stay.

{¶ 10} On December 28, 2021, the attorney examiner issued an Entry granting NEP's December 10, 2021 motion for a stay.

{¶ 11} On January 3, 2022 AEP Ohio filed an interlocutory appeal, or, in the alternative, request for certification of interlocutory appeal of the rulings made within the December 28, 2021 Entry. NEP filed a memorandum contra AEP Ohio's interlocutory appeal on January 10, 2022.

{¶ 12} On January 11, 2022, NEP filed a motion for leave to file an amended answer and counterclaim, *instanter*.

III. MOTION TO DISMISS

A. *Summary of the Pleadings*

{¶ 13} In its motion to dismiss, NEP first argues that the claims brought before the Commission by AEP Ohio are not ripe. NEP notes that it sent construction work orders to AEP Ohio to convert the Apartment Complexes to master-metered service and that AEP Ohio sent a letter denying NEP's request. Therefore, NEP asserts that it does not provide to the Apartment Complexes any of the services on which AEP Ohio bases its complaint. According to NEP, by filing its complaint, AEP Ohio improperly attempts to circumvent the procedural rules and law to obtain an advisory opinion from the Commission that NEP operates as a public utility. NEP believes that AEP Ohio's complaint is based on what AEP Ohio thinks NEP *might do* if AEP Ohio allows the Apartment Complex owners to configure the properties to master-metered service. However, no facts yet exist to show that NEP would be acting as a public utility. AEP Ohio's complaint, therefore, rests upon possible future actions of NEP at the Apartment Complexes to foretell legal injury to AEP Ohio. Consequently, the Commission would need to base its decision on non-existent evidence and speculation as to what will occur in the future, which is improper. See *In re the Complaint of The Cincinnati Gas & Elec. Co.*, Case No. 05-0075-EL-PWC, Opinion and Order (Mar. 7, 2006) at 9, quoting *The State ex rel. Elyria Foundry Co. v. Indus. Comm. of Ohio, et al.*, 82 Ohio St.3d 88 (1988).

{¶ 14} NEP next argues that AEP Ohio fails to state reasonable grounds for its complaint. According to NEP, AEP Ohio admits in the complaint that NEP is not supplying electricity to the Apartment Complexes, thus NEP cannot be in violation of Ohio law or Commission rules. NEP asserts that it has only submitted construction work order requests for the Apartment Complexes to AEP Ohio to configure each property to master-metered service and that submitting such requests does not make it a public utility. Applying the above reasoning to AEP Ohio's Counts I-III in the complaint (i.e. NEP is acting as a public utility, supplying or arranging for the supply of retail electric service in violation of the Certified Territory Act, and supplying or arranging supply of a competitive retail electric service, respectively), NEP argues that AEP Ohio makes no allegations that NEP is currently acting as and/or providing such service beyond making broad, conclusory and speculative assertions on what NEP would do for the Apartment Complexes if the properties were configured to the master-metered service. NEP argues that AEP Ohio has not alleged that NEP would do anything that the property owners do not have a right to do or to contract-out to do. NEP also asserts that AEP Ohio does not allege any actual or imminent harm or damage at the Apartment Complexes, only that such harm or damage may occur at some point in the future if AEP Ohio processes the construction work order request. For each of the reasons above, NEP argues that AEP Ohio's complaint should be dismissed for failure to state reasonable grounds and failure to state a claim.

{¶ 15} Under the third basis for its motion to dismiss, NEP asserts that AEP Ohio's request is a direct assault on the property rights of the Apartment Complex owners, as they are permitted to configure the service to their buildings and properties as allowed under AEP Ohio's tariff and Ohio property law. AEP Ohio acknowledges that it cannot bring complaints against a customer under R.C. 4905.26 and, thus, filed the complaint against NEP instead; however, the owners are AEP Ohio's customers and the entities that rightfully requested master-metered service. Since AEP Ohio cannot join all necessary and indispensable parties to this action, the Commission must dismiss the complaint. NEP argues that the Apartment Complex owners are necessary parties under Civ.R. 19(A)

because the construction requests that gave rise to the complaint relate to the property owners, not NEP, whose rights will be directly affected by this action. Second, AEP Ohio cannot join these parties since R.C. 4905.26 does not allow AEP Ohio to bring a complaint against customers (i.e. the property owners); therefore joinder is not feasible. Finally, considering the factors under Civ.R. 19(B), a decision in favor of AEP Ohio would deprive the property owners of the right to configure their properties as they see fit and to select the contractor of their choosing, would prejudice the property owners, and such prejudice could not be lessened or avoided.

{¶ 16} In its memorandum contra NEP’s motion to dismiss, AEP Ohio first asserts that NEP misses the context of the complaint, noting that AEP Ohio brings the complaint with the express purpose of providing the Commission an opportunity to finish the inquiry left open in *Wingo* and to determine that NEP is a public utility. AEP Ohio essentially argues that, under the plain language of R.C. 4905.03(C), NEP is “engaged in the business of supplying electricity” and is therefore an “electric light company” and that NEP bears no resemblance to the entities at issue in *Shroyer*¹ or the other cases that established the landlord exception to R.C. 4905.03(C). Further, if NEP is a public utility, then it is unlawful for NEP to operate in AEP Ohio’s service territory under the Certified Territory Act and related statutes and Commission rules. Considering the above, AEP Ohio believes that this complaint provides a live controversy and carries out the Supreme Court’s instructions on remand.

{¶ 17} AEP Ohio also argues that its claims are ripe. AEP Ohio asserts that the question of whether it must abandon its 1,069 customers at the Apartment Complexes and reconfigure the properties for NEP submetering is now clearly presented to the Commission for decision. See, e.g., *In re Time Warner Communications Of Ohio, L.P. v. Ameritech Ohio*, Case No. 98-308-TP-CSS, Opinion and Order (Oct. 14, 1998) at 3. This question falls in line with whether NEP’s “big business” model of submetering means that NEP is “engaged in the

¹ *In re Inscho v. Shroyer’s Mobile Homes*, Case No. 90-182-WSCSS, et al., Opinion and Order (Feb. 27, 1992).

business of supplying electricity” under R.C. 4905.03(C). According to AEP Ohio, NEP admits that the dispute is ripe for adjudication because NEP asked for its own affirmative relief – that the Commission grant a stay ordering AEP Ohio to follow its tariff and process the construction orders. As to NEP’s arguments regarding the complaint forcing the Commission to adjudicate on future facts, AEP Ohio notes that the principal question presented is whether NEP is “engaged in the business of supplying electricity” and therefore a public utility under Ohio law and that this question is more focused on NEP and its business model rather than solely submetering at the Apartment Complexes. According to AEP Ohio, the above assertions are not future, hypothetical facts. Rather, discovery and a hearing would build on known, established facts about how NEP already conducts business throughout its footprint in Ohio.

{¶ 18} In response to NEP’s argument that the complaint fails to state reasonable grounds, AEP Ohio first asserts that R.C. 4905.26 authorizes a public utility to file a complaint “as to any matter affecting its own product or service” and that NEP’s operation within AEP Ohio’s certified territory qualifies as a matter affecting AEP Ohio’s service. AEP Ohio argues that NEP mischaracterizes AEP Ohio’s complaint as making claims about what NEP will be doing, when in fact AEP Ohio’s claims focus on what NEP is doing through AEP Ohio’s service territory. AEP Ohio emphasizes that it is not NEP’s submission of a work order that makes NEP a public utility but rather its well-established business model, and since the model is well-known, the complaint does not require the Commission to make factual determinations about hypothetical future actions. AEP Ohio asserts that NEP’s argument that it does not meet the statutory definition of public utility or electric light company because AEP Ohio, not NEP, supplies electricity to the Apartment Complexes misses the point of the complaint and ignores *Wingo* and other recent proceedings on submetering. The fact that AEP Ohio currently serves the Apartment Complexes and that it supplies master-metered service to submetered buildings is irrelevant; it is NEP’s resale of electric service to end use customers that makes it a public utility.

{¶ 19} With regard to NEP’s claim that AEP Ohio has not alleged that NEP would do anything that the property owners do not have a right to do or to contract-out to do, AEP Ohio first argues that such a claim would require considerable factual support, which NEP failed to provide in its supporting memorandum, and a hearing would provide this opportunity. AEP Ohio asserts that its complaint shows that NEP is not simply acting on behalf of the building owner, rather, among other things, it offers developers incentives to use NEP to install, operate, and maintain meters and infrastructure, it designs bills similar to AEP Ohio’s bills, and it impersonates a public utility in dealings with customers. AEP Ohio also asserts that NEP has not established that a building owner has a right to do what NEP does, noting that the Court in *Wingo* did not apply the *Shroyer* and *Pledger*² precedent to NEP’s practices and that the big business model of NEP was not contemplated by these prior cases. Also, AEP Ohio argues that it is up to NEP to establish at hearing that it is truly an agent of the building owner or acting on behalf of the property owner. Also, to NEP’s tariff argument, AEP Ohio asserts that the tariff does not require AEP Ohio to configure a building for submetering if the submetering in question violates Ohio law and Commission precedent. It is AEP Ohio’s contention that NEP is operating as an illegitimate electric public utility and violating the requirements of its tariff, which is why AEP Ohio denied NEP’s construction order requests at the Apartment Complexes.

{¶ 20} In regard to NEP’s joinder argument, AEP Ohio first asserts that the building owners are not necessary parties; the central question here is whether NEP is “engaged in the business of supplying electricity.” This question probes NEP and its business model, not the building owners. Second, AEP Ohio notes that it is not attempting to infringe or limit the property owners’ rights, only seeking to ensure that the property owners’ ability to switch to master-metered service does not lead to NEP submetering the complexes. If NEP is a public utility, then it would be illegal for the property owners to use them as a submetering company. Third, AEP Ohio argues that the cases NEP cites regarding prejudice to an absent party are inapposite. NEP failed to cite to any case where the Commission has

² *Pledger v. Pub. Util. Comm.*, 109 Ohio St.3d 463, 2006-Ohio-2989, 849 N.E.2d 14, ¶18.

dismissed a complaint because the complainant failed to join a party over which the Commission has no jurisdiction. Also, the property owners have the right to seek intervention in the proceeding if they so choose; therefore, there is no prejudice to any absent party here. Fourth, AEP Ohio highlights that Commission precedent holds that the Commission need not follow the Ohio Rules of Civil Procedure and that the Commission should not do so here. AEP Ohio argues that the Commission has plenary jurisdiction over the two key questions in this case, whether NEP is a public utility and whether AEP Ohio must reconfigure the Apartment Complexes, noting that only the Commission can determine if NEP is a public utility and only the Commission can interpret AEP Ohio's tariff or rule on service questions, such as reconfiguring the Apartment Complexes.

{¶ 21} In its reply, NEP argues that AEP Ohio admits that it has manufactured this case to target NEP and force the Commission to conduct a broad investigation of NEP's business practices. NEP notes that the material facts on which AEP Ohio bases its claims have not actually happened yet at the Apartment Complexes, and AEP Ohio admits as much in the complaint. NEP contends that, if the Commission wishes to holistically address submetering in Ohio, it is permitted to initiate an investigation to do so, but it is inappropriate in this case, considering AEP Ohio would essentially be acting as a private investigator and usurping Commission authority. Further, AEP Ohio attempts to relitigate the *Wingo* case to hide the complaint's procedural flaws. Despite AEP Ohio's reliance on *Wingo*, AEP Ohio was a party in *Wingo* and did not appeal the Commission's decision to dismiss that case or object to Ms. Wingo's voluntary dismissal.

{¶ 22} In terms of the complaint's ripeness, NEP asserts that AEP Ohio is still dealing in hypotheticals, as NEP is not yet submetering at the Apartment Complexes; that AEP Ohio's desire to continue to litigate the *Wingo* case only highlights the case's lack of ripeness; and that AEP Ohio cannot fix the lack of ripeness by asking the Commission to allow AEP Ohio to conduct a private investigation of properties other than the Apartment Complexes. Regarding AEP Ohio's claims about reasonable grounds existing for the complaint, NEP states that AEP Ohio continues to rely on pure speculation and conclusory statements. AEP

Ohio cannot allege the requisite facts regarding any NEP activity at the Apartment Complexes since NEP is not submetering the properties. On the contrary, AEP Ohio admits that it is the distribution utility supplying electricity to the Apartment Complexes and that customer accounts are in the name of the customer, negating AEP Ohio's argument because property owners are able to resell part of the electric energy to their tenants without acting as public utilities under Ohio law. Further, AEP Ohio failed to address NEP's argument that the complaint should be dismissed since AEP Ohio failed to allege any harm. Finally, NEP argues that, despite AEP Ohio's assertions otherwise, the Apartment Complex owners are necessary and indispensable parties to this dispute. Considering all of the above, NEP believes that AEP Ohio's complaint should be dismissed.

B. Discussion

{¶ 23} Having reviewed all relevant pleadings, the attorney examiner concludes that reasonable grounds for the Commission's consideration of the complaint have been stated. Accordingly, NEP's motion to dismiss is denied and the case should be set for hearing.

{¶ 24} Pursuant to R.C. 4905.26, the Commission has authority to consider a complaint filed by a public utility concerning a matter affecting its own product or service, if it appears that reasonable grounds for the complaint are stated. Likewise, Ohio Adm.Code 4901-9-01(B) also contemplates complaint proceedings initiated by a public utility concerning its own product or service. Thus, as an initial matter, the attorney examiner finds NEP's arguments as to inappropriateness of AEP Ohio filing a complaint under R.C. 4905.26 to be erroneous. The alleged operation as a public utility by NEP within AEP Ohio's certified territory is clearly a matter affecting the product or services provided by AEP Ohio.

{¶ 25} In considering a motion to dismiss, the Commission accepts that all material allegations of a complaint are true and construed in favor of the complaining party. *In re the Complaint of XO Ohio, Inc. v. City of Upper Arlington*, Case No. 03-870-AU-PWC, Entry on

Rehearing (July 1, 2003). In complaint proceedings, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).

{¶ 26} First, the attorney examiner is not persuaded by NEP's arguments claiming the complaint is not ripe. The Ohio Supreme Court has determined that the doctrine of ripeness is a question of timing and is motivated in part by the desire to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies. *The State ex rel. Elyria Foundry Co. v. Indus. Comm. Of Ohio, et al.*, 82 Ohio St.3d 88 (1988). Here, although NEP has not converted the Apartment Complexes to master-metered service, AEP Ohio has formally denied NEP's request to reconfigure the properties on the position that, given the Court's recent decision in *Wingo*, NEP is unlawfully operating as a public utility in AEP Ohio's certified territory. Complaint at ¶ 28; Exhibit A. Given that NEP desires that AEP Ohio grant the construction work order to reconfigure the properties, the parties are at an impasse. Consequently, we agree with AEP Ohio that the question of whether it must reconfigure the properties for NEP submetering is now presented to the Commission for decision, and a decision on that question does not require premature adjudication by the Commission.³ NEP also argues that adjudicating the complaint would require the Commission to base its decision on non-existent evidence and speculation as to what will occur in the future since NEP is not providing submetering service at the Apartment Complexes. First, we will note that NEP's motion to stay was granted, which requires AEP Ohio to move forward temporarily with the construction work orders. Further, as AEP Ohio notes, the primary focus of the complaint is on NEP and its business model and whether it is "engaged in the business of supplying electricity" under R.C. 4905.03(C). Also, considering the unique circumstances regarding the *Wingo* decision and its remand, this complaint does provide the Commission

³ The attorney examiner acknowledges that NEP's motion for stay was granted on December 28, 2021, which required AEP Ohio to reconfigure the Apartment Complexes for master-metered service until a decision ordering otherwise is issued by the Commission. An interlocutory appeal of this Entry filed by AEP Ohio is still pending. However, the fundamental question of whether AEP Ohio must ultimately allow NEP to submeter the property remains open regardless of the stay.

an opportunity to address the open question concerning whether a third-party submetering company, like NEP, could be considered a public utility.

{¶ 27} The attorney examiner also finds that AEP Ohio has stated reasonable grounds for the complaint to proceed to hearing. As described above, and as AEP Ohio points out, the complaint is not centered solely on what NEP will be doing at the Apartment Complexes but rather NEP's business model and how it operates within AEP Ohio's service territory. The alleged operation as a public utility by NEP within AEP Ohio's certified territory is a matter affecting the product or services provided by AEP Ohio, as contemplated by R.C. 4905.26. Further, considering all material allegations of the complaint must be accepted as true when examining a motion to dismiss, the attorney examiner notes that AEP Ohio laid out numerous allegations regarding how NEP operates within AEP Ohio's service territory, such as, among other things, reselling electric service to end-use customers at a considerable mark-up, providing bills to tenants that are similar to AEP Ohio's bills, holding itself out as a replacement for public utility service, admitting that its business is to operate an electric distribution system at its submetered buildings, and installing, maintaining, and operating electric distribution equipment for the buildings in which it resells electric service to end-use customers. Complaint at ¶¶ 36-50; Exs. B, C, and D. Taken together, these allegations do appear to state reasonable grounds for complaint pursuant to R.C. 4905.26, especially considering the question left open by *Wingo* concerning whether a third-party submetering company, like NEP, could be considered a public utility. The discovery and hearing process will afford parties the opportunity to examine the breadth and accuracy of such allegations as well as afford NEP an opportunity to forward its assertion, among others, that it is purely an agent of the building owner or acting on behalf of the property owner, an assertion more appropriately developed through a factual record.

{¶ 28} The attorney examiner is also unpersuaded by NEP's arguments regarding joinder. Notably, the Ohio Rules of Civil Procedure do not limit the Commission's discretion in conducting cases before it. R.C. 4903.082. The attorney examiner does not find Civ.R. 19 applicable to the case at hand. First, as already described above, the complaint's

central question is whether NEP, not the property owners, is operating as a public utility within AEP Ohio's certified territory. If NEP were determined to be operating as a public utility, then NEP in its current form could not function as the third-party submetering company for the property owners without unlawfully operating as a public utility under Ohio law; thus, the Commission would not be infringing on the property owners' rights and ability to contract with such a company. Further, considering the central question above, NEP should be able to provide any necessary facts concerning the Apartment Complexes, such as contracts with the property owners, and its mode of operation without needing the property owners joined as necessary parties. Also, as AEP Ohio points out, the property owners are welcome to file motions to intervene if they believe doing is needed to protect their interests.

{¶ 29} Considering the above, the attorney examiner denies NEP's motion to dismiss and finds that the following procedural schedule is established for this proceeding:

- a. Discovery requests (except as to notices of deposition) shall be permitted until March 29, 2022.
- b. Parties should file testimony by April 19, 2022.
- c. Exhibits intended to be used on direct and cross-examination should be marked and exchanged by the parties and provided to the attorney examiners by electronic means no later than 5:00 p.m. on April 29, 2022. The parties are not required to re-file or exchange information that is already filed in the case docket.
- d. An evidentiary hearing in this matter should be scheduled to commence on May 3, 2022, at 10:00 a.m. via remote hearing technology. Instructions for participation in the evidentiary hearing shall be emailed to counsel prior to hearing. Individuals interested in observing the evidentiary hearing as a non-party can access the evidentiary hearing using the link <https://bit.ly/21-990->

[EVH](#), and entering the password PUCO, or by calling 1-408-418-9388, and entering code 2345 828 8898.

{¶ 30} Counsel and witnesses who will speak during the hearing should join the Webex event through internet access and must have a computer or smart device with a camera, microphone, and speakers; an e-mail address; and reliable internet service.

{¶ 31} The attorney examiner also notes that, on December 8, 2021, AEP Ohio filed a notice of additional authority regarding the decision in a case recently brought by NEP against AEP Ohio at the Franklin County Court of Common Pleas, *Civil Case*. On December 22, 2021, NEP filed a motion to strike AEP Ohio's notice of additional authority or, in the alternative, motion for leave to file a sur-reply, *instanter*. On December 28, 2021, AEP Ohio filed a memorandum contra NEP's motion to strike. Finally, on January 4, 2022, NEP filed a response to AEP Ohio's memorandum contra. The attorney examiner notes that the decision regarding the motion to dismiss was arrived at without consideration of the above civil case. Consequently, the entire controversy surrounding it is moot, and we will proceed forward with the procedural schedule established above.

IV. OCC'S MOTION TO INTERVENE

A. Summary of the Pleadings

{¶ 32} On October 28, 2021, OCC filed a motion to intervene and accompanying memorandum in support. OCC states that it seeks to intervene on behalf of AEP Ohio's 1.3 million Ohio residential utility customers, which includes the tenants at the Apartment Complexes. OCC asserts that NEP's provision of submetering service could negatively impact the consumer protections that residential consumers receive when they take electric utility service from a regulated public utility such as AEP Ohio. OCC also states that it wishes to ensure that any rates charged to residential consumers, by either AEP Ohio or NEP, are reasonable. As an advocate for residential utility customers, OCC states that it has a real and substantial interest in this case that is different from that of any other party. OCC

also offers a concern as to the rates that will be charged to residential consumers. Further, OCC declares that its intervention will not unduly prolong or delay the proceedings and will contribute to an equitable resolution of the matter. In summary, OCC feels that it meets the criteria set forth in R.C. 4903.221, Ohio Adm.Code 4901-1-11, and Supreme Court precedent concerning intervention, and that its motion should be granted.

{¶ 33} On November 12, 2021, NEP filed a memorandum contra OCC's motion to intervene. NEP argues that OCC has not shown that it has an interest that warrants intervention in a complaint proceeding involving commercial properties owned by commercial customers of AEP Ohio. NEP points out that OCC's stated interest in this case – protecting residential consumers and ensuring reasonable rates – are policy and precedent arguments that would unduly expand the scope of this proceeding. NEP believes that OCC's policy arguments belong in the General Assembly, not in a complaint proceeding between two companies. NEP asserts that OCC's interest is only in precedential value, and that the Commission has long held that precedential value is not sufficient for intervention. *In re Complaint of Mark. A. Whitt*, Case No. 15-697-EL-CSS, Entry (Nov. 18, 2015) at 5. NEP also believes that OCC has failed to meet the intervention criteria outlined in Ohio Adm.Code 4901-1-11.

{¶ 34} OCC filed its reply to NEP's memorandum contra on November 19, 2021. OCC reasserts its arguments as to why it should be granted intervention in this case. OCC further contends that NEP is attempting to deny consumers the voice of their state advocate (OCC) on issues that will affect their essential electric service. OCC believes that NEP's citation of precedent from *In re Complaint of Mark Whitt* is misplaced in this matter, as that case involved only a single residential consumer complainant who is an active attorney experienced in utility matters before the Commission. As such, Mr. Whitt could capably represent his own interests in that matter. By contrast, OCC argues that this case would directly impact over a thousand residential utility consumers living at the Apartment Complexes who are likely not experienced in regulatory matters before the Commission. OCC insists that if it is not granted intervention, the interests of the residents at the

Apartment Complexes will not be adequately represented. OCC concludes by again stating that it meets all statutory and Supreme Court requirements for intervention.

B. Discussion

{¶ 35} Pursuant to R.C. 4903.221, any person who may be adversely affected by a Commission proceeding may intervene in such proceeding provided that a timely motion to intervene is filed in the proceeding. Additionally, under Ohio Adm.Code 4901-1-11(A), a person seeking to intervene must show that it has a real and substantial interest in the proceeding and that the person is situated such that disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless that person's interest is adequately represented by existing parties. Pursuant to Ohio Adm.Code 4901-1-11(B), the Commission is to consider the following factors in deciding to permit intervention:

- (1) The nature and extent of the prospective intervenor's interest.
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case.
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings.
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.
- (5) The extent to which the person's interest is represented by existing parties.

{¶ 36} Additionally, the Commission has also long held that an interest in the precedential value of a case is insufficient justification for intervention in a proceeding. *In re Complaint of Mark. A. Whitt*, Case No. 15-697-EL-CSS, Entry (Nov. 18, 2015) at 3, 5; *In re*

Ohio Schools Council, et al. v. FirstEnergy Solutions Corp., Case No. 14-1182-EL-CSS, Entry (Sep. 4, 2014) at 3-4; *In re Complaint of the City of Cleveland*, Case No. 01-174-EL-CSS, Entry (Mar. 29, 2001) at 4.

{¶ 37} Having reviewed the relevant filings, the attorney examiner finds that OCC's motion to intervene should be denied. OCC's stated interest in ensuring protections for AEP Ohio's 1.3 million residential consumers and the reasonableness of rates charged to the residential customers are concerns within the purview of OCC's authorization under R.C. Chapter 4911, but they are not the issues that will be litigated in this proceeding. The ultimate issues in this case will be decided via application of the Supreme Court guidance offered in the *Wingo* case to NEP's submetering activities. The interests stated by OCC in their motion and reply may ultimately be at issue in subsequent Commission proceedings, but this type of precedential interest is precisely what the Commission has long held to not be a sufficient reason for granting intervention. *In re Complaint of Mark. A. Whitt*, Case No. 15-697-EL-CSS, Entry (Nov. 18, 2015) at 3, 5; *In re Ohio Schools Council, et al. v. FirstEnergy Solutions Corp.*, Case No. 14-1182-EL-CSS, Entry (Sep. 4, 2014) at 3-4; *In re Complaint of the City of Cleveland*, Case No. 01-174-EL-CSS, Entry (Mar. 29, 2001) at 4. Since OCC's interest is in the precedential value of the decision in this case, it cannot establish that it has a real and substantial interest in this particular proceeding.

{¶ 38} Applying other factors outlined in Ohio Adm.Code 4901-1-11 also demonstrates that OCC has not met the standard for intervention. As already stated, the nature and extent of OCC's interest is related to the precedent that this case may set, which is not sufficient for granting intervention. The policy positions advanced by OCC in this case would also unnecessarily expand the scope of the proceeding, which could both distract from the main focus of the case and unduly prolong and/or delay proceedings. Based upon these findings, the attorney examiner does not believe that OCC's participation will significantly contribute to the full development and equitable resolution of the case. OCC's motion to intervene is, therefore, denied.

**V. NEP'S MOTION FOR PROTECTIVE ORDER OR, IN THE ALTERNATIVE,
A STAY OF DISCOVERY**

A. Summary of the Pleadings

{¶ 39} On November 24, 2021, NEP filed a motion for protective order or, in the alternative, a stay of discovery. In this motion and supporting memorandum, NEP seeks an order precluding NEP's response to the discovery requests issued by OCC until 20 days after the Commission rules on NEP's motion to dismiss and OCC's opposed motion to intervene. NEP asserts that it should not have to incur the burden and expense of responding to the discovery requests prior to these rulings, as a decision in favor of the motion to dismiss would dispose of the case and a denial of OCC's motion to intervene would render the discovery requests moot. On December 8, 2021, AEP Ohio filed a memorandum contra NEP's motion to the extent that NEP seeks to preclude all discovery, including any propounded by AEP Ohio, until after the Commission rules on NEP's motion to dismiss. OCC filed a memorandum contra the motion on December 9, 2021. On December 15, 2021, NEP filed a reply in support of this motion.

B. Discussion

{¶ 40} Having reviewed the relevant pleadings on this matter, the attorney examiner finds that the motion for protective order or, in the alternative, a stay of discovery, is now moot and should, therefore, be denied. As detailed above, this Entry denies OCC's motion to intervene, so NEP is now under no obligation to respond to discovery requests propounded by OCC. This Entry also denies NEP's motion to dismiss the proceeding, so discovery between AEP Ohio and NEP should now progress as normal under Commission regulations and consistent with this Entry.

VI. ORDER

{¶ 41} It is, therefore,

{¶ 42} ORDERED, That NEP's motion to dismiss be denied, as stated in Paragraph 23. It is, further,

{¶ 43} ORDERED, That an evidentiary hearing in this matter be scheduled for May 3, 2022, in accordance with Paragraph 29. It is, further,

{¶ 44} ORDERED, That parties observe the procedural deadlines set forth in Paragraph 29. It is, further,

{¶ 45} ORDERED, That OCC's motion to intervene be denied, as stated in Paragraph 37. It is, further,

{¶ 46} ORDERED, That NEP's motion for a protective order or, in the alternative, a stay of discovery, be denied as stated in Paragraph 40. It is, further,

{¶ 47} ORDERED, That a copy of this Entry be served upon all interested persons and parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Matthew J. Sandor

By: Matthew J. Sandor
Attorney Examiner

JRJ/kck

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Case No(s). 21-0990-EL-CSS

Summary: Attorney Examiner Entry denying NEP's motion to dismiss, as stated in Paragraph 23; ordering that an evidentiary hearing in this matter be scheduled for May 3, 2022, in accordance with Paragraph 29; ordering that parties observe the procedural deadlines set forth in Paragraph 29; denying OCC's motion to intervene, as stated in Paragraph 37 and denying NEP's motion for a protective order or, in the alternative, a stay of discovery, as stated in Paragraph 40. electronically filed by Kelli C. King on behalf of Matthew Sandor, Attorney Examiner, Public Utilities Commission of Ohio