

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**OHIO POWER COMPANY’S MEMORANDUM CONTRA
NATIONWIDE ENERGY PARTNERS, LLC’S MOTION FOR PROTECTIVE ORDER**

Complainant Ohio Power Company (“AEP Ohio”) submits this Memorandum Contra the March 17, 2022 Motion for Protective Order (“Motion”) and Memorandum in Support (“Mem. in Supp.”) of Respondent Nationwide Energy Partners, LLC (“NEP”).

I. General considerations of NEP’s Motion provide more than enough grounds to deny the motion.

NEP’s motion lumps together 13 separate discovery requests¹ under the same general objections, but in reality, the 13 requests differ in scope, in why they are not unduly burdensome, and in why they are probative of the issues in this proceeding. AEP Ohio will address each challenged request individually in Part II, *infra*, and respectfully requests that the Commission address each request individually in its decision on NEP’s motion.² There are, however, several

¹ NEP takes issue with AEP Ohio Request for Production Nos. 22, 23, 29, 31, 32, and 36 (NEP Mem. at 7-8); and AEP Ohio Interrogatory Nos. 44, 52, 59, 97, 118, 123, and 127 (NEP Mem. at 9-10).

² As discussed in greater detail below, *see infra* Section II.F, AEP Ohio is responding to the 13 discovery requests that NEP expressly quoted and discussed in its Memorandum in Support. NEP also obliquely cited but did not discuss numerous other discovery requests. (*See, e.g.*, NEP Mem. in Supp. at 3 n.3.) Insofar as NEP is seeking a protective order to apply to all the requests it cited without discussion, the request should be summarily denied. NEP has utterly failed to provide any specific reasons or analysis as to why these numerous requests should be included in the protective order (let alone why they have met other requirements under OAC 4901-1-24 such as specifically outlining the offensive request, the proposed solution and what measures were taken to resolve the

general points about NEP’s motion that AEP Ohio will raise here, in Part I, before moving to the individual requests. These general considerations provide more than enough basis to deny NEP’s motion, but AEP Ohio will proceed below, in Part II, to also address each discovery request individually.

A. Discovery requests about NEP’s business practices are directly relevant to this proceeding and easily meet the standard of OAC 4901-1-16 of being reasonably calculated to lead to the discovery of admissible evidence.

NEP argues that certain AEP Ohio’s discovery requests are inappropriate because they ask about NEP’s business practices at all its buildings (*e.g.*, whether NEP allows lessees at its buildings to enter into budget payment plans,³ whether NEP permits lessees to operate solar panels,⁴ or whether NEP provides money to assist low-income lessees with utility bills⁵) and allegedly go beyond the five Apartment Complexes discussed in AEP Ohio’s Complaint. In NEP’s view, the challenged requests “have no bearing on the analysis of whether NEP is or will be operating as an ‘electric light company’ at the five apartment complexes.” (NEP Mem. at 8.) NEP is wrong for two reasons. First, NEP’s business practices at other NEP buildings are directly probative of how NEP will conduct business at the Apartment Complexes. *See infra* Section I.A.1. Second, NEP’s business practices are directly relevant to statutory definition of “electric light company” in R.C. 4905.03(C), because that definition centers on what kind of “business” NEP is “engaged in.” *See infra* Section I.A.2.

matter before filing the motion). AEP Ohio cannot fairly respond to NEP based solely on a citation without discussion.

³ AEP Ohio Interrogatory No. 59.

⁴ AEP Ohio Interrogatory No. 123.

⁵ AEP Ohio Interrogatory No. 10.

1. Information about how NEP conducts business at other multifamily buildings is probative of NEP's actions at the Apartment Complexes.

The challenged discovery requests are well within the scope of this proceeding because how NEP operates at its other multifamily buildings in AEP Ohio's service territory bears directly on how it "is or will be operating . . . at the five apartment complexes." (*E.g.*, NEP Mem. in Supp. at 8.) For instance, whether NEP permits the residents at other buildings to enter into budget payment plans (Interrogatory No. 59) is directly probative of whether the residents of the Apartment Complexes will have the benefit of budget payment plans if NEP is permitted to take over. Likewise, what personal data NEP collects from residents of its other buildings in AEP Ohio's service territory (Interrogatory No. 118) is directly probative of what personal data it will collect from the residents of the Apartment Complexes. Whether NEP contributes to low-income assistance is directly probative of what low-income assistance will be available to the Apartment Complex customers if AEP Ohio is forced to abandon its service to them. NEP has never suggested that it will treat the Apartment Complexes any differently than it treats its other buildings with respect to these or any other issues, and if it wants to make that argument, it can adduce evidence to that effect for the hearing. NEP's conduct in serving other complexes is the best evidence of how it will conduct business if permitted to serve the five Apartment Complexes, and there is no reason to think otherwise.

For now, NEP should be required to answer these questions so that the Commission can have a clear picture of what the Commission's decision in this proceeding will mean for the Apartment Complexes Customers. The interrogatories challenged in NEP's motion are tied to specific rules or regulations that AEP Ohio, as a public utility, must follow – including rules related to remote disconnection, determining the due date of bills, and the requirement to offering budget plans, among others. *See infra* Section II.D. It is vitally important for the

Commission to understand how the public utility service under the NEP regime will differ – what the Apartment Complex customers will gain (if anything) or lose from NEP taking over service from AEP Ohio.

2. The challenged discovery requests are probative of what “business” NEP is “engaged in” under R.C. 4903.05(C).

NEP emphasizes that AEP Ohio brought this proceeding to seek a Commission order preventing NEP from taking over electric service to the tenants at the five Apartment Complexes. (*See* NEP Mem. at 11 (quoting Compl. ¶¶ 30-35, Prayer for Relief B-D).) What NEP omits, however, is the *reason* that AEP Ohio believes the Commission should prohibit NEP from taking over the Apartment Complexes – AEP Ohio alleges that NEP is “engaged in the business of supplying electricity” under R.C. 4905.03(C) and therefore unlawfully operating as an “electric light company” and “public utility” under Ohio law. (Compl. ¶¶ 11-50.) NEP moved to dismiss this allegation, and the Commission denied the motion, set a hearing date, and permitted the parties to go forward with discovery on the issues raised in AEP Ohio’s complaint. *See* Entry, Case No. 21-990-EL-CSS, at 13 (Jan. 31, 2022).

AEP Ohio’s discovery requests about NEP’s business are targeted at supporting its allegations that NEP is “engaged in the business of supplying electricity” under R.C. 4905.03(C). (Compl. ¶¶ 11-50.) The January 31, 2022 Entry denying NEP’s motion to dismiss clearly held that 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.” Entry at 12 (emphasis added). The Entry further determined that this complaint provides the Commission “an opportunity to address the open question concerning whether a third-party submetering company, like NEP, could be considered a public utility.” *Id.* at 13. And the Entry reasoned that “the discovery and hearing process will afford the parties an opportunity to examine the breath and

accuracy” of the parties arguments about whether NEP “could be considered a public utility.”

Id.

NEP’s attempt to limit discovery to the five Apartment Complexes, therefore, is erroneous and has already been rejected by the Entry. The question here focuses on NEP’s “business model,” not just its activities at the Apartment Complexes. Entry at 12. AEP Ohio’s discovery requests are aimed directly at NEP’s business model and will elucidate facts that the Commission should consider when evaluating whether NEP is a “public utility.” NEP’s objections limiting its responses to the Apartment Complexes should be rejected, and NEP should be required to provide the information that AEP Ohio requested concerning NEP’s “business model.” Entry at 12.

B. NEP has not even attempted to support its claim that the challenged requests are unduly burdensome.

NEP argues that a protective order is necessary because NEP “would be subjected to undue burden and expense if forced to respond” to the challenged discovery requests. (Mem. in Supp. at 6.) NEP, however, provides no details and *no evidence at all* supporting this claim.

NEP’s claim of burden is especially untenable in the context of the challenged interrogatories.⁶ It is impossible to conceive how NEP would suffer any undue burden by answering simple questions such as, “Are lessees permitted to enter into a budget plan for electric service charges?”⁷ NEP can respond to that question in mere minutes and with virtually no expense. Ironically, NEP’s opposition to answering such simple questions is causing it to incur more litigation expenses than it would incur by if it had answered the question and moved on. Equally incredible is NEP’s claim that it would suffer undue burden by answering

⁶ AEP Ohio Interrogatory Nos. 44, 52, 59, 97, 118, 123, and 127 (NEP Mem. at 9-10).

⁷ AEP Ohio Interrogatory No. 59 (NEP Mem. at 9).

interrogatories that are essentially yes/no questions, such as whether NEP's disconnection practices and procedures are made available to lessees⁸ or whether NEP permits lessees to operate solar panels.⁹ NEP's claim of undue burden in answering the challenged interrogatories is at odds with common sense and unsupported by evidence.

NEP also fails to support its claim of undue burden for the challenged requests for production of documents.¹⁰ NEP does not, for example, cite the number of documents it would have to review to respond to any request, the amount of time this review would take, or the amount of money it would cost. These are basic facts needed to support a claim of undue burden in a motion for a protective order. NEP's failure to support this claim with specifics is underscored by the fact that NEP made no real effort to discuss the challenged document requests with AEP Ohio, as described in detail *infra* Section I.E, and by the fact that the challenged requests are mirror images of document requests that NEP had previously made to AEP Ohio, *see infra* Section II.B. In light of all of these considerations, NEP's claim of "burden" rings hollow.

C. NEP has adopted a manipulative and inappropriate position by "cherry picking" which discovery on the challenged topics it wishes to answer.

An especially troubling aspect of NEP's Motion is that NEP has already produced some information that goes beyond the scope of the five Apartment Complexes. For instance, in response to AEP Ohio's first set of discovery requests, NEP produced carefully chosen internal policy documents and communications discussing topics such as deposits, metering, rates, billing, disconnections, and outages at *all* of NEP's buildings. Moreover, NEP responded to

⁸ AEP Ohio Interrogatory No. 118 (NEP Mem. at 9).

⁹ AEP Ohio Interrogatory No. 123.

¹⁰ AEP Ohio Request for Production Nos. 22, 23, 29, 31, 32, and 36 (NEP Mem. at 7-8).

certain AEP Ohio interrogatories by producing a list of all its buildings in AEP Ohio's service territory with the number of tenants at each building; a list of miscellaneous fees that NEP charges residents at its all its buildings; and a 52-page "list of disconnects by community for 2021," which lists all the times that NEP disconnected electricity to tenants at *all* of its buildings in 2021. This shows that NEP has selectively chosen to answer discovery requests about buildings other than the five Apartment Complexes *where the answer is perceived to benefit NEP*.

Apparently, if NEP believes the answer casts NEP in a favorable light, it readily produces information about its business beyond the five Apartment Complexes. It is only when AEP Ohio has asked questions that NEP apparently does not wish to answer – questions about bill due dates and low-income assistance, for example – that NEP has refused to provide *any* response on the ground that the question goes beyond the five Apartment Complexes. That is not how discovery works. NEP's selective and opaque approach tends to suggest here that the withheld information is particularly probative and should be divulged "in order to facilitate thorough and adequate preparation for participation in commission proceedings," as is the purpose of the Commission's discovery rules. OAC 4901-1-16(A). A party is not allowed to choose which requests to answer based on whether the request casts the party in a favorable light. Having produced some information that clearly goes beyond the five Apartment Complexes, NEP cannot now adopt an inconsistent position by objecting to producing such information. That kind of cherry picking would improperly allow NEP to curate its discovery responses and only provide information that is favorable. That is inappropriate and should not be allowed.

D. Contrary to NEP’s suggestion, NEP has propounded more discovery requests on AEP Ohio than AEP Ohio has propounded on NEP.

Another example of NEP’s hypocrisy is its argument about the number of discovery requests that AEP Ohio has made of NEP. NEP complains that AEP Ohio’s first set of discovery requests “includes twenty-two (22) interrogatories and eighteen requests (18) for production of documents” and that AEP Ohio’s second through fourth sets of discovery “include a combined additional one hundred and six (106) interrogatories, twenty-four (24) requests for production of documents, and six (6) requests for admission.” (NEP Mem. at 1, 3.) Once again, however, NEP is asking the Commission to apply a different standard of discovery to NEP than to AEP Ohio. That is because NEP has served more discovery on AEP Ohio than AEP Ohio has served on NEP, even though the “primary focus of the complaint is on NEP and its business model.” Jan. 31, 2022 Entry at 12. NEP has served a total of 9 sets of discovery on AEP Ohio that includes 126 interrogatories, 128 requests for production, and 86 requests for admission. The Commission should reject NEP’s hypocritical attempt to apply a different discovery standard to AEP Ohio than to NEP.

E. NEP made no real effort to discuss the challenged discovery requests with AEP Ohio before filing its Motion for a Protective Order. If it had, it would have realized that AEP Ohio is not requesting “every single email and document in its possession.”

NEP repeatedly claims that “[a]ny Discovery Request that goes beyond the five apartment complexes, *practically requires NEP to turn over every single email and document in its possession.*” (E.g., Mem. in Supp. at 10 (emphasis added).) That is hyperbole. None of AEP Ohio’s discovery requests can be reasonably interpreted to seek “every single email and document” in NEP’s possession. The challenged interrogatories,¹¹ for one thing, seek very

¹¹ Interrogatory Nos. 44, 52, 59, 97, 118, 123, and 127 (NEP Mem. at 9-10).

specific information from NEP, and the interrogatories do not seek documents at all. The challenged requests for production of documents,¹² moreover, (1) are limited in time (generally from October 1, 2020 to present) and (2) are the mirror image of document requests that *NEP had previous made to AEP Ohio*. (AEP Ohio elaborates on this NEP double-standard in Section II.D below.)

Importantly, moreover, AEP Ohio was willing to discuss additional reasonable limits on the scope of the challenged requests for production, but NEP *never* attempted to discuss these requests with AEP Ohio, as it is required to do. *See* OAC 4901-1-24(B) (“No motion for a protective order shall be . . . until the person or party seeking the order has exhausted *all other reasonable means* of resolving any differences with the party seeking discovery.” (emphasis added).) NEP requested a telephone conference with AEP Ohio to discuss discovery, but nearly all of that call focused on NEP’s perceived deficiencies with AEP Ohio’s production of documents in response to NEP’s requests. NEP raised its own production in response to AEP Ohio’s requests only in a fleeting reference to the parties’ disagreement over the scope of the case. *In the parties’ conversation, NEP never raised the specific requests challenged in its motion and never suggested any limits on their scope.*

All of this is confirmed by the affidavit of NEP’s counsel supporting its motion, which describes the parties’ discussions as follows:

NEP requested AEP Ohio limit the scope of its discovery to the five apartment complexes at issue in this case. AEP Ohio refused the request, leaving NEP and AEP Ohio at an impasse on this issue.

Affidavit of Andrew P. Guran ¶ 3, Exhibit I to NEP’s Motion for Protective Order. Note that NEP’s counsel does *not* claim that NEP ever raised any specific discovery requests to NEP for

¹² AEP Ohio Request for Production Nos. 22, 23, 29, 31, 32, and 36 (NEP Mem. at 7-8).

the parties to discuss in the call. Nor does NEP's counsel cite any effort by NEP to propose reasonable limits on the requests, except for the plainly untenable and uncooperative suggestion that NEP simply *not answer* certain questions that in NEP's view go beyond "the five apartment complexes." Furthermore, NEP did not raise – and does not claim that it raised – any of its concerns with "burden" or "expense," and it did not tell AEP Ohio that it interpreted the requests as seeking "every single email and document" in NEP's position. Had NEP raised these issues of interpretation and scope, the parties may have reached a compromise that would have alleviated the need for NEP's Motion. Instead, NEP held a perfunctory call and immediately thereafter filed this Motion.

NEP's failure to engage in the required dialog between the parties on its challenged discovery responses prior filing this motion is emblematic of NEP's real tactics of obfuscation and delay in this proceeding. This motion for a protective order is the *sixth* motion NEP has filed in this proceeding,¹³ which has not even moved beyond the discovery stage. During this time AEP Ohio has filed *zero* motions.¹⁴ NEP's clear intent is to frustrate and delay AEP Ohio's ability to pursue this proceeding by stonewalling in discovery and forcing AEP Ohio (and the Commission) to expend considerable resources responding to motions such as this one. The Commission should not abide these attempts to muddy the waters and should deny NEP's motion for a protective order so that the parties can complete discovery and move to hearing on this important proceeding involving the electric service of over 1,000 customers in the Apartment Complexes.

¹³ (1) NEP's October 20, 2021 Motion to Dismiss, (2) NEP's November 24, 2021 Motion for Protective Order or Stay of Discovery, (3) NEP's December 10, 2021 Motion for a "Stay"/Preliminary Injunction, (4) NEP's December 22, 2021 Motion to Strike, (5) NEP's January 11, 2022 Motion for Leave to File Amended Answer and Counterclaim, and (6) NEP's March 17, 2022 Motion for Protective Order.

¹⁴ AEP Ohio's only substantive request for relief in this proceeding (beyond its complaint) was its January 3, 2022 Interlocutory Appeal of the Entry granting NEP's requested "stay"/preliminary injunction.

II. Specific responses to the challenged discovery requests underscore that NEP’s Motion should be denied.

A. Request No. 29 – NEP should produce documents demonstrating its corporate goals and objectives so the Commission can see how NEP itself describes the “business” it is “engaged in” under R.C. 4905.03(C).

On page 7 of its Memorandum, NEP challenges AEP Ohio’s Request for Production No. 29, which states:

Request No. 29: Please provide all documents demonstrating NEP’s corporate goals, objectives, mission, or purpose.

This request is directly relevant to the question of what “business” NEP is “engaged in” under R.C. 4905.03(C), which is the central issue in this case. *See* Jan. 31, 2022 Entry at 12 (holding that the “primary focus of the complaint is on NEP and its business model”). To answer this question, it is plainly permissible to investigate how NEP describes itself in its corporate documents. This request is also probative of whether the provision of utility service is “ancillary” to NEP’s “primary business” under the third prong of the *Shroyer* test. *See Inscho v. Shroyer’s Mobile Homes*, Case No. 90-182-WS-CSS (Feb. 27, 1992). In this regard, AEP Ohio attempted to independently research the matter by reviewing documents NEP filed with the Ohio Secretary of State; it is optional for an LLC to list its purpose as part of its articles of incorporation and NEP chose not to transparently reveal that information.¹⁵ So getting a response to the targeted request is necessary in order for AEP Ohio to access and receive discoverable information that is not otherwise available. At a minimum, the request is reasonably calculated to lead to the discovery of admissible evidence.

NEP claims that this request “would be inclusive of every single document in NEP’s possession,” but that claim is disingenuous and obviously an exaggeration. Surely only a limited

¹⁵ <https://bizimage.ohiosos.gov/api/image/pdf/199932100132>

number of NEP documents directly address its “goals, objectives, mission, or purpose,” and NEP’s routine business records, operational documents and communications that do not engage in strategic planning and other high-level activities would not be responsive. Moreover, as noted above, *see* Section I.D, NEP never raised its disingenuous interpretation of this request with AEP Ohio and never proposed any ways of focusing its search and production of documents in response to this question.¹⁶

NEP’s motion for a protective order should be denied and NEP should be instructed to locate and disclose documents evidencing its “corporate goals, objectives, mission, or purpose.” In so doing, NEP should search for and produce only documents that expressly state NEP’s corporate goals and objectives – for example, and without limitation, corporate planning documents, mission statements, and presentations to investors. This is a limited set of documents and is *directly* relevant to the question of whether NEP is “engaged in the business of supplying electricity” under R.C. 4905.03(C) and whether supplying electricity is “ancillary” to NEP’s business under the third *Shroyer* prong.

B. Request Nos. 22, 23, 31, 32, and 36 – NEP should respond to the same requests it made of AEP Ohio.

On pages 7-8 of its Memorandum, NEP challenges AEP Ohio Request for Production Nos. 22, 23, 31, 32, and 36. It is remarkable that NEP is making this argument because every one of these challenged requests is a mirror image of a discovery request that NEP had previously asked AEP Ohio. This is shown in the following table:

¹⁶ It is important to note that NEP does *not* argue that these documents would be sensitive or disclose trade secrets. The parties have executed an appropriate confidentiality agreement that would address any such concerns.

<i>NEP Requests to AEP Ohio</i>		<i>AEP Ohio Requests to NEP</i>	
NEP RFP 1-9	2/3/22	AEP Ohio RFP No. 22	2/18/22
Provide all documents evidencing communications between any person or entity and Angie Rybalt from October 1, 2020 to the present date that relate to or refer to submetering.		Provide all documents evidencing communications between any person or entity and Teresa Ringenbach from October 1, 2020 to the present date that relate to or refer to submetering.	
NEP RFP 1-10	2/3/22	AEP Ohio RFP No. 23	2/18/22
Provide all documents evidencing communications between any person or entity and Angie Rybalt from October 1, 2020 to the present date relating to or referring to NEP.		Provide all documents evidencing communications between any person or entity and Teresa Ringenbach from October 1, 2020 to the present date relating to or referring to AEP Ohio.	
NEP RPD 3-1	2/11/22	AEP Ohio RFP No. 31	3/1/22
Provide all documents evidencing communications between AEP Ohio and any other Ohio electric distribution utility including, but not limited to, Ohio Edison, the Toledo Edison Company, the Cleveland Electric Illuminating Company, AES Ohio and Duke Energy of Ohio, between October 1, 2020 and the present date referring to or relating to NEP.		Provide all documents evidencing communications between NEP and any other third-party submetering company, including but not limited to American Power & Light LLC and Pioneer Energy Management, Inc., between October 1, 2020 and the present date referring to or relating to AEP Ohio.	
NEP RPD 3-2	2/11/22	AEP Ohio RFP No. 32	3/1/22
Provide all documents evidencing communications between AEP Ohio and any other electric distribution utility including, but not limited to, Ohio Edison, the Toledo Edison Company, the Cleveland Electric Illuminating Company, AES Ohio and Duke Energy of Ohio, between October 1, 2020 and the present date referring to or relating to submetering or master meter service.		Provide all documents evidencing communications between NEP and any other third-party submetering company, including but not limited to American Power & Light LLC and Pioneer Energy Management, Inc., between October 1, 2020 and the present date referring to or relating to submetering or master meter service.	
NEP RPD 3-16	2/11/22	AEP Ohio RFP No. 36	3/1/22
Provide all documents relating to any calculation or analysis by AEP Ohio of revenue specific to multi-family properties.		Provide all documents relating to any calculation or analysis by NEP of revenue specific to multi-family properties.	

As shown above, NEP's requests to AEP Ohio (the left column) are nearly identical to the requests that AEP Ohio later made to NEP (the right column) and which NEP now refuses to answer. The only differences are where the names and concepts are changed so that the question

is targeted to NEP instead of AEP Ohio.¹⁷ It is the height of hypocrisy – and an unfair double-standard – for NEP to expect AEP Ohio to answer questions that NEP itself is unwilling to answer.

There is no reason for the scope of discovery to be different for the parties in this proceeding. If anything, the scope of information provided in discovery should be broader for NEP than for AEP Ohio, since AEP Ohio has the burden of proof, and this case is about what “business” *NEP* (not AEP Ohio) is “engaged in” under R.C. 4905.03 and whether *NEP* (not AEP Ohio) is unlawfully operating as a “public utility.” Jan. 31, 2022 Entry at 12 (holding that the “primary focus of the complaint is on NEP and its business model”).

Insofar as NEP claims that the scope of discovery should be broader for AEP Ohio due to NEP’s counterclaims, that position is untenable. As an initial matter, for the reasons stated in AEP Ohio’s January 26, 2022 Memorandum Contra NEP’s Motion for Leave to File Amended Answer and Counterclaim, NEP’s proffered counterclaims are untimely and contrary to NEP’s litigation positions in this Commission and in civil court, and for these reasons NEP’s motion to add these counterclaims should be denied. Until the Commission rules on NEP’s motion, the proffered counterclaims are not a part of this case and therefore do not justify NEP’s hypocritical position on the scope of discovery.

More importantly, even if the Commission were to grant NEP’s motion to add its counterclaims, those claims do not justify adopting different scopes of discovery for the parties or provide a basis to grant NEP protection from answering probative questions. If NEP is permitted to inject issues such as the parties’ internal financial analyses or communications with

¹⁷ In particular, Teresa Ringenbach, who submitted an affidavit for NEP in this case, is substituted for Angie Rybalt, who submitted an affidavit for AEP Ohio; NEP is substituted for AEP Ohio; and “any other third-party submetering companies” are substituted for “any other electric distribution utility.”

industry partners, AEP Ohio should have an equal right to inquire about NEP on those topics. AEP Ohio must be permitted an opportunity to defend NEP's counterclaims (if they are permitted in this case), and that opportunity would be unreasonably curtailed if AEP Ohio were not permitted to ask the same questions of NEP as NEP has asked of AEP Ohio. NEP's motion for a protective order with respect to these mirror-image documents requests should be denied.

C. Interrogatory No. 44 – Bizarrely, NEP has already fully answered this question.

On page 9 of its Memorandum in Support, NEP challenges AEP Ohio Interrogatory No. 44, which states:

Interrogatory No. 52: In which communities with a contract with NEP is NEP capable of remotely disconnecting electric service to a unit? Please identify each such community.

The inclusion of this interrogatory in NEP's Motion is perplexing because NEP *has fully answered this question*. In NEP's March 22, 2022 responses to AEP Ohio's third set of discovery requests, NEP answered this interrogatory by providing a list of approximately 100 multifamily complexes in which NEP is capable of remotely disconnecting electric service.

AEP Ohio is at a complete loss as to why NEP would seek a protective order for an interrogatory it has fully answered. But it is premature and inappropriate at this time to try to address any implication about admissibility of the evidence at hearing; NEP has provided responsive information and its motion for protection regarding that information is moot. This is yet another reason for the Commission to question NEP's motives in bringing this Motion and its overall tactics in this proceeding.

D. Interrogatory Nos. 52, 59, 97, 118, and 123 – NEP should respond to requests tied to specific rules that “public utilities” must follow.

On page 9 of its Memorandum in Support, NEP challenges AEP Ohio Interrogatory Nos. 52, 59, 97, 118, and 123. As an initial matter, as with Interrogatory No. 44, NEP already

provided a substantive answer to Interrogatory No. 59 in its March 22, 2022 responses to AEP Ohio’s third set of discovery requests. Yet again this demonstrates NEP’s duplicity. NEP is willing to answer certain questions that go beyond the scope of the Apartment Complexes when NEP believes the answer casts NEP in a favorable light. *See* Section I.C. The Commission should not countenance these manipulative and obstructive tactics.

Furthermore, all these interrogatories relate to rules that “public utilities” such as AEP Ohio must follow but NEP is not required to follow:

<i>Challenged Discovery Request</i>	<i>Corollary Regulatory Rule</i>
Interrogatory No. 52: How does NEP determine the due date of a bill for electric service?	OAC 4901:1-10-22(B)(10) (“The due date for residential bills shall not be less than fourteen days from the date of postmark.”).
Interrogatory No. 59: This interrogatory refers to communities with which NEP has a contract for services. Are lessees permitted to enter into a budget plan for electric service charges (also known as a uniform payment plan)?	OAC 4901:1-18-05(D) (“For customers without arrearages, the utility company shall also offer a budget plan (a uniform payment plan).”).
Interrogatory No. 97: Are NEP’s standard practices and procedures for disconnection made available to lessees or condominium owners of communities with which NEP has a contract for services? If so, how?	OAC 4901:1-18-06(I) (“The utility company shall include in its tariff its current standard practices and procedures for disconnection, including any applicable collection and reconnect charges. Any utility company proposing changes to its disconnection notice shall submit a copy to commission staff for review.”).
Interrogatory No. 118: What personal data of lessees or condominium owners does NEP collect?	OAC 4901:1-10-24(E) (establishing numerous rules concerning “Customer specific information”).
Interrogatory No. 123: Does NEP permit lessees or condominium owners to operate solar panels?	OAC 4901:1-10-28(B)(1) (“Each electric utility shall develop a standard net metering tariff and . . . shall make such tariffs available to customer-generators upon request, in a timely manner, and on a nondiscriminatory basis.”).

As noted above, the Commission should have a clear picture of what regulatory protections the Apartment Complex Customers currently benefit from and the extent to which they will lose these protections if NEP takes over service. This is directly relevant to the Commission’s interpretation of R.C. 4905.03(C). The answers to these questions also bear on the extent to

which NEP is “availing itself of special benefits available to public utilities” under the first prong of the *Shroyer* test.

NEP claims that these interrogatories constitute “broad inquiries” (NEP Mem. at 9), but in fact they are simple questions. After stating objections, NEP’s March 22, 2022 answer to Interrogatory 59 was a mere two sentences – hardly the result of a “broad inquiry.” There is virtually no burden to answering these questions, and they are directly relevant to the issues in this case. NEP’s motion for a protective order for these interrogatories should be denied.

Pointing to the Entry denying OCC’s intervention in this matter, NEP also argues that the Attorney Examiner already limited the scope of this proceeding to exclude policy issues. (NEP Mem. at 5.) NEP attempts to extrapolate a broader meaning from the Attorney Examiner’s January 31, 2022 Entry, which made such statements in a very limited context. First, the Entry was limited to OCC’s request to intervene in the case and was not an opinion on the scope of the matter for purposes of limiting discovery. The Attorney Examiner’s Entry addressed the reasons why OCC’s precedential interest in the policy issues and the outcome of this case are insufficient to grant intervention consistent with the Commission’s prior intervention rulings.

Second, AEP Ohio seeks information related to consumer protections for an entirely different purpose. OCC’s sought intervention to “ensur[e] protections for AEP Ohio’s 1.3 million residential customers and the rates charged to the residential customers.” Entry ¶ 37. AEP Ohio, on the other hand, is seeking information about the consumer protections offered by NEP because it relates directly to NEP’s operation as an “electric light company,” which NEP concedes is at the heart of this matter. (NEP Mem. at 1, 5.)

Of course, in presenting the claims made in its own complaint, AEP Ohio may develop pertinent facts through discovery (as these requests seek to do) in order to better support its own

legal (and policy) arguments. That has nothing to do with an outside intervenor like OCC coming into the case purely based on its own policy and precedential concerns. In any case, it would violate due process and otherwise be unlawful and unreasonable for the Commission to determine that AEP Ohio cannot make factual, legal and policy arguments in support of its complaint under R.C. 4905.26.

E. Interrogatory No. 127 – There is no burden on NEP to answer a yes/no question asking whether it has provided the same type of low-income support that AEP Ohio has provided.

On page 10 of its Memorandum in Support, NEP challenges AEP Ohio Interrogatory No. 127, which states:

Interrogatory No. 127: Has NEP donated or in any way provided money to assist low-income lessees or condominium owners with utility bills? If so, how much money has NEP provided for this purpose by year for the past five years?

This is another question designed to elucidate what protections and benefits the Apartment Complex Customers will lose if AEP Ohio is forced to give up its service to those Customers. AEP Ohio has donated its own funds to help its low-income customers who need assistance with utility bills. It is reasonable to ask whether NEP has made the same kind of donation. As with the other challenged interrogatories, moreover, this question presents no burden of any kind on NEP. If NEP has not made such a donation, it may answer “No.” If it has made such a donation, it may answer “Yes,” and provide a single number representing the amount of money it has donated in the past five years.

F. There are no grounds to grant a protective order for the numerous discovery requests NEP cites in footnotes or attaches to its motion without discussion.

Above, AEP Ohio has responded to the specific discovery requests that NEP quoted and discussed in its Memorandum in Support. At certain other points in its Memorandum, NEP seems to suggest that it is seeking a protective order for dozens of other discovery requests that it

did not discuss. (*See, e.g.*, NEP Mem. in Supp. at 9 (referring to “Interrogatory Nos. 44-127”).)

At one point in its Memorandum, NEP included a long footnote (NEP Mem. in Supp. at 3 n.3) in which it cited excerpted language from a large portion of all discovery requests AEP Ohio has made, but NEP fails to engage in any substantive discussion of those requests. And NEP has improperly attached entire sets of discovery to its Motion, including absurd stretches of completely redacted pages.

Insofar as NEP is seeking a protective order to apply to all the requests it cited or attached without discussion, the request should be summarily denied. NEP has utterly failed to provide any specific reasons or analysis as to why these numerous requests should be included in the protective order. Furthermore, NEP has already answered many of the requests it cited without discussion, and it never discussed these requests with AEP Ohio under OAC 4901-1-24(B).

A party seeking a protective order should be required to specifically identify the discovery requests it is challenging and provide substantive analysis of each one. Moreover, a party moving for a protective order under Rule 24 must specify what measures were taken to resolve the matter before the motion was filed. NEP’s tactic of citing a large portion of all discovery without analysis is unfair to AEP Ohio, because it does fairly identify why each request is included; it is wasteful of the Commission’s and parties’ resources; and it is wholly insufficient to meet the burden of showing that a protective order is “necessary” under OAC 4901-1-24(A).

CONCLUSION

For the foregoing reasons, NEP's Motion for a Protective Order should be denied.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Steven T. Nourse", is positioned above a horizontal line.

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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 29th day of March, 2022, via email.



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Summary: Memorandum Memorandum Contra to NEP Motion for Protective Order
electronically filed by Mr. Steven T. Nourse on behalf of Ohio Power Company