

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Duke Energy Ohio, Inc.)	
)	Case No. 22-279-EL-CSS
Complainant,)	
)	
v.)	
)	
Nationwide Energy Partners, LLC)	
)	
Respondent.)	

**REPLY TO NATIONWIDE ENERGY PARTNERS' MEMORANDUM CONTRA
OCC'S MOTION TO INTERVENE
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

NEP – a company which Duke rightly asserts is operating as a public utility without authorization¹ – wants to deny consumers the voice of their state advocate (the Ohio Consumers’ Counsel) on issues affecting their essential electricity service. The PUCO should instead *welcome* consumer advocacy on submeterer/reseller issues. The residential consumers of Duke² who are served by NEP may be “adversely affected”³ by NEP’s⁴ demands to resell (submeter) electric utility service at Somerset apartment complex. If NEP prevails, apartment complex residents could pay higher rates and lose many of the consumer protections they receive when Duke provides service under PUCO regulation.

¹ See Complaint of Duke Energy Ohio, Inc. (“Complaint”) (Mar. 30, 2022), at ¶¶ 20-23.

² Duke Energy Ohio, Inc. (“Duke”).

³ R.C. 4903.221.

⁴ Nationwide Energy Partners, LLC (“NEP”).

According to NEP, OCC's intervention should be denied because residential consumers have no interest in the outcome of this case.⁵ That is patently false. The apartment complex residents will be forced to take – and pay for – NEP's sub-metered electric utility service. These consumers have a right to be heard under Ohio law, including R.C. 4903.221. OCC satisfies the criteria for intervention in this case,⁶ and the PUCO should grant OCC's motion to intervene.

II. ARGUMENT

A. The residential consumers NEP wants to submeter electric utility service to have real and substantial interests in this complaint, and those interests should be represented by OCC.

NEP claims that OCC cannot demonstrate an interest to justify intervention because this is a “complaint proceeding over construction requests at a commercial property.”⁷ According to NEP, residential consumers living in the apartment complexes have no “real and direct”⁸ interest in this case. NEP states that because “[t]he 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.”⁹ NEP's arguments should be rejected. The fact that Duke filed its complaint as the result of NEP's construction requests on behalf of nonresidential property owners does not negate the harm the apartment complex residents ultimately may suffer if they can only take electric utility service provided through NEP.

⁵ See e.g., NEP Memorandum Contra (May 26, 2022), at 1, 5.

⁶ R.C. 4903.221; Ohio Adm. Code 4901-1-11.

⁷ NEP Memorandum Contra, at 1.

⁸ NEP Memorandum Contra, at 6.

⁹ NEP Memorandum Contra, at 5.

NEP also argues that the interests of the residential consumers OCC seeks to represent “are not grounded in the particular facts set forth in Duke Ohio’s complaint.”¹⁰ That is also wrong. Duke’s complaint states that if it is forced to abandon service to Somerset, NEP will become the provider of electric utility service to the complex’s residential consumers.¹¹ NEP is a submetering service company largely unregulated by the PUCO.¹² Thus, residential consumers who receive submetering service from NEP will lose the protections they receive when they are served by Duke, the PUCO regulated utility.¹³

Duke’s complaint states that 515 residential consumers will be harmed by NEP’s demands to take over electric utility service to the Somerset apartment complex.¹⁴ Duke claims that the resulting harms to residential consumers include: higher charges;¹⁵ the inability to choose a competitive retail supplier;¹⁶ no access to budget plans to help pay bills;¹⁷ and loss of other important consumer protections regarding disconnections and service quality set forth in the PUCO’s rules and Ohio law.¹⁸

Therefore, over 500 of Duke’s residential consumers have real and substantial interests firmly grounded in the complaint. Their voices should not be silenced by NEP.

¹⁰ NEP Memorandum Contra, at 6.

¹¹ Duke Complaint, at ¶ 52.

¹² Duke Complaint, at ¶ 2.

¹³ Duke Complaint, at ¶ 55.

¹⁴ Duke Complaint, at ¶ 25.

¹⁵ Duke Complaint, at ¶ 58.

¹⁶ Duke Complaint, at ¶ 53.

¹⁷ Duke Complaint, at ¶ 54.

¹⁸ Duke Complaint, at ¶ 55.

NEP's claim that OCC's only interest is the precedential value of this case¹⁹ has no merit. OCC's motion to intervene should be granted.

B. The PUCO wrongly denied intervention to OCC in previous cases regarding NEP. The PUCO should not deny OCC intervention in this case to represent the interests of residential consumers who could lose their Duke electric utility service.

NEP argues that OCC's intervention in this case should be denied based on an Attorney Examiner's decision to deny OCC intervention in another submetering case involving NEP, *Ohio Power Company v. Nationwide Energy Partners, LLC*, Case No. 21-990-EL-CSS, Entry, (Jan. 31, 2022). However, OCC filed an interlocutory appeal *directly* to the PUCO Commissioners (under Ohio Administrative Code 4901-1-15(A)(2)) of that unlawful decision by the Attorney Examiner.²⁰ The PUCO Commissioners have not yet ruled on OCC's Interlocutory Appeal. Thus, NEP's reliance on the Attorney Examiner's decision denying OCC intervention in *Ohio Power Company* is misplaced and premature.

NEP also relies on the PUCO's prior decision to deny OCC intervention in another complaint case against NEP, *In re Complaint of Mark Whitt*, Case No. 15-697-EL-CSS (Whitt Complaint).²¹ However, the PUCO's November 18, 2015 Entry denying OCC intervention in the Whitt complaint should not control here.

Indeed, the Whitt complaint concerned a *single* residential consumer complainant (Mark Whitt) against NEP.²² As NEP acknowledged in that case, Mr. Whitt was (and still is)

¹⁹ See NEP Memorandum Contra, at 5-6.

²⁰ See *Ohio Power Company v. Nationwide Energy Partners, LLC*, Case No. 21-990-EL-CSS, OCC's Interlocutory Appeal to Commissioners (Feb. 7, 2022).

²¹ NEP Memorandum Contra, at 6.

²² See Case No. 15-697-EL-CSS, Complaint of Mark Whitt (Apr. 10, 2015).

an attorney experienced in utility regulatory matters before the PUCO.²³ As such, Mr. Whitt was fully capable of representing his own interests in the matter. Further, OCC's motion to intervene sought intervention on behalf of all Ohio residential utility consumers.²⁴ Because the Whitt complaint involved a dispute between a single residential customer and NEP, both of whom were represented by experienced counsel, the PUCO denied intervention to OCC and others for failing to demonstrate how they represented the interests of either Mark Whitt or NEP.

By contrast, Duke's complaint in this case directly impacts *over five hundred* apartment complex residential utility consumers who are likely inexperienced in litigating matters before the PUCO. OCC's motion to intervene specifically states that OCC seeks intervention "on behalf of Duke's residential utility customers, *where NEP is attempting to force these residential consumers to give up Duke's electric utility service.*"²⁵ As set forth in Duke's complaint, the apartment complex residents have real and substantial interests in this case, and they deserve representation by the statutory residential utility consumer advocate, OCC.

In addition, although OCC's intervention in the Whitt complaint case was denied (mistakenly in our view), the PUCO stated that its decision did not foreclose OCC and other parties from representing consumers' interests through participation in the PUCO-ordered investigation into submetering in Case No. 15-1594-AU-COI. There, OCC and other parties had "an opportunity to contribute to the full development and equitable resolution of the

²³ Case No. 15-697-EL-CSS, NEP Memorandum Contra to OCC's Motion to Intervene (May 21, 2015), at 2.

²⁴ Case No. 15-697-EL-CSS, OCC's Motion to Intervene (May 6, 2015).

²⁵ OCC's Motion to Intervene, at 2 (emphasis added).

underlying legal issue.”²⁶ OCC did participate in the PUCO’s submetering investigation, which resulted in the PUCO’s adoption of the so-called “modified *Shroyer* test” to evaluate whether submetering companies like NEP operate as public utilities.²⁷ The modified *Shroyer* test was subsequently reversed by the Supreme Court of Ohio (“Court”) in *In re Wingo*, 2020-Ohio-5583.

If OCC’s intervention in this case is denied, there *is no present opportunity* to represent the interests of the residential consumers who have lost or will lose their Duke electric utility service while this case is pending at the PUCO. Nor will OCC have “an opportunity to contribute to the full development and equitable resolution”²⁸ of whether NEP acts as a public utility. The PUCO has not settled the jurisdictional issue since the modified *Shroyer* test was reversed by the Court. That is because on remand to the PUCO, the complainant in *Wingo* filed a notice of voluntary dismissal, which was granted by the PUCO.²⁹ Thus, the question of whether NEP acts unlawfully as a public utility is not settled, and there is no other PUCO proceeding to resolve the issue where the interests of the apartment complex residents will be represented.

In sum, the PUCO’s denial of intervention to OCC in the Whitt complaint should have no bearing on OCC’s motion to intervene here. OCC should be granted intervention in this case to represent the interests of the residential consumers who will be adversely affected if they are forced take electric utility service from NEP. Moreover, as OCC stated in

²⁶ Case No. 15-697-EL-CSS, PUCO Entry, (Nov. 18, 2015), at ¶ 9.

²⁷ Case No. 17-202-EL-CSS, PUCO Entry (Oct. 24, 2019) at ¶¶ 64-68, 70-78.

²⁸ Case No. 15-697-EL-CSS, PUCO Entry, (Nov. 18, 2015), at ¶ 9.

²⁹ See *In re Complaint of Wingo*, Case No. 17-2002-EL-CSS, Entry (Jul. 14, 2021).

its motion to intervene, the interests of these residential consumers cannot be adequately represented by Duke, as it also represents the interests of its shareholders.

C. OCC satisfies the remaining criteria for intervention under Ohio law and the PUCO's rules. The PUCO should grant OCC's motion to intervene.

As explained in the motion to intervene and memorandum in support, OCC satisfies all the criteria for intervention in R.C. 4903.221 and Ohio Adm. Code 4901-1-11.³⁰ NEP's arguments to the contrary should be rejected.

NEP claims that OCC cannot demonstrate that its legal position relates to the merits of the case as required by R.C. 4903.221(B)(2) and Ohio Adm. Code 4901-1-11(B)(2).³¹ OCC's legal position is that the residential consumers in the apartment complexes at issue should not pay unreasonable rates and lose many of the consumer protections they normally receive for adequate service under the law (including R.C. 4905.22) when Duke – the PUCO regulated utility – provides electric service.

NEP claims that these issues are not relevant to this complaint case because NEP is acting on behalf of Duke's nonresidential property owner customers.³² That argument should be rejected. As noted above, Duke's complaint alleges numerous harms to the residential consumers if NEP provides submetering service to the Somerset apartment complex. Further, the only reason NEP submitted construction requests to Duke in the first place was so NEP can submeter service to the apartment complex residents. NEP's claim that consumer protection issues are irrelevant to this case is wholly disingenuous.

³⁰ OCC's Motion to Intervene, Memorandum in Support, at 1-4.

³¹ NEP Memorandum Contra, at 7.

³² NEP Memorandum Contra, at 5.

NEP argues that OCC's intervention will unduly prolong and delay the proceedings in violation of R.C. 4903.221(B)(3) and Ohio Adm. Code 4901-1-11(B)(3).³³ NEP states that "OCC seeks to expand this proceeding to include all 'non-landlord submetering service companies like NEP'" and "all '700,000' of Duke Ohio's residential utility consumers.'"³⁴ NEP misstates OCC's motion. OCC's motion states the following for background: "Today's non-landlord submetering companies like NEP seek to provide utility service and profit from their sales to consumers, without providing the consumer protections available from their local utility."³⁵ Nowhere in the motion does OCC ask the PUCO to expand this proceeding to include all non-landlord submetering companies. Likewise, OCC's statement that it filed the motion "on behalf of Duke's residential utility customers, *where NEP is attempting to force these residential consumers to give up Duke's electric utility service*"³⁶ merely reflects the fact that OCC has authority to represent all of Duke's residential consumers under R.C. Chapter 4911. OCC's statement does not mean that OCC intends to broaden the scope of this proceeding to investigate every submetering scenario in Duke's service territory as NEP claims.³⁷

NEP argues that OCC will not contribute to the full development or equitable resolution of the factual issues in this case, as required by R.C. 4903.221(B)(4) and Ohio Adm. Code 4901-1-11(B)(4).³⁸ The PUCO should reject this argument as well.

³³ NEP Memorandum Contra, at 7.

³⁴ NEP Memorandum Contra, at 7 (quoting OCC's Motion to Intervene, at 1).

³⁵ OCC's Motion to Intervene, at 1.

³⁶ OCC's Motion to Intervene, at 2 (emphasis added).

³⁷ NEP Memorandum Contra, at 7.

³⁸ NEP Memorandum Contra, at 8.

First, it goes without saying that there will be no “equitable resolution” of the factual issues in this case for residential consumers if OCC is denied intervention. OCC’s intervention is needed to represent the interests of those who may be forced to give up Duke’s electric utility service and all the consumer protections that go with it. According to NEP, these consumer protection “policy” issues are irrelevant.³⁹ But as explained above, and in Duke’s complaint, the apartment complex residents have real and substantial interests in this case. OCC should be granted intervention toward an equitable resolution of the factual issues for the residential consumers involved.

Second, NEP claims OCC cannot contribute because it does not provide any information in the motion regarding NEP’s contracts with the apartment complex owners or NEP’s construction order requests to Duke.⁴⁰ NEP’s argument makes no sense. How would OCC have this information before intervening in the case? The purpose of OCC’s intervention is to develop and contribute to the record through information gained in the case.

NEP argues that OCC does not satisfy Ohio Adm. Code 4901-1-11(B)(5) because OCC cannot demonstrate that its interests are not already represented by the parties.⁴¹ This argument should also be rejected. Currently, the two parties to the case are Duke and NEP. Of course, NEP does not represent the interests of the apartment complex residential consumers. NEP does not even believe they have an interest in this matter.⁴² Duke also does

³⁹ NEP Memorandum Contra, at 8.

⁴⁰ NEP Memorandum Contra, at 8.

⁴¹ NEP Memorandum Contra, at 9.

⁴² See *e.g.*, NEP Memorandum Contra, at 1, 5-6.

not represent the interests of the apartment complex residents. Duke represents its shareholders' business interests.

Thus, Duke does not represent the interests of the apartment complex residents as NEP contends.

OCC, on the other hand, is in the unique position of being the statutory legal representative for Ohio's residential utility consumers. OCC represents *only* residential utility consumers without competing interests. Accordingly, the PUCO should grant OCC's motion to intervene.

Finally, NEP claims that OCC cites the Court's decision in *Ohio Consumers Counsel v. Public Util. Comm.*⁴³ as providing a "blanket right to intervene in PUCO proceedings."⁴⁴ OCC relies on *Ohio Consumers' Counsel* for the proposition that OCC has a right to intervene in cases when it files a motion addressing how it satisfies the intervention criteria set forth in Ohio law and the PUCO's rules. And the Court in *Ohio Consumers' Counsel* held that "intervention ought to be **liberally allowed** so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO."⁴⁵ The PUCO very recently cited this holding when it granted OCC's motion to intervene over a party's opposition in another case.⁴⁶ The Court's decision should not be flouted by NEP (nor by the PUCO). OCC has demonstrated that it satisfies the criteria for intervention under Ohio law and the PUCO's rules, and the PUCO should grant OCC's motion to intervene.

⁴³ 111 Ohio St.3d 384, 2006-Ohio-5853.

⁴⁴ NEP Memorandum Contra, at 10.

⁴⁵ 111 Ohio St.3d 384, 2006-Ohio-5853, ¶ 20 (emphasis added).

⁴⁶ See *In the Matter of the Commission's Investigation of XOOM Energy Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-267-GE-COI, Entry (May 20, 2022), ¶ 10.

III. CONCLUSION

Residential consumers could be subject to unreasonable electric rates and inadequate electric service if NEP prevails in this case and provides submetering services to the apartment complex at issue. OCC satisfies the standards in R.C. 4903.221 and O.A.C. 4901-1-11 for intervention in this case. Consumers deserve to be heard through OCC, the statutory representative of consumers. To protect consumers, the PUCO should grant OCC's motion to intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply to Nationwide Energy Partners' Memorandum Contra OCC's Motion to Intervene was served on the persons stated below via electronic transmission, this 2nd day of June 2022.

/s/ Angela D. O'Brien
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