

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**INTERLOCUTORY APPEAL OF NATIONWIDE ENERGY PARTNERS, LLC**

Pursuant to Ohio Adm.Code 4901-1-15(A), Nationwide Energy Partners, LLC (“NEP”) submits this immediate interlocutory appeal to the Commission with regard to the May 6, 2020 Entry issued in this proceeding and specifically the Entry’s statement at ¶ 28 that “... NEP should not be permitted to a broader scope of discovery due to its counterclaim.” The Attorney Examiner’s language in paragraph 28 of the Entry should be reversed because if intended to be a directive, could prohibit NEP from obtaining discovery relevant to the subject matter of NEP’s counterclaims and contrary to Ohio Adm.Code Rule 4901-1-16(B). NEP’s counterclaims include claims addressing AEP Ohio’s discriminatory policy of denying master-meter configurations and AEP Ohio’s unlawful and unreasonable actions in bringing its complaint against NEP to harass and maliciously injure NEP. All of NEP’s counterclaims and the underlying allegations necessitate a scope of discovery that is not identical to AEP Ohio’s scope of discovery (which makes sense as AEP Ohio’s claims differ from NEP’s counterclaims). The Attorney Examiner’s directive should also be reversed because AEP Ohio has not filed any motion for protective order to limit the scope of NEP’s discovery. To the extent AEP Ohio believes that NEP’s discovery requests are not reasonably calculated to lead to the discovery of admissible evidence, then AEP

Ohio should follow the Commission's rules on resolving any dispute with NEP over its discovery requests. Accordingly, this interlocutory appeal is warranted and absent a clarifying or correcting Entry by the Attorney Examiner, should be granted.<sup>1</sup> A copy of the May 6, 2022 Entry is attached.

Respectfully submitted,

/s/ Michael J. Settineri

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<sup>1</sup> NEP's submission of this interlocutory appeal should in no way be used to preclude NEP from seeking to limit the scope of the hearing on AEP Ohio's claims to the five apartment complexes referenced in AEP Ohio's complaint, or preclude NEP from challenging any evidence AEP Ohio seeks to admit into the evidentiary record.

## **MEMORANDUM IN SUPPORT**

### **I. INTRODUCTION**

The Commission should reverse and modify paragraph 28 of the May 6, 2022 Entry regarding NEP's scope of discovery absent clarification or correction by the Attorney Examiner. Procedurally, NEP's scope of discovery was not at issue before the Attorney Examiners when NEP sought a protective order on AEP Ohio's scope of discovery on March 17, 2022. To date, AEP Ohio has not submitted any motion for protective order and made no request that NEP's discovery should be limited. Additionally, NEP's counterclaims and its allegations in those counterclaims are materially different in substance to AEP Ohio's complaint. And importantly, the statement in ¶ 28 of the Entry if considered a directive is inconsistent with the Commission's broad scope of discovery in proceedings. *See* Rule 4901-1-16(B). For these reasons, absent clarification or correction by the Attorney Examiner that a directive limiting NEP's scope was not issued, the Commission should reverse and modify ¶ 28 of the Entry to ensure that NEP's ability to seek discovery in this proceeding is not limited through the Entry.

### **II. STANDARD OF REVIEW**

Ohio Adm.Code 4901-1-15(A) provides, in pertinent part, that "any party who is adversely affected thereby may take an immediate interlocutory appeal to the commission from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference that does any of the following: (1) Grants a motion to compel discovery or denies a motion for a protective order." The Entry issued in this proceeding denied in part and granted in part NEP's motion for protective order, and included the statement at ¶ 28 that "... NEP should not be permitted to a broader scope of discovery due to its counterclaim." Given the language in paragraph 28, if considered a directive, to limit NEP's scope of discovery

in this proceeding, an immediate interlocutory appeal is warranted for the Commission's determination.

### **III. ARGUMENT**

#### **A. Absent Clarification or Correction, the Commission Should Reverse the Entry's Directive Stating that NEP's Discovery Should be the Same Scope as AEP Ohio's Discovery.**

##### **1. AEP Ohio Did Not Move for a Protective Order on NEP's Discovery.**

On March 17, 2022, NEP filed a motion for a protective order to limit AEP Ohio's discovery to the "discrete set of facts" it alleged in its complaint. AEP Ohio did not file a motion for protective order. NEP's motion came after an extensive back and forth via written communications and a conference call with AEP Ohio's counsel. And, only after coming to an impasse on the issue of scope, did NEP file its motion. AEP Ohio has not raised any issue of NEP's scope of discovery, let alone made a good faith effort to resolve any such issue with NEP as required by Ohio Adm.Code 4901-1-24(B). Indeed, the only reason AEP Ohio raised NEP's scope of discovery was as an argument that NEP's motion for protective order should not be granted. *See* AEP Ohio's Memo. Contra at p. 12-15.

Although AEP Ohio did not seek a protective order or raise any issue of a dispute with NEP on NEP's discovery, paragraph 28 of the Entry analyzes the parties' arguments and concludes that "a separate scope of discovery between the parties is not warranted." NEP assumes this to be a partial basis for the denial, in part, of NEP's motion for protective order and not a determination that NEP's scope of discovery is limited. However, in the event the intent of the Attorney Examiner was to limit the scope of NEP's discovery through the Entry, the Commission should reverse that directive given that no issues with NEP's discovery requests were raised to the

Attorney Examiner through the Commission's rules, which require a good faith effort to resolve the dispute prior to seeking any limitation on discovery. *See* Ohio Adm.Code 4901-1-24(B).

**2. NEP's Discovery Related to its Counterclaims Goes Beyond AEP Ohio's Complaint.**

The Commission did not grant NEP's motion for leave to amend its complaint and add counterclaims until April 4, 2022—after AEP Ohio filed its memorandum contra to NEP's motion for protective order and just one day prior to NEP's reply to AEP Ohio's memorandum contra. NEP's counterclaims allowed by the Commission sought to address much more than AEP Ohio's denial of the requests to master-meter the five apartment complexes and included claims on AEP Ohio's unilateral policy decisions to not allow master-meter conversions, its discrimination against NEP and the basis and motives for filing an unlawful complaint against NEP.

NEP's allegations in its counterclaims support reversal and/or clarification of the Attorney Examiner's statement. For example, NEP's allegations in its counterclaims include:

¶ 71. "While refusing to process the construction requests for the five apartment complex properties, AEP Ohio continued to provide master-metered service to existing submetered buildings in its service territory, including properties where NEP receives and pays bills as an agent of the property owners."

¶ 72. "Recently, on December 17, 2021 in its memorandum contra motion to stay, AEP Ohio stated that it is going forward with requests to install master-meters to facilitate submetering at newly constructed buildings but will be denying requests to connect existing multi-family properties to master-metered configurations."

¶ 73. "AEP Ohio did not receive any Commission authorization for its new policy of denying construction requests for properties where NEP has contracts to convert to a mastermetered configuration, and has only applied this policy to NEP projects."

¶ 89. “AEP Ohio filed its complaint to harass and maliciously injure NEP including causing NEP to incur needless litigation costs. NEP’s counterclaims anti-competitive behavior.”

¶ 90. “AEP Ohio’s filing of the complaint is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, and cannot be supported by a good faith argument for the establishment of new law.”

¶ 98. “AEP Ohio’s new policy to deny construction requests to convert to a master-meter configuration at any property involving NEP was and is unjust, unreasonable, unlawful, unjustly discriminatory, unjustly preferential, and in violation of R.C. 4905.26.”

What is apparent from NEP’s allegations is that discovery should be allowed on matters reasonably calculated to lead to the discovery of admissible evidence to support NEP’s allegations and counterclaims (which differ from AEP Ohio’s claims).

### **3. The Entry is Inconsistent with the Broad Scope of Discovery Allowed under Commission Rule 4901-1-16(B)**

Lastly and just as important, the Entry, as written at paragraph 28, is inconsistent with the Commission’s broad allowance for discovery in Ohio Adm.Code 4901-1-16(B), which states in relevant part “... any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” The Entry’s statement at paragraph 28, if considered a directive, is inconsistent with this standard and no basis has been presented to apply any limitation on NEP’s discovery. In fact the Attorney Examiner stated that

“both parties will need adequate discovery to defend themselves against the other’s claims.” May 6, 2022 Entry at ¶28. Either the Entry should be clarified that a directive was not issued as to NEP’s scope of discovery, or the Commission should grant this interlocutory appeal and reverse the directive.

#### **IV. CONCLUSION**

NEP as the respondent is entitled to discovery within the bounds of the Commission’s broad standard for discovery. As well, NEP as a counterclaimant bringing claims against AEP Ohio through NEP’s counterclaims is entitled to discovery to support its allegations and support its counterclaims. Absent AEP Ohio following the Commission’s rules on resolving any discovery disputes with NEP’s discovery to AEP Ohio, the Attorney Examiner should not preemptively limit NEP’s ability to seek discovery in this proceeding. NEP respectfully requests that absent a clarifying or correcting entry that the statement in paragraph 28 of the Entry does not limit NEP’s scope of discovery, the Commission should reverse and modify paragraph 28 of the Entry to ensure that NEP’s ability to seek discovery in this proceeding is not limited through the Entry.

Respectfully submitted,

/s/ Michael J. Settineri

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### **CERTIFICATE OF SERVICE**

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on this May 11th, 2022 upon all persons listed below:

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/s/ Michael J. Settineri  
Michael J. Settineri



# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF  
OHIO POWER COMPANY,

CASE No. 21-990-EL-CSS

COMPLAINANT,

v.

NATIONWIDE ENERGY PARTNERS, LLC,

RESPONDENT.

## ENTRY

Entered in the Journal on May 6, 2022

### I. SUMMARY

{¶ 1} The attorney examiner finds that Nationwide Energy Partners, LLC's motion for protective order should be granted, in part, and denied, in part. Further, the attorney examiner accepts AEP Ohio's amended answer and directs the parties to observe the procedural schedule set forth in this Entry.

### II. PROCEDURAL HISTORY

{¶ 2} On September 24, 2021, the Ohio Power Company d/b/a AEP Ohio (AEP Ohio) filed a complaint against Nationwide Energy Partners, LLC (NEP). 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. On November 4, 2021, AEP Ohio filed a memorandum contra NEP's motion to dismiss.

{¶ 6} On October 28, 2021, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene and accompanying memorandum in support. 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. By Entry issued January 31, 2022, the attorney examiner denied OCC's motion to intervene.

{¶ 7} On November 24, 2021, NEP filed a motion for protective order or, in the alternative, a stay of discovery. 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. By Entry issued January 31, 2022, the attorney examiner denied NEP's motion as moot.

{¶ 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, d/b/a 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). 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. On December 17, 2021, both OCC and AEP Ohio filed memoranda contra NEP's motion for a stay. On December 28, 2021, the attorney examiner issued an Entry granting NEP's December 10, 2021 motion for a stay.

{¶ 10} 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.

{¶ 11} On January 11, 2022, NEP filed a motion for leave to file an amended answer and counterclaim, instant. On January 26, 2022, AEP Ohio filed a memorandum contra NEP's motion. On February 2, 2022, NEP filed a reply in support of its motion.

{¶ 12} By Entry issued January 31, 2022, among other things, the attorney examiner denied NEP's motion to dismiss and established a procedural schedule.

{¶ 13} On February 7, 2022, OCC filed an interlocutory appeal regarding the attorney examiner's decision to deny OCC intervention in this matter. On February 14, 2022, NEP filed a memorandum contra OCC's appeal.

{¶ 14} On March 17, 2022, NEP filed a motion for protective order regarding certain discovery propounded by AEP Ohio. On March 29, 2022, AEP Ohio filed its memorandum contra NEP's motion. On April 5, 2022, NEP filed its reply.

{¶ 15} By Entry issued April 4, 2022, the attorney examiner granted NEP's motion for leave to file its answer and counterclaim, directed AEP Ohio to file its response to the counterclaim within 20 days of the Entry, and suspended the procedural schedule and hearing.

{¶ 16} On April 22, 2022, AEP Ohio filed its answer to NEP's counterclaim. Subsequently, on May 2, 2022, AEP Ohio filed an amended answer to add clarifying language to Paragraphs 37, 38, 57, 63, 74, and 110, which AEP Ohio says resolves potential ambiguity concerning past practices between AEP Ohio and NEP. AEP Ohio cites Ohio Rule of Civil Procedure 15(A), which permits a party to amend its answer once as a matter of course within 28 days after serving it. Further, AEP Ohio asserts that there will be no prejudice to NEP from the amended answer, as NEP was granted leave to file its amended answer to the complaint outside the 28-day period. On May 5, 2022, NEP filed a letter noting that, while it believes the manner in which AEP Ohio filed its amended answer is improper, it does not object to AEP Ohio's filing. Accordingly, at this time, the attorney examiner recognizes and accepts AEP Ohio's amended answer, as filed on May 2, 2022.

### **III. MOTION FOR PROTECTIVE ORDER**

#### **A. *Summary of the Filings***

{¶ 17} In its motion for protective order, NEP argues that a protective order is warranted since portions of AEP Ohio's discovery requests subject NEP, if directed to respond, to undue burden and expense, asserting that these requests are not reasonably

calculated to lead to the discovery of admissible evidence, as required by Ohio Adm.Code 4901-1-16(B). Further, NEP contends that, when making a determination under Ohio Adm.Code 4901-1-24(A), an attorney examiner must decide whether the information sought to be discovered is relevant. As an initial matter, NEP notes that, from January 11, 2022, to March 4, 2022, AEP Ohio propounded on NEP four sets of interrogatories, requests for production of documents (RFP), and requests for admissions. At the time of filing, and subject to the objections detailed below, NEP states that it provided its responses to the first two sets of discovery, further noting that the due dates for the remaining sets were still pending. NEP states that it does not seek to prohibit AEP Ohio's discovery requests as a general matter; however, it does seek to protect itself from requests that probe beyond the reconfiguration of master-metered service and NEP's role at the Apartment Complexes. NEP asserts that the inquiry upon which this case will turn is whether NEP is, or will be, engaged in the business of supplying electricity within the meaning of R.C. 4905.03 at the Apartment Complexes. According to NEP, discovery requests that are not related to this inquiry are unduly burdensome; plus, requests that focus on policy positions, such as questions regarding rates and consumer protections, are outside the scope of the hearing, especially considering the January 31, 2022 Entry denying OCC's intervention due to OCC's basis for intervention being predicated on policy positions. NEP believes AEP Ohio's discovery requests are extraordinarily broad in nature and seek information and documents that have no pertinence to the underlying factual dispute regarding the Apartment Complexes identified in AEP Ohio's complaint. NEP notes that that it held a discovery conference call on March 17, 2022, regarding the scope of AEP Ohio's discovery requests, where NEP requested that AEP Ohio limit the scope of such requests to the Apartment Complexes; however, AEP Ohio refused, which has resulted in an impasse between the parties.

{¶ 18} NEP argues that AEP Ohio's discovery requests seek to expand this inquiry to all of NEP's communities and to a time prior to NEP's October 2020 request to reconfigure the Apartment Complexes. Consequently, according to NEP, these broad requests are

irrelevant to the scope of the proceeding. NEP also asserts that Interrogatory No. 22 and RFP Nos. 4-8 request information and documents “since 2012,” which is nine years prior to the above request. NEP then proceeds to highlight a selection of specific interrogatories and RFPs for which it seeks protection. NEP argues that RFP No. 29, which requests documents demonstrating NEP’s corporate goals, objectives, mission, or purpose, is irrelevant and is arguably inclusive of every document in NEP’s possession. According to NEP, properly responding to such a request would impose an undue burden and expense on it. Further, NEP argues that RFP Nos. 22 and 23, requesting all documents evidencing communications by Teresa Ringenbach relating to or referring to submetering and AEP Ohio since October 1, 2020, respectively, include documents protected by privilege and would include almost all communications in Ms. Ringenbach’s possession since assisting property owners with submetering is a core element of NEP’s business. These requests, according to NEP, expand beyond AEP Ohio’s service territory and into contracts with other Ohio customers and other states, as well as may extend to Ms. Ringenbach’s personal communications. NEP next asserts that RFP Nos. 31 and 32, which request documents evidencing communications between NEP and any other third-party submetering company since October 1, 2020, referring to or relating to AEP Ohio or submetering or master meter service, respectively, bear no reasonable or relevant purpose to the matter at hand. Similarly, RFP No. 36, which requests that NEP provide all documents relating to any calculation or analysis by NEP of revenue specific to multi-family properties, is irrelevant to the matter at hand. Regarding the interrogatories, NEP takes issues with Interrogatory Nos. 44, 52, 59, 97, 118, 123, and 127, among others, noting that they are not limited in scope to the Apartment Complexes, have no limitation in scope, are applicable beyond AEP Ohio’s service territory, and reach into business operations in other states. NEP believes that the discovery requests, as posited, would require hundreds of thousands of documents to be turned over and would require NEP divulging day-to-day business activities that have no impact on the Apartment Complexes.

{¶ 19} NEP emphasizes that the scope of this proceeding is limited to the Apartment Complexes. NEP points to numerous passages within AEP Ohio's complaint where it believes AEP Ohio limits its scope to a "discrete set of facts" that AEP Ohio defines as circumstances surrounding the Apartment Complexes. According to NEP, AEP Ohio's December 17, 2021 memorandum contra NEP's motion for a stay and request for expedited ruling specifically stated that the only complexes at issue in the complaint are the Apartment Complexes, as did the affidavit of Angie M. Rybalt attached to the memorandum contra. NEP also argues that the January 31, 2022 Entry did not expand the scope of this proceeding. NEP contends that the parties had not raised scope as an issue prior to that Entry being issued, and the Entry referenced the complaint in relation to the Apartment Complexes in multiple instances, including stating that "the question of whether it must reconfigure the properties for NEP submetering is now presented to the Commission for decision." January 31, 2022 Entry at ¶ 26. NEP cautions that any expansion of this proceeding beyond the Apartment Complexes would increase the length of the hearing from one or two days to weeks. NEP also notes that, when the Supreme Court of Ohio examined the modified *Shroyer* test in *Wingo*, it held that the test's focus on profits, rates, and charges had nothing to do with the applicable jurisdictional statutory language. Here, NEP asserts that discovery requests relating to consumer protections, rates, fees and charges, disconnection procedures, payment plan and low-income assistance programs, and other policy issues are not relevant to the determination of jurisdiction in this matter.<sup>1</sup>

{¶ 20} In its memorandum contra, AEP Ohio first notes that NEP only substantively identified and discussed 13 discovery requests<sup>2</sup>, yet cites to numerous interrogatories and RFPs without discussion. AEP Ohio believes it cannot fairly respond to any challenged request that was only cited and not discussed. AEP Ohio believes its requests related to NEP's business practices at buildings other than the Apartment Complexes are directly

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<sup>1</sup> In a nearly page-long footnote, NEP cites to brief excerpts of numerous discovery requests it believes relate to these policy issues.

<sup>2</sup> AEP Ohio asserts that NEP specifically challenges RFP Nos. 22, 23, 29, 31, 32, and 36, as well as Interrogatory Nos. 44, 52, 59, 97, 118, 123, and 127.



probative of how NEP will conduct business at the Apartment Complexes, and NEP's business practices are directly relevant to the statutory definition of "electric light company" in R.C. 4905.03(C) since that definition centers on what kind of business in which NEP is engaged. According to AEP Ohio, NEP has not indicated that it plans to treat the Apartment Complexes differently than other multi-family buildings; therefore, for example, questions such as whether NEP permits residents at other buildings to enter into budget payment plans, what personal data NEP collects from residents at other buildings, and whether NEP contributes to low-income assistance are all probative of how NEP will conduct its business related to those matters at the Apartment Complexes. AEP Ohio states that the interrogatories challenged in NEP's motion are tied to specific rules or regulations that a public utility must follow, so NEP's answers will help shed light on the type of business NEP operates. Further, AEP Ohio argues that its discovery requests about NEP's business are targeted to support its allegation that NEP is "engaged in the business of supplying electricity" under R.C. 4905.03(C). According to AEP Ohio, the January 31, 2022 Entry 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." January 31, 2022 Entry at ¶ 26. Therefore, the question in this matter focuses on NEP's business model, not just its activities at the Apartment Complexes. And, according to AEP Ohio, NEP has provided no evidence to support its claim that NEP would be subjected to undue burden and expense if forced to respond to the challenged discovery requests, especially considering certain questions, such as whether lessees are permitted to enter into a budget plan for electric service charges, should require only a few minutes to answer with little expense. Further, AEP Ohio alleges that NEP has readily produced information about its business beyond the Apartment Complexes when NEP believes the answer casts it in a favorable light. For example, AEP Ohio asserts that NEP, in response to the first set of discovery requests, 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, and NEP produced a list of miscellaneous fees that it charges residents at all buildings, as well as a 52-page list of disconnections by community

for 2021. AEP Ohio believes NEP's selective approach is inappropriate and hinders AEP Ohio's ability to thoroughly and adequately prepare for participation at hearing.

{¶ 21} AEP Ohio also asserts that none of its discovery requests can reasonably be interpreted to request every email and document that NEP possesses. AEP Ohio argues that the challenged interrogatories only seek specific information from NEP, and the challenged RFPs are limited in time and mirror document requests that NEP previously made of AEP Ohio. Also, AEP Ohio contends that NEP failed to pursue all other reasonable means of resolving any differences between the parties prior to filing the motion for protective order, as required under Ohio Adm.Code 4901-1-24(B), since NEP never attempted to discuss additional reasonable limits on the scope of the challenged requests, even though AEP Ohio was willing to engage in such discussions. Contrary to NEP's assertions, AEP Ohio states that, during the March 17, 2022 discovery conference, NEP never raised the challenged requests and did not suggest any limits on their scope, instead focusing primarily on what NEP perceived as deficiencies in AEP Ohio's responses to NEP's discovery requests. According to AEP Ohio, NEP did not raise any concerns with burden or expense or communicate that NEP interpreted some of the requests as seeking all documents in NEP's possession. AEP Ohio believes that, had NEP raised these issues, the parties may have been able to reach a compromise; instead, AEP Ohio states that NEP filed this motion, which is emblematic of NEP's approach during this proceeding—to stonewall discovery and force AEP Ohio to respond to numerous motion filings.

{¶ 22} In regard to specific requests, AEP Ohio asserts that RFP No. 29, which requests documents demonstrating NEP's corporate goals, objectives, mission, or purpose, is indicative of the business NEP is engaged in under R.C. 4905.03(C) and probative of whether the provision of utility service is ancillary to NEP's primary business under the third prong of the *Shroyer* test. AEP Ohio states that it attempted to gather some of this corporate governance information on the Ohio Secretary of State's website; however, the purpose of the corporation was not listed in NEP's articles of incorporation, therefore AEP Ohio needs to request more information. AEP Ohio notes that it is not requesting every

email or document within NEP's possession, just documents that expressly state NEP's corporate goals and objectives, including, without limitation, corporate planning documents, mission statements, and presentations to investors. Regarding RFP Nos. 22, 23, 31, 32, and 36, AEP Ohio asserts that these challenged requests closely mirror the same requests NEP served upon AEP Ohio and that it is unfair for AEP Ohio to have to answer questions NEP is unwilling to answer. Further, to the extent NEP argues that the scope of discovery between the parties should be different, AEP Ohio asserts that NEP's counterclaim does not justify adopting different scopes of discovery. AEP Ohio should be able to ask the same or similar questions of NEP as NEP asks of AEP Ohio, reasoning that it should be permitted to properly defend itself against NEP. Next, AEP Ohio states that NEP provided AEP Ohio with an answer to Interrogatory Nos. 44 and 59, meaning the issues pertaining to those questions are moot, though AEP Ohio believes that the fact that NEP answered these questions underscores AEP Ohio's position above that NEP is only answering questions it perceives cast it in a favorable light. With regard to Interrogatory Nos. 52, 59, 97, 118, and 123, AEP Ohio argues that these requests relate to Commission rules that public utilities must follow. AEP Ohio claims that responses to these questions would provide a clear picture of what regulatory protections the Apartment Complex residents would lose if submetered by NEP, and these responses 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. Further, AEP Ohio argues that little burden exists to answering these questions. AEP Ohio distinguishes between the January 31, 2022 Entry denying OCC's intervention request due to its precedential interest in the policy issues of the case compared to the actual scope of this proceeding. That Entry, according to AEP Ohio, made its ruling in the limited context of examining the legal standard for intervention in Commission cases and had no bearing on the scope of the actual proceeding. Also, AEP Ohio requests the consumer protection information to examine NEP's business model whereas OCC requested the information for the protection of AEP Ohio's customers. Regarding Interrogatory No. 127, AEP Ohio asserts that there is no burden associated with answering a yes/no question concerning whether NEP has provided the same type of low-income support that AEP Ohio

has provided and that the purpose of this question is to elucidate what protections and benefits the Apartment Complex residents will lose if submetered by NEP.

{¶ 23} In its reply, NEP states that, contrary to AEP Ohio's contention that NEP's motion was focused on 13 specific discovery requests, the motion sought to limit the scope of discovery in its entirety for this proceeding and not just those specific discovery requests. According to NEP, producing information and documents relating to over 150 multifamily complexes is considerably burdensome and would require a protracted hearing whereby testimony and documents regarding each building would need to be presented. Instead of limiting requests to the Apartment Complexes and to a reasonable time period, NEP argues that AEP Ohio's discovery requests seek information and documents existing prior to the relevant time period at issue. Further, they are not limited in geographic location, and they potentially encompass all documents within NEP's possession. In response to AEP Ohio's assertion that NEP has responded inconsistently to some of the discovery requests by providing some information and documents related to buildings other than the Apartment Complexes, NEP states that it did so in a good faith attempt to avoid a dispute, but, nevertheless, producing such responses does not preclude NEP from seeking a protective order when AEP Ohio persists to serve requests beyond the scope of this proceeding. With regard to AEP Ohio's assertion that NEP failed to pursue all other reasonable means to resolve this dispute before filing the motion for protective order, NEP asserts that the scope of discovery was raised multiple times in writing and during the conference call between the parties. Specifically, NEP states that it raised its scope objection in response to AEP Ohio's first set of discovery, and this objection was challenged by AEP Ohio in correspondence dated February 15, 2022. NEP then repeated its objection in a response letter on February 18, 2022. NEP notes that, instead of responding further, AEP Ohio served its second set of discovery on NEP, within which NEP objected again to the scope, and AEP Ohio subsequently served three more sets of discovery that go beyond the scope of the proceeding. NEP claims that, during the March 17, 2022 conference call, it did raise the discovery issue, and AEP Ohio would not agree to the limitation; therefore, the parties are

at an impasse. Accordingly, NEP argues that it filed the motion for protective order in accordance with Commission rules. Further, NEP highlights that AEP Ohio did not directly respond to NEP's argument that the pleadings and briefing in this case admit that claims are limited to the Apartment Complexes.

{¶ 24} NEP next addresses AEP Ohio's claim that its discovery requests are probative of NEP's business model, characterizing AEP Ohio's requests as seeking information no matter the time period, geographic location, or relevant contract language. According to NEP, whether NEP is "engaged in the business of supplying electricity" is a narrower question than "what is NEP's business model" and implicates a narrower set of facts off which the proceeding is based. Also, in response to AEP Ohio stating that its questions about consumer protections were designed to see what benefits residents would lose if submetered by NEP, NEP argues that these questions examine potential harm to residents and emphasizes that "harm" is not a jurisdictional question. NEP points out that the Supreme Court of Ohio stated that harm is not a jurisdictional question but rather a merits question that can be answered only after Commission jurisdiction is determined. *Wingo* at ¶ 23. Finally, in response to AEP Ohio arguing that the parties' discovery cannot have different scopes, NEP disagrees and argues that its discovery requests to AEP Ohio can seek information on AEP Ohio's motive and intent in filing its complaint against NEP, information that is relevant to its defense and counterclaims.

## ***B. Discussion***

{¶ 25} Ohio Adm.Code 4901-1-24(A), in part, provides that "[u]pon motion of any party or person from whom discovery is sought \* \* \* an attorney examiner may issue any order that is necessary to protect a party or person from \* \* \* undue burden or expense. Such a protective order may provide that: \* \* \* (5) [t]he scope of discovery be limited to certain matters." Generally, the Commission's discovery rules encourage " \* \* \* the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings." Ohio Adm.Code 4901-1-16(A).

Ohio Adm.Code 4901-1-16(B), in part, states that “\*\*\* any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

{¶ 26} Having reviewed all relevant filings, the attorney examiner concludes that NEP’s motion for protective order should be granted, in part, and denied, in part. Initially, in terms of scope, the attorney examiner acknowledges that AEP Ohio points to the circumstances surrounding the Apartment Complexes as part of the impetus, along with the *Wingo* decision, for bringing the complaint. However, the complaint also claims NEP was “engaged in the business of supplying electricity for light, heat, or power, purposes to consumers within this state” under R.C. 4905.03(C), which the Supreme Court of Ohio in *Wingo* highlighted as the standard off of which to work when determining the Commission’s jurisdiction over a submetering company like NEP. *Wingo* at ¶ 26. As already articulated in the January 31, 2022 Entry denying NEP’s motion to dismiss, the attorney examiner stated that, given the unique circumstances presented here considering the open jurisdictional question from *Wingo*, “\*\*\* 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). January 31, 2022 Entry at ¶ 26. Further, the Entry explains that “\*\*\* 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.” January 31, 2022 Entry at ¶ 27. Consequently, examining this question necessitates that the scope of this proceeding will not be limited to circumstances related exclusively to the Apartment Complexes. We agree with AEP Ohio that examining whether NEP qualifies as an electric light company under R.C. 4905.03(C) requires an examination of what kind of “business” NEP “is engaged in” and that NEP’s business practices at other NEP buildings are probative of how NEP will conduct business at the Apartment Complexes. Also, notably, the third prong of the *Shroyer* test specifically asks whether the provision of utility

service is ancillary to the landlord's primary business. Therefore, an inquiry into NEP's business model and practices must be made, meaning AEP Ohio may request information and documents related to NEP's business that extend beyond the Apartment Complexes.

{¶ 27} The geographic scope of this proceeding will extend beyond the Apartment Complexes but should remain within AEP Ohio's service territory. This scope is consistent with the January 31, 2022 Entry, where the attorney examiner stated that "\*\*\* 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*." (Emphasis added); January 31, 2022 Entry at ¶ 27. Also, since this proceeding is not tied entirely to the Apartment Complexes, the attorney examiner does not believe that October 2020, the time frame during which NEP made its request to AEP Ohio to convert the Apartment Complexes to submetering and the timing that NEP advances as the proper scope cut-off, is an adequate measure of NEP's operations<sup>3</sup>. At the same time, the attorney examiner finds certain AEP Ohio discovery requests asking for documents spanning back to 2012 as being unduly burdensome and expensive for NEP and as being not reasonably calculated to lead to discovery of admissible evidence. Therefore, the scope for this proceeding will go back only as far as January 9, 2019, which marks the end of the Commission's investigation into submetering in Ohio in Case No. 15-1594-AU-COI, as it was the day the Fourth Entry on Rehearing was issued in that matter.

{¶ 28} Also, the attorney examiner agrees with AEP Ohio that the scope of discovery for the parties should not be different in this matter, and NEP should not be permitted to a broader scope of discovery due to its counterclaim. The complaint and counterclaim both, to some extent, center on the circumstances surrounding the Apartment Complexes, NEP's submetering practices and business, and AEP Ohio's actions when handling the submetering requests. Considering the overlapping nature of these facts and that both

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<sup>3</sup> The attorney examiner notes that some of AEP Ohio's discovery requests only seek documents from October 1, 2020, to the present. The decision here does not apply to requests that AEP Ohio already limited to a shorter time period than the scope articulated above by the attorney examiner.

parties will need adequate discovery to defend themselves against the other's claims, the attorney examiner believes a separate scope of discovery between the parties is not warranted.

{¶ 29} Regarding the discovery responses that NEP contends would cause undue burden and expense to produce, the attorney examiner initially notes that NEP cited to and substantively discussed 13 discovery requests, consisting of RFP Nos. 22, 23, 29, 31, and 36, as well as Interrogatory Nos. 44, 52, 59, 97, 118, 123, and 127. NEP also cited to numerous other discovery requests either at the end of a sentence or within footnotes in its memorandum. The attorney examiner agrees with AEP Ohio that it would be unfair to address challenges to discovery requests where such requests were not specifically identified and substantively discussed in the same manner as the 13 discovery requests; therefore, the attorney examiner will not address those citations and references to AEP Ohio's other discovery requests. Also, the attorney examiner notes that, according to AEP Ohio, NEP provided responses to RFP No. 44 and Interrogatory No. 59; therefore, the motion for protective order regarding these discovery requests are moot and should be denied.

{¶ 30} Regarding RFP No. 29, which requests documents demonstrating NEP's corporate goals, objectives, mission, or purpose, the attorney examiner finds unavailing NEP's argument that this request seeks all documents NEP possesses and is thus unduly burdensome and expensive. As AEP Ohio stated in its memorandum contra, it is not requesting every document in NEP's possession, and AEP Ohio also clarified what types of documents for which it is looking. These documents and communications, as clarified in AEP Ohio's memorandum contra, appear reasonably calculated to lead to the discovery of admissible evidence, considering they are relevant to 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 prong of the *Shroyer* test. Therefore, the motion for protective order regarding RFP No. 29 should be denied.



{¶ 31} Regarding RFP Nos. 22 and 23, which request all documents evidencing communications by Teresa Ringenbach relating to or referring to submetering and AEP Ohio since October 1, 2020, respectively, the attorney examiner finds that these requests are reasonably calculated to lead to discovery of admissible evidence. Generally, documents evidencing communication by Ms. Ringenbach, NEP's Vice President of Business Development, referring to submetering and AEP Ohio near the time of NEP's initial reconfiguration requests for the Apartment Complexes are certainly related to the issues at hand, and the requests are not overbroad since they are limited to specific terms and a shorter time period compared to the scope of this proceeding discussed above. Also, NEP notes its concern regarding these requests extending to other Ohio customers and other states. The attorney examiner reiterates that AEP Ohio is permitted to examine NEP's business practices only within AEP Ohio's service territory. Further, if NEP deems any of these documents or communications as privileged, as NEP worries some may be, it is welcome to state that objection to AEP Ohio as to specifically identified documents or communications when responding to the discovery requests. Therefore, the motion for protective order regarding RFP Nos. 22 and 23 should be denied.

{¶ 32} Regarding RFP Nos. 31 and 32, which request documents evidencing communications between NEP and any other third-party submetering company since October 1, 2020, referring to or relating to AEP Ohio or submetering or master meter service, respectively, the attorney examiner finds that these requests are reasonably calculated to lead to discovery of admissible evidence. Significantly, as noted above, the scope of discovery for each party in this proceeding is the same, and, as AEP Ohio demonstrated, the requests mirror NEP's similar discovery requests, with changes only to names and concepts to target NEP instead of AEP Ohio. For similar reasons, the attorney examiner finds that RFP No. 36 is reasonably calculated to lead to the discovery of admissible evidence; therefore, the motion for protective order regarding RFP Nos. 31, 32, and 36 should be denied.

{¶ 33} Regarding the final set of contested discovery requests, Interrogatory Nos. 52, 97, 118, 123, and 127, the attorney examiners agree with NEP that these go beyond the scope of the relevant inquiry into this case. In *Wingo*, the Court pointed out that the modified *Shroyer* test's second safe harbor provision involved comparing what a resident paid according to the submetering arrangement with what the utility would have charged, and further noted that the Commission justified this approach by claiming that a resident cannot be harmed if the resident pays the same or less than if the resident was served by the utility." *Wingo* at ¶ 23. The Court reasoned, however, that "\*\*\* whether someone is 'harmed' isn't a jurisdictional question; it is a merits question that can be answered only after it is determined that an activity falls within the PUCO's jurisdiction." *Wingo* at ¶ 23. The Court continued, "\*\*\* [t]he jurisdictional price line drawn by the PUCO has no connection to the statutory language that defines jurisdiction." *Wingo* at ¶ 24. AEP Ohio argues that these interrogatories are all tied to specific Commission rules that public utilities must follow, and that NEP should be required to respond so that the Commission can 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 submetered by NEP. As NEP argues, examining what protections customers may or may not lose if submetered by NEP are specifically harm-based inquiries. As discussed above, this proceeding is largely based on the jurisdictional question of whether NEP is a public utility. Questions centering on Commission-imposed consumer protections and what benefits consumers would purportedly lose if submetered by NEP fall beyond the jurisdictional line of this proceeding.

{¶ 34} Further, AEP Ohio argues that these consumer protection questions 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. The attorney examiner is not persuaded by this argument. The first prong of the *Shroyer* test specifies some examples of the special benefits to which it refers, namely accepting a grant of franchised territory, a certificate of public convenience and necessity, the use of eminent domain, and use of the public right of way for utility purposes. Contrarily, the Commission rules identified by AEP Ohio impose

requirements upon AEP Ohio and other public utilities that these entities must follow when providing service to customers. Accordingly, this argument does not pass muster at face-value and is even paradoxical since the Commission-imposed rules identified by AEP Ohio could not by their very nature equate to “special benefits” to which public utilities avail themselves. Furthermore, the attorney examiner believes these consumer protection questions pertain to policy considerations, which the Court in *Wingo* held are not related to the subject inquiry under R.C. 4905.03(C). *Wingo* at ¶¶ 23-25. Finally, most Commission rules affecting public utilities do not currently apply to NEP since it has yet to be determined whether NEP is a public utility or not; therefore, determining whether NEP follows such rules is irrelevant to the jurisdictional question of whether NEP is a public utility. Accordingly, NEP’s motion for protective order regarding Interrogatory Nos. 52, 97, 118, 123, and 127 should be granted.

{¶ 35} At this time, the attorney examiner finds it appropriate to establish a new procedural schedule for this proceeding:

- a. Discovery requests (except as to notices of deposition) shall be permitted until July 19, 2022.
- b. Parties should file testimony by August 2, 2022.
- c. Any motion to strike testimony should be filed by August 9, 2022.
- d. An evidentiary hearing in this matter should be scheduled to commence on August 23, 2022, at 10:00 a.m. at the office of the Commission, Hearing Room 11-C, 11th Floor, 180 East Broad Street, Columbus, Ohio 43215. The parties should register at the lobby desk and then proceed to the 11th Floor in order to participate in the hearing. As COVID-related restrictions are constantly evolving, instructions regarding safety requirements or accommodations for the hearing room may be forthcoming, either posted on the Commission website or communicated to the parties.

**IV. ORDER**

{¶ 36} It is, therefore,

{¶ 37} ORDERED, That NEP's motion for protective order should be granted, in part, and denied, in part, consistent with this Entry. It is, further,

{¶ 38} ORDERED, That parties observe the procedural schedule set forth in Paragraph 35. It is, further,

{¶ 39} 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

MJA/mef

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**in**

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

Summary: Attorney Examiner Entry granting the motion for protective order, in part, and denying, in part, as detailed herein; and setting the procedural schedule: discovery requests due July 19, 2022, testimony due August 2, 2022, motions to strike testimony due August 9, 2022, and an evidentiary hearing on August 23, 2022, at 10:00 a.m. electronically filed by Ms. Mary E. Fischer on behalf of Matthew Sandor, Attorney Examiner, Public Utilities Commission of Ohio

**This foregoing document was electronically filed with the Public Utilities  
Commission of Ohio Docketing Information System on**

**5/11/2022 5:19:34 PM**

**in**

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

Summary: Request Interlocutory Appeal electronically filed by Mr. Michael J.  
Settineri on behalf of Nationwide Energy Partners, LLC