

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

Duke Energy Ohio, Inc.

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Complainant,

)

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v.

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Case No. 22-279-EL-CSS

)

Nationwide Energy Partners, LLC

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Respondent.

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NATIONWIDE ENERGY PARTNERS, LLC'S MEMORANDUM CONTRA
THE MOTION TO INTERVENE BY THE OFFICE OF
THE OHIO CONSUMERS' COUNSEL

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NATIONWIDE ENERGY PARTNERS, LLC’S MEMORANDUM CONTRA
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I. INTRODUCTION

The Commission should deny the Office of the Consumers’ Counsel’s (“OCC”) petition to intervene because OCC has not shown an interest that warrants its intervention in a complaint proceeding involving a commercial property (the Somerset complex) owned by a commercial customer of Duke Energy Ohio, Inc. (“Duke Ohio”). The only interest OCC presents is enveloped in the policy and the precedential value of this case. OCC Mtn. to Intervene at p. 2 (“OCC is filing on behalf of Duke’s residential utility consumers where NEP is attempting to force these residential consumers to give up Duke’s electric utility service and instead take NEP’s submetering service.”).

OCC’s stated policy interest is clear on the face of its pleading. OCC states that its advocacy in this proceeding will focus on a policy that tenants should not lose “service protections they would normally receive when taking service from Duke.” OCC Mem. In Supp. at p. 1. OCC also argues that the rates for service should be “no more than what is reasonable.” *Id.* at p. 3. These are policy arguments that belong in the General Assembly—not in a complaint proceeding over construction requests at a commercial property. Such an interest does not warrant intervention. *See Ohio Power Company v. Nationwide Energy Partners, LLC*, No. 21-990-EL-CSS, Entry (Jan. 31, 2022) at 20 (denying OCC’s motion to intervene in a similar complaint case filed by AEP Ohio against NEP).¹

¹ *See also In re Complaint of Mark A. Whitt*, Case No. 15-697-EL-CSS, Entry (Nov. 18, 2015) at 5 (denying OCC’s motion to intervene in a complaint against NEP); *In re Ohio Schools Council, et al. v. First Energy Solutions Corp.*, Case No. 14-1182-EL-CSS, Entry (Sept. 4, 2014) at 3-4 (denying motions to intervene); *In re Complaint of the City of St. Clairsville*, Case No. 17-1750-EL-CSS, Finding and Order (Apr. 11, 2018) at 11-12 (denying motions to intervene).

The ultimate issue presented by this case is whether NEP is (or will be) at the Somerset complex operating as a “public utility” under Ohio law and therefore subject to the jurisdiction of the Commission. This inquiry is strictly legal in nature and does not have a policy dimension to which OCC’s stated interests might be relevant. *Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 163 Ohio St. 3d 208, 2020-Ohio-5583, 169 N.E.3d 617, ¶ 23 (“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”) and ¶ 24 (“defining the parameters of the PUCO’s jurisdiction is up to the General Assembly, not the PUCO”).

Furthermore, OCC’s participation in this proceeding will unduly prolong and delay these proceedings given the likely discovery OCC will engage in to support its policy arguments. Likewise, OCC will not significantly contribute to a full development and equitable resolution of the factual issues in this complaint proceeding relating to a commercial property owner’s request to reconfigure a commercial property to master-metered service. OCC also cannot establish that the existing parties in this proceeding do not represent OCC’s stated interests. The Commission should deny OCC’s motion to intervene.

II. PROCEDURAL HISTORY

On March 30, 2022, Duke Ohio filed a complaint against NEP. Duke Ohio asserts that NEP has or will cause harm to the “144 residential customers” at Somerset, “if NEP is permitted to take over electric service at Somerset.” Compl. at ¶ 52; *see also id.* at Prayer for Relief B (“that if NEP were to take over electric distribution service to the Somerset customers (whether as a purported ‘agent’ of the property owner or otherwise), NEP would be operating as an ‘electric light company,’ a ‘public utility,’ an ‘electric supplier,’ and an uncertified competitive retail electric service provider”). The only act that Duke Ohio alleges that NEP has taken as to the Somerset

complex is “NEP’s unlawful demands that Duke Energy Ohio abandon its existing customers and allow NEP to submeter certain multi-unit residential properties in Duke Energy Ohio’s service territory.” *Id.* at ¶ 7. NEP filed its answer and counterclaim on May 20, 2022.

On May 12, 2022, OCC filed a motion to intervene “on behalf of Duke’s residential utility consumers where NEP is attempting to force these residential consumers to give up Duke’s electric utility service and instead take NEP’s submetering service.” OCC Mtn. to Intervene at p. 2. OCC’s claimed standing in this matter rests on it interjecting itself into the **nonresidential** customers’ construction requests and who submits them to the utility. Ultimately and similar to its prior requests, however, OCC seeks sweeping Commission precedent that enables Duke Ohio and perhaps other utilities to refuse (illegally) the commercial owners from configuring their service to master-metered service.

III. ARGUMENT

A. Standard of Review.

Pursuant to R.C. 4903.221, any person who may be adversely affected by a Commission proceeding may intervene in such proceeding provided that the motion is timely (R.C. 4903.221(A)). Under Rule 4901-1-11, a person seeking to intervene must show that it has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person’s interest is adequately represented by existing parties. In deciding whether to permit intervention, the Commission considers the following criteria:

- (1) The nature and extent of the prospective intervenor’s interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;

(3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings;

(4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

(5) The extent to which the person's interest is represented by existing parties.

Ohio Adm.Code 4901-1-11(A),(B).

“Additionally, the Commission has long held that an interest in the precedential value of a case is not sufficient reason for intervention. For example, this Commission has held that a legitimate interest in the precedent of a complaint case is not sufficient reason for intervention, but parties with a legitimate interest in the precedent may have equally legitimate grounds to file a separate complaint case.” *In re Complaint of Mark A. Whitt*, Case No. 15-697-EL-CSS, Entry (Nov. 18, 2015) at 3, 5 (denying OCC's motion to intervene in a complaint against NEP) (citations omitted).² See also *Ohio Power Company v. Nationwide Energy Partners, LLC*, No. 21-990-EL-CSS, Entry (Jan. 31, 2022) at 18 (“The interests stated by OCC in their motion and reply may ultimately be at issue in subsequent Commission proceedings, but this type of precedential interest is precisely what the Commission has long held to not be a sufficient reason for granting intervention.”).

In this proceeding, OCC has the burden to establish that it should be granted intervention. As discussed below, OCC has not established a reason for the Commission to grant OCC intervention in a complaint proceeding over commercial account issues.

² See also *In re Complaint of the City of Cleveland*, Case No. 01-174-EL-CSS, Entry (Mar. 29, 2001) (“the Commission has long held that interest is not a sufficient basis for intervention”); *In re Ohio Schools Council, et al, v. FirstEnergy Solutions Corp.*, Case No. 14-1182-EL-CSS, Entry (Sep. 4, 2014) at 3-4 (“the Commission has long held that such an interest is not a sufficient reason for intervention”); and *In re Complaint of the City of St. Clairsville*, Case No. 17-1750-EL-CSS, Finding and Order (Apr. 11, 2018) at 12 (“the Commission has long held that a party's legitimate interest in the precedent, which might be set in a case, is an insufficient basis for intervention”).

B. OCC has not made a Sufficient Showing to Warrant Intervention in this Complaint Proceeding.

1. OCC's Interest in the Precedent of the Complaint is Not Sufficient for Intervention.

OCC's precedential interests are of a nature and extent that do not warrant intervention. Duke Ohio's complaint involves a narrow set of circumstances relating to the Somerset complex. The complaint is not a statewide matter, or even a matter for all Duke Ohio customers as OCC asserts. OCC Mtn. to Intervene at p. 2 ("on behalf of Duke's residential utility consumers where NEP is attempting to force these residential consumers to give up Duke's electric utility service and instead take NEP's submetering service."). The complaint was filed in response to construction work order requests to Duke Ohio on behalf of a nonresidential customer who is the owner of a specific location—the Somerset complex.

Despite OCC's halfhearted attempt to hide its true interest or legal position, OCC does not intend to limit its interest to the facts at issue in this case and, instead, intends to establish a policy and precedent across all of Duke Ohio's territory (and likely all of Ohio) as it relates to submetering (as it attempted to do in prior proceedings). OCC Mtn. to Intervene at p. 2; *see also Ohio Power Company v. Nationwide Energy Partners, LLC*, No. 21-990-EL-CSS, Entry (Jan. 31, 2022) at 18. OCC's advocacy is focused upon establishing a policy that tenants should not "lose important service protections they would normally receive when taking service from Duke." OCC Mem. In Supp. at p. 1. "OCC's advocacy for residential consumers will include advancing the position that they should not be forced to take NEP's submetering service or **lose service protections** they currently receive in the event NEP is permitted to provide submetering." *Id.* at p. 2-3 (emphasis added). And, that "**regardless of who ultimately provides service**, rates should be no more than what is reasonable." *Id.* at p. 3. These interests and policy positions are clearly not limited to or

focused on the facts at issue in this proceeding. OCC's interest and policy positions are related to arguments that the case will create a significant precedent.

Indeed, the Commission has rejected a similar request by OCC to intervene in a complaint proceeding regarding submetering. Earlier this year, in *Ohio Power Company v. Nationwide Energy Partners, LLC*, No. 21-990-EL-CSS, Entry (Jan. 31, 2022), the Commission was confronted with OCC's motion to intervene, in another complaint case brought against NEP. The Commission denied OCC's motion to intervene, stating at Finding 37 of the January 31, 2022 Entry (emphasis added):³

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

As the Commission determined in Case No. 21-990-EL-CSS, OCC's interest must be real and direct as to the factual allegations contained in the complaint. The broader residential interests that OCC alleges regarding service protections and rates are not grounded in the particular facts set forth in Duke Ohio's complaint. Instead, OCC's stated interests are in the broad policy and

³ The Commission went through a similar analysis at Finding 9 in its denial of several motions to intervene in a submetering case brought against NEP in 2015. *In re Complaint of Mark. A. Whitt*, Case No. 15-697-EL-CSS, Entry (Nov. 18, 2015) at 3, 5; *see also In re Ohio Schools Council, et al. v. First Energy Solutions Corp.*, Case No. 14-1182-EL-CSS, Entry (Sept. 4, 2014), at 3-4.

precedent that this case may result. OCC has not shown a valid interest under subsection (B)(1) for intervening in this proceeding.

Subsection (B)(2) requires a showing that the legal positions advanced by the prospective intervenor are related to the merits of the case. Once again, Duke Ohio's complaint is regarding the construction by NEP as the authorized representative for the property owner of the Somerset complex. If not dismissed in advance, there will be an application of the jurisdictional statute. *Wingo* at ¶ 26. Policy issues, which would necessarily include the consumer protection issues raised by OCC, are not relevant to the jurisdictional determination. *See id.* at ¶ 22-25. OCC's views on submetering are not relevant to Duke Ohio's complaint on the construction requests, and OCC's advocacy to preserve or impose utility consumer protections for tenants leasing apartments from landlords and to have rate regulation adds nothing to this analysis.

2. OCC's Intervention Will Unduly Prolong and Delay this Proceeding.

OCC states in its motion to intervene that it is filing (at least) on behalf of all Duke Ohio's residential utility customers. OCC Mtn. to Intervene at p. 2. If OCC is permitted to expand this case from the construction requests for the Somerset complex to the interests of all "700,000" of Duke Ohio's residential utility customers, it is certainly foreseeable that this case will be unduly prolonged and delayed. Compl. at ¶ 1. OCC seeks to expand Duke Ohio's complaint to include all "non-landlord submetering companies like NEP." OCC Mtn. to Intervene at p. 1. This includes not only all of Duke Ohio's 700,000 residential utility customers, but arguably every "non-landlord submetering company[y]" in the state of Ohio.⁴ *Id.* Additionally, as in Case No. 21-990-EL-CSS,

⁴ OCC intentionally avoids reference to Duke Ohio's 700,000 residential utility customers or Duke Ohio's service territory to attempt to avoid a similar denial to its motion as provided in *Ohio Power Company v. Nationwide Energy Partners, LLC*, No. 21-990-EL-CSS, Entry (Jan. 31, 2022). *Compare* at 18 ("OCC's stated interest in ensuring protections for AEP Ohio's 1.3 million residential consumers and the reasonableness of rates changed to residential customers are concerns within the purview of OCC's authorization under R.C. Chapter 4911, but they are not the issues that will be litigated in this proceeding.") However, OCC's motion in this proceeding goes further as now there is no limitation in the scope of its intentions.

“[t]he policy positions advanced by OCC in this case would also unnecessarily expand the scope of the proceeding, which could both distract from the main focus of the case and unduly prolong and/or delay proceedings.” Entry at 18; *see also Whitt, supra*, Entry at p. 6 (OCC’s intervention will “broaden the scope of this complaint to every submetering situation or scenario in the state of Ohio, as well as the scope of the Commission’s exclusive jurisdiction, which we find would unduly prolong or delay this case”). Accordingly, OCC’s motion also fails under Subsection (B)(3).

3. OCC Will Not Contribute to Full Development and Equitable Resolution of the Factual Issues in this Case.

OCC also cannot establish significant contribution to the factual issues in Duke Ohio’s complaint under Subsection (B)(4) based upon its precedential interest related to broader consumer protections and rates. OCC asserts without support or example that its intervention will “significantly contribute” to the factual issues in Duke Ohio’s complaint. Yet, OCC does not assert any information concerning the Somerset complex or any contractual arrangements with NEP. OCC also has no additional information regarding Duke Ohio’s alleged claims regarding NEP’s submission of construction work order requests on behalf of the Somerset complex owner to Duke Ohio to configure the property to master-metered service that forms the basis of Duke Ohio’s complaint. OCC is intervening to pursue its own agenda and attempting to expand this issue to each of Duke Ohio’s residential utility customers and to seek a precedential ruling. OCC’s only interest is the underlying legal issue—which the Commission also determined in Case No. 21-990-EL-CSS—“the attorney examiner does not believe OCC’s participation will significantly contribute to the full development and equitable resolution of the case.” Entry at 18; *see also Whitt, supra*, Entry at p. 6 (finding OCC’s participation “will not significantly contribute to the full development and equitable resolution of the factual issues in this case.”).

As established in *Wingo*, consumer protections (i.e., reasonableness of rates, etc.) and other “harm-based inquiries” are not part of the jurisdictional question in this proceeding. *Ohio Power Company v. Nationwide Energy Partners, LLC*, No. 21-990-EL-CSS, Entry (May 6, 2022), at 33, citing *Wingo* at ¶ 23 (“* * * 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.”). The *Wingo* Court’s direction to the PUCO is that the relevant legal determination in this case cannot be based on the policy and consumer protection issues OCC raises. Simply, OCC’s interest has nothing to contribute to any jurisdictional issues in this proceeding. Thus, OCC’s motion similarly fails under Subsection (B)(4).

4. The Existing Parties Adequately Represent the Interests OCC Asserts as a Basis for Intervention.

The Commission should also find that OCC’s interests in this proceeding (if any) can be adequately represented by Duke Ohio. OCC states, generally, that it has an interest in this case as the advocate for residential utility customers.⁵ OCC Mem. in Supp. Mtn. to Intervene at p. 3. Once again, this is a case regarding NEP’s submission of construction work order requests on behalf of the Somerset complex owners—nonresidential customers. OCC does not contend it has, and does not have, an interest in the outcome of this dispute itself—only the underlying legal issue and the precedent this case may create. Indeed, OCC’s interest is not in the jurisdictional question before the Commission, but whether Duke Ohio’s residential utility consumers will be forced to take “submetering services without **adequate consumer protections**.” *Id.* To the extent the complaint is not dismissed, Duke Ohio has raised the same issues as OCC regarding the alleged loss of “consumer protections” in the complaint. *See, e.g.*, Compl. at ¶¶ 52-57. Even if the Commission

⁵ OCC also does not allege or identify the real and substantial interest that the residential utility customers have in the case at issue. OCC relies on generalized statement and its over broad interest in the dispute generally. OCC Mem. in Supp. Mtn. to Intervene at p. 3.

allowed the consideration of OCC's precedential and policy interests in this case (which it should not), the interests OCC asserts to protect and alleged harm it seeks to prevent are already adequately protected by Duke Ohio's participation. Thus, OCC cannot satisfy the criteria under OAC Rule 4901-1-11(B)(5).

C. OCC Does Not Have a Blanket Right to Intervene in PUCO Proceedings.

Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 384, 2006-Ohio-5853, at ¶¶ 13-20 does not support intervention, and the case is easily distinguishable from the case at issue.

In *Ohio Consumers' Counsel v. Pub. Util. Comm.*, the Court held that the Commission abused its discretion when the Commission denied OCC's motions to intervene in two accounting cases, finding that (1) "[t]he Consumers' Counsel's interests were not represented by any other party to the proceedings, and [2] there is no suggestion in the record that intervention would have unduly delayed the proceedings or caused prejudice to any party." 2006-Ohio-5853 at ¶ 18. This is not the case here. Duke Ohio is bringing the case, and asserts the same precedential issue as OCC and asserts the same consumer protection and policy issues that OCC raises. Compl. at ¶¶ 52-57. Furthermore, NEP has expressly identified the undue delay and prejudice that will occur if OCC's motion to intervene is granted including, but not limited to, responding to OCC discovery.

OCC does not have a blanket right to intervention and cannot repeatedly point to *Ohio Consumers' Counsel* as basis for intervention.⁶ Instead, as with every case, OCC must show that it satisfies the intervention criteria. It has not made such a showing here and its motion should be denied.

⁶ A more appropriate case to consider by the Commission is *Ohio Power Company v. Nationwide Energy Partners, LLC*, No. 21-990-EL-CSS, Entry (Jan. 31, 2022).

IV. CONCLUSION

OCC has no legitimate basis to intervene in this case. OCC's interest is merely in the precedent that may result and the policy arguments it wishes to assert, not the factual dispute or jurisdictional question that Duke Ohio has alleged in its complaint regarding the Somerset complex owners' request through NEP to configure the owner's buildings and property to a master-meter configuration. This case should not be expanded to allow OCC to pursue its policy arguments on submetering and how it should be regulated. Accordingly, the Commission should deny OCC's motion to intervene as it has in the past on similar intervention requests. *See, e.g., Ohio Power Company v. Nationwide Energy Partners, LLC*, No. 21-990-EL-CSS, Entry (Jan. 31, 2022) at 18.

Respectfully submitted,

/s/ Michael J. Settineri

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