**IN THE SUPREME COURT OF OHIO**

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|---|---|---|
| **In the Matter of the Complaint of Ohio Power Company** | ) | **Case No. 2024-0207** |
| | ) | |
| **v.** | ) | **On Appeal from the Public Utilities Commission of Ohio** |
| | ) | |
| **Nationwide Energy Partners, LLC** | ) | **Case No. 21-990-EL-CSS** |

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**MOTION FOR RECONSIDERATION OF INTERVENING APPELLEE NATIONWIDE ENERGY PARTNERS, LLC**

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## <u>MOTION FOR RECONSIDERATION</u>

Intervening Appellee Nationwide Energy Partners, LLC ("NEP") respectfully moves, pursuant to S.Ct.Prac.R. 18.02(B)(4), for reconsideration of the decision on the merits of this case. NEP presents five bases for reconsideration with each independently warranting reflection and reconsideration by the Court.

1) The Court incorrectly applied a de novo review to the Commission's factual determinations and made findings on disputed facts that conflict with the Commission's factual findings.

2) The Court should correct its misattribution of AEP Ohio's landlord-tenant exception argument to the Commission and misapprehension of the Commission's Opinion and Order.

3) The Court should not overturn its precedent in *Pledger* without reference to the principle of stare decisis and application of the *Galatis* factors.

4) The Commission and not the Court should first apply the facts to R.C. 4905.03(C) as newly interpreted by the Court.

5) The Court should comply with R.C. 4903.13 and clarify what parts of the Commission's Opinion and Order, if any, were unlawful or unreasonable.

NEP recognizes that the Court's reconsideration of a decision is rare. But in this instance, reconsideration is warranted to ensure statutory compliance with the requisite standard of review, to avoid the Court usurping the Commission's role as the trier of fact, and to protect the doctrine of stare decisis subject to *Galatis*. Reflection and reconsideration by the Court is warranted.

### I. The Court should grant reconsideration because it incorrectly applied a de novo review to the Commission's factual determinations and made findings on disputed facts that conflict with the Commission's factual findings.

Reconsideration is warranted because the Court, in its decision, incorrectly applied a de novo review to the Commission's factual determinations and then substituted its own judgment for that of the Commission on the disputed facts. Not only did the Court erroneously apply a de novo standard of review to the Commission's factual findings, the Court's findings of fact directly conflict with the Commission's findings. The Court must defer to the Commission's findings of fact under the "unreasonable" standard of review mandated by R.C. 4903.13, and can only overturn the Commission if the findings are against the manifest weight of the evidence. As further described below in this section, reconsideration is warranted.

**A. The Court must defer to the Commission's findings of fact.**

The Court gave no deference to the Commission's fact finding in the decision, instead the Court erroneously made its own factual determinations under a de novo standard of review. The Court justified its de novo review on the basis that "[a]s the *relevant facts are largely undisputed*, PUCO's determination that NEP is [not] engaged in the business of supplying electricity to consumers was purely a legal conclusion." *Complaint of Ohio Power Co. v. Nationwide Energy Partners, L.L.C.*, 2026-Ohio-1406, ¶ 21 (emphasis added) (hereinafter, "Decision"). NEP adds "not" to this quote to clarify ¶ 21 of the decision as the Commission did *not* hold that "NEP is engaged in the business of supply electricity." The Commission expressly held the exact opposite. (*See* Opinion and Order at ¶ 207, OPC Appx. 101-102 ("We make the following findings, which establish that NEP is not 'engaged in the business of supplying electricity' . . . .")).

Whether "relevant facts" are "largely undisputed" has no bearing on whether a Commission order is unlawful or unreasonable, the standard of review prescribed under R.C. 4903.13. This standard of review is well-established and consistently applied in this Court. *See Pollitz v. Pub. Util. Comm.*, 97 Ohio St. 191 (1918), paragraph three of the syllabus (declining to set aside an order of the public utilities commission unless it was "unreasonable or unlawful"); *see also Chester Twp. v. Power Siting Comm.*, 49 Ohio St.2d 231, 238 (1977) (recognizing "unreasonable or unlawful" as a standard under R.C. 4903.13); *see also In re Rev. of the Power-Purchase-Agreement Rider of Ohio Power Co. for 2018 & 2019*, 2026-Ohio-1485, ¶ 18 (Fischer, J.); *In re Comm.'s Investigation Into RPA Energy, Inc.'s Compliance With The Ohio Adm. Code*, 2026-Ohio-563, ¶ 15 (Hawkins, J.); *In re S. Branch Solar, L.L.C.*, 2025-Ohio-5679, ¶ 18 (Brunner, J.); *In re Ohio Power Co. for Auth. to Establish A Std. Serv. Offer Pursuant to R.C. 4928.143*, 2025-Ohio-3034, ¶ 14 (Kennedy, C.J.); *In re Applications of Dayton Power & Light Co. for Administration of the Significantly Excessive Earnings Test Under R.C. 4928.143F*, 2025-Ohio-2953, ¶ 22 (Kennedy, C.J.); *In re Harvey Solar I, L.L.C.*, 2025-Ohio-1503, ¶ 11 (DeWine, J.).

Indeed, as recently as two days ago, this Court applied the standard setting forth how the Court applies the standard of review under R.C. 4903.13. *See Power-Purchase-Agreement*, 2026-Ohio-1485 at ¶ 18, quoting *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 2004-Ohio-6767, ¶ 50. And, just two months ago in *RPA Energy* the Court expressly set forth the applicable standard.

> **The term "unlawful" in the standard-of-review context refers to this court's review of legal questions, such as the proper interpretation of a statute or whether the commission followed the procedures prescribed by statute or commission rules.** *See In re Application of Firelands Wind, L.L.C.*, 173 Ohio St. 3d 40, 2023-Ohio-2555, ¶ 12, 227 N.E.3d 1129; *In re Application of Alamo Solar I, L.L.C.*, 174 Ohio St. 3d 143, 2023-Ohio-3778, ¶ 11, 235 N.E.3d 372. Our review of legal questions is de novo. *Id.*
>
> **A commission order is unreasonable when it is manifestly contrary to the evidence in the record, when the evidence is clearly insufficient to support the decision, or when it is internally inconsistent.** *See Firelands Wind* at ¶ 16. Additionally, a commission order is unreasonable when the commission's exercise of its discretion in making determinations within broad statutory criteria falls outside the zone of permissible statutory construction. *Id.* at ¶ 15.
>
> **In adjudicating whether a commission order is unreasonable, we do not reweigh the evidence or second-guess the commission on questions of fact.** *In re Complaints of Lycourt-Donovan v. Columbia Gas of Ohio Inc.*, 152 Ohio St. 3d

> 73, 2017-Ohio-7566, ¶ 35, 93 N.E.3d 902. We will not disturb the commission's factual determinations when the record contains sufficient probative evidence to show that the commission's decision "is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty." *Columbus v. Pub. Util. Comm.*, 58 Ohio St. 2d 103, 104, 388 N.E.2d 1237 (1979).

*RPA Energy* at ¶¶ 16-18 (emphasis added). Furthermore, "[t]he appellant bears the burden of demonstrating that the commission's decision is unlawful or unreasonable." *RPA Energy* at ¶ 15, citing *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.*, 51 Ohio St.3d 150, 154 (1990).

Although *Power-Purchase-Agreement* and *RPA Energy* just issued, the decision in this proceeding made no mention of the standard of review, and as noted above, characterizes the Commission's determination of the facts as a legal conclusion in order to apply a de novo standard of review. (Decision at ¶ 21). For support, the decision cites to *TWISM*, but that case involved the Court's de novo review of an administrative body's statutory interpretations and not a de novo review of factual determinations. (*See id.* at ¶21, citing *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, ¶ 38). The Court should have applied the proper standard of review under R.C. 4903.13 to the Commission's findings of fact, but as discussed below, it did not.

### B. The Court erroneously applied a de novo review to the Commission's findings of fact.

While NEP does not dispute the Court's authority to conduct a de novo review of the Commission's interpretation of R.C. 4905.03(C), it is evident that the Court applied a de novo review to the Commission's factual findings. The Commission reviewed the evidence gathered at trial to determine that it is the landlord that purchases electric service from AEP Ohio, that resells electricity to tenants through the leases, and that owns the infrastructure to provide electricity to the apartment units. (Opinion and Order at ¶ 208-212, OPC Appx. 102-106). The Commission also found that disconnects only occur with the "express or tacit consent" of the landlord. (*Id.* at ¶ 213, OPC Appx. 107). Those factual findings were not legal conclusions but rather findings that resulted from a more than week-long hearing with multiple witnesses and nearly 100 exhibits, debate of the alleged facts in nearly 500 pages of post-hearing briefing, and resulted in a 161-page Commission Opinion and Order.[1] The Commission's factual findings were robustly supported by the record.

The Court, however, rejected these findings and conducted its own de novo review. Relying primarily on the contract between the landlord and NEP to the exclusion of all other evidence reviewed by the Commission, the Court found that NEP and not the landlord purchases electricity, NEP and not the landlord resells that electricity to thousands of tenants, NEP and not the landlord "provides the means (wires, electrical conduit, etc.) by which the electricity is delivered from the master meter to the tenants," and that NEP and not the landlord bills tenants directly and can disconnect service to tenants. (Decision at ¶¶ 3, 33). And only by rejecting the Commission's findings on disputed facts, was the Court able to reach its determination that NEP was engaged in the business of supplying electricity to consumers.

The Court rejected another principal fact determination by the Commission when the Court applied a de novo review of the Commission's determination that NEP acts as the agent of the landlord as to AEP Ohio and tenants. (*Id.* at ¶¶ 41-42). This Court has previously determined that "under agency law, the authority of any purported agent to act on behalf of a principal is ordinarily a question of fact." *Nascar Holdings, Inc. v. Testa,* 2017-Ohio-9118, ¶ 11, quoting *Jemo Assocs., Inc. v. Lindley*, 64 Ohio St.2d 365, 367 (1980); *see also Auer v. Paliath,* 2014-Ohio-3632, ¶ 20 ("The scope-of-agency determination necessarily turns upon a multitude of considerations and fact-specific inquiries . . . ."). The Court, however, applied a de novo

[1] The record of the underlying proceedings was filed on March 11, 2024.

standard of review to the Commission's agency determination, believing its "characterization" of NEP's relationship with the landlord was "better." (Decision at ¶ 42).

The Court's substitution of its judgement for the Commission's when reversing the Commission's factual finding that NEP was acting as the landlord's agent is evident. The Commission below found at ¶ 182 of the Opinion and Order that "[w]e further find that the evidence demonstrates that NEP functions as an agent of the landlords, as expressed in the contracts between the landlords and NEP, to facilitate submetering service to tenants at each of the Apartment Complexes." (OPC Appx. 89-90). The Court rejected this finding at ¶ 44 of the decision, stating that "[t]hus, none of the justifications relied on by PUCO support the result that it reached." In reaching that conclusion, the Court also voided the Commission's finding that "[a]s already detailed above, the landlords of the Apartment Complexes have executed AEP Ohio's customer [letter of authorizations] to allow NEP to act as the landlords' agent." (Opinion and Order at ¶ 202, OPC Appx. 99).

Fundamentally, the decision turned on a difference in fact-finding as to whether the agreements between NEP and the five apartment complexes and the use of AEP Ohio's third-party letter of authorization form created an agency relationship: the Commission (as fact-finder) determined "yes", while the decision found "no". (*Compare* Opinion and Order at ¶¶ 182, 201-202, 207, 209, 212-214, 218-221, OPC Appx. 89, 98-99, 101-104, 106-111 (references throughout of NEP as agent of the landlords) and NEP Ex. 90, Ex. E; *see, e.g.*, NEP Supp. 7-9 (AEP Ohio third-party letter of authorization (attached)), *with* Decision at ¶ 42 ("On fair reading, NEP's relationship to the landlords does not look like a traditional agency relationship at all.")). As such, the decision erred in making a fact-specific decision as to agency without first determining that the Commission's findings of agency were manifestly against the weight of evidence. *RPA Energy*, 2026-Ohio-563 at ¶ 18.

There should be no dispute that the Court conducted a de novo review of the Commission's factual findings and erroneously applied its judgment for the Commission's judgment. *See Monongahela Power Co. v. Pub. Util. Comm.*, 2004-Ohio-6896, ¶ 29 ("This court has consistently refused to substitute its judgment for that of the commission on evidentiary matters."), citing *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 84 (2002).

### C. The Court made findings of fact on disputed facts that conflict with the Commission's findings.

The Court reweighed the evidence and second-guessed the Commission on questions of fact when the decision reversed the Commission's Opinion and Order. Rather than the Court, however, it is the Commission that sat through a more than week-long hearing and carefully considered 100 exhibits and nearly 500 pages in briefing to make its factual determinations. That is why this Court "… will not disturb the commission's factual determinations when the record contains sufficient probative evidence to show that the commission's decision 'is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.'" *Columbus v. Pub. Util. Comm.*, 58 Ohio St. 2d 103, 104 (1979); *see also Power-Purchase-Agreement*, 2026-Ohio-1485 at ¶ 18 ("But we do not 'reweigh the evidence or second-guess the [commission] on questions of fact.'"), quoting *In re Complaints of Lycourt-Donovan v. Columbia Gas of Ohio Inc.*, 2017-Ohio-7566, ¶ 35.

The importance of applying an "unreasonableness" standard to the Commission's fact findings in this proceeding is reflected by the many instances in which the Court's factual findings are different than the Commission's Opinion and Order.

| **"Undisputed fact" in the Decision** | **Commission Finding in Opinion and Order** | **Disputed Facts** |
|---|---|---|
| "The undisputed facts demonstrate that based on contractual arrangements with landlords, NEP purchases electricity . . . ." Decision at ¶ 3; *see also id.* at ¶ 33. | "Here, as already detailed above, the landlords of the Apartment Complexes elected pursuant to AEP Ohio's tariff to purchase master meter service at the general service level and entered into lease agreements with tenants, who explicitly agreed, as expressed in the leases, to purchase resale of electric service through the landlord." Opinion and Order at ¶ 194, OPC Appx. 94. | "Given the record (e.g., NEP does not produce, purchase, or take title to electricity and does not own the infrastructure) . . . ." NEP Interv. Appellee Br. at 16. |
| "The undisputed facts demonstrate that based on contractual arrangements with landlords, NEP . . . resells that electricity to thousands of tenants." Decision at ¶ 3; *see also id.* at ¶ 33. | "We find that the landlords supply electricity on their own property to the tenants under the terms of the CCSA and the lease to tenants at the Apartment Complexes." Opinion and Order at ¶ 208, OPC Appx. 102; *see also id.* at ¶¶ 207, 212, 221, OPC Appx. 101-102, 106, 111. | "The landlord takes title to all electricity delivered to the community by AEP Ohio and resells and redistributes that electricity to tenants." NEP Interv. Appellee Br. at 7. |
| NEP "provides the means (wires, electrical conduits, etc.) by which the electricity is delivered from the master meter to the tenants." Decision at ¶ 33; *see also id.* at ¶¶ 3, 14, 41. | "The evidence in the record shows that ownership of equipment necessary to resell the electricity now passes to the landlord." Opinion and Order at ¶ 199, OPC Appx. 97. | "The landlord owns the electric infrastructure on its property, including submeters." NEP Interv. Appellee Br. at 7; *see also id.* at 16. |
| "NEP may disconnect tenants who fail to pay their bills." Decision at ¶ 16; *see also id.* at ¶ 3. | "[W]e find that NEP only disconnects a tenant's electric service with the express or tacit consent of the landlord, who is the consumer under R.C. 4905.03(C) and the reseller of electric service on its property." Opinion and Order at ¶ 213, OPC Appx. 107; *see also id.* at ¶ 219, OPC Appx. 109-110. | "NEP may disconnect electric service to residents for non-payment '**[the landlord's] direction**.'" NEP Interv. Appellee Br. at 15 (emphasis in original). |

| **"Undisputed fact" in the Decision** | **Commission Finding in Opinion and Order** | **Disputed Facts** |
|---|---|---|
| "Regardless of the source of supply, NEP is obligated to pay the provider the cost of the electricity purchased . . . ." Decision at ¶ 13; *see also id.* at ¶ 3. | "The landlord also remains obligated to pay its utility bills; however, NEP '* * * shall timely pay, on behalf of Customer, all Electric Commodity Costs * * *'" Opinion and Order at ¶ 201 (internal citation omitted), OPC Appx. 98.<br><br>"As already detailed above, the landlords of the Apartment Complexes have executed AEP Ohio's customer LOAs to allow NEP to act as the landlords' agent . . . . The landlords selected NEP to act as its 'Account Agent and Billing Agent' which the form summarizes as meaning NEP can handle '[a]ll activity and transactions, including receiving bills and remitting payments[;] [b]illing and correspondence are sent to the Authorized party' . . . . [AEP Ohio] confirmed that the above form can be used to manage the customer's account in the ways described in the form." *Id.* at ¶ 202 (internal citations omitted), OPC Appx. 99; *see also id.* at ¶¶ 202-208, OPC Appx. 99-103. | "[The landlord] remains obligated to pay its utility bills, but NEP 'shall timely pay, on behalf of [the landlord], all Electric Commodity Costs' so long as [the landlord] is not in default under the contract." NEP Interv. Appellee Br. at 15. |
| "Thus, none of the justifications relied on by PUCO support the result that it reached [on agency]." Decision at ¶ 44. | "In response to AEP Ohio's argument that NEP is supplying electricity because it arranges for and pays for electricity, we note that the landlord specifically authorized NEP to engage in such activity on its behalf both in the contract **and** in AEP Ohio's [third-party letter of authorizations][.]" Opinion and Order at ¶ 212 (emphasis added), OPC Appx. 106.<br><br>"We further find that **the evidence demonstrates that NEP functions as an agent of the landlords**, as expressed in the contracts between the landlords and NEP, to facilitate submetering service to tenants at each of the Apartment Complexes." Opinion and Order at ¶ 182 (emphasis added), OPC Appx. 89-90. | From AEP Ohio's LOA, "I understand that by reason of this Authorization, the named appointee may conduct the designated activity and transactions on the account(s) that I as customer of record may direct or perform even though I remain responsible for all payment and other service obligations. This Authorization shall continue in effect until the date specified unless earlier terminated by the customer of record." NEP Supp. 7-9. |

| “Undisputed fact” in the Decision | Commission Finding in Opinion and Order | Disputed Facts |
|---|---|---|
| | “Furthermore, the contract consists of numerous other grants of authorization from the landlord to NEP enabling NEP to act on the landlord’s behalf.” Opinion and Order at ¶ 201, OPC Appx. 98.<br><br>“Finally, Schedule 1 to each CCSA consists of a notarized resolution executed by the landlord to provide a broad grant of agency authority to NEP[.]” Opinion and Order at ¶ 201, OPC Appx. 99. | “Through its contracts with its customers (i.e., the landlords) and via AEP Ohio’s own Customer Letter of Authorization to Release Information and Conduct Account Activity, NEP is the customer’s agent – e.g., submitting payment for the landlord’s AEP Ohio master meter bills and reading submeters and billing tenants on behalf of the landlord.” NEP Interv. Appellee Br. at 5-6. |

While the Court was entitled to apply a de novo review to the Commission’s interpretation of R.C. 4905.03(C), it erred when applying its interpretation of the facts to the statute rather than deferring to the Commission’s findings of fact. “[T]he weight to be given the evidence . . . [is] primarily for the trier of the facts.” *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The decision did not follow this guidance, instead stepping into the Commission’s shoes as the trier of fact. The decision’s factual findings on disputed facts conflict with the Commission’s findings and are contrary to the record evidence. That is why the Court should not engage in de novo reviews of factual determinations. Reconsideration is warranted on this important point.

**D. The Court’s application of a de novo review in the decision if left undisturbed will adversely impact all administrative agencies in Ohio.**

Importantly, if a de novo review is applicable to an administrative agency’s underlying factual determinations, then any administrative agency’s findings of fact that are to be applied to a statute would be subject to a de novo standard of review. For example, under the decision's approach, factual findings made by the Ohio Power Siting Board to make the statutory certificate determinations under R.C. 4906.10(A) would be subject to a de novo standard of review. That result would be directly contrary to this Court's precedent as reflected by the Court's decision in *Alamo Solar*. *In re Alamo Solar I, L.L.C.*, 2023-Ohio-3778, ¶ 15 (DeWine, J.). There the Court stated that:

> Finally, in adjudicating whether an agency's determination is unreasonable, we do "not * * * reweigh the evidence or second-guess [the agency] on questions of fact." *Lycourt-Donovan v. Columbia Gas of Ohio, Inc.*, 152 Ohio St.3d 73, 2017-Ohio-7566, 93 N.E.3d 902, ¶ 35. We will not disturb the board's factual determinations "when the record contains sufficient probative evidence to show that the board's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty." *In re Application of Champaign Wind, L.L.C.*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, ¶ 7.

*Id.* at ¶ 17.

The Court's use of a de novo review only applies when considering whether the action of the Commission was "unlawful" such as the proper interpretation of a statute. A de novo review does not extend to whether the Commission acted "unreasonably" in making its factual determinations or its weighing of the evidence. Reconsideration on the Court's application of a de novo review to the facts is warranted. Without reconsideration, the decision will establish an expansive precedent that will result in this Court, and not agencies or other underlying trial courts, becoming the ultimate trier of fact.

## II. The Court should grant reconsideration to correct its misattribution of AEP Ohio's landlord-tenant exception argument to the Commission and misapprehension of the Commission's order.

The Court's analysis fundamentally misapprehends the Commission's Opinion and Order and abrogates that order based on a strawman erected by AEP Ohio. The decision found that "PUCO reasoned that our caselaw had developed a landlord-tenant exception to R.C.

4905.03(C)."  (Decision at ¶ 35, citing 2023 WL 5880187 at *69).  A judicially created exception to a statute exists nowhere in the Commission's Opinion and Order.

That a landlord-tenant exception existed was AEP Ohio's position below.[2]  The Commission never adopted that position.  In the case below and in its briefs before this Court, AEP Ohio, *not* the Commission, argued for the limitation or abrogation of what it called a "judicially-created" "landlord-tenant exception" to R.C. 4905.03(C).[3]  Of course, no such "judicially-created landlord-tenant exception" exists because courts cannot create exceptions to statutes, and the Commission did not adopt AEP Ohio's characterization.

Upon mistakenly transposing AEP Ohio's argument on the Commission, this Court then found that the "PUCO's" premise that "landlords have a special exemption from PUCO's jurisdiction that the landlords can extend to third-party resellers . . ." was incorrect.  (Decision at ¶ 36).  In so finding, the Court has paradoxically ruled in AEP Ohio's favor by finding against AEP Ohio's legal theory but mistakenly attributing that theory to the Commission.  Thus, the Court overturned a decision that the Commission never made based on a "landlord-tenant exception" paradigm that exists only in AEP Ohio's briefs.  The Court should reconsider its

[2] The phrases "landlord exception" and "landlord-tenant exception" appear in AEP Ohio's initial brief in the case below 35 times.  (*See, e.g.*, AEP Ohio Init. Br. at 29 ("Nevertheless, through a series of cases beginning before the current version of Title 49 was even enacted, Ohio courts have created a limited **landlord exception** to the Commission's jurisdiction under Title 49 for landlords that directly provide utility services to tenants residing on their property.") (emphasis added)).

[3] The phrase "landlord-tenant exception" appears ten times in AEP Ohio's Merit Brief.  (*See, e.g.*, AEP Ohio Merit Br. at 1 ("Yet, the Court long ago, in *Jonas v. Swetland Co*., 119 Ohio St. 12 (1928), created a limited **"landlord-tenant exception"** to the Commission's jurisdiction under Title 49…") (emphasis added); *id.* at 25 ("[A]lternatively, the Court should abandon the general **landlord-tenant exception to R.C. 4905.02(C) –** because such an overbroad application of the **judicially-created exception** is neither grounded in the controlling statutory language nor based on a case-by-case application of the law to the facts.") (emphasis added)).

decision to address the Commission’s actual reasoning instead of AEP Ohio's nonsensical legal theory.

## III. The Court should grant reconsideration because its decision overruled prior Court precedent without application of the *Galatis* factors.

The Court overruled over 20-years of long-standing precedent as to the definition of “consumer” under R.C. 4905.03(C) in its decision. The Court did so even though it has long upheld the importance of the doctrine of stare decisis “. . . to provide continuity and predictability in our legal system . . . thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs.” *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, ¶ 43, citing *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 4-5 (1989). The Court also overruled *Pledger* even though, “[t]hose affected by the law come to rely upon its consistency.” *Id.*, citing *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

### A. *Galatis* protects those that rely upon this Court’s precedent.

To provide consistency to those that rely upon the law, the Court has adopted three factors that must be met prior to overruling prior precedent. *Galatis*, 2003-Ohio-5849 at ¶ 48. A prior decision by the Court may be overruled where:

> (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, **and** (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

*Id.* at ¶ 48 (emphasis added). The Court, however, did not apply the *Galatis* factors to its decision in this proceeding when it overruled its prior holdings in *Pledger* and that court’s reliance on *FirstEnergy Corp.* as to the meaning of “consumer.” (*See* Decision at ¶¶ 27-30); *see also Pledger v. Pub. Util. Comm.*, 2006-Ohio-2989, ¶ 38; *FirstEnergy Corp. v. Pub. Util. Comm.*, 2002-Ohio-4847, ¶ 9 (rejecting argument that tenants were the ultimate consumers under R.C. Chapter 4928).

### B. The *Pledger* court's holding on the meaning of "consumer" was not dicta.

The Court's decision attempts to avoid the *Galatis* factors by dismissing *Pledger*'s holding as "at least arguably dicta". (Decision at ¶ 27). While the use of the phrase "at least arguably" is novel, it does not establish that the *Pledger* court's holding was dicta. The central issue in *Pledger* was whether the owner and manager of an apartment complex was a "water-works company" or a "sewage disposal system company" as ". . . defined in R.C. 4905.03(A)(8) and (14)." *Pledger* at ¶ 9. The ultimate decision on this central issue by the *Pledger* court was "[s]ince the landlord is not the supplier of water **to consumers**, it is not a water-works company and therefore not a public utility subject to the commission's jurisdiction." *Id.* at ¶ 39 (emphasis added).

The *Pledger* court could not have made that ultimate decision without determining the definition of "consumer", which it did. *Id.* at ¶¶ 32-39. The central issue in that case is functionally identical to the case at bar; it is logically impossible for the definition of "consumer" to have been unnecessary in that case but necessary here. If the definition of "consumer" in *Pledger* was dicta, the decision's reversal of that definition in this case is likewise dicta. Because the *Pledger* court's holding that submetered tenants are not "consumers" was necessary to its decision, that holding cannot and should not be treated as dicta. *See State ex rel. Gordon v. Barthalow*, 150 Ohio St. 499, 505-506 (1948) ("obiter dictum" is defined as "'an incidental and collateral opinion uttered by a judge, and therefore (as not material to his decision or judgment) not binding. * * * Hence, any incidental remark, reflection, comment, or the like.'"), quoting *Webster's New International Dictionary* (2d Ed.); *State v. Mason*, 2018-Ohio-1462, ¶ 49 (Kennedy, J., concurring) (a "holding did not go beyond the facts and issues then before the court and its analysis was necessary for our ruling. Therefore, it is not dictum."). Thus, the Court cannot overrule *Pledger* without first applying the *Galatis* factors.

### C. The Court must apply *Galatis* prior to deciding whether to overrule *Pledger.*

Besides treating *Pledger* as "at least arguably" dicta, the Court's decision references three other reasons why it believes *Pledger* is not relevant, none of which trump the need to apply all three of the *Galatis* factors prior to overruling *Pledger*. (*See* Decision at ¶¶ 27-30). While the Court may believe that the first factor of *Galatis* is met because of the change in the Court's deference created by *TWISM,* it cannot overrule *Pledger* without first considering the other two *Galatis* factors.

- **Abandoning the precedent would create an undue hardship for those who have relied upon it**

Although further briefing and oral argument may be warranted, the second and third *Galatis* factors weigh heavily in favor of not overruling *Pledger*. For example, as to the third *Galatis* factor, companies, landlords, the Commission, and even AEP Ohio, have relied on the Court's precedent in *Pledger* that tenants are not the consumer under R.C. 4905.03(C) for decades. Businesses developed to assist landlords with submetering and some landlords have directly engaged in submetering. (*Id.* at ¶ 12). To reverse the meaning of "consumer" and find that those businesses and even landlords can now be considered public utilities serving tenants at apartment complexes, shopping centers, and duplexes creates an undue hardship for those that have relied on the Court's prior case precedent. Further, depriving businesses and tenants of the benefits for which they have bargained under countless contracts executed subject to this Court's previous interpretation of "consumer" under *Pledger* creates an "undue hardship" for those parties, and doing so without applying *Galatis* calls into question parties' freedom to contract in Ohio more broadly.

- **The *Pledger* decision does not defy practical workability**

Likewise, as to the second *Galatis* factor, the Court's decision in *Pledger* does not "def[y] practical workability." That so many businesses have come to rely on it in their operations is itself evidence that *Pledger's* holding is eminently workable. The fact that Ohio's monopoly utilities object to *Pledger's* holding on the belief that it limits their monopolies and gives property owners too many rights does not render *Pledger* "unworkable." By reversing its prior holding and now finding that a tenant is a "consumer" under the statute, landlords who supply electricity to tenants may be considered public utilities.

Even shopping centers, medical campuses, and industrial parks that have resold or redistributed electricity to their tenants or members for decades may now be "public utilities." *See, e.g.*, *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 76 Ohio St. 3d. 521, 521-522 (1996) (electric distribution utility alleged entity reselling electricity to universities, museums, hospitals and churches was an "electric light company" under R.C. 4905.03(C)). In short, the decision destroys a certainty about the reach of the Commission and extent of utility monopolies that had existed for decades. It is the Court's new definition of "consumers" that defies practical workability, not the *Pledger* decision.

***

Given that the *Pledger* court's definition of "consumer" was not dicta, the Court cannot ignore the doctrine of stare decisis and the application of the *Galatis* factors. The decision changes the law without any regard to whether doing so will harm those who have come to rely on it, doing exactly what the *Galatis* test was designed to prevent. The Court should grant reconsideration to allow for further proceedings on the application of *Galatis* to determine whether the Court's prior precedent in *Pledger*, upon which businesses have relied for decades, should be overruled. Without reconsideration, the Court's decision in this case will create destabilizing precedent for the proposition that previous decisions of the Court may be discarded without any constraints whatsoever.

## IV. The Court should grant reconsideration and allow the Commission on remand to first apply the facts to the Court's new interpretation of R.C. 4905.03(C).

Although the Court changed its interpretation of the word "consumer" and applied a dictionary definition to the term "supply", it did not remand the proceeding back to the Commission to let it apply the disputed facts to the Court's new legal standards on the interpretation of R.C. 4905.03(C). Instead, the Court bypassed the Commission and independently determined the facts in dispute to determine whether NEP was engaged in the business of supplying electricity to tenants. The Court also did not give the Commission the first opportunity to determine whether NEP's activities in regard to tenants were "incidental" to its primary business, as well as the factual question of what is NEP's primary business. The Court's assumption of the Commission's role as the trier of fact in the first instance warrants reconsideration.

The Court's deference to the Commission's application of the facts to statutory legal standards is well established. This Court has expressly stated that "the application of the relevant legal standards [in R.C. 4905.03(C)] to the facts is one that is best left to the PUCO in the first instance." *Complaint of Wingo v. Nationwide Energy Partners, L.L.C.*, 2020-Ohio-5583, ¶ 26 (DeWine, J.); *see also In re Suburban Natural Gas Co.*, 2021-Ohio-3224, ¶ 35 (DeWine, J.), citing *Wingo* at ¶ 26. In *Wingo*, the Court highlighted, in part, the importance of the meaning of the terms "in the business of" and "supplying" in the Commission's inquiry as it applied those terms to the facts in the case.[4] Importantly, though, the *Wingo* Court directed that the Commission should be the first to apply the legal standards to the facts.

That is what must happen on remand in this proceeding because the Court through its decision changed the legal standards. For example, there is no dispute that the decision involves a change in the legal standard for "consumer" given that the Court has for the first time interpreted the term "consumers" to include both landlords and tenants. In its abandonment of *Pledger's* holding on what constitutes the "consumer", the Court discredited the Commission's application of the Court's prior legal standard and applied a new plain-meaning standard in the landlord-tenant context for determining the meaning of "consumer." (Decision at ¶ 25 ("In reaching a contrary decision, PUCO relied heavily on *Pledger* . . . .")). The Court then applied the facts to this new legal standard for the definition for "consumer" and its definition for "supply" to determine that NEP was acting as an electric light company.

Similarly, the Court, for the first time, articulates a new "incidental" test that departs from the traditional three-part *Shroyer* test to determine whether an entity such as a landlord is in the business of supplying electricity. (*Id.* at ¶¶ 38-40). Under that test as articulated in the decision, the fact that the supply of electricity is incidental to a company's primary business would avoid "electric light company" status under R.C. 4905.03(C). (*Id.* at ¶ 39). The Commission should be given the opportunity to determine whether NEP's alleged supply of electricity to tenants is incidental to its primary business. This is important because the Commission found that "NEP, itself, is essentially a service provider a landlord hires to provide services such as energy control, advisory services, energy construction and design solutions,

[4] Notably, the *Wingo* decision does not mention the term "consumer" as being significant to the Commission's remand analysis.

electric vehicle charging, equipment financing, utility rates and tariff monitoring and support, tenant billing, and other energy-related services." (Opinion and Order at ¶ 221, OPC Appx. 111).

The decision's abandonment of precedent in favor of plain-meaning definition and application of a new non-statutory test are new legal standards for the Commission to apply when determining whether a company is a public utility. Accordingly, the decision was in error by applying disputed facts to the law as interpreted in this decision instead of remanding the case back to the Commission to apply the Court's new legal standards to the facts. *Suburban*, 2021-Ohio-3224 at ¶ 35; *Wingo*, 2020-Ohio-5583 at ¶ 26; *see also Cleveland Elec.*, 46 Ohio St.2d 105 at paragraph one of the syllabus ("In an appeal from an order of the Public Utilities Commission, the authority to remand the cause to the commission is a necessary concomitant of this court's jurisdiction to reverse, vacate, or modify.").

The Commission found that "NEP is 'engaged in the business of' providing a service to landlords that helps facilitate submetering service at the Apartment Complexes to the tenants and not to the general public." (Opinion and Order at ¶ 214, OPC Appx. 108). On remand, it should be the Commission to first determine whether the Court's new articulation of the law changes that analysis, i.e., whether NEP is engaged in the business of supplying electricity for light, heat, or power purposes to the tenants (the "consumers") and whether any such activity by NEP is incidental to its primary business. Reconsideration is warranted.

## V. The Court should grant reconsideration because the decision did not identify which aspects of the Commission's order, if any, were unlawful or unreasonable in compliance with R.C. 4903.13.

The decision is silent on whether the Commission's Opinion and Order was unlawful or unreasonable, determinations required by R.C. 4903.13. The General Assembly directive on this issue is express and unambiguous. "A final order made by the public utilities commission *shall* *be reversed, vacated, or modified by the supreme court on appeal*, if, upon consideration of the record, such court is of the opinion that such order was *unlawful or unreasonable*." R.C. 4903.13 (emphasis added). The decision, however, does not contain any express holding that the Commission's Opinion and Order was unlawful or unreasonable. It also does not identify which aspects of the Commission's Opinion and Order were unlawful (legal) and which were unreasonable (factual), if any.

The requirements of R.C. 4903.13 are binding on this Court. The statute's conditional clause "if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable" sets forth a necessary predicate for reversal, vacatur, or modification. Simply put, the statute does not authorize reversal, vacatur, or modification absent a determination that the order is unlawful or unreasonable. While NEP recognizes that in many instances, a reversal on legal grounds can be determined from the text of the decision, in this case, the decision addressed both factual and legal issues but made no distinction as to what was unlawful or unreasonable.

NEP also recognizes that prior decisions of this Court are mixed on whether the Court expressly used the words "unlawful" or "unreasonable" when reversing the Commission. R.C. 4903.13, however, requires those findings. Over the last year, this Court consistently applied R.C. 4903.13 to appeals from the Commission. *See Power-Purchase-Agreement*, 2026-Ohio-1485 at ¶ 18 (Fischer, J.); *RPA Energy*, 2026-Ohio-563 at ¶ 15 (Hawkins, J.); *Ohio Power (R.C. 4928.143)*, 2025-Ohio-3034 at ¶ 14 (Kennedy, C.J.); *Dayton Power (R.C. 4928.143F)*, 2025-Ohio-2953 at ¶ 22 (Kennedy, C.J.).

Thus, NEP respectfully requests the Court grant reconsideration and, in accordance with R.C. 4903.13, clarify and state what parts of the Commission's Opinion and Order, if any, were unlawful or unreasonable. Doing so will ensure that the standard of review articulated by R.C. 4903.13 is properly applied.

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To reach its conclusion in this case, the Court overruled its prior precedent without reference to its own standards, impacting businesses that have been operating for decades in Ohio and forcing the Commission to examine every type of business relationship a landlord may enter into with a third-party to help submeter a property. This includes business arrangements related to water, sewer, gas, electric, onsite generation, and battery storage; and the numerous ways that third-parties assist landlords in managing their properties (such as property management, billing, and collections). But neither the Commission nor Ohio's public utilities should be deciding how landlords perform business on their properties and how those business arrangements are structured. That can be avoided by correcting the errors in the decision on reconsideration.

Respectfully submitted on behalf of,

Nationwide Energy Partners, LLC

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on May 1, 2026, a copy of the foregoing was served upon the following counsel of record by electronic mail:

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**AEP AMERICAN ELECTRIC POWER**

# CUSTOMER LETTER OF AUTHORIZATION TO RELEASE INFORMATION AND CONDUCT ACCOUNT ACTIVITY

The Customer Letter of Authorization to Release Information and Conduct Account Activity form permits account holders to delegate certain rights to Authorized parties concerning American Electric Power and its subsidiary operating companies' account(s)/service(s). The customer of record may permit an Authorized party to receive information or transact business on its behalf and must specify what information the third party is entitled to receive, what if any act(s) the Authorized party may transact on its behalf and whether the Authorization is being provided on a one-time basis or on a longer-term basis. **This form must be completed in its entirety and signed by the customer of record or someone who has a power of attorney or other legal right to sign the customer's name on their behalf. It is American Electric Power's desire to permit Authorized parties to transact necessary business in a manner without jeopardizing the confidential nature of the customer of record.**

Email: inforelease@aep.com

Fax: 1-800-281-3916

Questions: 1-888-710-4237

Mail: American Electric Power
ATTN: Business Operations
1 AEP Way
Hurricane, WV 25526

Please keep a copy of the completed Authorization form(s) for your records.

## RETAIL CUSTOMER'S AUTHORIZATION:

Retail Customer Name: Arlington Pointe Borrower, LLC
*Name of Record on Distribution Company Account*

Retail Customer Mailing Address: 2555 Shore Line Ln
*Address*
Columbus — OH — 43221
*City* — *State* — *Zip*

Contact Information: Telephone 6146953145 E-Mail Address krichardson@coastalridge.com

Printed Representative's Name and Title Kris Richardson, Finance Manager

I understand that by reason of this Authorization, the named appointee may conduct the designated activity and transactions on the account(s) that I as customer of record may direct or perform even though I remain responsible for all payment and other service obligations. This Authorization shall continue in effect until the date specified unless earlier terminated by the customer of record.

I (Customer) *hereby release, hold harmless, and indemnify American Electric Power from any liability, claims, demands, and cause of action, damages, or expenses resulting from any release of information or transaction of business pursuant to this Authorization; the unauthorized use of this information or transaction of business by the Authorized Party; and any actions taken by the Authorized Party pursuant to* this Authorization.

Kris Richardson
*Retail Customer's or Authorized Retail Customer Representative's Signature*

**Executed this date of** 09 / 11 / 2020 (mm/dd/yyyy)

**THIRD-PARTY SEEKING THE RETAIL CUSTOMER'S AUTHORIZATION:**

Company Name: Nationwide Energy Partners, LLC

Mailing Address: 230 West Street, Suite 150
*Address*
Columbus OH 43215
*City* *State* *Zip*

Contact Information: Telephone 614-918-2047 E-Mail Address reurich@nationwideenergypartners.com

Printed Third Party Representative's Name and Title: Rick Eurich - Controller

*I* (Third Party) *hereby release, hold harmless, and indemnify American Electric Power from any liability, claims, demand, causes of action, damages, or expenses resulting from the use of customer information obtained pursuant to this Authorization and from the taking of any action pursuant to this Authorization, including rate changes.*

*Third Party Signature*

**Executed this date of** 9 / 17 / 2020 (mm/dd/yyyy)

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**The Third party can receive account information and/or conduct business as indicated above from**

9 / 17 / 2020 (mm/dd/yyyy) to 9 / 17 / 2023 (mm/dd/yyyy)
*Effective Date* *Expiration Date*

***Note:*** *The expiration date above cannot exceed three years from the date of execution. If no time period is specified, the Authorization period will be from the date of the Retail Customer's signature and expire in one year. If the Retail Customer needs to terminate the Authorization early, AEP must be notified 30 days in advance of the new termination date.*

**The Third party is allowed to conduct the following actions (Initial one line only):**

X Account Agent and Billing Agent (All activity and transactions, including receiving bills and remitting payments. Billing and correspondence are sent to the Authorized party.)
__ Billing Agent (Receive bills and remit payments only. Billing and correspondence are sent to the Authorized party.)

**OR**

Specific transactions or functions listed below **(Initial all that apply):**

__ All options listed below
__ Request and receive billing history, interval usage, peak load contributions, and all meter usage history data
__ Request and receive balances on accounts
__ Conduct account changes
__ Request and receive credit history
__ Request special metering
__ Request connection and disconnect of services
__ Request rate analysis and/or rate changes
__ Other ____________________

05/2014

**Retail Customer's end-use sites MUST be identified by correct Account Number or Service Delivery Identifier below or on an attached excel spreadsheet.**

Either account numbers or Service Delivery Identifiers (SDIs) (or Electronic Service IDs) can be submitted (for choice purposes, an SDI must be submitted). They MUST be correctly formatted as shown below in order to process the request. All AEP account numbers are 11 digits in length, while SDIs are 17 digits. Where the account number or SDI begins with a zero (0) the leading zero(s) must be recorded on the request (Example: 07000000000 or 00140060700000000).

| Operating Company | Account Begins With | Service Delivery Identifier Begins With |
|---|---|---|
| Kingsport Power Company | 01 | |
| Appalachian Power Company | 02 | 000073302 |
| Kentucky Power Company | 03 | |
| Indiana Michigan Power Company | 04 | 000932404 |
| Wheeling Power Company | 06 | |
| Ohio Power Company | 07 | 001400607 |
| Columbus Southern Power Company | 10 | 000406210 |
| Texas Central Company | 94 | 100327894 |
| Public Service Company of Oklahoma | 95 | |
| Southwestern Electric Power Company | 96 | 101769896 |
| Texas North Company | 97 | 102040497 |

| Account Number / Service Delivery ID | Service Address (Street, City, State and Zip Code) |
|---|---|
| [redacted] | 2555 Shore Line Ln, Perry Twp, Columbus, OH 43221 |
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