

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(B), Nationwide Energy Partners, LLC (“NEP”) requests that this interlocutory appeal be certified to the Commission with regard to two errors committed in the October 19, 2022 Entry (the “October 19 Entry”; attached hereto as Ex. A). Specifically, the October 19 Entry erred by denying NEP’s Motion to Compel regarding: (1) documents relevant to the Ohio Power Company’s (“AEP Ohio”) disparate treatment of NEP; and (2) documents that were improperly withheld regarding legislative and governmental issues. Accordingly, the October 19 Entry should be certified so the Commission may reverse the Attorney Examiner’s decision on these points.

Respectfully submitted,

/s/Michael J. Settineri

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MEMORANDUM IN SUPPORT

I. Introduction

On October 19, 2022, the Attorney Examiner issued an omnibus decision on several discovery-related motions. NEP now files this interlocutory appeal regarding two rulings in that October 19 Entry. Specifically, the Attorney Examiner denied NEP's September 16, 2022 Motion to Compel which sought, *inter alia*: (1) information regarding the Northtowne apartment complexes; and (2) documents related to governmental and legislative information regarding submetering. As set forth below, this was error. Accordingly, the October 19 Entry on each of these categories of documents should be reversed. In addition, the October 19 Entry departed from past precedent and erroneously decided a new or novel issue. These errors will cause undue prejudice to NEP because NEP will be required to present its case at the October 24, 2022 hearing without the benefit of this discoverable information. Accordingly, this interlocutory appeal should be certified for immediate review and the October 19 Entry should be reversed on these points.

II. Standard of Review

Ohio Adm. Code 4901-1-16(B) provides that an interlocutory appeal may be certified to the Commission if "the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question."

Here, the October 19 Entry departed from past precedent with regard to both rulings because it refused to permit discovery of relevant and responsive information. The October 19 Entry also raises new or novel issues with respect to both rulings. That is, AEP Ohio's

abandonment at the Northtowne apartments is the first of its kind related to submetering, thus, the scope of discovery regarding this topic is a new or novel issue. Likewise, AEP Ohio asserted a novel “protected commercial speech and legislative issues” privilege. However, that is not an established privilege under Ohio law, therefore, this is a new or novel question.

An immediate appeal is necessary because the October 19 Entry will cause undue prejudice to NEP since NEP will be forced to present its case at the October 24, 2022 hearing without the aid of this discoverable information. Accordingly, this appeal should be certified for immediate interlocutory review.

III. Argument

The October 19 Entry erred by denying NEP’s Motion to Compel regarding: (1) documents relevant to NEP’s disparate treatment of NEP; and (2) documents that were improperly withheld regarding legislative and governmental issues. Immediate interlocutory review of these errors is necessary and appropriate because the October 19 Entry departed from past precedent and raises new or novel questions.

A. The October 19 Entry erred by denying NEP’s Motion to Compel regarding AEP Ohio’s disparate treatment of NEP at the Northtowne Apartments.

NEP asserted counterclaims against AEP Ohio founded upon AEP Ohio’s disparate treatment of NEP compared to others. Therefore, disparate treatment between NEP and those similarly situated is plainly relevant to NEP’s counterclaims and also NEP’s defenses. For example, the Northtowne apartment complex contacted AEP and requested to convert to the same type of master-metering that is at issue in this case (the “Northtowne Conversion Request”). Accordingly, NEP issued discovery requests to AEP Ohio regarding the Northtowne Conversion

Request. (*See* NEP-RPD-15-005; NEP-INT-16-069; NEP-RPD-16-001; NEP-RPD-16-002; NEP-RPD-16-025; and NEP-RPD-16-026 (collectively, “Northtowne Discovery Requests.”))¹

Despite the direct connection to NEP’s counterclaims, AEP Ohio refused to respond to the Northtowne Discovery Requests, arguing that the Northtowne Conversion Request did not occur until after the NEP’s counterclaims were filed and were therefore overly broad, unduly burdensome, and irrelevant. The Attorney Examiner conducted an *in-camera* review of these documents, but ultimately denied NEP’s Motion to Compel. However, the fact that AEP Ohio treated NEP differently in the past, **and continues to do so**, is the exact harm of which NEP complains in its counterclaims. Accordingly, this information goes to the crux of NEP’s counterclaims.

In addition, the Northtowne Conversion Request is further relevant to NEP’s counterclaims because it shows that AEP Ohio is retaliating against NEP. That is, on Friday, July 8, 2022, AEP Ohio emailed Northtowne apartments (and cc’ed NEP) stating that AEP Ohio unilaterally determined that it would provide “a single point of primary service to the property line” and that “[t]he conversion to master meter service causes AEP Ohio to abandon service to its existing customers and to abandon some facilities on the property.”² On the following Monday, July 11, 2022, AEP Ohio filed an abandonment application. AEP Ohio’s application for abandonment refers to **this case no less than 11 times**, and requests that the Commission rule on its application “upon deciding the merits of the Complaint Case [(i.e., the AEP v. NEP case)].” *See In re Application of Ohio Power Company for Authority to Abandon Electric Service Lines*, Case No. 22-0693-EL-ABN, Application (July 11, 2022) at 6.

¹ These discovery requests are attached as Ex. C to NEP’s September 16, 2022 Motion to Compel.

² This email is available at NEP’s September 16, 2022 Motion to Compel at 9.

AEP Ohio's unilateral decision to file an application for abandonment at the Northtowne apartments is the first of its kind related to submetering, and shows AEP Ohio's retaliatory intent. For example, AEP Ohio has already stated that with regard to two other similarly situated facilities—The Heights at Worthington Place and The Oak Creek at Polaris—AEP Ohio did **not** file an application for abandonment. (*See* NEP's September 16, 2022 Motion to Compel at 10 discussing AEP Ohio's responses to NEP-INT-16-011; NEP-INT-16-022.) And, that "[t]he complaint filed in this case and the application filed in PUCO Case No. 22-693-EL-ABN are the **only two abandonment proceedings that the Company has filed that relate to submetering.**" (*Id.* at 10 discussing AEP Ohio's Ltr. dated Sept. 15, 2022 at p. 4-5 (emphasis added).) Accordingly, AEP Ohio's abandonment of certain projects, but not others, speaks directly to NEP's disparate treatment theories.

Finally, if the above was not enough, AEP Ohio itself opened the door regarding the Northtowne Conversion Request. For example, on May 27, 2022, **in this case**, AEP Ohio filed a letter to the Commission in which AEP Ohio identified the Northtowne Conversion Request and used it as a basis for requesting an urgent ruling on AEP Ohio's January 3, 2022 interlocutory appeal of the Attorney Examiner's December 28, 2021 Entry granting NEP's motion for a stay:

AEP Ohio just recently received a request to convert yet another multi-unit complex with 293 existing AEP Ohio customers to master-metered service with NEP. Of note, the units at this complex have been AEP Ohio customers since it was built in 1971 and have high shopping and PIPP rates. Over 50% of the 293 AEP Ohio customers are shopping and over 55% of the remaining non-shopping customers (over 25% of the total number of customers) are on the Percentage of Income Payment Plan (“PIPP”).

(Corresp. Letter dated May 27, 2022 at p. 2.³)

In sum, prior to and throughout these proceedings, AEP Ohio has violated R.C. 4905.26 (Count One) and R.C. 4905.35 (Count Two) as to NEP. NEP has a right to discover information and documents relevant to these counterclaims. This necessarily includes discovery surrounding AEP Ohio’s recent decision to file an abandonment application in association with (and expressly referencing) its complaint and arguments in this action. Thus, the Commission should reverse the October 19 Entry and compel AEP Ohio to respond in full to the Northtowne Discovery Requests (NEP-RPD-15-005; NEP-INT-16-069; NEP-RPD-16-001; NEP-RPD-16-002; NEP-RPD-16-025; and NEP-RPD-16-026). This information is central to NEP’s presentation of its case. Accordingly, this appeal should be certified by the Commission and the October 19 Entry should be overturned on these points.

³ This email is available at NEP’s September 16, 2022 Motion to Compel at 9.

B. The October 19 Entry erred by denying NEP’s Motion to Compel documents related to legislative proposals.

AEP Ohio improperly withheld responsive documents that are within its possession and control. That is, NEP issued tailored discovery requests regarding submetering regulation and legislation, as well as regarding submetering related to NEP. In response, AEP Ohio refused to produce responsive documents arguing that the requests were “related to the Company’s protected commercial speech and legislative issues [that] are beyond the scope of discovery in this proceeding.”⁴ (See AEP Ohio’s response to NEP-RPD-14-008.) The October 19 Entry erroneously denied NEP’s Motion to Compel.

Indeed, the Commission’s rules freely allow the discovery of non-privileged information if it is reasonably calculated to lead to admissible evidence. See Ohio Adm.Code 4901-1-16(B). AEP Ohio’s correspondence and documents regarding AEP Ohio’s views on both proposed and current laws on submetering would be relevant to the determination of whether AEP Ohio sought to amend the law to add or revise legislation (other than those it now asserts are applicable to NEP) for submetering companies. These documents may also shed light on what AEP Ohio’s view of the law was, including its view of the *Wingo* decision. Likewise, AEP Ohio’s attempts to change legislation or other communications with the legislature may provide insight into AEP Ohio’s true goals of this litigation. These withheld documents may also show that AEP Ohio only resorted to

⁴ AEP responses are attached as Exhibit E to NEP’s September 16, 2022 Motion to Compel. AEP Ohio inappropriately withheld documents under this asserted privilege in the following requests: NEP-RPD-01-009; NEP-RPD-01-011; NEP-RPD-01-014; NEP-RPD-01-016; NEP-RPD-01-017; NEP-RPD-01-026; NEP-RPD-01-027; NEP-RPD-03-001; NEP-RPD-03-002; NEP-RPD-03-007; NEP-RPD-03-008; NEP-RPD-06-001; NEP-RPD-07-001; NEP-RPD-07-011; NEP-RPD-07-012; NEP-RPD-08-001; NEP-RPD-08-002; NEP-RPD-08-004; NEP-RPD-08-006; NEP-RPD-08-007; NEP-RPD-08-008; NEP-RPD-08-009; NEP-RPD-08-010; NEP-RPD-08-011; NEP-RPD-08-012; NEP-RPD-08-013; NEP-RPD-08-014; NEP-RPD-08-015; NEP-RPD-08-016; NEP-RPD-09-003; NEP-RPD-09-005; NEP-RPD-14-008; NEP-RPD-14-009; NEP-RPD-15-004; NEP-RPD-16-014; NEP-RPD-16-015; NEP-RPD-16-016; NEP-RPD-16-017. For the first time on September 12, 2022, AEP Ohio informed NEP that not only did AEP Ohio object on the basis of “protected commercial speech” privilege, AEP Ohio considered certain documents “as non-responsive and were excluded” from its productions. AEP Ohio did not previously inform NEP that it was withholding any documents based upon this asserted privilege.

filing a complaint in this proceeding after failing at the legislature, and contain internal and external communications that would be relevant in addressing NEP, AEP Ohio's tariff, and the *Wingo* decision. Accordingly, the information sought is within the scope of discovery.

Furthermore, there is no basis in Ohio law to support AEP Ohio's assertion of a "protected commercial speech" privilege. Indeed, despite multiple requests for the legal and factual basis for the assertion of that privilege, AEP Ohio has provided no basis. Instead, AEP Ohio continues to pound the table asserting the conclusory assertion that these documents are protected by this alleged privilege. However, Ohio law provides no such "protected commercial speech" privilege to prevent the production of responsive documents. Thus, the Commission should require AEP Ohio to supplement its responses and produce any documents it previously withheld under the "protected commercial speech" privilege.

IV. Conclusion

The October 19 Entry erred by denying NEP's Motion to Compel regarding: (1) documents relevant to AEP Ohio's disparate treatment of NEP; and (2) documents that were improperly withheld regarding legislative issues. Accordingly, this appeal should be certified by the Commission and that entry should be reversed on these points.

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 October 24, 2022 upon all persons listed below:

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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 19, 2022

I. SUMMARY

{¶ 1} The attorney examiner grants, in part, and denies, in part, the August 30, 2022 motion to compel filed by Nationwide Energy Partners, LLC. The attorney examiner denies the September 16, 2022 motion to compel filed by Nationwide Energy Partners, LLC. The attorney examiner grants the October 11, 2022, motion for protective order filed by Ohio Power Company.

II. DISCUSSION

A. *Relevant Procedural History*

{¶ 1} On September 24, 2021, the Ohio Power Company (AEP Ohio or the Company) 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.

{¶ 2} 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.

{¶ 3} 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.

{¶ 4} 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.

{¶ 5} 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.

{¶ 6} On April 4, 2022, the attorney examiner issued an Entry granting NEP's motion for leave to file an amended answer and counterclaim, as well as revised the procedural schedule.

{¶ 7} AEP Ohio filed its answer to NEP's counterclaim on April 22, 2022. On May 2, 2022, AEP Ohio filed an amended answer to the counterclaim. NEP filed correspondence in the case docket on May 5, 2022, indicating that NEP does not object to the filing of AEP Ohio's amended answer.

{¶ 8} Numerous filings have been made by both parties in the case and in which AEP Ohio and NEP loquaciously disagree on virtually every procedural and substantive issue. At the July 28, 2022, prehearing conference, both parties agreed to withdraw motions related to discovery and depositions that were pending at that time.¹

{¶ 9} By Entry issued August 3, 2022, the attorney examiner set a new procedural schedule for the case, which set the following: motions to compel related to written discovery (not related to depositions) to be filed by September 16, 2022; testimony to be filed by the parties by October 3, 2022; any motions to strike testimony to be filed by October 17, 2022. In addition, the Entry rescheduled the evidentiary hearing to commence on October 24, 2022.

{¶ 10} On August 30, 2022, NEP filed a motion to compel discovery and memorandum in support. In its filing, NEP moves for an order compelling AEP Ohio to provide information related to four topics outlined within the motion and further discussed below. AEP Ohio filed a memorandum contra this motion to compel on September 14, 2022. NEP filed a reply in support on September 21, 2022.

{¶ 11} On September 16, 2022, NEP filed a second motion to compel discovery and memorandum in support. In this motion, NEP seeks an order compelling AEP Ohio to provide information related to four separate topics outlined within the motion and further

¹ The motions specifically withdrawn on the record during the prehearing conference were: AEP Ohio's June 2, 2022 motion to compel and for sanctions; AEP Ohio's July 11, 2022 motion for protective order regarding deposition notice; and, NEP's July 11, 2022 motion to compel corporate deposition.

discussed below. AEP Ohio filed a memorandum contra this motion to compel on October 3, 2022. NEP filed a reply in support on October 7, 2022.

{¶ 12} On October 11, 2022, AEP Ohio filed a motion for protective order and a request for expedited ruling. As discussed further below, in this motion AEP Ohio seeks an order protecting AEP Ohio from designating a corporate witness to discuss matters that are subject to the pending September 16, 2022, motion to compel discovery, and which AEP Ohio objects to. NEP filed a memorandum contra the motion for protective order on October 12, 2022.

B. NEP's August 30, 2022 Motion to Compel

{¶ 13} In its August 30, 2022, motion to compel, NEP seeks an order compelling AEP Ohio to provide information related to the following four topics:

- (1) The complete PowerPoint presentations that included information on AEP Ohio's submetering initiative. NEP states that AEP Ohio acknowledges that the presentations exist but has only provided an incomplete set of slides and refused to produce all of the PowerPoint documents.
- (2) An attachment that was part of a July 2021 email sent by AEP Ohio employee Angie Rybalt.
- (3) An unredacted version of the attachment attached to a September 23, 2021 email that was sent a day before AEP Ohio filed its complaint against NEP.
- (4) A proposal referenced in a February 2022 email.

{¶ 14} Having reviewed all filings related to the August 30, 2022, motion to compel, and having conducted an *in camera* review of the documents at issue in the motion, the

attorney examiner finds that the motion to compel should be granted, in part, and denied, in part, consistent with the findings outlined below.

i. PowerPoint Presentations

{¶ 15} With respect to the PowerPoint presentations at issue, NEP argues that it is entitled to receive the presentations in their entirety, not just the slides that AEP Ohio determines to be responsive to the discovery requests. NEP states that it needs the full set of documents in order to conduct its own review. According to NEP, without additional contextual information, NEP has no way of knowing which PowerPoint presentation each slide belongs to and cannot properly review them without contextual information for the slides that have been produced.

{¶ 16} In its memorandum contra, AEP Ohio labels the requests relating to the PowerPoint presentations as a “fishing expedition.” AEP Ohio believes that NEP is attempting to obtain information about general AEP Ohio business practices that go far beyond the concept of submetering and are, therefore, beyond the scope of this case. AEP Ohio states that it provided the relevant slides from slide decks from July, August, and November 2021. AEP Ohio maintains that the slides that were not provided were withheld because they contain information about other AEP Ohio business matters that are completely unrelated to submetering. As to NEP’s assertion that it needs context to properly review the produced slides, AEP Ohio states that, to the extent that the attorney examiner finds any validity in NEP’s concerns, that it should only be required to produce the front-page slide for the presentations provided to NEP. Further, AEP Ohio submits that no order to produce the documents should be issued without the attorney examiners conducting an *in camera* inspection of the documents.

{¶ 17} In its reply in support of the motion to compel, NEP stresses that without reviewing the entire PowerPoint presentation of which each produced slide is a part, NEP (and the Commission) only has AEP Ohio’s word that the rest of the slides are unrelated to

submetering. According to NEP, the entire PowerPoint presentation is necessary for it to understand the context of each produced slide.

{¶ 18} Having reviewed the filings related to this issue and conducted an *in camera* inspection of the complete PowerPoint presentations, the attorney examiner agrees with AEP Ohio that nearly all other slides concern AEP Ohio's operations that are unrelated to submetering. These additional slides are, therefore, well beyond the scope of this case. However, the attorney examiners did find one slide with information pertaining to submetering that was not produced. The information on this slide appears to have largely been included on another slide that was produced, but for completeness, the attorney examiner finds that slide 6 of the November 15, 2021 PowerPoint presentation should be produced with all information redacted except for the following: the title of the slide, the second row of the slide, and the slide notes. Further, the attorney examiner also orders AEP Ohio to produce the cover page for each PowerPoint presentation containing slides that were produced to NEP.

ii. *July 2021 Email Attachment*

{¶ 19} In this request, NEP seeks an attachment that was not produced by AEP Ohio but was originally attached to an email that AEP Ohio did produce. NEP attached a copy of the email under seal, as AEP Ohio designated it as confidential document. According to NEP, the produced email not only referred to NEP but also contained the unproduced attachment. NEP states that the context of the produced email clearly indicates that NEP is referenced in the attachment. NEP argues that the attachment may include notes, explain why certain information was included, and explain why NEP was even listed in the attachment. NEP states that it could contain other information that NEP deems relevant to its defense and counterclaims. NEP avers that it is not AEP Ohio's role to object to the production based on relevancy. Further, NEP believes that AEP Ohio's concerns about confidential business information being shared are unfounded because the parties have a protective agreement in place.

{¶ 20} In its memorandum contra, AEP Ohio again believes this request to be overly broad. It states that the email that contained the attachment was negligibly related to the case but that it produced it in good faith. AEP Ohio further explains that the attachment at issue is a document that lists its top 1,000 customers by revenue and usage. AEP Ohio states that the produced emails reveal NEP's place on that list, but that NEP continues to insist upon receiving the attachment in its entirety. First, AEP Ohio asserts that the document at issue contains competitively-sensitive customer information regarding usage by AEP Ohio customers, the production of which would generally be prohibited by Ohio Adm.Code 4901:1-10-24(E) and Ohio Adm.Code 4901-1-24. AEP Ohio also objects to the notion that a document is relevant simply because it references NEP. AEP Ohio believes this interpretation is contrary to Ohio Adm.Code 4901-1-16(B), which limits discovery to matters "relevant to the subject matter of the proceeding." AEP Ohio states that it attached to its motion a redacted version of the first page of the attachment, which shows NEP's position on the list, and AEP Ohio argues that this alone should dispose of this matter.

{¶ 21} In its reply in support, NEP states that it previously offered to accept a redacted copy of the attachment. NEP states that it remains open to a redacted copy of the document, but that any other account name on the list that AEP Ohio believes to be engaged in submetering should also have its information unredacted. NEP avers that it has the right to discover information about why AEP Ohio views submetering companies as "customers." NEP again argues that it is not AEP Ohio's role to determine the relevancy of the document.

{¶ 22} Having reviewed the relevant filings and conducted an *in camera* review of the produced emails and disputed attachment, the attorney examiner orders that AEP Ohio produce a redacted version of the first page of the attachment, except leaving the row related to NEP unredacted. With respect to the other names and information contained within the attachment, the attorney examiner agrees that it contains competitively-sensitive information regarding usage by AEP Ohio customers, which is completely unrelated to the issues in this case. While Commission rules do allow broad discovery rights, the attorney

examiner first notes that Ohio Adm.Code 4901-1-16(B) does require that discovery be “relevant to the subject matter of the proceeding,” which the bulk of this attachment does not. Further, as part of the staggering amount of discovery already served and responded to, NEP already possesses the pertinent information in the produced emails, without the need for unnecessary production of competitively-sensitive data. AEP Ohio’s September 14, 2022 memorandum contra indicates that it attached a copy of the document as Exhibit 2, with NEP’s line unredacted, but the filing in the case docket does not appear to have any of NEP’s information unredacted. Therefore, the attorney examiner directs AEP Ohio to provide NEP with the intended document as soon as possible.

iii. *Unredacted Version of Attachment to September 23, 2021 Email*

{¶ 23} NEP seeks the production of the proposed term sheet that was referenced as an attachment to a responsive email produced by AEP Ohio. The produced email was from Steve Nourse, counsel for AEP Ohio, to representatives of the Champion Companies related to a request to purchase AEP Ohio assets at a multi-family complex, and was made the day before AEP Ohio filed the complaint in this case. NEP states that AEP Ohio refused to produce the unredacted attachment on grounds that it was a confidential preliminary draft settlement agreement. NEP argues that the document is not related to a settlement, but rather concerns the terms of a proposed business deal. In support, NEP notes that the heading to the redacted document says only “CONFIDENTIAL DRAFT AGREEMENT,” and makes no mention of a settlement communication. Further, NEP cites a number of cases which it asserts demonstrate that Ohio courts have allowed the discovery of settlement agreements by third parties. To the extent that AEP Ohio has confidentiality concerns about the document, NEP believes that the existence of the protective agreement between the parties negates such arguments. NEP also disagrees with any assertion of the document being subject to attorney-client or work-product privilege, as the email was freely shared with the other corporate entity.

{¶ 24} AEP Ohio responds in its memorandum contra that it already voluntarily produced to NEP the final settlement offer at issue. AEP Ohio states that NEP is incorrect that the document was not part of a settlement offer, as it was made in the context of threatened litigation by the Champion Companies. AEP Ohio believes that the date of the settlement offer in relation to opening this case is irrelevant. According to AEP Ohio, the draft agreement also sheds no light on the matters at issue in this case. Further, AEP Ohio contends that not only is the draft document unlikely to lead to the discovery of admissible evidence, but from a policy and legal perspective, disclosure of settlement offers could have a chilling effect on settlement discussions in subsequent Commission proceedings. AEP Ohio points out that NEP possesses the final terms of the settlement, which is the only one that is binding on the parties, and that NEP can use the information from that document in any permissible way.

{¶ 25} In its reply in support, NEP again asserts that it should be permitted to discover this draft, initial proposal as it relates to the conversion of two apartment complexes during the same time that AEP Ohio denied the request to convert the Apartment Complexes. NEP also continues to be skeptical of claims that the document relates to a settlement agreement. To the extent that the attorney examiners would conduct an *in camera* review of the document and determine that it does constitute a confidential settlement discussion, NEP asserts that it is still discoverable.

{¶ 26} Having reviewed the relevant filings on this issue and conducted an *in camera* review of the document at issue, the attorney examiner denies NEP's request that AEP Ohio be ordered to produce an unredacted copy of the draft agreement. As an initial matter, the final version of the agreement at issue explicitly states that it is being made by the parties out of a "desire to avoid litigation and controversy and further costs and legal fees and to resolve and settle, fully and finally, any and all claims between them as related to this informal dispute." That is the language of a settlement agreement. Further, as AEP Ohio points out, NEP is in possession of the final agreement entered into by AEP Ohio and

Champion Companies and is free to use the information in that document for any permissible purposes.

iv. Proposal Referenced in February 2022 Email

{¶ 27} As became evident after the motion to compel was filed, the document at issue in this instance is the same draft settlement agreement that is discussed above. In its motion to compel, NEP points to a February 2022 email from a non-attorney representative of Champion Companies to AEP Ohio that references an “initial proposal.” NEP theorized that this proposal related to submetering and, for the same reasons discussed above in Section II(B)(iii), NEP asserts that it is entitled to the document because it directly goes to supporting its counterclaims against AEP Ohio over its treatment of NEP.

{¶ 28} AEP Ohio acknowledges in its September 14, 2022 memorandum contra that the document at issue in this request is the same draft agreement at issue above. AEP Ohio disagrees with any contentions of NEP that the produced correspondence demonstrates underlying technical issues by non-attorneys, therefore rendering it unrelated to settlement discussions. According to AEP Ohio, the non-attorney conversation did not involve negotiating any changes to the draft agreement. AEP Ohio asserts that a subordinate discussion of technical issues being conducted without attorneys does not transform the confidential settlement offer into a discoverable record.

{¶ 29} In its reply in support, NEP essentially restates the arguments made in its motion to compel, stressing that this draft proposal was formulated during the same time that AEP Ohio denied the request to convert the Apartment Complexes.

{¶ 30} Based upon the reasoning outlined above, as well as both parties acknowledging that this is the same document at issue in the third item of this motion to compel, the attorney examiner again denies NEP’s request that AEP Ohio be ordered to produce the draft proposal. The same reasoning outlined above in the ruling in Paragraph 26 applies to this request and the request is, therefore, denied.

C. *NEP's September 16, 2022 Motion to Compel*

{¶ 31} In its September 16, 2022, motion to compel, NEP seeks an order compelling AEP Ohio to provide information related to the following four topics:

- (1) An unredacted copy of a redacted February 2021 email chain that AEP Ohio produced in response to discovery requests.
- (2) Responses and documents to requests regarding the Northtowne apartment complexes that AEP Ohio identified in its May 27, 2022 letter to the Commission and which AEP Ohio filed an application for abandonment in a separate proceeding.
- (3) Communications and documents between AEP Ohio and Duke Energy Ohio (Duke) based upon commercial interests and/or dated prior to the June 3, 2022 entry into a joint defense agreement (JDA).
- (4) Documents being withheld related to management governmental/legislative communications under an asserted "protected commercial speech and legislative issues" privilege.

{¶ 32} Having reviewed all filings related to the September 16, 2022 motion to compel and having conducted an *in camera* review of nearly all of the documents at issue in this motion, the attorney examiner finds that the motion to compel should be denied as to each request, consistent with the rulings outlined below.

i. *Unredacted Copy of February 2021 Email Chain*

{¶ 33} NEP seeks an order compelling AEP Ohio to produce a portion of an email, which AEP Ohio identifies in its memorandum contra as a communication between Jon F. Williams, AEP Ohio's Managing Director of Customer Experience & Distribution Technology, and Greg Earl, AEP Ohio's Community and Customer Experience Manager. AEP Ohio declined to provide an unredacted copy of the email chain based upon attorney-

client privilege and work-product. NEP asserts that neither asserted privilege applies to this communication, as no attorney is copied on the communications. Instead, NEP states that only the first name of one of AEP Ohio's counsel is mentioned. NEP cites a number of cases that it believes supports the conclusion that a regular communication between two non-attorney employees is not protected by attorney-client privilege (*See* NEP's September 16, 2022 Motion to Compel at 6 for full case citations and discussion). NEP argues that this communication is not protected by the work-product doctrine either because it is clearly not related to litigation or prepared in anticipation of litigation.

{¶ 34} AEP Ohio responds in its memorandum contra that this disagreement is over only 4-5 lines of the email chain that it redacted as privileged when it produced the emails to NEP. According to AEP Ohio, the general subject of the earlier email is a landlord expressing interest in purchasing infrastructure at two building sites. Jon Williams forwarded the landlord's email to Greg Earl with a request for background information. Earl then responded with a brief explanation and describes a legal issue which Earl believes should be discussed with Steve Nourse, AEP Ohio's Vice President – Legal. AEP Ohio agrees that the redacted lines are not protected by the work-product doctrine but asserts that they are protected by attorney-client privilege. AEP Ohio cites case law that postdates the cases cited by NEP and which AEP Ohio believes indicate communications between non-attorney corporate employees are covered by attorney-client privilege if they are made in order to secure legal advice from counsel (*See* AEP Ohio's October 3, 2022 Memorandum Contra at 4-5 for full case citations and discussion). Applying the reasoning from these cases, AEP Ohio argues that it is clear that the redacted sentences relate to the employees' intention to seek legal advice and are, therefore, privileged.

{¶ 35} In its reply in support, NEP submits that the attorney examiners should review *in camera* the email communication at issue and determine whether the employees were seeking legal advice from in-house counsel or some separate non-legal advice communication.

{¶ 36} The attorney examiner conducted the *in camera* review requested by NEP and, as a result, denies NEP's motion to compel production of an unredacted copy of the email chain. Upon review of the email, the attorney examiner agrees with AEP Ohio's contention that the redacted lines show communications clearly demonstrating an intention to seek legal guidance on the matter from the Company's in-house legal counsel. The motion to compel as to this item is, therefore, denied.

ii. *Responses and Documents Relating to the Northtowne Apartment Complex*

{¶ 37} NEP seeks an order compelling AEP Ohio to produce discovery responses related to a pending NEP request for conversion of the Northtowne Apartment complex (Northtowne) to master-metered service. NEP alleges that the facts and circumstances related to the Northtowne request are relevant to NEP's defenses and counterclaims, as evidence of AEP Ohio's disparate treatment of NEP. NEP asserts that the requests for master-metered conversion at Northtowne in or around May 19, 2022, are substantially similar to those made for the Apartment Complexes. Further, NEP points to the May 27, 2022, letter filed by AEP Ohio in this docket in which, according to NEP, AEP Ohio identified the Northtowne request and used it as a basis for requesting an urgent ruling on AEP Ohio's pending interlocutory appeal. AEP Ohio subsequently filed an abandonment application for Northtowne and NEP states that in that application AEP Ohio references this case at least 11 times. NEP asserts that the pertinent production requests are not vague or overly burdensome. NEP argues that these documents relate directly to NEP's counterclaims. NEP also asserts that these requests are directly related to submetering within AEP Ohio's service territory and are, therefore, pertinent.

{¶ 38} In its memorandum contra, AEP Ohio asserts that NEP's request as to the Northtowne requests should be denied because the requests are overly broad and burdensome and seek irrelevant information that postdates NEP's counterclaims. While NEP asserts that the Northtowne information is pertinent to its counterclaims, AEP Ohio states that NEP did not make the request to convert Northtowne to submetering until after

NEP was granted leave to file its counterclaims in this case. AEP Ohio points out that NEP filed its motion for leave to file its counterclaims on January 11, 2022 and that the motion was granted on April 4, 2022, but that it was not until May 18, 2022, that NEP submitted a request to convert Northtowne to master-metered service. AEP Ohio asserts that events that occurred after a counterclaim is filed necessarily cannot form the basis of the counterclaim. AEP Ohio submits that NEP oversimplified the Northtowne requests to try and make them appear similar to this case. AEP also disagrees that its mentioning the Northtowne property in the May 27, 2022, letter in this case, or, conversely, its mentioning this case in the 22-693-EL-BGN abandonment proceeding, serve to establish Northtowne as now a part of this case.

{¶ 39} In its reply in support, NEP essentially reasserts the arguments made in its motion to compel and states that the Northtowne requests are indisputably relevant to NEP's counterclaims. NEP states that it is the only company against whom AEP Ohio has ever initiated abandonment proceedings that relate to submetering and that on this basis alone AEP Ohio should be compelled to respond. NEP finds no merit in AEP Ohio's timing arguments, insisting that AEP Ohio's alleged discrimination continues despite the counterclaims being filed. NEP also finds AEP Ohio's arguments that the requests are overly broad or unduly burdensome to be belated and disingenuous.

{¶ 40} After reviewing the filings related to this issue and conducting an *in camera* review of the withheld documents, the attorney examiner denies NEP's motion to compel with respect to the Northtowne requests. NEP dismisses AEP Ohio's timing arguments, but the timeline is significant as AEP Ohio rightly asserts, events taking place subsequent to the filing of the counterclaims cannot be essential to the counterclaims themselves. The Northtowne conversion requests appear to have been filed four months after NEP filed its motion for leave to file the counterclaims, leaving it outside the scope of those counterclaims as well as clearly outside the scope of the Apartment Complexes at issue in this proceeding. Further, the Northtowne complex is already the subject of a separate Commission proceeding – to the extent that NEP feels it is appropriate to delve into

Northtowne and facts surrounding the abandonment application, it should do so in that case, not by further expanding this proceeding. The attorney examiner is also unpersuaded that AEP Ohio referencing the Northtowne requests in its May 27, 2022, letter somehow makes it appropriate to include Northtowne into this proceeding. The context in which Northtowne was referenced in that letter was merely as an example of AEP Ohio needing further clarification as to the extent of the stay that was granted. The attorney examiner also notes that this ruling is consistent with the ruling provided by the attorney examiner when the parties called the attorney examiners for guidance during an October 14, 2022 deposition.

iii. *AEP Ohio and Duke Communications Prior to Entering into the JDA*

{¶ 41} NEP seeks the production of documents and communications regarding NEP between AEP Ohio and Duke prior to the effective date of the JDA, which was entered into by AEP Ohio and Duke on June 3, 2022. NEP argues that AEP Ohio's assertion of a joint defense privilege is inappropriate, because the request is for documents and correspondence that is dated prior to the effective date of the JDA. NEP states that commercial interests between AEP Ohio and Duke is not a sufficient basis for assertion of the common interest privilege doctrine. Rather, NEP asserts that the common interest privilege doctrine requires an identical legal interest with respect to the subject matter. NEP states that AEP Ohio has produced the JDA but continues to refuse production of the earlier documents and communications with Duke created prior to entering the JDA. NEP asserts that the requested documents and communications are unquestionably relevant to this proceeding and that AEP Ohio should be compelled to produce them. In order to determine the propriety of AEP Ohio's assertions of privilege, NEP believes that an *in camera* review of the documents by the attorney examiners is needed.

{¶ 42} AEP Ohio, in its memorandum contra, states that it is obvious that valid common interests exist between AEP Ohio and Duke based on each utility having separately filed similar complaint cases against NEP relating to NEP's submetering

activities (this case and Case No. 22-279-EL-CSS). Further, AEP Ohio stresses that the only responsive documents that exist prior to the effective date of the JDA relate to the initiation of the JDA effort and the exchange of drafts of the proposed agreement. AEP Ohio concedes NEP's contention that substantive communications between parties prior to the effective date of a joint defense agreement could be discoverable, but AEP Ohio stresses that in this case they are not because the only communications relate strictly to the initiation and formation of the JDA. AEP Ohio argues that there is nothing more plainly within the scope of the common interest privilege than attorneys discussing and forming a joint defense agreement based on a common legal interest.

{¶ 43} In its reply, NEP reiterates the arguments made in the motion to compel and again states that, at the very least, the disputed documents should be produced to the attorney examiners for *in camera* review. NEP also states that AEP Ohio appears to be misinterpreting the requests to only seek communications between AEP Ohio and Duke legal counsel in 2022. NEP clarifies that its requests are not limited to either 2022 or those legal counsel.

{¶ 44} The attorney examiners conducted the *in camera* review requested by NEP and find that NEP's motion to compel as to documents and communications between AEP Ohio and Duke prior to June 3, 2022, regarding the JDA, is denied. A review of the documents substantiates AEP Ohio's claim that the existing communications are between attorneys of the two utilities and relate to the initiation and formation of the JDA. While these communications obviously predate the effective date of the JDA, they are related exclusively to its formation and execution and its relation to the two similar complaint cases pending before the Commission. NEP's motion to compel with respect to these requests is, therefore, denied.

iv. Internal AEP Ohio Documents Related to Legislative Proposals

{¶ 45} NEP seeks an order compelling AEP Ohio to produce communications and documents relating to legislative positions taken by AEP Ohio. NEP asserts that AEP

Ohio's historical views on proposed submetering legislation is relevant to the determination of whether AEP Ohio sought to amend the law to add or revise legislation for submetering companies. NEP believes that these documents could also indicate AEP Ohio's view of the current law and its interpretation of the *Wingo* decision, as well as AEP Ohio's "true goals" of this litigation. NEP finds AEP Ohio's assertion of a "protected commercial speech" privilege as the basis for withholding the documents to be completely unfounded. NEP asserts that no such privilege exists, and that AEP Ohio has provided no factual or legal basis to support such a privilege. To the extent that AEP Ohio believes the documents are beyond the scope of this proceeding, NEP states that it is not AEP Ohio's role to make relevancy determinations.

{¶ 46} In its memorandum contra, AEP Ohio argues that internal communications regarding legislative proposals bear no connection to the issues in this case and is far from being reasonably calculated to lead to admissible evidence. AEP Ohio also argues that the requests are overly broad and burdensome. Further, delving into unnamed legislative proposals would, in AEP Ohio's estimation, unduly expand the scope of the proceeding. AEP Ohio asserts that whether it asserted its right to petition the legislature is irrelevant and that disclosure of its internal legislative materials would create a chilling effect on the exercise of free speech in the future. AEP Ohio makes arguments concerning corporations having free speech rights under the first amendment, as well as asserting that the bulk of such materials are also likely covered by attorney-client privilege. Further, they argue that the evidentiary privilege afforded Ohio legislators regarding meetings, processes, conversations, and documents that are part of the deliberative process may also cover these documents.

{¶ 47} In its reply in support, NEP asserts that AEP Ohio's legislative and municipal efforts regarding submetering are directly at issue in this proceeding and that the requested documents are reasonably calculated to lead to the discovery of admissible evidence. NEP states that discovery on these issues can be used to support testimony of its own witnesses. With respect to AEP Ohio's first amendment and protected commercial speech arguments,

NEP responds that first amendment rights do not prevent discovery disclosure by a commercial entity. NEP states that the legislative privilege referenced by AEP Ohio is held by the elected legislators, not corporations.

{¶ 48} Having reviewed the relevant filings on this matter, the attorney examiner denies NEP's motion to compel with respect to the production requests relating to AEP Ohio communications on legislative proposals. With the amount of discovery already conducted, and the level of contention as to every issue raised by either party in the leadup to the hearing, litigating ancillary issues will not assist in resolving this case. At issue in this case will be what the law is now, interpreted in light of the *Wingo* decision, to determine if NEP is operating as a public utility. Delving into draft legislation and hypothetical proposals will serve to do nothing more than unnecessarily expand the scope of this case and enlarge an already swollen case docket and record. The attorney examiner also notes that this ruling is consistent with the ruling provided by the attorney examiner when the parties called the attorney examiners for guidance during an October 14, 2022 deposition.

D. AEP Ohio's October 11, 2022 Motion for Protective Order

{¶ 49} AEP Ohio filed its motion to protective order and request for expedited ruling to request an order protecting AEP Ohio from designating a corporate witness to discuss matters which it argued were outside the scope of this proceeding. AEP Ohio explained that NEP's Second Amended Notice of Deposition, filed on October 5, 2022, included topics that were the subject of NEP's September 16, 2022 motion to compel. At the time AEP Ohio filed this motion for protective order, the motion to compel was still pending before the Commission. AEP Ohio filed this motion to protect its witness from having to answer questions on certain topics at a deposition scheduled to begin on October 13, 2022. Specifically, AEP Ohio requests that the Commission order NEP to limit its deposition "to matters related to this proceeding, and to be barred from asking questions pertaining to:

- (1) The Northtowne complex.

- (2) Communications regarding AEP Ohio's legislative positions.
- (3) AEP Ohio's communications regarding the JDA with Duke.

{¶ 50} AEP Ohio argues that for the same reasons outlined in its memorandum contra NEP's September 16, 2022 motion to compel, its request for a motion for protective order on these topics should be granted.

{¶ 51} NEP filed a memorandum contra the motion for protective order, disputing that the identified topics were only added to the notice of deposition as part of its second amendment. NEP also outlines the same or similar arguments on each topic as stated in its motion to compel.

{¶ 52} As already outlined and ruled upon above on these topics in NEP's motion to compel, the attorney examiner makes the same findings with respect AEP Ohio's motion for protective order. The attorney examiner grants the protective order such that NEP shall not inquire in depositions as to: documents and communications related to the Northtowne complex; documents and communications regarding AEP Ohio's legislative positions; and AEP Ohio's communications regarding the JDA with Duke. The reasoning for the ruling on each topic is the same as that outlined above.

{¶ 53} The attorney examiners also note that during a deposition on October 14, 2022, the parties called the attorney examiners for guidance as to questions regarding the Northtowne complex and communications regarding AEP Ohio's legislative positions. The attorney examiners made rulings as to both topics with respect to NEP's motions to compel and AEP Ohio's motion for protective order. Those oral rulings are consistent with the rulings outlined in this Entry.

III. ORDER

{¶ 54} It is, therefore,

{¶ 55} ORDERED, That NEP's August 30, 2022 motion to compel be granted, in part, and denied, in part, consistent with this Entry. AEP Ohio should provide NEP with copies of the document it has been ordered to produce as soon as possible. It is, further,

{¶ 56} ORDERED, That NEP's September 16, 2022 motion to compel be denied, consistent with this Entry. It is, further,

{¶ 57} ORDERED, That AEP Ohio's October 11, 2022 motion for protective order be granted, consistent with this Entry. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/David M. Hicks

By: David M. Hicks
Attorney Examiner

MJA/dmh

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

10/19/2022 4:08:09 PM

in

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

Summary: Attorney Examiner Entry ordering that NEP's August 30, 2022 motion to compel be granted in part, and denied in part; NEP's September 16, 2022 motion to compel be denied; AEP Ohio's October 11, 2022 motion for protective order be granted electronically filed by Ms. Donielle M. Hunter on behalf of David M. Hicks, Attorney Examiner, Public Utilities Commission of Ohio

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

10/24/2022 4:23:54 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