

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Duke Energy Ohio, Inc.,)	
)	
Complainant,)	
)	
v.)	Case No. 22-0279-EL-CSS
)	
Nationwide Energy Partners, LLC)	
)	
Respondent.)	

**DUKE ENERGY OHIO, INC. MEMORANDUM CONTRA
NATIONWIDE ENERGY PARTNERS, LLC’S MOTION TO DISMISS**

I. INTRODUCTION

Consistent with well-established Ohio jurisprudence, the Public Utilities Commission of Ohio (Commission) must deny Nationwide Energy Partners, LLP’s (NEP) Motion to Dismiss the original complaint filed by Duke Energy Ohio, Inc. (Duke Energy Ohio) in this proceeding. The day after NEP filed its Motion to Dismiss, Duke Energy Ohio sought leave to amend the original complaint and to file a separate abandonment application in compliance with the Commission’s AEP Ohio/NEP Order (defined below). Since NEP seeks dismissal of an outdated, superseded complaint filed over twenty (20) months ago and since Duke Energy Ohio’s proposed amended complaint (Amended Complaint¹) states reasonable grounds for complaint as required by R.C. 4905.26, the Commission must deny the Motion to Dismiss as a matter of law.

In doing so, the Commission will enable the parties to develop a full and comprehensive record on critical questions regarding the Miller Act that were left unanswered by the AEP

¹ See Motion for Leave to Amend the Complaint and to File a Separate Abandonment Application and Motion to Consolidate, Attachment A.

Ohio/NEP Order, which will benefit all stakeholders involved with similar submetering requests, including utilities, landlords, agents of landlords, and tenants.

II. BACKGROUND

On March 30, 2022, Duke Energy Ohio filed a complaint against NEP in the above-captioned proceeding wherein Duke Energy Ohio asserted four specific counts against NEP on the basis that NEP was unlawfully operating as a “public utility” in violation of numerous statutes and regulations (Original Complaint). In response, NEP filed an answer to the Original Complaint denying Duke Energy Ohio’s allegations, and NEP filed a counterclaim against Duke Energy Ohio. At that time, NEP did not file a motion to dismiss the Original Complaint. Subsequently, the above-captioned case remained dormant while the Commission adjudicated an earlier-filed complaint case brought by AEP Ohio against NEP in Case No. 21-990-EL-CSS (AEP Ohio/NEP Case), which involved similar legal claims as those asserted in the Original Complaint.

On September 6, 2023, the Commission issued an Opinion and Order in the AEP Ohio/NEP Case, finding that AEP Ohio failed to prove NEP’s submetering activities contravened Ohio law because (among other reasons) NEP was merely acting as the agent of the landlord who has a right under Ohio law to determine how service is delivered on its property, whether that be through a master-metered configuration with submetering to tenants or individual utility meters for each tenant (AEP Ohio/NEP Order).² Critically, however, the AEP Ohio/NEP Order never addressed how, if at all, electric distribution utilities (EDUs) are supposed to comply with the Miller Act when a landlord seeks to convert existing, individually metered EDU customers with their own existing (and in some instances long-standing) individual accounts to submetering through the

² *In the Matter of the Complaint of Ohio Power Company v. Nationwide Energy Partners, LLC*, Case No. 21-990-EL-CSS, Opinion and Order (Sept. 6, 2023).

installation of master-metered service for the landlord. The Commission never addressed the Miller Act because AEP Ohio did not assert a separate Miller Act count in its complaint against NEP and did not file a separate application for the abandonment at issue in that case.³ Therefore, the Commission found that “any allegations related to the Miller Act will not be considered and should be dismissed.”⁴

Given that Duke Energy Ohio asserted very similar legal theories against NEP in its Original Complaint, Duke Energy Ohio recognized that, while it disagreed with the AEP Ohio/NEP Order, the Commission had effectively ruled against Duke Energy Ohio as to those four specific counts. Importantly, however, because the Commission declined to address the Miller Act in the AEP Ohio/NEP Order due to procedural deficiencies, Duke Energy Ohio filed a Motion for Leave to Amend the Complaint and to File a Separate Abandonment Application and Motion to Consolidate (Motion for Leave) in the above-captioned docket on December 19, 2023. In the Motion for Leave, Duke Energy Ohio attached its proposed Amended Complaint (*see* Attachment A) and its proposed abandonment application (*see* Attachment B). However, before Duke Energy Ohio could file the Motion for Leave, NEP filed a motion to dismiss the Original Complaint (Motion to Dismiss) on December 18, 2023.

As explained below, it is hornbook law in Ohio that the filing of an amended complaint moots any prior motion to dismiss the original complaint. Accordingly, as a matter of law and consistent with longstanding Ohio precedent, the Commission must deny the Motion to Dismiss and allow the parties a full and fair opportunity to develop a comprehensive record sufficient for

³ *Id.* at ¶¶ 230-231.

⁴ *Id.*

the Commission to clarify the significant legal questions left unanswered by the AEP Ohio/NEP Order.

III. STANDARD OF REVIEW

R.C. 4905.26 requires the Commission to proceed to hearing upon a complaint “if it appears reasonable grounds for complaint are stated.” In making such a determination, the Commission is guided by the standards governing motions to dismiss set forth in the Ohio Rules of Civil Procedure.⁵ As the Ohio Supreme Court has recognized, the Commission has adopted the same civil standards when reviewing motions to dismiss under R.C. 4905.26.⁶ For instance, the Commission has previously held that “when a motion to dismiss is being considered, all material allegations of the complaint must be accepted as true and construed in favor of the complaining party.”⁷ To survive a motion to dismiss, the plaintiff/complainant must only show some set of facts that would entitle it to relief.⁸ Indeed, a complainant may only be dismissed after there is a determination beyond a reasonable doubt that the complaining party can prove no set of facts in support of its claim which would entitle it to relief.⁹ As set forth below, NEP has failed to meet

⁵ *In the Matter of the Complaint of Townships of Mahoning County, Ohio et al. v. Ohio Edison Company*, 1977 WL 424785, Case No. 76-1067-EL-CRC, Entry (Nov. 2, 1977), ¶ 5.

⁶ *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 524, 668 N.E.2d 889, 891 (1996).

⁷ *OCC v. Dominion Retail*, Case No. 09-257-GA-CSS, Entry (July 1, 2009), ¶ 7 (citing *In the Matter of the Complaint of XO, Inc. v. City of Upper Arlington*, Case No. 03-870-AU-PWC, Entry on Rehearing (July 1, 2003)).

⁸ *See O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975).

⁹ *See Sacksteder v. Senney*, 2nd Dist. Montgomery No. 24993, 2012-Ohio-4452, ¶ 20.

the minimum standard for dismissal under R.C. 4905.26; thus, the Motion to Dismiss should be denied.

IV. ARGUMENT

A. The Motion to Dismiss Duke Energy Ohio’s Original Complaint Is Rendered Moot by the Subsequent Filing of Duke Energy Ohio’s Amended Complaint Consistent with Longstanding, Well-Established Precedent in Ohio.

Ohio courts, including the Ohio Supreme Court, have consistently and repeatedly recognized that substituting an amended pleading for an original pleading constitutes an abandonment of the original pleading and a reliance upon the amended one.¹⁰ Citing to Ohio Jurisprudence Pleading, a well-respected and widely cited secondary source, Ohio courts have repeatedly described it as “hornbook law” or “elementary law” that an amended pleading supersedes the original, the latter being treated thereafter as “non-existent” or as “*functus officio*.”¹¹ Indeed, Ohio courts have consistently applied this “hornbook law” to situations like the one here where a complainant files an amended complaint *after* the respondent files a motion to dismiss the original complaint. Ohio courts have specifically affirmed that it is “elementary law” that the filing of an amended complaint moots a motion to dismiss the original complaint.¹² Not

¹⁰ See, e.g., *State ex rel. Talaba v. Moreland*, 132 Ohio St. 71, 75, 5 N.E.2d 159, 161 (1936) (“Likewise it is elementary law that when a party substitutes an amended petition for an earlier one, this constitutes an abandonment of the earlier pleading and a reliance upon the amended one. The earlier pleading becomes *functus officio*.”) (emphasis in original); *Williams v. MJS Enterprises, Ltd.*, 4th Dist. No. 22CA8, 2022-Ohio-3695, 199 N.E.3d 132, ¶ 16; *Morris v. Morris*, 10th Dist. No. 10AP-15, 189 Ohio App.3d 608, 2010-Ohio-4750, 939 N.E.2d 928, ¶ 32 (“It is well settled that an amended pleading supersedes the original pleading.”); *Abram & Tracy, Inc. v. Smith*, 88 Ohio App.3d 253, 263, 623 N.E.2d 704, 711 (10th Dist. 1993) (acknowledging that “an amended pleading supersedes the original pleading”); *Carlock v. Coleman*, 7th Dist. Mahoning No. 89 C.A. 121, 1990 WL 121874, *2 (acknowledging “that an amended pleading supersedes the original, the latter being treated [*sic*] thereafter as nonexistent”).

¹¹ See, e.g., *State ex rel. Talaba*, 132 Ohio St. at 75; *Morris*, 939 N.E.2d at 940; *Carlock*, 1990 WL 121874 at *2.

¹² See, e.g., *Williams*, 199 N.E.3d at 139 (“Not only does the amended complaint moot the motion to dismiss, it affords the defendant an opportunity to make a new motion to dismiss and re-raise previous defenses or raise new ones.”); *Everhome Mgte. Co. v. Baker*, 10th Dist. Franklin No. 10AP-534, 2011-Ohio-3303, ¶ 25 (“A motion to dismiss an original complaint is rendered moot by subsequent filing of an amended complaint.”); *DVCC, Inc v. Med. College of Ohio*, 10th Dist. Franklin No. 05AP-237, 2006-Ohio-945, ¶ 9 (acknowledging trial court denied defendants’ motions to dismiss as moot after plaintiff filed an amended complaint).

surprisingly, in light of this “well settled” law, the Commission has similarly ruled that the filing of an amended complaint moots any prior motion to dismiss the original complaint.¹³

This is particularly true where, as here, the Motion to Dismiss seeks the dismissal of four specific counts asserted in the Original Complaint that were *not* reasserted in the Amended Complaint. The Motion to Dismiss filed by NEP seeks the dismissal of the Original Complaint, which, according to NEP, “hinges on whether NEP’s activities constitute those of a public utility and, interdependently, whether NEP is subject to the jurisdiction of the Commission.”¹⁴ But unlike the Original Complaint, the Amended Complaint does not hinge on any such determination about whether NEP is an “electric light company” under R.C. 4905.03 or a “public utility” under R.C. 4905.02. Instead, the Amended Complaint merely seeks a determination as to the applicability of the Miller Act to submetering requests like those at issue in this case.

Moreover, denying the Motion to Dismiss will enable the Commission to clarify lingering questions left unanswered by the AEP Ohio/NEP Order. Specifically, the Commission declined to address the Miller Act in the AEP Ohio/NEP Order because (i) AEP Ohio’s complaint against NEP did not assert a specific count alleging a Miller Act violation, and (ii) AEP Ohio did not file a separate abandonment application.¹⁵ Likewise, as Duke Energy Ohio acknowledged its Motion for Leave, the Original Complaint filed in this proceeding did not assert a separate, standalone count for an alleged Miller Act violation, and Duke Energy Ohio did not file a separate

¹³ See *In the Matter of the Complaints of S.G. Foods, Inc. et al. v. The Cleveland Electric Illuminating Company et al.*, Case Nos. 04-28-EL-CSS et al., Entry (Aug. 7, 2006), ¶ 6 (finding that “the prior motions are moot and will not be addressed” due to the filing of an amended complaint).

¹⁴ NEP Motion to Dismiss, p. 2.

¹⁵ *In the Matter of the Complaint of Ohio Power Company v. Nationwide Energy Partners, LLC*, Case No. 21-990-EL-CSS, Opinion and Order (Sept. 6, 2023), ¶¶ 230-232.

abandonment application.¹⁶ As a result, unless the Commission grants the Motion for Leave and denies the Motion to Dismiss, important questions related to the Miller Act will remain unanswered and unresolved whenever a landlord seeks to convert the EDU's existing customers (i.e., tenants of the landlord) to submetering customers of the landlord. Since the Commission declined to address the Miller Act in the AEP Ohio/NEP Order due to the foregoing procedural deficiencies, Duke Energy Ohio has sought leave to file the Amended Complaint and to file a separate Abandonment Application, which would squarely and properly raise these critical, unanswered questions for Commission adjudication consistent with the AEP Ohio/NEP Order.

Granting leave to file the Amended Complaint and a separate Abandonment Application will narrow the claims at issue and allow the Commission to substantively address the Miller Act. No party would be prejudiced by the denial of NEP's Motion to Dismiss as NEP will be afforded the ample opportunity to respond to the Amended Complaint via a new answer and/or a new motion to dismiss focused solely on the Amended Complaint.

In sum, in accordance with well-established "hornbook law" and in light of Duke Energy Ohio's filing of the Motion for Leave, the Commission must deny NEP's Motion to Dismiss. To the extent NEP seeks to file a renewed motion to dismiss, it must specifically seek dismissal of the single count asserted in the Amended Complaint, as the Original Complaint has been superseded and should be treated as "non-existent" and "moot" as a matter of law consistent with longstanding Ohio jurisprudence.

¹⁶ See Motion for Leave to Amend the Complaint and to File a Separate Abandonment Application and Motion to Consolidate ("Motion for Leave to Amend").

B. It Would Be Premature, Unnecessary, and Counterproductive to Substantively Consider NEP's Miller Act Arguments In the Motion to Dismiss a Superseded, Outdated Complaint.

Although NEP moves to dismiss the four counts asserted in the Original Complaint, NEP acknowledges that there is a “passing reference to the Miller Act” in the Original Complaint, which is “buried in the final paragraph of the ‘FACTS’ portion of the [Original] Complaint.”¹⁷ NEP concedes that this “allegation does not appear in Duke’s Counts I-IV”, but nonetheless argues that a hypothetical Miller Act claim should be “rejected on substantive grounds.”¹⁸ In support of that statement, NEP cites numerous Commission cases that purportedly support the proposition that **“[t]he Commission has settled this question already – a transfer of tenants’ service from Duke to their landlord does not raise a Miller Act issue.”**¹⁹

As an initial matter, NEP is mistaken. None of the cases cited in its Motion to Dismiss support that contention. Instead, all of these cases deal with the transfer of utility assets or regulated public utility service to non-jurisdictional entities like electric cooperatives or otherwise involve a utility seeking to abandon service that is not economically feasible. None involved submetering or even any landlord/tenant issues, and none of these cases support NEP’s unfounded proposition that the Miller Act questions in the submetering context have already been settled by the Commission. If that were the case, the Commission could have easily and swiftly affirmed as much in the AEP Ohio/NEP Order.

Regardless, given that the Motion to Dismiss is moot as a matter of law as described above, it would be premature, unnecessary, and counterproductive to address the substance of NEP’s Miller Act arguments in the Motion to Dismiss. It is undisputed that the Original Complaint,

¹⁷ NEP Motion to Dismiss, at 8.

¹⁸ *Id.*

¹⁹ *Id.* at 10-11 (emphasis in original).

which is the subject of the Motion to Dismiss, did not assert a standalone Miller Act claim. Hence Duke Energy Ohio seeking leave to file an amended complaint devoted exclusively to the Miller Act. For the Miller Act questions to be fully and fairly adjudicated, the Commission needs to develop a comprehensive record where all parties are afforded sufficient opportunity to brief their Miller Act arguments for Commission consideration. For example, the landlord(s) who NEP purports to be acting as agent for would be necessary parties to such a determination and should be permitted to be heard. Granting dismissal of the Original Complaint and denying Duke Energy Ohio leave to file the Amended Complaint would be counterproductive in that it would effectively deprive the Commission of a fully developed record necessary to render an informed decision regarding the Miller Act in accordance with Ohio law and Commission regulations.

By denying the Motion to Dismiss and granting the Motion for Leave, the Commission will ensure that all parties, including NEP and the landlord(s) who NEP purports to represent, will have sufficient opportunity to fully and fairly brief these issues. Further, it will cure the procedural deficiencies that prevented the Commission from addressing the Miller Act in the AEP Ohio/NEP Case. Thus, for the Miller Act questions to be properly addressed by the Commission, the Commission must deny the Motion to Dismiss, grant Duke Energy Ohio's Motion for Leave, and allow the parties to fully brief their legal arguments based on the allegations in the Amended Complaint.

V. CONCLUSION

For the foregoing reasons and for the benefit of all stakeholders (landlords, agents of landlords, tenants, utilities, etc.), the Commission should deny the Motion to Dismiss as a matter of law and allow the parties a full and fair opportunity to develop a sufficient record for the

Commission to adjudicate the important legal questions left unanswered by the AEP Ohio/NEP Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities of Ohio on this 2nd day of January, 2023. The PUCO's Docketing Information System will electronically serve notice of the filing of this document on counsel for all parties.

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