

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMPLAINT OF  
OHIO POWER COMPANY,

COMPLAINANT,

CASE NO. 21-990-EL-CSS

v.

NATIONWIDE ENERGY PARTNERS, LLC,

RESPONDENT.

## ENTRY

Entered in the Journal on October 17, 2022

### I. SUMMARY

{¶ 1} The attorney examiner finds that Ohio Power Company's motion to quash subpoenas should be denied.

### II. RELEVANT PROCEDURAL HISTORY

{¶ 2} On September 24, 2021, the Ohio Power Company (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 January 11, 2022, NEP filed a motion for leave to file an amended answer and counterclaim, *instanter*.

{¶ 6} By Entry issued April 4, 2022, the attorney examiner granted NEP's motion for leave to file its answer and counterclaim.

{¶ 7} On April 22, 2022, AEP Ohio filed its answer to NEP's counterclaim.

{¶ 8} On August 3, 2022, the attorney examiner issued an Entry establishing a procedural schedule, which set the hearing for October 24, 2022, and required the parties to file any motions to compel related to written discovery (not related to depositions) by September 16, 2022; testimony by October 3, 2022; and any motions to strike testimony by October 17, 2022.

{¶ 9} On October 11, 2022, NEP filed two motions for subpoena directed at Angie Rybalt, an employee of AEP Ohio, for her to appear at a deposition and to appear at hearing.

Both motions requested expedited treatment. Before filing on the docket, counsel for NEP presented both motions to the attorney examiner, who subsequently signed both subpoenas.

{¶ 10} On October 13, 2022, AEP Ohio filed a motion to quash both subpoenas.

{¶ 11} On October 17, 2022, NEP filed a memorandum contra AEP Ohio's motion to quash.

### III. MOTIONS FOR SUBPOENA

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

{¶ 12} In its motion to appear at deposition, NEP argues that documents produced in discovery and responses to discovery requests show Ms. Rybalt, Director of Customer Experience at AEP Ohio, as having a role in the decision by AEP Ohio to stop the master-metered conversions at the Apartment Complexes in September 2021. NEP also asserts that documents produced by AEP Ohio during discovery show that she leads AEP Ohio's submetering initiative team and collects information and communicates results to senior management of AEP Ohio, such as Jon Williams. NEP also contends that she communicated with AEP Ohio employees regarding the status of the conversions prior to AEP Ohio stopping the conversions. According to NEP, Ms. Rybalt also submitted an affidavit to support AEP Ohio's December 17, 2021 memorandum contra to NEP's motion for stay, establishing her as an important fact witness. Within the affidavit, NEP states that Ms. Rybalt claims that NEP establishes itself as AEP Ohio's customer of record for accounts it manages on behalf of landlords and certain property managers, a contention NEP disputes, and she explains AEP Ohio's internal practices regarding submetering before and after the *Wingo* decision. NEP argues, considering the above, it has a reasonable basis to take Ms. Rybalt's deposition and that it is reasonably calculated to lead to the discovery of admissible evidence.

{¶ 13} In its motion to appear at hearing, NEP largely reiterates the arguments provided within the motion to appear at deposition, adding that her testimony is important

to NEP's defense and counterclaims given that she was involved in many of the internal communications produced during discovery.

{¶ 14} In its motion to quash, AEP Ohio argues that the subpoenas are unreasonable and oppressive, pursuant to Ohio Adm.Code 4901-1-25. AEP Ohio asserts that there is no value to deposing Ms. Rybalt since NEP has had ample opportunity to explore its counterclaim allegations through voluminous discovery production and that her testimony would be duplicative of another witness's testimony. In response to NEP's assertion that Ms. Rybalt had a role in the decision to stop conversion at the Apartment Complexes, AEP Ohio states that, in fact, its witness, Jon Williams, was the primary decisionmaker concerning the Apartment Complexes, that Mr. Williams filed testimony addressing AEP Ohio's actions concerning the Apartment Complexes, that he will be deposed as a company witness, that he was deposed as corporate deponent after being designated by AEP Ohio to address topics related to the relevant timeline in question, and that he will be available for cross-examination at hearing. AEP Ohio also asserts that Mr. Williams' testimony addresses the Submetering Initiative, that he led the Submetering Initiative, not Ms. Rybalt as NEP claims, and that she reports to Mr. Williams. AEP Ohio contends that Ms. Rybalt's affidavit was submitted for the limited purpose of supporting AEP Ohio's opposition to the stay motion, which is now moot considering the subsequent rulings by the Commission, and, regardless, AEP Ohio designated Mr. Williams as a witness to answer NEP's corporate deposition topics related to the affidavit. Citing to an agreement between the parties articulated at the July 28, 2022 prehearing conference concerning depositions and that AEP Ohio informed NEP of its corporate-designated witness by September 20, 2022, AEP Ohio argues that NEP's delayed motions for subpoena are merely an eleventh-hour tactic to distract AEP Ohio and the Commission on the eve of the hearing, as well as are oppressive in that preparing for them will require AEP Ohio to expend critical resources despite the fact that a witness is already available to speak on all of the above topics.

{¶ 15} In its memorandum contra AEP Ohio's motion to quash, NEP reiterates and expands upon arguments made in its motions for subpoenas.

**B. Discussion**

{¶ 16} Upon consideration of the arguments, the attorney examiner denies AEP Ohio's motion to quash the subpoenas issued to Ms. Rybalt. Pursuant to Ohio Adm.Code 4901-1-25(C), an attorney examiner may quash a subpoena if it is unreasonable or oppressive. First, the subpoenas are not unreasonable. Ms. Rybalt appears to have been involved in the Submetering Initiative and in communications regarding the decisions surrounding master-metered conversions at the Apartment Complexes, both of which are related to the complaint and/or counterclaims in this matter. Although Ms. Rybalt's December 17, 2021 affidavit pertained to NEP's motion to stay filed on December 9, 2021, it clearly indicates that she has knowledge concerning the requested conversions at the Apartment Complexes, and, her being put forth as the affiant, at least would suggest she may have played a prominent role regarding the conversion requests. Also, although AEP Ohio designated Jon Williams as its corporate-designated deponent/witness regarding such topics as the Submetering Initiative and the requests to convert the Apartment Complexes, NEP is not necessarily precluded from seeking deposition or hearing testimony from another employee who has knowledge about some of the same topics. This notion holds true especially for Ms. Rybalt who appears to have been involved in the Submetering Initiative and decisions regarding the conversion of the Apartment Complexes, as purportedly evidenced by internal AEP Ohio communications and as reflected in the December 17, 2021 affidavit. Also, the agreement articulated by the parties during the July 28, 2022 prehearing conference resolved disputes related to prior discovery motions and did not speak to the specific scenario at issue here. NEP currently is seeking the deposition and hearing testimony of only one additional AEP Ohio employee, and, in this specific instance, the attorney examiner does not believe requiring her to appear for deposition or at hearing is unreasonable. Further, the attorney examiner finds that the subpoenas are not oppressive for the same reasons articulated above. The attorney examiner, however, notes that this finding does not give NEP license to ask Ms. Rybalt questions at the deposition or hearing

duplicative of or similar to those asked of and answered by AEP Ohio's corporate designee at his deposition or at hearing.

#### IV. ORDER

{¶ 17} It is, therefore,

{¶ 18} ORDERED, That AEP Ohio's motion to quash be denied, as stated in Paragraph 16. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Matthew J. Sandor

By: Matthew J. Sandor  
Attorney Examiner

JRJ/dmh

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

Summary: Attorney Examiner Entry that AEP Ohio's motion to quash be denied, as stated in Paragraph 16 electronically filed by Ms. Donielle M. Hunter on behalf of Matthew J. Sandor, Attorney Examiner, Public Utilities Commission of Ohio