BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

NATIONWIDE ENERGY PARTNERS' MOTION TO DISMISS THE COMPLAINT OF DUKE ENERGY OHIO, FILED MARCH 30, 2022

Pursuant to Rule 4901-9-01(C) of the Ohio Administrative Code, Respondent Nationwide Energy Partners, LLC ("NEP") moves the Commission for an order dismissing the complaint of Duke Energy Ohio, Inc. ("Duke") because the Commission is without jurisdiction to hear this complaint against NEP. The reasons for this motion are more fully explained in the Memorandum in Support below.

Respectfully submitted,
/s/ Brian A. Gibbs

Brian A. Gibbs (0088260)
Drew B. Romig (0088519)
230 West Street, Ste. 150
Columbus, Ohio 43215
614-446-8485
brian.gibbs@nationwideenergypartners.com
dromig@nationwideenergypartners.com

Michael J. Settineri (0073369), Counsel of Record
Anna Sanyal (0089269)
Andrew P. Guran (0090649)
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, Ohio 43215
614-464-5462
mjsettineri@vorys.com
aasanyal@vorys.com
apguran@vorys.com
Attorneys for Nationwide Energy Partners

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On March 30, 2022, Duke filed the instant complaint alleging that NEP is illegally operating as a public utility in Duke's certified territory. The complaint hinges on whether NEP's activities constitute those of a public utility and, interdependently, whether NEP is subject to the jurisdiction of the Commission.

These questions were recently and thoroughly answered by the Commission in a virtually identical complaint case brought by Ohio Power Company ("AEP") against NEP in Case No. 21-0990-EL-CSS. Duke's complaint isn't just similar to AEP's complaint; a great majority is copied verbatim.

Both complaints are based upon NEP's business services at apartment complexes within the utilities' respective service territories. Both cases involve NEP's actions as agent on behalf of the property owner. More specifically, both cases involve the owner's request to convert a property's configuration from individually-metered service to master-metered service. Duke's complaint alleges no unique facts materially distinguishing it from AEP's complaint and both complaints rely on the same theories of law.

On September 6, 2023, the Commission issued an Opinion and Order ("AEP Order") in Case No. 21-0990-EL-CSS. The Commission carefully examined NEP's business practices and definitively determined that NEP is not engaged in the business of supplying electricity under R.C. 4905.03(C) and is not a public utility under R.C. 4905.02(A).[1] (AEP Order at ¶¶ 1, 179, 197, 207, 322). Therefore, the Commission does not have jurisdiction to hear a complaint against NEP and Duke's complaint must be dismissed.

[1] AEP filed an Application for Rehearing, challenging this determination, but the Commission found this challenge to be without merit. (See Second Entry on Rehearing at ¶42).

The AEP Order is a final adjudication and is fully effective under R.C. 4903.15. In the interest of judicial economy and efficiency, the Commission may exercise its discretion to dismiss a complaint where the Commission has previously considered the very subject matter of the complaint and the complainant alleges nothing new or different for the Commission's consideration. *See In re Complaint of Mark R. Weiss v. The Cleveland Elec. Illum. Co*., Case No. 97-876-EL-CSS, Entry (Nov. 6, 1997).

As will be further set forth below, Duke's complaint alleges nothing new or different for the Commission's consideration of the jurisdictional questions. The Commission should reiterate its prior determinations in this record, thereby dismissing Duke's action for lack of jurisdiction.

II. FACTUAL ALLEGATIONS

According to Duke: "The specific facts giving rise to this Complaint concern recent efforts by NEP to implement submetering services at a multi-unit complex called Somerset at Deerfield in Mason, Ohio (Somerset)." (Complaint at ¶ 24). More broadly, Duke alleges that NEP performs a myriad of activities on behalf of the property owner, to "facilitate the resale of utility services to tenants." (Complaint at ¶ 15).

Duke goes on to describe its understanding of the services that NEP offers to property owners, such as tenant billing and financial incentives. (Complaint at ¶¶ 16-17). Duke adds some color to the complaint with its own characterizations of NEP's business practices and marketing materials. (Complaint at ¶¶ 18-22). Specific to Somerset, Duke describes the series of communications that took place between the parties during the various stages of service requests and denials to reconfigure the property's metering arrangement. (Complaint at ¶¶ 27-50). Ultimately, Duke communicated a blanket denial policy for any requests made through NEP to convert existing buildings to master-meter service. (Complaint at ¶ 50).

Duke recognizes that "Ohio law does not prohibit a landlord/property owner from submetering utility services to individual tenants." (Complaint at ¶ 8). Nevertheless, "Duke Energy Ohio rebuffed NEP's efforts… at Somerset." (Complaint at ¶ 36). Duke explains its reasoning that "NEP is separately and distinctly providing utility services as an outside third-party to the landlord-tenant relationship." (Complaint at ¶ 17).

These issues are nearly identical to those raised by AEP. The only distinguishing feature is the particular multi-family property involved. There are no material differences in Duke's factual allegations or theories of law. The AEP Order resolved all issues in the Duke complaint when the Commission determined that NEP's activities do not constitute those of a public utility subject to the jurisdiction of the Commission.

III. LAW AND ARGUMENT

A. Standard of Review

In reviewing motions to dismiss a complaint brought under R.C. 4905.26, the Commission has adopted the same standard used by courts in a civil case and deems all of the complainants' factual allegations to be true. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 524, 668 N.E.2d 889 (1996). R.C. 4905.26 necessitates a finding by the Commission that there are reasonable grounds for the complaint. Dismissal is warranted if it appears beyond a doubt that the complainant can prove no set of facts which would entitle it to relief.

B. Duke's Counts I-III have already been adjudicated before the Commission.

Duke's complaint piggybacks on the earlier AEP complaint, raising the same legal arguments based upon indistinguishable factual circumstances. In fact, Duke essentially copied and pasted Counts I-III from the AEP complaint. The only variable is that the AEP case involved five apartment complexes (referred to as the "Apartment Complexes") whereas the Duke

complaint involves only one apartment complex ("Somerset"). The Commission fully adjudicated Counts I-III and rendered the following findings with respect to each Count:

i. COUNT I: UNLAWFUL PROVISION OF NONCOMPETITIVE ELECTRIC SERVICE

Duke Complaint:

62. By engaging in the business of supplying electricity, NEP is an "electric light company" under R.C. 4905.03 and a "public utility" under R.C. 4905.02.

AEP Order:

{¶ 179} NEP is not "engaged in the business of supplying electricity * * * to consumers within this state" as a result of its activities at the Apartment Complexes and, therefore, does not qualify as an "electric light company" under R.C. 4905.03(C) and, thus, is not a "public utility" pursuant to R.C. 4905.02(A).

ii. COUNT II: VIOLATION OF CERTIFIED TERRITORY ACT

Duke Complaint:

76. By supplying or arranging for the supply of retail electric service to customers at Somerset, NEP is an "electric supplier" as defined in R.C. 4933.81(A), providing "electric service" as defined in R.C. 4933.81(F), and is violating Duke Energy Ohio's certified territory under R.C. 4933.83(A).

AEP Order:

{¶ 227} [W]e found that NEP is not an electric light company under R.C. 4905.03(C). Therefore, NEP cannot be an electric supplier under R.C. 4933.81(A), meaning its operations at the Apartment Complexes cannot violate the CTA under R.C. 4905.03(C).

iii. COUNT III: UNLAWFUL PROVISION OF COMPETITIVE RETAIL ELECTRIC SERVICE

Duke Complaint:

80. By supplying or arranging for the supply of a competitive retail electric service to end-use customers at Somerset without the required certification or complying with the attendant regulations (e.g., all the requirements of Ohio Administrative Code Chapter 4901:1-21), NEP is violating R.C. 4928.08(B).

AEP Order:

> {¶ 228} We find AEP Ohio's third count within its Complaint, that NEP supplies or arranges for the supply of a CRES to the Apartment Complexes without the required certification or complying with applicable regulations in violation of R.C. 4928.08(B), has no merit.

The Commission should reiterate its determinations from the AEP Order: "NEP is not serving as an electric light company and, therefore, is not a public utility for multiple reasons." (Order at ¶ 183). "NEP cannot be an electric light company because the landlord of each of the Apartment Complexes **and not the tenant** is the 'consumer,' as contemplated under R.C. 4905.03(C), of electricity supplied by AEP Ohio." (Order at ¶ 184) (emphasis added). "NEP is simply the agent of the landlord when facilitating submetering service at the Apartment Complexes." (Order at ¶ 221). "NEP, itself, is essentially a service provider a landlord hires to provide… energy-related services." *Id*. And, finally, "the Commission's jurisdiction ends at this point and does not extend to a landlord's reselling of that electricity to its tenants." (Order at ¶ 194).

There is nothing new or different for the Commission to consider with the Duke Complaint. In fact, because tenants are not "consumers" under R.C. 4905.03(C) and Duke does not (and cannot) allege that any service will cross property lines, there are no facts that Duke could plead that would create a possibility of a different outcome here as a matter of law. Duke fails to allege any set of facts which would entitle it to relief or vest the Commission with jurisdiction to hear its Complaint, in due regard to the Commission's findings above. So then, the Commission should dismiss the Duke complaint because NEP is <u>not</u> a public utility under R.C. 4905.02 and, as such, is <u>not</u> subject to the jurisdiction of the Commission.

C. Count IV alleges that NEP is violating a provision of Duke's tariff, despite that provision having no application to the facts pled.

For the reasons stated above, the Commission does not have jurisdiction to hear Duke's complaint against NEP. That includes Duke's complaint that NEP violated a provision of its tariff. Nevertheless, Count IV can be easily dismissed because it has zero application under the facts alleged. Duke cites the following from Section II.5. (Use of Service) which states:

> Service is supplied directly to the customer through the meter and is to be used by the customer only for the purposes specified in and in accordance with the provisions of the applicable rate schedule and these regulations and any service agreement.
>
> **The customer will not build lines across or under a street, alley, lane, court or avenue or other public space in order to obtain service for adjacent property through one meter**, even though such adjacent property is owned by customer, **without the prior written approval of the Company**.
>
> In case of unauthorized sale, extension or other disposition of service, the Company may discontinue the supplying of service to the customer until such unauthorized act is discontinued and full payment is made for all service supplied or used, billed on proper classification and rate schedule, and reimbursement in full made to the Company for all extra expenses incurred, including expenses for clerical work, testing and inspections.

(Complaint at ¶ 11). (Emphasis added.)

Oddly enough, Duke does not even allege that NEP took any action, on behalf of the property owner, to "build lines across or under a street, alley, lane, court or avenue or other public space" in order to obtain service for adjacent properties.

Misconstruing its own tariff, Duke asserts that "Section II.5 (Use of Service) of the Duke Energy Ohio's Tariff prohibits the resale of any service without the prior written approval of Duke Energy Ohio." (Complaint at ¶ 82). The assertion is plainly inaccurate to the extent it suggests that *any* service request necessitates prior written approval under Section II.5.

Section II.5 only applies to the limited circumstance where a customer seeks to "build lines across or under a street, alley, lane, court or avenue or other public space in order to obtain service for adjacent property through one meter[.]" This situation simply does not exist at the Somerset apartment complex. Furthermore, if Duke's tariff actually did prohibit resale of any service without Duke's prior written permission, it would be invalid as an unlawful restriction of landlords' well established legal rights. *See Jonas v. Swetland Co.*, 119 Ohio St. 12, 16, 162 N.E. 45, 46 (1928); *Shopping Centers Ass'n v. Public Utilities Com.*, 3 Ohio St. 2d 1, 4 208 N.E. 2d 923, paragraph two of the syllabus (1965); *FirstEnergy Corp. v. PUC*, 96 Ohio St. 3d 371, 373, 2002-Ohio-4847, 775 N.E.2d 485, at ¶ 10. *See also In re Complaint of Michael E. Brooks, et al., Complainants v. The Toledo Edison Company*, Case No. 94-1987-EL-CSS, Opinion and Order (May 8, 1996) at 35. Since Duke does not allege any facts relevant to this tariff provision, and this tariff provision plainly does not apply as Duke suggests, Count IV should also be dismissed.

D. The Miller Act does not apply to a landlord's request to reconfigure to master-metered service.

Lastly, in paragraph 60 of its Complaint, Duke makes a passing reference to the Miller Act. Duke alleges that "by taking over service from Duke Energy Ohio at Somerset, NEP has forced (and continues to force) Duke Energy Ohio to abandon service to its customers in violation of R.C. 4905.20 and 4905.21 (commonly referred to as the Miller Act)." This allegation is buried in the final paragraph of the "FACTS" portion of Duke's Complaint. The allegation does not appear elsewhere in Duke's Counts I-IV. The claim should be raised, if at all, in an Application for Abandonment[2] separate from Duke's complaint under RC 4905.26. Thus, the issue is not properly raised and should be rejected on procedural grounds. Again, the Commission does not have

[2] NEP does not agree that an Application for Abandonment is proper under these or similar circumstances. *See* NEP's Motion to Dismiss filed December 4, 2023 in Case No. 22-0693-EL-ABN.

jurisdiction to hear a complaint against NEP, so a complaint against NEP is not a proper vehicle to raise any issue at all, the Miller Act included.

Nevertheless, even if the Commission were to consider a Miller Act claim, such claim should also be rejected on substantive grounds. Duke is not "abandoning" service when a landlord chooses a master-metered configuration. That's because "under current law, the landlord and not the tenant is the 'consumer' under R.C. 4905.03(C), even in the context of electric submetering." (Order at ¶ 188). Approximately 90 years of precedent establishes the landlord as the "consumer" in this context. And "the Commission's jurisdiction ends at this point and does not extend to a landlord's reselling of that electricity to its tenants." (Order at ¶ 194).

The Miller Act does not apply to changes of service on private property. Any change in service necessarily involves ceasing to provide the old service in favor of the new service, but **not all service is subject to the Miller Act**.

R.C. 4905.20 provides:

> [N]o public utility as defined in section 4905.02 of the Revised Code furnishing service or facilities within this state, shall abandon or be required to abandon or withdraw any . . . electric light line . . . or any portion thereof . . . or the service rendered thereby, that has once been . . . **used for public business**, nor shall any such facility be closed for traffic or service thereon, therein, or thereover except as provided in section 4905.21 of the Revised Code. (emphasis added).

And R.C. 4905.21 provides:

> [A]ny public utility or political subdivision desiring to abandon or close, or have abandoned, withdrawn, or closed for traffic or service all or any part of any line . . . referred to in section 4905.20 of the Revised Code, shall make application to the public utilities commission in writing. The commission shall thereupon cause reasonable notice of the application to be given, stating the time and place fixed by the commission for the hearing of the application.

The words "used for public business" must have meaning and cannot include equipment or service entirely within the bounds of private property. The Miller Act ensures that a utility cannot

unreasonably leave a customer without service because the lines running between properties are "used for public business." But lines and equipment within the bounds of one private property are not, under any reasonable reading of those words, "used for public business." The Miller Act is simply irrelevant to a property owner's request for a utility to alter its service or metering configuration existing only on their private property.

In other words, there is no "abandonment" that would require an application to the Commission because the utility's ultimate customer – the landlord – continues to receive service from the utility regardless of the configuration of the metering on their property. As the Commission recently reaffirmed, "the landlord…**and not the tenant** is the 'consumer,' as contemplated under R.C. 4905.03(C), of electricity supplied by [the utility]." (Order at ¶ 184) (emphasis added). Where the utility **continues to serve every customer**, every line "used for public business" remains in service and no abandonment that would trigger an application of the Miller Act has taken place.

An alternative view is that service to tenants will be transferred from Duke to the landlord, which, again, has a perfectly clear legal right to resell and redistribute service to tenants and is unregulated by the Commission. From that perspective, "[t]he Commission has previously found that transactions involving the transfer of service by a regulated public utility to service by a nonregulated entity are not tantamount to an abandonment of service or facilities within the meaning of R.C. 4905.20 and 4905.21." *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Abandon Natural Gas Service*, Case No. 18-1662-GA-ABN, Finding and Order (March 10, 2021) at ¶ 3, citing *In re Southeastern Natural Gas Co.*, Case No. 15-1508-GA-ATR, Finding and Order (June 1, 2016); *In re Northern Industrial Energy Development, Inc.*, Case No. 05-1267-GAATR, Finding and Order (Dec. 14, 2005); *See also, In the Matter of the*

Application of Columbia Gas of Ohio, Inc. for Approval of a Transfer of Facilities and Customers, and a Transportation Agreement with Utility Pipeline Ltd., Case No. 18-1662-GA-ABN, Finding and Order (February 2, 2005) at ¶ 9 ("the application reflects that a regulated utility's service is to be transformed into a nonregulated service and the Commission has previously found such transactions are not tantamount to an abandonment of service or facilities and are not subject to Commission review under Sections 4905.20 and 4905.21, Revised Code."). **The Commission has settled this question already** – a transfer of tenants' service from Duke to their landlord does not raise a Miller Act issue.

Because the landlord is the ultimate consumer under a master-metered configuration, and Duke does not dispute that it will still be providing service to the ultimate consumer under a master-metered configuration, there are no grounds for an abandonment issue and the Miller Act is simply irrelevant to Somerset's service request.

IV. CONCLUSION

Duke's allegations fail to present reasonable grounds for a complaint under R.C. 4905.26 because the Commission is without jurisdiction to hear a complaint against NEP, in due consideration of the Commission's recent adjudication that NEP is not an "electric light company" under R.C. 4905.03 and therefore not a "public utility" under R.C. 4905.02. For the foregoing reasons, NEP respectfully requests that the Commission dismiss Duke's complaint in its entirety.

Respectfully submitted,

/s/ Brian A. Gibbs

Brian A. Gibbs (0088260)
Drew B. Romig (0088519)
230 West Street, Ste. 150
Columbus, Ohio 43215
614-446-8485
brian.gibbs@nationwideenergypartners.com
dromig@nationwideenergypartners.com

Michael J. Settineri (0073369), Counsel of Record
Anna Sanyal (0089269)
Andrew P. Guran (0090649)
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, Ohio 43215
614-464-5462
mjsettineri@vorys.com
aasanyal@vorys.com
apguran@vorys.com

Attorneys for Nationwide Energy Partners

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CERTIFICATE OF SERVICE

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Rocco D'Ascenzo
rocco.dascenzo@duke-energy.com

Jeanne Kingery
jeanne.kingery@duke-energy.com

N. Trevor Alexander
talexander@beneschlaw.com

Mark Keaney
mkeaney@beneschlaw.com

Kari Hehmeyer
khehmeyer@beneschlaw.com

Angela O'Brien
angela.obrien@occ.ohio.gov

Connor Semple
connor.semple@occ.ohio.gov

/s/ Brian A. Gibbs

Brian A. Gibbs (0088260)

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