

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**OHIO POWER COMPANY’S MEMORANDUM CONTRA
NATIONWIDE ENERGY PARTNERS, LLC’S INTERLOCUTORY APPEAL**

I. Introduction

Pursuant to Ohio Adm.Code 4901-1-15(D), Complainant Ohio Power Company (“AEP Ohio” or “Company”) submits this Memorandum Contra the October 24, 2022 interlocutory appeal (“Appeal”) filed by Respondent Nationwide Energy Partners, LLC (“NEP”).

NEP has served voluminous discovery in this case. In response, AEP Ohio has produced large amounts of information. As of early May 2022, NEP had already served 12 sets of discovery asking AEP Ohio 268 interrogatories, 188 requests for production of documents, and 154 requests for admission. AEP Ohio cooperated with these requests, and produced 2,211 documents totaling 9,633 pages, in addition to the narrative responses to the discovery requests themselves. AEP Ohio has also presented 4 witnesses for deposition, for nearly 27 total hours of testimony. Yet apparently, those thousands of documents and hours of testimony are not enough. Even now, NEP continues to clamor for more and more discovery, of increasingly marginal relevance.

In its interlocutory appeal, NEP re-asserts its right to discovery regarding two more topics: (1) information regarding the Northtowne apartment complex's request to convert to master-meter service; and (2) "AEP Ohio's views on * * * proposed * * * laws on submetering" and "attempts to change legislation or other communications with the legislature * * * ." (NEP Interlocutory Request at 4-5, 8.) The Attorney Examiner's October 19, 2022 Entry ("October 19th Entry") denied NEP's motion to compel discovery on these topics, concluding reasonably that neither of these topics was within the scope of this proceeding. Yet NEP insists that it is entitled to this discovery, and that the Commission must review the Attorney Examiner's rulings immediately.

The Commission should reject NEP's request to certify an interlocutory appeal of the October 19th Entry. NEP's filing fails to demonstrate that the October 19th Entry raises new or novel questions of interpretation, law, or policy, or that the October 19th Entry is inconsistent with precedent. NEP also fails to explain why an immediate review of the October 19th Entry is necessary to avoid undue prejudice or expense to NEP.

If the Commission does choose to certify the interlocutory appeal, it should affirm the Attorney Examiner's rulings. NEP's right to discovery is based in R.C. 4903.082 and Ohio Adm.Code 4901-1-16. *Id.* at ¶ 42. The statute, importantly, limits parties in Commission proceedings to "reasonable discovery." R.C. 4903.082. The Commission's rules, in turn, permit discovery only on matters that are "relevant to the subject matter of the proceeding." Ohio Adm.Code 4901-1-16(B). The Northtowne apartment complex and AEP Ohio's legislative communications are not relevant to AEP Ohio's claims or NEP's counterclaims. For these reasons, and as further discussed below, the appeal should be denied.

II. NEP’s motion does not meet the requirements for a discretionary interlocutory appeal under Ohio Adm.Code 4901-1-15(B).

The Commission’s rules do not grant parties the right to “take an immediate interlocutory appeal to the commission from” an Attorney Examiner ruling that denies a motion to compel discovery. Ohio Adm.Code 4901-1-15(A). Accordingly, NEP requests certification of an interlocutory appeal under Rule 4901-1-15(B). Under that rule, “[t]he * * * attorney examiner * * * shall not certify [an interlocutory] appeal unless he or she finds that [1] the appeal [a] presents a new or novel question of interpretation, law, or policy, or [b] is taken from a ruling which represents a departure from past precedent *and* [2] an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties * * * .” (Emphasis added.) Ohio Adm.Code 4901-1-15(B). A party seeking certification of an interlocutory appeal must satisfy both prongs of this test. “The failure to demonstrate [one] element, even where the [other] is satisfied, is fatal to any application for certification of an interlocutory appeal * * * .” *In re Complaint of Suburban Natural Gas Co. v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, Entry ¶ 24 (May 25, 2018). As explained below, NEP does not satisfy either prong of this test. Accordingly, the Commission should deny NEP’s request for interlocutory appeal.

A. The October 19th Entry does not present a new or novel question of interpretation, law, or policy.

NEP does not satisfy the first element of the test for certifying an interlocutory appeal under Ohio Adm.Code 4901-1-15(B), because it has not shown that this appeal “presents a new or novel question of interpretation, law, or policy.” Rather than focusing on the substance of the evidentiary rulings it is contesting, NEP offers up non sequiturs.

With regard to NEP’s Northtowne-related discovery requests, NEP argues that the Attorney Examiner’s ruling raises a “new or novel issue” because AEP Ohio’s abandonment

application for the Northtowne apartments “is the first of its kind related to submetering,” and “the scope of discovery regarding this topic is a new or novel issue.” (NEP Interlocutory Appeal at 4.) But the Attorney Examiner did not deny NEP’s motion to compel because he disagreed with NEP’s arguments over the appropriate “scope of discovery” when an electric utility files an abandonment application related to submetering. He denied NEP’s motion to compel because the abandonment application is “the subject of a separate Commission proceeding” and the conversion requests that led to that application were not the subject of NEP’s counterclaim (and, in fact, occurred months after NEP filed its counterclaim). October 19th Entry ¶ 40. Whether discovery in a complaint case is limited to “the subject matter of th[at] proceeding” is not a new or novel issue – it is directly answered in the Commission’s rules. Ohio Adm.Code 4901-1-16(B).

Next, NEP argues that the Attorney Examiner’s ruling regarding submetering legislation raises a “new or novel issue” because “AEP Ohio asserted a novel ‘protected commercial speech and legislative issues’ privilege.” (NEP Interlocutory Appeal at 4.) But the Attorney Examiner did not deny NEP’s motion to compel because he found the requested information was privileged; he denied it because “AEP Ohio communications on legislative proposals” relate to an “ancillary issue[]” that “will not assist in resolving [a] case” that has proven complicated and contentious without that issue. October 19th Entry ¶ 48. Again, whether the Commission empowers its attorney examiners to “[t]ake such actions as are necessary to * * * [p]revent the presentation of irrelevant or cumulative evidence” and “[a]ssure that the hearing proceeds in an orderly and expeditious manner” is not a new or novel issue; the Commission’s rules explicitly grant that authority. Ohio Adm.Code 4901-1-27(B)(7)(b), (d).

In sum, NEP's interlocutory appeal does not raise any new or novel issues. The "new or novel" issues NEP describes have nothing to do with the Attorney Examiner's actual ruling. Instead, NEP's interlocutory appeal raises basic issues regarding the limits of discovery in a complaint case. For this reason, NEP's request to certify an interlocutory appeal should be denied.

B. The October 19th Entry does not represent a departure from past precedent.

NEP also has not demonstrated that the Attorney Examiner's denial of discovery regarding Northtowne and AEP Ohio's communications with legislators is contrary to precedent. NEP argues only that the discovery it sought to compel was "relevant," implying that the Commission typically allows discovery of relevant information and failed to do so here. (NEP Interlocutory Appeal at 3.) This, too, is insufficient to justify an interlocutory appeal.

NEP has not cited any Commission or Supreme Court of Ohio precedent holding that a party to a complaint case is entitled to discovery regarding events that occurred months after the party filed its claims. Nor has it identified any precedent holding that the Commission lacks authority to restrict discovery on marginally relevant issues. In fact, NEP's interlocutory appeal cites no precedent at all. For this reason as well, NEP's request to certify an interlocutory appeal must be denied.

C. No immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to NEP.

Most importantly, NEP has not met the second, independent requirement for certification of an interlocutory appeal: undue prejudice absent an immediate determination. NEP asserts that the October 19th Entry will "force[it] to present its case at * * * hearing without the aid of this discoverable information." (NEP Interlocutory Appeal at 3 and 4.) But given the massive amount of information that AEP Ohio has already provided in discovery, it is exceedingly

unlikely that additional discovery would unearth information that would change the outcome of this proceeding. Going to hearing without this additional information is unlikely to make or break NEP's case.

Regardless, NEP's argument misses the point of the prejudice analysis that the Attorney Examiner must make under Rule 4901-1-15(B). The "immediate determination" criterion for certification of an interlocutory appeal does not ask whether the challenged ruling will cause "undue prejudice or expense" if left in place. Ohio Adm.Code 4901-1-15(B). It asks whether the Commission must address the ruling *now*. As the Commission has explained:

Because an immediate ruling is essential only where the potential for undue prejudice and expense exists, the rule should require that a party establish the need for an immediate Commission determination before any interlocutory appeal will be entertained.

In re Amendment of Chapter 4901-1 of the Ohio Administrative Code and the Rescission of Certain Provisions of Chapter 1551:1-7 of the Ohio Administrative Code, Case No. 87-84-AU-ORD, 1987 Ohio PUC LEXIS 49, ¶ 13 (Oct. 14, 1987). Under Ohio Adm.Code 4901-1-15(B), then, the party requesting a discretionary interlocutory appeal must make "a showing that an *immediate* determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, if the Commission were ultimately to reverse the ruling in question." (Emphasis added.) *In re the 2018 Long-Term Forecast Report of Ohio Power Co. and Related Matters*, Case Nos. 18-501-EL-FOR *et al.*, Entry ¶ 38 (Nov. 13, 2018). NEP makes no effort to make the required showing.

As a practical matter, an interlocutory appeal on these issues would make very little difference. The hearing is nearly completed. Any AEP Ohio witness who could answer questions about Northtowne or AEP Ohio's legislative efforts has long left the stand. And even if the Attorney Examiner certified an interlocutory appeal immediately, and the Commission

ruled on it with lightning speed, AEP Ohio would be hard-pressed to produce the requested information before the hearing concludes. Whether the Attorney Examiner certifies an interlocutory appeal or not, NEP could not present additional evidence regarding Northtowne or AEP Ohio's legislative efforts without the Commission reopening the hearing. Thus, even if the October 19th Entry had prejudiced NEP in any way – and, again, it is hard to imagine that it could have – certifying an interlocutory appeal of that Entry would not eliminate that prejudice. At *best*, it might expedite the scheduling of a reopened hearing. Because NEP has not satisfied the second element of the test for certifying an interlocutory appeal, certification must be denied.

III. If the Commission does certify the interlocutory appeal, it should affirm the Attorney Examiner's ruling.

If the Commission does conclude that NEP has met the requirements for certification of a discretionary interlocutory appeal in Ohio Adm.Code 4901-1-15(B), it should affirm the Attorney Examiner's October 19th Entry. NEP's interlocutory appeal does not raise any new arguments, or cite any new precedent, to justify its request that the Commission overturn the Attorney Examiner's ruling. It simply repeats the same relevancy arguments that it made in its motion to compel, tells the Commission that the Attorney Examiner got it wrong, and asks the Commission to "reverse the Attorney Examiner's decision * * * ." (NEP Interlocutory Appeal at 1.) The Attorney Examiner did not get it wrong.

With regard to the discovery relating to the Northtowne conversion request, NEP argues that its discovery requests are relevant because Northtowne "requested to convert to the same type of master-metering that is at issue in this case" and AEP Ohio's abandonment application is additional evidence of its disparate treatment of NEP. (NEP Interlocutory Appeal at 4-5.) But NEP's counterclaim accusing AEP Ohio of discriminatory treatment is based on "AEP Ohio's refusal to process the five requests to reconfigure to master-meters * * * at the [same] five

apartment complexes” that are the subject of AEP Ohio’s complaint. (Counterclaim ¶ 108; *see also id.* at ¶ 109 (“AEP Ohio’s * * * new policy * * * has subjected NEP to undue and unreasonable prejudice and disadvantage by stopping construction at the five apartment complexes * * * .”)) Northtowne is not one of the five apartment complexes that are the subject of this proceeding. Moreover, NEP did not submit its conversion request for Northtowne until May 2022 –months after NEP filed its motion for leave to file its counterclaim. NEP further argues that AEP Ohio’s abandonment application for Northtowne is relevant because it “shows AEP Ohio’s retaliatory intent.” (NEP Interlocutory Appeal. at 6.) But NEP’s counterclaims say nothing about retaliation. And again, AEP Ohio did not file its abandonment application in Case No. 22-0693-EL-ABN until July 2022. As a matter of basic physics, events that happened *after* the counterclaim cannot form the basis of the counterclaim.

With regard to NEP’s discovery relating to AEP Ohio’s legislative proposals on submetering, NEP speculates that the requested documents “may * * * shed light on AEP Ohio’s view of the law * * *, including its view of the *Wingo* decision[,]” and “AEP Ohio’s true goals [for] this litigation[,]” among other topics. (NEP Interlocutory Appeal at 8-9.) NEP’s baseless speculation is the farthest thing from being reasonably calculated to lead to admissible evidence; it lacks any reasonable basis for concluding that the information would lead to admissible evidence. Indeed, none of NEP’s imaginary scenarios are even relevant in this case, and all of them would unduly expand the scope of this proceeding. Whether AEP Ohio exercised its right to petition the legislature in the past, and its legislative positions and communications regarding past legislative issues, are not relevant or probative of anything relevant in this case. And disclosure of specific legislative material in this case would create a chilling effect on AEP Ohio’s exercise of free speech. Corporations like AEP Ohio have free speech rights under the

First Amendment. *See Citizens United v FEC*, 130 S.Ct. 876 (2010). And Ohio legislators have an evidentiary privilege covering meetings, processes, conversations and documents that are an integral part of the deliberative and communicative process by which legislators participate in the legislative proceedings. *City of Dublin v. State of Ohio*, 138 Ohio App.3d 753, 758-759 (2000). NEP's overbroad discovery requests implicate both legislative free speech and legislative privilege. The Commission should not lightly or inadvertently discard these important interests in facilitating a discovery fishing expedition.

At base, NEP's continued pursuit of discovery on these ancillary issues appears to reflect a belief that it is entitled to limitless discovery in this proceeding. It is not. NEP is entitled to "full and *reasonable* discovery" (emphasis added) (R.C. 4903.082), "not unfettered discovery opportunities" (*In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 17-2474-EL-RDR, Entry ¶ 30 (Mar. 9, 2022)). Courts may limit discovery to prevent "fishing expeditions" where the requested discovery is broad and the party requesting the discovery fails to demonstrate a likelihood that relevant evidence will be obtained. *Drawl v. Cleveland Orthopedic Ctr.*, 107 Ohio App.3d 272, 277-78 (1995), citing *Bland v. Graves*, 85 Ohio App.3d 644, 620 N.E.2d 920 (1993). Similarly, this Commission has denied motions to compel discovery when the discovery requests related to issues beyond the scope of a proceeding. *See, e.g., In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company*, Case No. 99-1729-EL-ETP, *et al.*, Entry, 2000 Ohio PUC LEXIS 412, 3 (Apr. 24, 2000) (denying a motion to compel discovery related to service reliability and workforce levels because the "scope of the transition plan proceedings [was] not to evaluate the reliability, safety, or quality of the utilities' services at the present or throughout the market development period");

In the Matter of the Application of Time Warner Communications of Ohio, L.P., et al., Case No. 94-1695-TP-ACE, Entry, 1995 Ohio PUC LEXIS 454, *17-18 (May 30, 1995).

In its July 27th Entry, the Commission noted “the voluminous amount of litigation activity in * * * this docket” and “agree[d] with the attorney examiner that litigating matters ancillary to the determinative issue of whether a submetering company is a public utility would unnecessarily expand the scope of the proceeding.” Entry ¶ 55 (July 27, 2022). The Attorney Examiner’s October 19th Entry, which denied NEP’s motion to compel discovery on two ancillary issues – the Northtowne apartment complex’s master-meter conversion request (and AEP Ohio’s subsequent abandonment application) and AEP Ohio’s communications regarding submetering legislation – was fully consistent with the Commission’s July 27th Entry. If the Attorney Examiner certifies this interlocutory appeal to the Commission, the Commission should reject NEP’s attempt to prolong its fishing expedition and affirm the Attorney Examiner’s October 19th Entry.

IV. Conclusion

For the reasons set forth above, NEP’s interlocutory appeal should be denied because it does not meet the requirements for a discretionary interlocutory appeal under Ohio Adm.Code 4901-1-15(B) and the appeal otherwise lacks merit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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